

– Land Theft in Cambodia –

The Relevance of Women’s Rights under the Rome Statute: Can Land Grabbing in Cambodia amount to Gender-Based Persecution?

LL.B. Thesis

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“They never came to ask me, the owner of the house, directly. I begged them not to destroy my house and to let me move my stuff outside, but they did not agree. (...) So I just picked up my child and we went.”

– Sophal, female victim of land grabbing in Cambodia¹

Abstract:

Land grabbing is a growing global phenomenon, fuelled by corrupt local governments and companies investing money in agricultural land in developing countries around the world. While these investments are often made to feed Western consumers, they lead to homelessness, poverty and hunger in the communities that are the victims of the ensuing land grabs. The soaring prevalence of this phenomenon and its detrimental impacts on local communities have been recognised by organisations, scholars and the International Criminal Court (ICC). What is, however, largely missing from the discussion on an international criminal law response is the discriminatory and adverse impact land grabbing has on women. Land grabbing is amounting to gender-based persecution in Cambodia, under consideration of women's rights, as is argued in this paper.

INTRODUCTION

In Cambodia, over 900,000 hectares of land across almost all provinces have been leased to foreign companies.² Many of these land concessions have been conducted without consultations of local communities beforehand; as a result, affected communities often face

¹ Amnesty International, *Eviction and Resistance in Cambodia: Five Women Tell Their Stories* (2011) 26 < <https://doc.es.amnesty.org/cgi-bin/ai/BRSCGI/CAMBODIA%20EVICTIION%20AND%20RESISTANCE%20IN%20CAMBODIA%20FIVE%20WOMEN%20TELL%20THEIR%20STORIES?CMD=VEROBJ&MLKOB=3005677555> > last accessed 11 June 2017.

² OHCHR, *Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia* (24 September 2012) UN Doc A/HRC/21/63/Add.1, 32 < http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-63-Add1_en.pdf > last accessed 11 June 2017.

involuntary loss of their means of subsistence and their possessions, including shelter and land.³ Such inequitable land concessions are referred to as land grabs.⁴

The Office of the High Commissioner for Human Rights (OHCHR) observed that land grabbing in Cambodia contributes to the marginalisation of women.⁵ One major reason for this is that women suffer from gender-based discrimination influencing their socio-economic status in society.⁶ The associated disadvantages aggravate women's suffering before, during and after land grabbing.⁷

In an unprecedented step⁸, the Office of the Prosecutor (OTP) of the International Criminal Court (ICC or Court) declared a priority the prosecution of organised crimes and crimes against the environment, including land grabbing, in its 2016 policy paper.⁹ This step is remarkable as it illustrates the gravity of these offences, especially when considering that these crimes are not as such included in the Rome Statute. Of similar importance in regards to the emerging crime of land grabbing is the communication to the OTP filed by the law firm Global Diligence, proposing the prosecution of land grabbing in Cambodia as multiple counts of crimes against humanity.¹⁰ However, this communication regrettably falls short of addressing the gender-specific impact of land grabbing.

In times of growing land pressure through phenomena like land grabbing, scholars have recognised the importance of applying a gender-inclusive (legal) response to land concessions.¹¹

³ Ibid No 2 (OHCHR, 'Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia') 40.

⁴ Olivier de Schutter, 'The Green Rush: The Global Race for Farmland and the Rights of Land Users' (2011) 52 *Harvard International Law Journal* 503, 504. The specific definition of land grabbing will further be discussed in Chapter I.

⁵ Ibid No 2 (OHCHR, 'Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia') 58.

⁶ UN Women, 'Women's Access to Land: An Asian Perspective' (2011) EGM/RW/2011/EP.3, 5 < <http://www.un.org/womenwatch/daw/csw/csw56/egm/Rao-EP-3-EGM-RW-30Sep-2011.pdf> > last accessed 11 June 2017.

⁷ Ben White & Julia White, 'The gendered politics of dispossession: oil palm expansion in Dayak Hihun in community in West Kalimantan in Indonesia' (*International Conference on Global Land Grabbing*, 6-8 April 2011) 4 < <http://www.future-agricultures.org/papers-and-presentations/conference-papers-2/1300-the-gendered-politics-of-dispossession-oil-palm-expansion-in-a-dayak-hibun-community-in-west-kalima/file> > last accessed 1 June 2017.

⁸ Unprecedented because the OTP had until then not declared crimes a priority that are not as such included in the Rome Statute.

⁹ International Criminal Court Office of the Prosecutor, Policy Paper on Case Selection and Case Prioritisation (2016) 5 < https://www.icc-cpi.int/itemsdocuments/20160915_otp-policy_case-selection_eng.pdf > last accessed 11 June 2017.

¹⁰ Ibid No 9 (International Criminal Court Office of the Prosecutor, 2016 Policy Paper on Case Selection and Case Prioritisation) 5.

¹¹ Bina Agarwal, 'Gender and land rights revisited: Exploring new prospects via the State, family and market' (2003) 3 *Journal of Agrarian Change* 184, 184-5.

Such an approach appears to be in accordance with international law, and women’s rights in particular.¹² The CEDAW Committee has accordingly held that land expropriations affecting women can constitute discrimination based on gender.¹³

This paper aims to address the issue of women’s marginalisation in land resettlement by proposing a classification of land grabbing in Cambodia as a gender-based crime, under consideration of relevant human rights sources, answering the research question “The Relevance of Women’s Rights under the Rome Statute: Can Land Grabbing in Cambodia amount to Gender-Based Persecution?” in the affirmative. The first chapter provides the factual background on the concept of land grabbing and its relevance in the Cambodian context. The second chapter moves on to the interpretation and application of the crime of persecution, applying a human rights-based approach. The third and last chapter justifies this human rights-based approach in a thorough analysis of Article 21(3) of the Rome Statute.¹⁴ Lastly, a conclusion will summarise the main findings.

CHAPTER I. The Concept of Land Grabbing

In order to introduce the subject matter of this paper, this chapter will discuss the global dimensions of land grabbing, the definition of the phenomenon, and the practice and impact of land grabbing on Cambodia and Cambodian women.

A. The Global Race for Land

Large-scale land transfers, referred to as land grabbing¹⁵ as will be defined below, are occurring worldwide¹⁶ and have compellingly been referred to as a “new wave of colonialism”¹⁷.

¹² The CEDAW is the only major international treaty explicitly stipulating the human right to land, *see* Jeremie Gilbert, ‘Land Rights as Human Rights: The Case for a Specific Right to Land’ (2013) 18 *International Journal of Human Rights* 115, 122.

¹³ CEDAW, *E.S. & S.C. v. Tanzania*, Communication No. 48/2013.

¹⁴ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002, last amended 2010) ISBN No. 92-9227-227-6 (Rome Statute) art 21(3).

¹⁵ *Ibid* No 4 (Olivier de Schutter, ‘The Green Rush: The Global Race for Farmland and the Rights of Land Users’) 504.

¹⁶ Saturnino M. Borras Jr. & Jennifer Franco, ‘Towards a Broader View of the Politics of Global Land Grab: Rethinking Land Issues, Reframing Resistance’ (2010) 1 *Initiatives in Critical Agrarian Studies Working Paper Series* 2, 2.

¹⁷ Stefano Liberti, *Land Grabbing* (Verso 2013) 78. Land acquisitions are a historical phenomenon, *see* Christophe Gironde et al (eds), *Large-Scale Land Acquisitions: Focus on South-East Asia* (Brill Nijhoff 2015) 3.

The global race for land is intrinsically linked to the “presence of material systemic threats to the earth”¹⁸, such as climate change¹⁹, which are making land an increasingly scarce resource.²⁰ Its scarcity is turning land into a lucrative investment in a world of rising food prices²¹, a growing population, and new technologies like biofuels.²² The World Bank, an enthusiastic advocate for large-scale land acquisitions²³, reiterates that as long as all parties are well informed and property rights are well-defined, the transactions will be beneficial to all, making further regulation on land

¹⁸ Matias E. Margulis et al (eds), *Land Grabbing and Global Governance* (Routledge 2013) 71.

¹⁹ Climate change and other factors play a role in the reasons for land grabs, see Olivier De Schutter, ‘Large-scale land acquisitions and leases: A set of core principles and measures to address the human rights challenge’ (11 June 2009) 6, 14 <<http://www.srfood.org/en/human-rights-principles-to-discipline-land-grabbing>> last accessed 11 June 2017.

²⁰ Ibid No 18 (Margulis et al (eds), *Land Grabbing and Global Governance*) 71; Ibid No 16 (Borras Jr. & Franco, ‘Towards a Broader View of the Politics of Global Land Grab: Rethinking Land Issues, Reframing Resistance’) 4; Olivier de Schutter, ‘The Emerging Human Right to Land’ (2010) 12 *International Community Law Review* 306.

²¹ Ibid No 19 (De Schutter, ‘Large-scale land acquisitions and leases: A set of core principles and measures to address the human rights challenge’) 5; Ibid No 18 (Margulis et al (eds), *Land Grabbing and Global Governance*) 193; Ibid No 17 (Gironde et al (eds), *Large-Scale Land Acquisitions: Focus on South-East Asia*) 3; Oxfam, ‘Our Land, Our Lives’ (2010) 7 <https://www.google.com/search?q=oxfam+our+land+our+lives&ie=utf-8&oe=utf-8&client=firefox-b-ab&gfe_rd=cr&ei=ERowWZrLF0bS8AfDmJCYAw> last accessed 11 June 2017. Jessica Embree, ‘Criminalising Land Grabbing: Arguing for ICC Involvement in the Cambodian Land Concessions Crisis’ (2015) 27 *Florida Journal of International Law* 399, 404; ; Ibid No 16 (Borras Jr. & Franco, ‘Towards a Broader View of the Politics of Global Land Grab: Rethinking Land Issues, Reframing Resistance’) 4. De Schutter explained the dynamic between rich and poor countries in light of the land and food crisis in a 2009 interview: “The countries targeted by these deals, particularly in sub-Saharan Africa where labor is relatively cheap and where land is considered plentiful, will be potentially increasingly dependent on international markets to achieve food security. So they will produce more food, but this food will be exported. This is one of the things we saw during the global food crisis of 2007/2008. Countries that are the least self-sufficient and most dependent on international markets have been most severely affected increasingly volatile prices”, see Michael Knigge, ‘Good Governance is Key in Managing Land Grabbing’ (*Deutsche Welle*, 2 August 2009) <<http://www.dw-world.de/dw/article/0,,4524232,00.html>> last accessed on 17 December 2009.

²² Food production and production of biofuels are the two main purposes of cultivation on land transferred in land grabs, see Ibid No 20 (De Schutter, ‘The Emerging Human Right to Land’) 308. See also, Ibid No 17 (Liberti, *Land Grabbing*) 90; Ibid No 18 (Margulis et al (eds), *Land Grabbing and Global Governance*) 71-2; Julia Behrmann et al, ‘Gender Implications in Large-Scale Land Deals’ (*IFPRI*, 2011) 2 <<http://www.ifpri.org/publication/gender-implications-large-scale-land-deals-0>> last accessed 1 June 2017; NGOs have recognised the scarcity of land and the effects resulting therefrom, see International Land Coalition, ‘Tirana Declaration’ (2011) ii <<http://www.landcoalition.org/en/resources/tirana-declaration>> last accessed 11 June 2017.

²³ Francesca Romanin Jacur et al (eds), *Natural Resources Grabbing: An International Law Perspective* (Brill Nijhoff, 2016) 312; World Bank policies and recommendations are facilitating and encouraging land grabs, see Anuradha Mittal, ‘Is the World Bank enabling agribusiness land grabs?’ (*Al Jazeera*, 12 April 2014) <<http://www.aljazeera.com/indepth/opinion/2014/04/world-bank-enabling-agribusiness-2014412134645827557.html>> last accessed 1 June 2017; The World Bank is financially supporting companies and projects that have led to land grabbing, see Ibid No 21 (Oxfam, ‘Our Land, Our Lives’) 9-10; Oakland Institute, ‘World Bank sides with agribusinesses against farmers, indigenous communities’ (*Farmlandgrab*, 20 April 2017) <<http://www.farmlandgrab.org/post/view/27075-world-bank-sides-with-agribusinesses-against-farmers-indigenous-communities>> last accessed 11 June 2017; Food and Agriculture Organization (FAO), ‘Trends and Impacts of Foreign Investment in Developing Country Agriculture: Evidence from Case Studies’ (2013) 8 <<http://www.fao.org/docrep/017/i3112e/i3112e.pdf>> last accessed 1 June 2017.

transfers obsolete.²⁴ The problem with this position is the striking imbalance of power between the players: while the investors are governments or multinationals, often supported by European Union²⁵ or World Bank schemes²⁶, the affected communities are typically located in the global south in areas with a weak rule of law.²⁷ This disparate dynamic often induces exploitation of local farmers and increases poverty.²⁸ The enormous gains²⁹ for investors are thus coming at detrimental costs for local community members in some of the world's poorest countries.³⁰ Large-scale land transactions are therefore often not as equitable as the World Bank likes to portray them³¹ and thus should be regulated and administered by courts of law.³²

B. Defining Land Grabbing

Although it is a global phenomenon that is receiving soaring attention by the United Nations (UN), renowned scholars, civil society and the ICC, land grabbing has thus far not been officially defined. Nevertheless, there seems to be a somewhat clear consensus on what the concept

²⁴ Ibid No 18 (Margulis et al (eds), *Land Grabbing and Global Governance*) 73.

²⁵ Among these schemes are the Renewable Energy Directive, which creates incentives to produce biofuels, which are one of the main causes for land grabs; another scheme is the Everything but Arms agreement, which lifts all duties and restrictions for import from developing countries for everything but weapons, creating strong incentives for producing food for export on a large scale. This scheme is mainly responsible for land grabbing in Cambodia, Transnational Institute (TNI) et al, 'The European Union and the Global Land Grab' (2012) 3 < <https://www.tni.org/en/publication/the-european-union-and-the-global-land-grab> > last accessed 11 June 2017.

²⁶ Ibid No 17 (Liberti, *Land Grabbing*) 78; Ibid No 23 (Romanin Jacur et al (eds), *Natural Resources Grabbing: An International Law Perspective*) 302-6; NGOs and media have heavily criticised the World Bank's responsibility for unfair land transfers, through schemes such as the Bank's endeavour to transform agriculture, see Ibid No 23 (Oakland Institute, 'World Bank sides with agribusinesses against farmers, indigenous communities').

²⁷ Ibid No 18 (Margulis et al (eds), *Land Grabbing and Global Governance*) 72; Ibid No 17 (Liberti, *Land Grabbing*) 5, 143, 169. While most land grabs are occurring in the global south, this does not mean that southern countries play no role in land grabbing. Quite the opposite: many, if not all, of these countries are complicit in the land transactions, soliciting and facilitating the transactions, see Ibid No 18 (Margulis et al (eds), *Land Grabbing and Global Governance*) 79. Mainly countries in the global south are targeted in land grabbing "because of the perception that there is plenty of land available, because its climate is favorable to the production of crops, because the local labour is inexpensive and because the land is still relatively cheap", see Ibid No 19 (De Schutter, 'Large-scale land acquisitions and leases: A set of core principles and measures to address the human rights challenge') 3. NGOs have recognised the detrimental position of small-scale land owners in situations of large-scale land transfers as well, see Ibid No 22 ('Tirana Declaration') ii.

²⁸ Most people affected by land grabbing in Southeast Asia are already living in poverty before there are being expropriated, see Ibid No 17 (Gironde et al (eds), *Large-Scale Land Acquisitions: Focus on South-East Asia*) 162.

²⁹ Ibid No 17 (Gironde et al (eds), *Large-Scale Land Acquisitions: Focus on South-East Asia*) 21.

³⁰ The effects of land grabbing are truly detrimental as the consequences of the continuous surge of land deals could lead to unprecedented levels of poverty, see Ibid No 17 (Gironde et al (eds), *Large-Scale Land Acquisitions: Focus on South-East Asia*) 23.

³¹ Ibid No 18 (Margulis et al (eds), *Land Grabbing and Global Governance*) 73.

³² Critique against the World Bank on their involvement in land grabbing is gaining momentum, see Ibid No 21 (Oxfam, 'Our Land, Our Lives') 7.

of land grabbing comprises. Former UN Special Rapporteur on the right to food, Olivier De Schutter, defines land grabbing as “the buying or leasing of large tracts of farmland (...) by governments or private investors.”³³ While he recognises that land transfers can lead to “win-win-win”³⁴ situations, benefitting local communities as much as the investors and the government, De Schutter emphasises that the acquisition of land will amount to land grabbing when such acquisition is inequitable, leading to a situation where the local communities are negatively affected, while the investors are profiting from the land deal.³⁵ This seems to be the most prominent understanding of land grabbing, supported by other scholars.³⁶

Several UN bodies, such as UN Women, have addressed land grabbing and the problems associated with it.³⁷ Moreover, there has been significant involvement of non-governmental organisations (NGOs) on land grabbing.³⁸ In addition, the Prosecutor of the ICC has

³³ Ibid No 4 (De Schutter, ‘The Green Rush: The Global Race for Farmland and the Rights of Land Users’) 504. The term ‘large’ or ‘large-scale’ in relation to land grabbing has been understood as 200 hectares or above, *see* Ibid No 21 (Oxfam, ‘Our Land, Our Lives’) 5. Legal limitations on the number of hectares that can be transferred to foreign companies do not seem to prevent the large-scale acquisition of land, *see* Ibid No 2 (OHCHR, ‘Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia’) 39; *see also*, Franziska Maria Oehm, ‘Land Grabbing in Cambodia as a Crime Against Humanity – Approaches in International Criminal Law’ (2015) 48 *Verfassung und Recht in Übersee* 469, 478.

³⁴ Ibid No 4 (De Schutter, ‘The Green Rush: The Global Race for Farmland and the Rights of Land Users’) 520. There is criticism of the win-win-win consideration, such as that the entities involved are not homogenous and that their ideal outcomes thus do not necessarily ever align, *see* Ibid No 17 (Gironde et al (eds), *Large-Scale Land Acquisitions: Focus on South-East Asia*) 84.

³⁵ Ibid No 4 (De Schutter, ‘The Green Rush: The Global Race for Farmland and the Rights of Land Users’) 520. Generating large profits has been identified as the major driver behind land deals, *see* Ibid No 17 (Gironde et al (eds), *Large-Scale Land Acquisitions: Focus on South-East Asia*) 21.

³⁶ Surya P. Subedi, ‘Land Rights in Countries in Transition: A Case Study of Human Rights Impact of Economic Land Concessions’ (2011) 17 *Asian Yearbook of International Law* 1, 4; Jootaek Lee, ‘Contemporary Land Grabbing: Research Sources and Bibliography’ (2015) 107 *Law Library Journal* 259, 260; Ibid No 33 (Oehm, ‘Land Grabbing in Cambodia as a Crime Against Humanity – Approaches in International Criminal Law’) 473.

³⁷ Realising women’s rights to land should become a priority against the backdrop of growing land pressures through land grabbing, *see* OHCHR and UN Women, ‘Realising Women’s Rights to Land (2013) HR/PUB/13/04, 4 < <http://www.ohchr.org/Documents/Publications/RealizingWomensRightstoLand.pdf> > last accessed 11 June 2017.

³⁸ NGOs were amongst the first actors to speak out against large-scale land transfers, supporting victims (e.g. Amnesty International in Cambodia, *see generally* Ibid No 1 (Amnesty International, *Eviction and Resistance in Cambodia: Five Women Tell Their Stories*)), and have gathered extensive information that are referred to by international bodies, such as the World Bank, *for example see* GRAIN, ‘World Bank Report on Land Grabbing: beyond the Smoke and Mirrors’ (*GRAIN*, 8 September 2010) < <https://www.grain.org/article/entries/4021-world-bank-report-on-land-grabbing-beyond-the-smoke-and-mirrors> > last accessed 11 June 2017. In 2011, 500 NGOs adopted the Dakar Appeal against land grabs, recognising that the “recent massive land grabs targeting tens of millions of acres for the benefit of private interests or third States – whether for reasons of food, energy, mining, environment, tourism, speculation or geopolitics – violate human rights by depriving local, indigenous, peasant, pastoralist and fisher communities of their livelihoods, by restricting their access to natural resources or by removing their freedom to produce as they wish, and exacerbate the inequalities of women in access and control of land”, *see* La Via Campesina, ‘Dakar Appeal against land grab’ (*La Vie Campesina*, 2011) < <https://viacampesina.org/en/index.php/main-issues-mainmenu-27/agrarian-reform-mainmenu-36/1013-dakar-appeal-against-the-land-grab> > last accessed 11 June 2017. In addition, peasant organisations are playing an important role

used the term land grabbing when declaring its prosecution a priority of the Court.³⁹ Despite the lack of a recognised definition, there thus is a comprehensive acknowledgement of the existence of the phenomenon of land grabbing and its defining parameters at the highest levels of global governance and in civil society. It is for the terminology employed by the ICC whose Statute will be analysed in this paper, that the term ‘land grabbing’ will be used in this paper to refer to inequitable large-scale land transactions.

C. The Practice and Impact of Land Grabbing in Cambodia

In addition to having addressed land grabbing as a global phenomenon, the UN has approached specific issues faced by affected countries, such as Cambodia.⁴⁰ In the report on land concessions in Cambodia, the Special Rapporteur on the situation of human rights in Cambodia, Surya P. Subedi, discusses the impact of land transfers in the Southeast Asian country.⁴¹ According to his report, land concessions in Cambodia are conducted for multiple purposes, including agriculture, mining, forestry, property development, tourism and infrastructure.⁴² Most concessions, however, are carried out for the production of food and biofuels⁴³, a bulk of which is

in representing local land owners, *see* Ibid No 17 (Gironde et al (eds), *Large-Scale Land Acquisitions: Focus on South-East Asia*) 20. *See also*, Food and Agriculture Organization (FAO), ‘Trends and Impacts of Foreign Investment in Developing Country Agriculture: Evidence from Case Studies’ (2013) < <http://www.fao.org/docrep/017/i3112e/i3112e.pdf> > last accessed 1 June 2017. Moreover, De Schutter proposed minimum standards for land deals, *see generally* Ibid No 19 (De Schutter, ‘Large-scale land acquisitions and leases: A set of core principles and measures to address the human rights challenge’). For more background information on these instruments, *see* Ibid No 17 (Gironde et al (eds), *Large-Scale Land Acquisitions: Focus on South-East Asia*) 234. *See also*, Ibid No 22 (‘Tirana Declaration’) art 4: “we define as acquisitions or concessions that are one or more of the following: (i) in violation of human rights, particularly the equal rights of women; (ii) not based on free, prior and informed consent of the affected land-users; (iii) not based on a thorough assessment, or are in disregard of social, economic and environmental impacts, including the way they are gendered; (iv) not based on transparent contracts that specify clear and binding commitments about activities, employment and benefits sharing, and; (v) not based on effective democratic planning, independent oversight and meaningful participation.”

³⁹ Ibid No 9 (International Criminal Court Office of the Prosecutor, 2016 Policy Paper on Case Selection and Case Prioritisation) [7].

⁴⁰ Ibid No 2 (OHCHR, ‘Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia’) 6. The term used by the UN in this report for land grabs is “economic land concessions”.

⁴¹ Ibid No 2 (OHCHR, ‘Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia’).

⁴² Ibid No 2 (OHCHR, ‘Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia’) 1; Ibid No 17 (Gironde et al (eds), *Large-Scale Land Acquisitions: Focus on South-East Asia*) 141.

⁴³ Ibid No 16 (Borras Jr. & Franco, ‘Towards a Broader View of the Politics of Global Land Grab: Rethinking Land Issues, Reframing Resistance’) 1; Ibid No 20 (De Schutter, ‘The Emerging Human Right to Land’) 308.

exported.⁴⁴ The large scale of land grabbing in Cambodia is putting immense pressure on local communities.⁴⁵

While land concessions in general, and in Cambodia specifically, can have some positive impacts, such as job creation and improved infrastructure⁴⁶, the Special Rapporteur's report acknowledges that overall, land concessions in Cambodia fail to benefit local communities and even lead to increased poverty and other negative impacts.⁴⁷ The absence of a “win-win-win” situation allows for classifying the land concessions occurring in Cambodia as land grabs according to De Schutter's definition.

The negative impacts, according to the Special Rapporteur's report on Cambodia⁴⁸, include, amongst others, the destruction of the environment, involuntary relocation, bulldozing and burning down of villages and crops⁴⁹, loss of land⁵⁰ and militarisation.⁵¹ In protest of these conditions, Cambodians have taken to both peaceful and violent demonstrations, indicating increasing desperation in the population.⁵² The situation has been deemed as posing a risk to Cambodia's post-conflict stability.⁵³

⁴⁴ Ibid No 25 (Transnational Institute (TNI) et al, 'The European Union and the Global Land Grab') 3-4: the Everything But Arms Agreement lifts all duties and restrictions for import from developing countries for everything but weapons, thereby creating strong incentives for producing food for export on a large scale.

⁴⁵ Ibid No 17 (Gironde et al (eds), *Large-Scale Land Acquisitions: Focus on South-East Asia*) 138; Ibid No 4 (De Schutter, 'The Green Rush: The Global Race for Farmland and the Rights of Land Users') 521; Ibid No 20 (De Schutter, 'The Emerging Human Right to Land') 306.

⁴⁶ Ibid No 2 (OHCHR, 'Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia') 47.

⁴⁷ Ibid No 2 (OHCHR, 'Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia') 48; inequitable land distribution leads to increased poverty according to World Bank research, see Ibid No 20 (De Schutter, 'The Emerging Human Right to Land') 328. See also, Ibid No 33 (Oehm, 'Land Grabbing in Cambodia as a Crime Against Humanity – Approaches in International Criminal Law') 470. Moreover, this position is supported in other sources, see Ibid No 36 (Subedi, 'Land Rights in Countries in Transition: A Case Study of Human Rights Impact of Economic Land Concessions') 37.

⁴⁸ Ibid No 2 (OHCHR, 'Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia') 47; see also, Ibid No 36 (Subedi, 'Land Rights in Countries in Transition: A Case Study of Human Rights Impact of Economic Land Concessions') 38.

⁴⁹ Ibid No 33 (Oehm, 'Land Grabbing in Cambodia as a Crime Against Humanity – Approaches in International Criminal Law') 483.

⁵⁰ Ibid No 2 (OHCHR, 'Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia') 47; see also, Ibid No 36 (Subedi, 'Land Rights in Countries in Transition: A Case Study of Human Rights Impact of Economic Land Concessions') 38.

⁵¹ Ibid No 21 (Embree, 'Criminalising Land Grabbing: Arguing for ICC Involvement in the Cambodian Land Concessions Crisis') 401.

⁵² Ibid No 2 (OHCHR, 'Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia') 48.

⁵³ Phelim Kyne, 'Land grabbing threatens social stability – UN' (*The Phnom Penh Post*, 6 July 2001) <<http://www.phnompenhpost.com/national/land-grabbing-threatens-social-stability-un>> last accessed 11 June 2017; Ibid No 2 (OHCHR, 'Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human

Apart from addressing the impact on communities in general, the report specifically addresses the situation of women. As per the report and other sources⁵⁴, women are particularly and adversely affected by land grabbing. This is first of all due to the fact that women are often discriminated against in their rights regarding land registration and tenure.⁵⁵ Due to inadequate attempts to resolve the destruction of land titles that occurred under the Khmer Rouge⁵⁶, vulnerable groups, including women, are disadvantaged⁵⁷, leading to many women having ineffective or no land rights at all.⁵⁸ This puts many women in vulnerable positions.⁵⁹ Such gender-based discrimination in land ownership prevails throughout the world and is reflected in the fact that

Rights Analysis of Economic And Other Land Concessions In Cambodia') 48. That land issues can lead to conflict is evident for example from the situation in Afghanistan, *see* Erica Gaston and Lillian Dang, 'Addressing Land Conflict in Afghanistan' (*United States Institute of Peace*, 27 May 2015) <

<https://www.usip.org/publications/2015/05/addressing-land-conflict-afghanistan> > last accessed 11 June 2017.

⁵⁴ Ibid No 6 (UN Women, 'Women's Access to Land: An Asia Perspective') 4; OHCHR, 'Final study of the Human Rights Council Advisory Committee on the advancement of the rights of peasants and other people working in rural areas' (24 February 2012) A/HR/C/19/75, 7 <

<http://www.ohchr.org/EN/HRBodies/HRC/RuralAreas/Pages/WGRuralAreasIndex.aspx> > last accessed 11 June 2017.

⁵⁵ "(W)omen (...) face difficulties in terms of property registration and land title, reducing their security of tenure and making them more vulnerable to land concessions granted on the land they inhabit", *see* Ibid No 2 (OHCHR, 'Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia') 59; *see also*, Ibid No 22 (Behrmann et al, 'Gender Implications in Large-Scale Land Deals') 2; Ibid No 6 (UN Women, 'Women's Access to Land: An Asia Perspective') 4. *See also*, Marsha A. Freeman et al (eds), *The UN Convention on the Elimination of Discrimination Against Women. A Commentary* (Oxford University Press 2012) 375; Ibid No 21 (Embree, 'Criminalising Land Grabbing: Arguing for ICC Involvement in the Cambodian Land Concessions Crisis') 404.

⁵⁶ Ibid No 2 (OHCHR, 'Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia') 22.

⁵⁷ Under the new land titling scheme, women reportedly have equal access to land titling, issues often occur when they share land ownership with their spouse, as most Cambodian women do. In case of separation for whatever reason, custom often dictates that property rights are transferred to the male co-owner, *see* CEDAW Committee, 'Concluding Comments of the Committee on the Elimination of Discrimination against Women: Cambodia' (25 September 2006) CEDAW/C/KHM/CO/3, 7 <

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2FC%2FKHM%2FCO%2F3&Lang=en > last accessed 11 June 2017; Ibid No 2 (OHCHR, 'Report of the Special Rapporteur on the

situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia') 52. Strengthening security of tenure is crucial in combatting land grabbing, *see* Ibid No 20 (De Schutter, 'The Emerging Human Right to Land') 323.

⁵⁸ Ibid No 2 (OHCHR, 'Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia') 59; Ibid No 6 (UN Women, 'Women's Access to Land: An Asia Perspective') 6.

⁵⁹ Ibid No 2 (OHCHR, 'Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia') 59; similar conditions prevail worldwide, *see* The Global Initiative for Economic, Social and Cultural Rights, 'Using CEDAW to Secure Women's Land and Property Rights: A Practical Guide' 1-2 < <http://globalinitiative-escr.org/wp-content/uploads/2014/03/CEDAW-Guide.pdf> > last accessed 11 June 2017. *See also*, Ibid No 55 (Freeman et al (eds), *The UN Convention on the Elimination of Discrimination Against Women. A Commentary*) 375: "women are considerably disadvantaged by the process of privatization, as most lands and livestock were registered under the male heads of households leaving women without legal title or control over their assets". *See also*, Maarit Jäntarä-Jareborg & Helene Tigroudja (eds), *Women's Human Rights and the Elimination of Discrimination* (Brill Nijhoff 2016) 32.

women make up the majority of farmers⁶⁰ but the minority of land owners.⁶¹ The countries with weak property rights for women are concentrated in the global south⁶² and many of these countries are facing large-scale land transfers.⁶³

Other adverse impacts on women in Cambodia are rooted in discrimination in regards to education, sexual self-determination and social roles⁶⁴, disadvantaging women before, during and after the course of land grabbing.⁶⁵ Before the land transactions take effect, the *de facto* discrimination against women regarding their land rights and the exclusion of women from consultations⁶⁶ makes them more vulnerable to lose the land they inhabit.⁶⁷ The loss of land resulting from land grabbing limits women's sources of income and food generation, exacerbating poverty and economic dependency.⁶⁸ In Cambodia, where 80% of the rural population is sustaining themselves off agriculture, loss of land has great impacts on women⁶⁹, who are the main caretakers, farmers and suppliers of food in their families and communities.⁷⁰ An aggravating aspect is that re-

⁶⁰ Ibid No 59 (The Global Initiative for Economic, Social and Cultural Rights, 'Using CEDAW to Secure Women's Land and Property Rights: A Practical Guide') 1. NGOs have recognised women's crucial role for ensuring food security of their families and communities, *see* Ibid No 22 ('Tirana Declaration') art 1.

⁶¹ Ibid No 22 (Behrmann et al, 'Gender Implications in Large-Scale Land Deals') 6. According to some estimations, women own as little as 1% of the land worldwide, *see* Ibid No 6 (UN Women, 'Women's Access to Land: An Asia Perspective') 3; while this is a controversial estimation, it is safe to assume that across continents, female land owners are the minority, *see* Ibid No 20 (De Schutter, 'The Emerging Human Right to Land') 331. In multiple Asian countries, women own around or below 10% of the land, while farming up to 50% of the land, *see* Ibid No 6 (UN Women, 'Women's Access to Land: An Asia Perspective') 12.

⁶² Valerie M. Hudson, 'Practice of Property Rights for Women' (The Womenstats Project, 2012) <
http://www.womanstats.org/substatics/Practice%20of%20Property%20Rights%20for%20Women_2012.tif_wmlogo3.png> last accessed 11 June 2017.

⁶³ Chris Jochnik, 'Land Rights and Global Development' (*Foreign Affairs*, 7 February 2017) <
<https://www.foreignaffairs.com/articles/2017-02-07/land-rights-and-global-development>> last accessed 11 June 2017.

⁶⁴ Ibid No 2 (OHCHR, 'Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia') 58.

⁶⁵ Ibid No 2 (OHCHR, 'Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia') 59.

⁶⁶ Ibid No 4 (De Schutter, 'The Green Rush: The Global Race for Farmland and the Rights of Land Users') 544; Ibid No 55 (Freeman et al (eds), *The UN Convention on the Elimination of Discrimination Against Women. A Commentary*) 376.

⁶⁷ Ibid No 2 (OHCHR, 'Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia') 59.

⁶⁸ Ibid No 22 (Behrmann et al, 'Gender Implications in Large-Scale Land Deals') 2. *See also*, Ibid No 55 (Freeman et al (eds), *The UN Convention on the Elimination of Discrimination Against Women. A Commentary*) 375; Ibid No 1 (Amnesty International, *Eviction and Resistance in Cambodia: Five Women Tell Their Stories*) 33.

⁶⁹ STAR Kampuchea, *Shadow Report on Women's Land Rights in Cambodia - Analysis of the status of compliance with CEDAW articles 14, 15 and 16 (2013)* 1 <
http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/KHM/INT_CEDAW_NGO_KHM_15172_E.pdf> last accessed 11 June 2017.

⁷⁰ Ibid No 2 (OHCHR, 'Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia') 59; Ibid No 22 (Behrmann et al, 'Gender

acquiring land or receiving equal compensation also often proves difficult for women.⁷¹ Furthermore, the jobs created by the companies involved in the land grabs are often inaccessible for women due to their generally lower levels of education.⁷² Another critical aspect is that in many cultures in Cambodia and elsewhere, women are ambassadors of cultural traditions, such as healing traditions. In Cambodia, where traditions and faith are very much linked to nature and are traditionally nurtured by female community members, the loss of land, including sacred land, negatively impacts women practicing such traditions.⁷³ In addition, due to the weak land ownership rights of many women tending land, they are in a disadvantaged position in relation to getting remedies for inequitable land transfers.⁷⁴ Furthermore, affected women face increased pregnancy rates⁷⁵, domestic violence⁷⁶, security issues⁷⁷ and deteriorating mental health at all stages of expropriation.⁷⁸ In summary, land grabbing in Cambodia⁷⁹ disproportionately impacts women

Implications in Large-Scale Land Deals') 4; Ibid No 59 (Jäntarä-Jareborg & Tigroudja (eds), *Women's Human Rights and the Elimination of Discrimination*) 198; Women are ensuring food security of their families and communities, see Ibid No 22 ('Tirana Declaration') art 1. Most of the land that is being transferred in Southeast Asia was used for growing small-scale crops prior to the land transfers, see Ibid No 17 (Gironde et al (eds), *Large-Scale Land Acquisitions: Focus on South-East Asia*) 144-5.

⁷¹ ECOSOC, 'Women and adequate housing' (2003) E/CN.4/2003/55, 67 < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G03/123/81/PDF/G0312381.pdf?OpenElement> > last accessed 11 June 2017.

⁷² Reportedly, men are often hired over women by the plantation operators; this is mainly due to the fact that many girls do not receive as good an education as boys, see Ibid No 22 (Behrmann et al, 'Gender Implications in Large-Scale Land Deals') 4; Ibid No 71 (ECOSOC, 'Women and adequate housing') 67; Ibid No 7 (White & White, 'The gendered politics of dispossession: oil palm expansion in Dayak Hihun in community in West Kalimantan in Indonesia') 17; See also, Ibid No 2 (OHCHR, 'Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia') 57; Ibid No 17 (Gironde et al (eds), *Large-Scale Land Acquisitions: Focus on South-East Asia*) 92; Ibid No 1 (Amnesty International, *Eviction and Resistance in Cambodia: Five Women Tell Their Stories*) 37.

⁷³ Ibid No 22 (Behrmann et al, 'Gender Implications in Large-Scale Land Deals') 4; Ibid No 1 (Amnesty International, *Eviction and Resistance in Cambodia: Five Women Tell Their Stories*) 8.

⁷⁴ Ibid No 22 (Behrmann et al, 'Gender Implications in Large-Scale Land Deals') 6.

⁷⁵ Ibid No 2 (OHCHR, 'Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia') 59.

⁷⁶ Ibid No 2 (OHCHR, 'Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia') 59; Ibid No 71 (ECOSOC, 'Women and adequate housing') 65.

⁷⁷ Women in Myanmar have reportedly suffered rape before, during and after forced evictions from their homes and land, see Ibid No 71 (ECOSOC, 'Women and adequate housing') 65. Ibid No 2 (OHCHR, 'Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia') 58. CEDAW, General Recommendation No 34 on the rights of rural women (4 March 2016) CEDAW/C/GC/34 [24].

⁷⁸ Ibid No 69 (STAR Kampuchea, *Shadow Report on Women's Land Rights in Cambodia - Analysis of the status of compliance with CEDAW articles 14, 15 and 16*) 2; Ibid No 71 (ECOSOC, 'Women and adequate housing') 65.

⁷⁹ The impacts of land grabbing on women are similar across the world, see Ibid No 21 (Oxfam, 'Our Land, Our Lives') 6. This is due to the prevailing discrimination against women in these countries, see Ibid No 62 (Valerie M. Hudson, 'Practice of Property Rights for Women' Chart).

before, during and after its occurrence due to deep-rooted gender roles.⁸⁰ It is important to note that the circumstances which cause this discrimination and the ensuing unequal treatment during land grabbing, such as customs, male-biased co-ownership practices and laws, are imposed on women against their consent and are largely beyond their influence.⁸¹

Thus, while land grabbing is problematic for all victims, including men, the consequences it has for women are even graver as they are rooted in gender-based discrimination. The profound impacts land grabbing can have on women illustrates that land is not just a commodity, but a necessity for gender equality.⁸² Against this backdrop, finding a gender-inclusive legal response to land grabbing is imperative.⁸³ The ICC plays an important role in this regard.⁸⁴

CHAPTER II. A Human Rights-Based Approach to Land Grabbing in Cambodia as Gender-based Persecution

“Crimes against humanity might usefully be viewed as an implementation of human rights norms within international criminal law”⁸⁵, because other than war crimes, they can be committed in peace time and they are generally characterised as grave violations of human rights committed as part of a widespread or systematic attack.⁸⁶ The prosecution of crimes against humanity dates back to the Nuremberg tribunal and has been a part of international criminal law

⁸⁰ Ibid No 57 (CEDAW, ‘Concluding observation on the fourth and fifth periodic reports of Cambodia’) 10. This can amount to a violation of women’s right to equality, *see* Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW), art 1.

⁸¹ *See generally*, Ibid No 1 (Amnesty International, *Eviction and Resistance in Cambodia: Five Women Tell Their Stories*’).

⁸² Ibid No 6 (UN Women, ‘Women’s Access to Land: An Asia Perspective’) 1. The discriminatory impacts suffered by women in Cambodia mirror general observations of the discrimination suffered by women in regards to their socio-economic life, *see* Ibid No 59 (Jäntarä-Jareborg & Tigroudja (eds), *Women’s Human Rights and the Elimination of Discrimination*) 198-9.

⁸³ Ibid No 11 (Agarwal, ‘Gender and land rights revisited: Exploring new prospects via the State, family and market’) 184-5.

⁸⁴ This is because Cambodia’s domestic court system is complicit and corrupt (Global Diligence, ‘Communication Under Article 15 of the Rome Statute of the International Criminal Court’ (2014) [26] < https://www.fidh.org/IMG/pdf/executive_summary-2.pdf > last accessed 2 June 2017) and there is no regional human rights court rendering the receiving human rights remedies difficult for the victims of land grabbing in Cambodia. The evidence brought by Global Diligence in its communication *prima facie* supports several charges of crimes against humanity and proves that the matter is admissible before the ICC since it is not presently being investigated and appears to be sufficiently grave (Ibid No 84 (Global Diligence, ‘Communication Under Article 15 of the Rome Statute of the International Criminal Court’) [25], [27]).

⁸⁵ William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 139.

⁸⁶ Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 139.

since. In the Rome Statute, crimes against humanity are codified in Article 7, which lists eleven crimes, one of which is the crime of persecution. Persecution, which sits “at the core of crimes against humanity”⁸⁷, prohibits the perpetration of an underlying act which discriminates against one of the groups listed in the article. One of these groups is ‘gender’, thus prohibiting gender-based persecution as a crime against humanity.⁸⁸

Global Diligence convincingly argued in its communication to the OTP that acts of land grabbing can amount to the crimes against humanity of forcible transfer, murder, illegal imprisonment, other inhumane acts, and political persecution.⁸⁹ Regrettably, gender-related charges are not included.⁹⁰ As discussed above, land grabbing has distinct and grave impacts on women specifically. It is therefore proposed that in addition to these charges, the crime of gender-based persecution deserves notice in relation to land grabbing.

This chapter will therefore address land grabbing in Cambodia as gender-based persecution, applying a human rights-based approach. This approach is warranted by Article 21(3), which states that the “application and interpretation of law (...) must be consistent with internationally recognized human rights (...)”.⁹¹ Especially in interpreting persecution, taking a human rights-based approach is constructive considering the profound similarities and overlaps with human rights law on non-discrimination.⁹²

The Court adopted a structured methodology to a human rights-based interpretation in its discussion on the repatriation of ICC witnesses who sought asylum in the Netherlands.⁹³ This

⁸⁷ Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 175.

⁸⁸ Ibid No 14 (Rome Statute) art 7(1)(h).

⁸⁹ Ibid No 84 (Global Diligence, ‘Communication Under Article 15 of the Rome Statute of the International Criminal Court’).

⁹⁰ In light of the Court’s position as innovator of international gender justice and its 2014 policy paper on gender-based crimes, the discussion on land grabbing should include a gender perspective, where applicable (*see* Rana Lehr-Lehnardt, ‘One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court’ (2002) 16 Brigham Young University Journal of Public Law 371, 340-5; Louise Chappell, *The Politics of Gender Justice at the International Criminal Court* (Oxford University Press 2016) 32; International Criminal Court Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Violence (2014) < <https://www.icc-cpi.int/iccdocs/otp/otp-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf> > last accessed 21 March 2017).

⁹¹ Ibid No 14 (Rome Statute) art 21(3). The Court has made frequent reference to human rights pursuant to this article, leading some to state that “a strong relationship” is emerging between the Court and human right norms, *see* Annika Jones, ‘Insights Into an Emerging Relationship: Use of Human Rights Jurisprudence at the International Criminal Court’ (2016) 16 Human Rights Law Review 701, 703.

⁹² Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 175; Leena Grover, *Interpreting the Crimes in the Rome Statute of the International Criminal Court* (Cambridge University Press, 2014) 125.

⁹³ In this case, the Court addressed the Court’s obligation to send witnesses back to their countries after they testified in light of their human rights, *see Prosecutor v Katanga*, Decision on the Application for the Interim Release of

assessment took place in four steps. First, the Court identified the human rights relevant to the matter at hand; followed by an assessment of these rights' scope, nature and content; followed by a discussion of the relevant context; and concluded by interpreting and applying the Statute to the matter at hand in light of this context. Zeegers has embraced this approach, calling it the "contextualisation of human rights norms".⁹⁴

In the asylum claims matter, the Court attributed to human rights norms a position of normative superiority, as it ruled against the Court's obligation under Article 93(7) to repatriate witnesses due to the risk of human rights violations upon the witnesses' return to the Congo.⁹⁵ The appeals chamber affirmed this superiority of human rights, stating that they can be repatriated only in exchange for the promise that Congolese authorities will uphold their fair trial rights.⁹⁶

In line with the above described four-step methodology and the Court's attribution of superiority to human rights, the following will discuss the crime of gender-based persecution from a human rights perspective, ultimately applying the interpretative findings to the situation of land grabbing in Cambodia. Following this, the chapeau elements of crimes against humanity will be discussed in relation to Cambodia, followed by a summary concluding this chapter.

A. Relevant Women's Rights

Article 21(3)⁹⁷ allows referral to human rights that are "internationally recognised".⁹⁸ The term 'internationally recognised human rights' has thus far not been defined by the Court. To shed light on the scope of the term, a brief analysis will be undertaken.

Detained Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 (Trial Chamber II) ICC-01/04-01/07-3405 (1 October 2013).

⁹⁴ Krit Zeegers, *International Criminal Tribunals and Human Rights Law* (TMC Asser Press 2016) 355.

⁹⁵ *Prosecutor v Katanga et al*, Decision on the Application for the Interim Release of Detained Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 (Trial Chamber II) ICC-01/04-01/07-3405 (1 October 2013) [70-3], [79].

⁹⁶ *Prosecutor v Chui*, Order on the implementation of the cooperation agreement between the Court and the Democratic Republic of the Congo concluded pursuant article 93 (7) of the Statute (Appeals Chamber) ICC-01/04-02/12 A (20 January 2014). The overriding role of human rights has been affirmed by scholars, see Alex Davidson, 'Human Rights Protection before the International Criminal Court: Assessing the Scope and Application of Article 21(3) of the Rome Statute' (2016) 18 *International Community Law Review* 72, 90; *Ibid* No 91 (Jones, 'Insights Into an Emerging Relationship: Use of Human Rights Jurisprudence at the International Criminal Court') 717-9; *Ibid* No 94 (Zeegers, *International Criminal Tribunals and Human Rights Law*) 79; Gudrun Hochmayr, 'Applicable Law in Practice and Theory' (2014) 12 *Journal of International Criminal Justice* 655, 662.

⁹⁷ *Prosecutor v Katanga*, Decision on the Application for the Interim Release of Detained Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 (Trial Chamber II) ICC-01/04-01/07-3405 (1 October 2013) [64], [67-9].

⁹⁸ *Ibid* No 14 (Rome Statute) art 21(3).

The words ‘internationally recognised’ suggests that some form of international acknowledgement is needed⁹⁹; however, it is commonly agreed that neither universal acceptance of the norm nor customary status is required.¹⁰⁰ In its practice, the Court has referred to international and regional treaties, custom, and soft law as internationally recognised human rights.¹⁰¹ While especially the status of international recognition of soft law seems questionable, the omission of the term ‘law’ after ‘human rights’ appears to affirm that soft law and rulings by human rights treaty bodies can constitute internationally recognised human rights.¹⁰² Moreover, it should be noted that the term ‘internationally recognised human rights’ falls short of any sort of specification or limitation regarding the type of applicable human rights.¹⁰³ This strongly suggests that Article 21(3) envisions the referral to human rights in general, including substantive human rights.¹⁰⁴ Thus, when discussing gender-related crimes, such as gender-based persecution, the relevant sources of internationally recognised human rights may include the CEDAW¹⁰⁵, General Recommendations, Concluding Observations and CEDAW Committee decisions.

⁹⁹ Ibid No 96 (Davidson, ‘Human Rights Protection before the International Criminal Court: Assessing the Scope and Application of Article 21(3) of the Rome Statute’) 84.

¹⁰⁰ Ibid No 92 (Grover, *Interpreting the Crimes in the Rome Statute of the International Criminal Court*) 117; Ibid No 94 (Zeegers, *International Criminal Tribunals and Human Rights Law*) 94, 382.

¹⁰¹ *Prosecutor v Lubanga*, Decision on the Prosecutor’s Application for Leave to Reply to ‘Conclusions de la defense en reponse au memoire d’appel du Procureur’ ICC-01/04-01/06-424 (12 September 2006) [3]. *See also*, Gerhard Hafner & Christina Binder, ‘The Interpretation of Article 21(3) ICC Statute. Opinion Reviewed’ (2004) 9 *Austrian Review of International and European Law* 163, 189; Daniel Sheppard, ‘The International Criminal Court and “Internationally Recognized Human Rights”: Understanding Article 21(3) of the Rome Statute’ (2010) 10 *International Criminal Law Review* 43, 50-3, 63, 67; Ibid No 96 (Davidson, ‘Human Rights Protection before the International Criminal Court: Assessing the Scope and Application of Article 21(3) of the Rome Statute’) 77; Ibid No 91 (Jones, ‘Insights Into an Emerging Relationship: Use of Human Rights Jurisprudence at the International Criminal Court’) 722; Gilbert Bitti, ‘Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC’, in Carsten Stahn and Göran Sluiter (eds) *The Emerging Practice of the International Criminal Court* (Brill Nijhoff 2009) 301; Ibid No 94 (Zeegers, *International Criminal Tribunals and Human Rights Law*) 95.

¹⁰² Ibid No 101 (Hafner & Christina Binder, ‘The Interpretation of Article 21(3) ICC Statute Opinion Reviewed’) 171-2. This position is supported by the finding of scholars that the applicability of sources of human rights should not primarily be determined by their formal status but by their subject matter, *see* Ibid No 96 (Davidson, ‘Human Rights Protection before the International Criminal Court: Assessing the Scope and Application of Article 21(3) of the Rome Statute’) 95.

¹⁰³ Ibid No 101 (Hafner & Binder, ‘The Interpretation of Article 21(3) ICC Statute Opinion Reviewed’ (2004) 9 *Austrian Review of International and European Law* 163, 183. *See also*, Stephen Bailey, ‘Article 21(3) of the Rome Statute: A Plea for Clarity’ (2014) 14 *International Criminal Law Review* 513, 523; Ibid No 92 (Grover, *Interpreting the Crimes in the Rome Statute of the International Criminal Court*) 117; Ibid No 101 (Bitti, ‘Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC’) 301.

¹⁰⁴ This is despite the fact that in practice, the Court has thus far focused on human rights relating to a fair trial, *see* Ibid No 103 (Bailey, ‘Article 21(3) of the Rome Statute: A Plea for Clarity’) 526.

¹⁰⁵ Ibid No 101 (Hafner & Binder, ‘The Interpretation of Article 21(3) ICC Statute Opinion Reviewed’) 189.

In the case of land grabbing, human rights pertaining to land, housing and property play a role. For the sake of concision, however, the following will focus on the CEDAW's Article 14(2)(g)¹⁰⁶ on land and other relevant articles in the CEDAW on non-discrimination and equal treatment in regards to land.

B. Scope, Nature and Content of the Relevant Women's Rights

Scope, nature and content relate to the meaning of the relevant human rights, their interpretation by treaty bodies, and principles and interests protected by these rights.¹⁰⁷

The most important article in relation to land is Article 14(2)(g), conferring the right for rural women to be treated equally in land reform and resettlement.¹⁰⁸ This is the only article in a core human rights treaty conferring land rights. The CEDAW occupies this significant position because land rights were identified as pivotal for eliminating discrimination against women.¹⁰⁹ The articles in the CEDAW are non-derogable.¹¹⁰

The CEDAW Committee has interpreted the scope of land rights in most of its observations.¹¹¹ Moreover, the CEDAW Committee has ruled in *E.S. and S.C. v Tanzania*¹¹² that expropriation of women due to customs that disadvantage women in property ownership amounts to gender-based discrimination. This case constitutes a landmark case for women's land rights.¹¹³ In addition, several General Recommendations are relevant, such as No 34, which states that rural women are particularly affected by land resettlement and concessions¹¹⁴; No 28, which provides a definition of 'gender'¹¹⁵; and No 27, which links land grabbing to gender-based

¹⁰⁶ Ibid No 80 (CEDAW) art 14(2)(g).

¹⁰⁷ Ibid No 94 (Zeegers, *International Criminal Tribunals and Human Rights Law*) 385.

¹⁰⁸ Ibid No 55 (Freeman et al (eds), *The UN Convention on the Elimination of Discrimination Against Women. A Commentary*) 358; Ibid No 12 (Gilbert, 'Land Rights as Human Rights: The Case for a Specific Right to Land') 121.

¹⁰⁹ Ibid No 12 (Gilbert, 'Land Rights as Human Rights: The Case for a Specific Right to Land') 121.

¹¹⁰ Ibid No 55 (Freeman et al (eds), *The UN Convention on the Elimination of Discrimination Against Women. A Commentary*) 28.

¹¹¹ Ibid No 12 (Gilbert, 'Land Rights as Human Rights: The Case for a Specific Right to Land') 122.

¹¹² Ibid No 13 (CEDAW, *E.S. & S.C. v. Tanzania*) [7.3]. See also, Tamar Ezer, 'CEDAW Committee ruling is victory for women's land rights' (*Land Portal*, 27 May 2015) < <http://landportal.info/news/2017/03/cedaw-committee-ruling-victory-women%E2%80%99s-land-rights> > last accessed 2 June 2017. This case was primarily discussing Article 16 equal marital rights, which includes an implicit right to land, see Ibid No 80 (CEDAW) art 16.

¹¹³ Ibid No 112 (Tamar Ezer, 'CEDAW Committee ruling is victory for women's land rights').

¹¹⁴ CEDAW, General Recommendation No 34 on the rights of rural women (4 March 2016) CEDAW/C/GC/34 [78].

¹¹⁵ CEDAW, General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (19 October 2010) CEDAW/C/2010/47/GC.

discrimination against older women.¹¹⁶ Additionally relevant are the CEDAW Committee's concluding observations on Cambodia.¹¹⁷ Also relevant is Article 1 of the CEDAW on gender-based discrimination.¹¹⁸ The CEDAW system prohibits both direct and indirect discrimination.¹¹⁹

These human rights norms will be taken into consideration in the interpretation and application of gender-based persecution in the situation of land grabbing in Cambodia.

C. Context of the Application of the Human Rights Norms

In discussing the asylum claims matter, the Court identified several contextual aspects that would influence the application of the identified human rights norms.¹²⁰ One of these aspects was that it does not possess the authority to decide on citizenship¹²¹, which led the Court to adapt the application of *non-refoulement* and other human rights norms accordingly.¹²²

The context in which the Court operates is that of criminal justice, which is fundamentally different from the context in which human rights normally apply.¹²³ To ensure legitimacy of the analysis, two main contextual factors can be identified regarding land grabbing as gender-based persecution. Firstly, human rights must be applied in the context the principle of legality.¹²⁴ Secondly, the interests of justice and the interests of the victims need to be taken into account.

¹¹⁶ CEDAW, General recommendation No 27 on older women and protection of their human rights (19 October 2010) CEDAW/C/2010/47/GC.

¹¹⁷ Ibid No 57 (CEDAW, 'Concluding observation on the fourth and fifth periodic reports of Cambodia') 10.

¹¹⁸ Ibid No 80 (CEDAW) art 1.

¹¹⁹ While direct discrimination is based on formal equality, indirect discrimination "occurs when a practice, rule, requirement or condition is neutral on its face but impacts disproportionately upon particular groups", see *Interights*, 'Non-discrimination in international law' (*Interights*, 2011) 18 < <http://www.interights.org/document/153/index.html> > last accessed 11 June 2017; See also, Sandra Fredman, *Discrimination Law* (Oxford University Press 2011) 166; *Ethiopia v South Africa (South West Africa case)* Dissenting Opinion of Judge Tanaka, [1966] ICJ Rep 6, ICGJ 158 (ICJ 1966), 18th July 1966, International Court of Justice [ICJ].

¹²⁰ Ibid No 94 (Zeegers, *International Criminal Tribunals and Human Rights Law*) 390.

¹²¹ *Prosecutor v Katanga et al*, Decision on the Application for the Interim Release of Detained Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 (Trial Chamber II) ICC-01/04-01/07-3405 (1 October 2013) [64].

¹²² *Prosecutor v Katanga et al*, Decision on the Application for the Interim Release of Detained Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 (Trial Chamber II) ICC-01/04-01/07-3405 (1 October 2013) [64]; see also, Ibid No 94 (Zeegers, *International Criminal Tribunals and Human Rights Law*) 389.

¹²³ Ibid No 94 (Zeegers, *International Criminal Tribunals and Human Rights Law*) 392.

¹²⁴ Dov Jacobs, 'Why the Vienna Convention Should not be applied to the Rome Statute: a plea for respecting the principle of legality' (*Spreading the Jam*, 24 August 2013) < <https://dovjacobs.com/2013/08/24/why-the-vienna-convention-should-not-be-applied-to-the-icc-rome-statute-a-plea-for-respecting-the-principle-of-legality/> > last accessed 11 June 2017.

The principle of legality, as stipulated in Article 22(2) reads: “The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.”¹²⁵ The principle of legality is part of customary law and thus has to be observed even when human rights constitute norms capable of overriding the Statute.¹²⁶ The application of relevant human rights should thus not go as far as creating a new offence, as this would compromise the principle of legality.

The second contextual factor is the interest of justice and victims.¹²⁷ The interest of justice, as expressed in the preamble of the Rome Statute, is closely linked to the aim of bringing persons responsible for international crimes to justice in order to pave the way for peace and the prevention of conflict and crime.¹²⁸ Generally, the interest of victims is that justice be done and that stability returns to their communities.¹²⁹ In this regard, it is important to emphasise the importance of gender-inclusive responses to international crimes, as empirical research has shown that the equality of women is directly linked to a state's peacefulness and the prevention of conflict.¹³⁰

This context will be considered when applying human rights to provisions of the Rome Statute.

¹²⁵ Ibid No 14 (Rome Statute) art 22(2).

¹²⁶ Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article* (Beck 2008), 717.

¹²⁷ Ibid No 14 (Rome Statute) art 53(1)(c).

¹²⁸ International Criminal Court Office of the Prosecutor, Policy Paper on the Interest of Justice (2007) 3 < <https://www.icc-cpi.int/Pages/item.aspx?name=otp-policy-int-just> > last accessed 11 June 2017. In this regard, the Court has been called the “missing link in the international legal system” since without it “acts of (...) egregious violations of human rights often go unpunished”, see Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 53.

¹²⁹ Ibid No 128 (International Criminal Court Office of the Prosecutor, 2007 Policy Paper on the Interest of Justice) 5. The interests of victims are important considering the Court's unprecedented role in including victims in international criminal proceedings, see Vladimir Tockilowsky, *The Law and Jurisprudence of the International Criminal Tribunals and Courts* (Intersentia 2014) 745.

¹³⁰ Valerie M. Hudson et al, *Sex & World Peace* (Columbia University Press 2012) 114.

D. Interpretation of Gender-based Persecution and Application to Cambodia

Under the Rome Statute, persecution is the commission of an underlying act in connection with discrimination regarding one of the listed groups, one of which is gender.¹³¹ The crime of gender-based persecution has never been prosecuted by an international tribunal; neither has land grabbing been prosecuted in the international criminal law arena. This unprecedented status calls for interpretation and analysis on the matter. To this end, the following will first define the material element of persecution under the Rome Statute in relation to land grabbing and apply the findings to the situation in Cambodia; and secondly, the mental element of gender-based persecution will be defined and applied to the situation of land grabbing in Cambodia.

a. Material Element: Fundamental Human Rights Violations as Underlying Acts

The material element, or underlying act, of persecution is defined in Article 7(1)(h) as “any act referred to in this paragraph or any crime within the jurisdiction of the Court”.¹³² “Any act referred to in this paragraph” refers to the other crimes against humanity, such as forcible transfer, meaning that they qualify as underlying acts of persecution. The second part referring to “any crime within the jurisdiction of the Court” has often been narrowly interpreted as relating to violations of war crimes and genocide as underlying acts¹³³; however, this narrow interpretation is not necessarily warranted. In an endeavour to reflect the harm of female victims of land grabbing in the underlying act of gender-based persecution, the following interpretation will analyse the material element of the crime, proposing a more progressive legal perspective.

Starting with a textual analysis in line with the Vienna Convention on the Law of Treaties (VCLT)¹³⁴, the ordinary meaning of the text of the provision in question must be interpreted in good faith.¹³⁵ As mentioned, the reference to “any other crime within the jurisdiction of the Court” in Article 7(1)(h) has been interpreted as requiring violations of the other crimes in

¹³¹ Ibid No 14 (Rome Statute) art 7.

¹³² Ibid No 14 (Rome Statute) art 7(1)(h).

¹³³ Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 177.

¹³⁴ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 17 January 1980) 1155 UNTS 331 (VCLT) art 31-33.

¹³⁵ Chester Brown, *A Common Law of International Adjudication* (Oxford University Press 2007) 165; Richard K. Gardiner, *Treaty Interpretation* (2nd ed, Oxford University Press 2017) 145. The ensuing analysis will follow the VCLT approach since the ICC expressly recognised it as an interpretative tool, see Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 388.

the Rome Statute, i.e. genocide and war crimes, as underlying acts.¹³⁶ This interpretation, however, would limit the acts underlying persecution to crimes against humanity and war crimes, essentially, because prosecuting genocide as persecution would be nonsensical.¹³⁷ The 1991 version of the International Law Commission's Draft Code explicitly lacked any confinement to Rome Statute crimes, stating that persecution "relates to human rights violations *other* than those covered by the previous paragraphs (emphasis added)".¹³⁸ Furthermore, the limitative approach to persecution has been criticised by scholars and tribunals: Schabas warned that limiting the underlying acts to Statute violations risks "emasculating the concept of persecution"¹³⁹ and according to the ICTY it would contravene customary law and was therefore rejected.¹⁴⁰ These criticisms are supported by the ordinary meaning of "any other crime within the jurisdiction of the Court". This reference to the jurisdiction of the Court, rather than to the Rome Statute, suggests that the underlying acts may go beyond the crimes contained in the Statute.¹⁴¹ In line with this textual interpretation, other sources, such as human rights, when considered part of the Court's jurisdiction, would qualify as underlying acts of persecution.

This view is supported by the contextual interpretation. The context is established by reading the sub-section in question in the context of the provision in its entirety and the treaty as a whole.¹⁴² Moreover, relevant practice of the Court can be indicative of the context of a provision.¹⁴³

Article 7 is structured in an interesting manner, with the first paragraph listing and defining the crimes against humanity prohibited under the Statute, and paragraph two adding explanations to these crimes. This structure suggests a hierarchy between the paragraphs, with the first paragraph being the primary source regarding the definition of persecution and the second paragraph having a supplementary character, similar to the Elements of Crimes. The supplementary Article 7(2)(g)¹⁴⁴ and the Elements of Crimes¹⁴⁵ provide the same content in regards to the material

¹³⁶ Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 177.

¹³⁷ Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 177.

¹³⁸ Ibid No 126 (Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article*) 216.

¹³⁹ Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 177.

¹⁴⁰ *Prosecutor v Kupreskic et al* (Trial Chamber) IT-95-16-T (14 January 2000) [579-81].

¹⁴¹ The absence of a qualifying term or limitation is significant to the textual meaning, see Ibid No 135 (Gardiner, *Treaty Interpretation*) 167.

¹⁴² Ibid No 135 (Brown, *A Common Law of International Adjudication*) 46.

¹⁴³ Ibid No 134 (VCLT) art 31; Ibid No 91 (Jones, 'Insights Into an Emerging Relationship: Use of Human Rights Jurisprudence at the International Criminal Court') 714; see also, Ibid No 135 (Brown, *A Common Law of International Adjudication*) 46.

¹⁴⁴ Ibid No 14 (Rome Statute) art 7(2)(g).

¹⁴⁵ Elements of Crimes (2011) ISBN No. 92-9227-232-2 (International Criminal Court) art 7(1)(h), element 1.

element of persecution: both state that any violation of a fundamental right will suffice as underlying act. This supports the textual interpretation reached above, according to which underlying acts may go beyond the crimes in the Statute. Hence, violations of fundamental rights can be considered to fall within the realm of “any other crime within the jurisdiction of the Court”, thus qualifying as underlying acts.

Practice affirms this line of interpretation. While the ICC has not interpreted the crime of persecution, other international courts have. Noteworthy in this respect is the practice of the *ad hoc* tribunals. The *ad hoc* tribunals accepted fundamental human rights violations as the underlying act for persecution, as opposed to requiring charter violations.¹⁴⁶ The background for this is the close historical relation between human rights and the crime of persecution. Many of the human rights violations inflicted by the Nazis, such as the obligation to wear a yellow star, would not have been considered serious enough for prosecution by an international criminal tribunals in and of themselves.¹⁴⁷ The *ad hoc* tribunals, however, acknowledged that the cumulative – i.e. widespread or systematic – effect of such discriminatory human rights violations amounts to the level of an international crime, namely the crime against humanity of persecution. This understanding of persecution has been shared by all major international criminal tribunals since – the tribunals for Yugoslavia, Rwanda, Sierra Leone and Cambodia.¹⁴⁸ A confinement of the underlying acts to the crimes contained in the Rome Statute would thus be unprecedented in modern international criminal law.¹⁴⁹

Lastly, a teleological view will be taken. The object of the Rome Statute is derived from the chapter in which the provision in question is located and the purpose is gathered from the

¹⁴⁶ See for example, *Prosecutor v Kupreskic et al* (Trial Chamber) IT-95-16-T (14 January 2000) [615]; see also, Ottavio Quirico, ‘The Evolving Notion of Persecution in the Law and Jurisprudence of International Criminal Tribunals’ (2010) 2 *The Italian Yearbook of International Law Online* 201, 208.

¹⁴⁷ Fausto Pocar, ‘Persecution as a Crime under international law’ (2008) 2 *Journal of International Security Law & Policy* 355, 359.

¹⁴⁸ *Ibid* No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 177-8.

¹⁴⁹ Although other types of limitations in regards to crimes against humanity have existed, such as the Nuremberg Charter’s requirement of a nexus to armed conflict, see *Ibid* No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 144. See also, *Ibid* No 126 (Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article*) 258-61.

“wider aims of the law”¹⁵⁰ as obtained from the preamble and the general tenor of the treaty.¹⁵¹ Considering that the Rome Statute was drafted with the purpose of effectively prosecuting crimes¹⁵², which includes the obligation to interpret the law progressively¹⁵³, an interpretation of Article 7(1)(h) as limiting persecution to Statute violations does not seem to be in line with the object and purpose as it would seriously hamper the effectiveness and development of the law.

Considering the above factors of text, context, and object and purpose, it appears that the underlying act for persecution can be any crime against humanity or any other violation within the jurisdiction of the Court, which includes war crimes and violations of fundamental rights which are not necessarily contained in the Statute.

The question arising from this conclusion is: what rights are fundamental rights? This will be discussed next with special attention paid to rights relevant in situations of land grabbing.¹⁵⁴ For the ICTY, the starting point for determining fundamental rights has been human rights law.¹⁵⁵ In the course of its existence, the ICTY has identified various human rights that amount to fundamental rights¹⁵⁶ which can be divided into four groups: “(1) offences against physical integrity; (2) offences against individual freedom; (3) offences against economic, social and cultural rights; and (4) offences against private or public property”.¹⁵⁷ The fourth group includes specific violations of human rights relevant in the context of land grabbing: the destruction of property, destruction of villages and destruction of means of subsistence.¹⁵⁸

¹⁵⁰ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal (Appeals Chamber) ICC-01/04 (13 July 2006) [33].

¹⁵¹ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal (Appeals Chamber) ICC-01/04 (13 July 2006) [33].

¹⁵² Ibid No 14 (Rome Statute) preamble.

¹⁵³ Ibid No 14 (Rome Statute) art 10.

¹⁵⁴ M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press 2011) 404.

¹⁵⁵ *Prosecutor v Kupreskic et al* (Trial Chamber) IT-95-16-T (14 January 2000) [621].

¹⁵⁶ Valerie Oosterveld, 'Gender, Persecution, and the International Criminal Court: Refugee Law's Relevance To The Crime Against Humanity Of Gender-Based Persecution' (2006) 17 *Duke Journal of Comparative & International Law* 49, 64.

¹⁵⁷ Ibid No 146 (Quirico, 'The Evolving Notion of Persecution in the Law and Jurisprudence of International Criminal Tribunals') 208; *see also*, *Prosecutor v Kupreskic et al* (Trial Chamber) IT-95-16-T (14 January 2000) [615]. The finding that persecution can be committed in connection with crimes under these four groups is a development from the findings of the Nuremberg tribunal: the tribunal held in *Flick* that underlying acts of persecution could only be crimes that affect life or liberty, *see* Ibid No 126 (Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article*) 262.

¹⁵⁸ *Prosecutor v Kupreskic et al* (Trial Chamber) IT-95-16-T (14 January 2000) [615].

However, not all human rights violations can amount to persecution.¹⁵⁹ Triffterer, while referring to human rights, states that fundamental rights include those rights “from which no derogation is permitted”.¹⁶⁰ A similar approach was taken by the Court in *Katanga*.¹⁶¹ Moreover, violations of fundamental rights must be sufficiently grave¹⁶², requiring them to reach a comparable level of gravity as other crimes against humanity.¹⁶³

To summarise, the material act underlying persecution requires the violation of a crime against humanity, war crime, or fundamental human right. Fundamental rights are non-derogable human rights and their violation must be sufficiently grave.¹⁶⁴

i. Application to the Situation in Cambodia

Moving to the application, it will be assessed which rights violations could underlie a charge relating to land grabbing in Cambodia as gender-based persecution.¹⁶⁵

A relevant right in connection with land grabbing, as identified above, is Article 14(2)(g), which confers the right on women to “equal treatment in land and agrarian reform as well as in land resettlement schemes”.¹⁶⁶ The rights contained in the CEDAW do not allow for any derogations¹⁶⁷ and the concept of non-discrimination against women has attained *ius cogens* status, according to the Interamerican Court of Human Rights.¹⁶⁸ Moreover, the CEDAW Committee

¹⁵⁹ *Prosecutor v Kupreskic et al* (Trial Chamber) IT-95-16-T (14 January 2000) [618].

¹⁶⁰ *Ibid* No 126 (Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article*) 262.

¹⁶¹ *Prosecutor v Katanga et al*, Decision on the Application for the Interim Release of Detained Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 (Trial Chamber II) ICC-01/04-01/07-3405 (1 October 2013) [33].

¹⁶² *Ibid* No 154 (Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application*) 403; *Prosecutor v Kupreskic et al* (Trial Chamber) IT-95-16-T (14 January 2000) [615]; single acts can, in special circumstances, also constitute persecution, see *Prosecutor v Kupreskic et al* (Trial Chamber) IT-95-16-T (14 January 2000) [624].

¹⁶³ *Ibid* No 146 (Quirico, ‘The Evolving Notion of Persecution in the Law and Jurisprudence of International Criminal Tribunals’) 206.

¹⁶⁴ Moreover, The ICTY has identified fundamental rights violations that could be relevant in connection with land grabbing, which relate, amongst other, to the destruction of livelihood, see *Prosecutor v Kupreskic et al* (Trial Chamber) IT-95-16-T (14 January 2000) [615].

¹⁶⁵ *Ibid* No 154 (Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application*) 404.

¹⁶⁶ *Ibid* No 80 (CEDAW) art 14(2)(g).

¹⁶⁷ *Ibid* No 55 (Freeman et al (eds), *The UN Convention on the Elimination of Discrimination Against Women. A Commentary*) 28; M. Shaw, *International Law* (6th ed, Cambridge University Press 2008) 275.

¹⁶⁸ *Juridical Condition and Rights of the Undocumented Migrants* (Advisory Opinion) OC-18/03 (17 September 2003) [23]; *Ibid* No 55 (Freeman et al (eds), *The UN Convention on the Elimination of Discrimination Against Women. A Commentary*) 28.

deemed this right critical for the subsistence of women, and rural women particularly¹⁶⁹ and found that the unequal treatment of women regarding land can amount to a serious risk to women's livelihood.¹⁷⁰ Specifically in regards to Cambodia, the CEDAW Committee's concluding observation describes land resettlement as a threat to women's means of subsistence.¹⁷¹ Violations of the livelihoods and means of subsistence of victims have previously been recognised as fundamental rights violations by tribunals and scholars.¹⁷² Article 14(2)(g) of CEDAW therefore amounts to a fundamental right, thus qualifying as underlying act for persecution.

Whether this right is being violated during land grabbing in Cambodia and whether such violation would be of sufficient gravity will be assessed now. Land reform and resettlement is occurring in Cambodia in form of land grabbing.¹⁷³ Many victims of land grabbing in Cambodia, including men, are experiencing poverty and rights violations, as the CEDAW Committee recognised.¹⁷⁴ However, it has been acknowledged that generally, women are experiencing aggravated harm during land reform and resettlement.¹⁷⁵ This is because land constitutes women's, and particularly rural women's¹⁷⁶, major means of subsistence: the loss of access to land causes women to lose their income sources and means to provide for their families¹⁷⁷, whereas male victims reportedly often have more options for subsistence, due to higher education standards and

¹⁶⁹ Rural women are much more disadvantaged than rural men, *see* Ibid No 114 (CEDAW General Recommendation 34) [5].

¹⁷⁰ Ibid No 13 (CEDAW *E.S. & S.C. v Tanzania*) [7.3]; Ibid o 116 (CEDAW General recommendation No 27).

¹⁷¹ Ibid No 57 (CEDAW, 'Concluding observation on the fourth and fifth periodic reports of Cambodia') 10.

¹⁷² *Prosecutor v Kupreskic et al* (Trial Chamber) IT-95-16-T (14 January 2000) [630], citing the IMT Judgement; *Prosecutor v Kupreskic et al* (Trial Chamber) IT-95-16-T (14 January 2000) [631]; Ibid No 146 (Quirico, 'The Evolving Notion of Persecution in the Law and Jurisprudence of International Criminal Tribunals') 216 citing *to Prosecutor v Harun and Others*, Decision on the Prosecution Application under Article 58(7) of the Statute (Pre-Trial Chamber I) ICC-02/05-01/07 (27 April 2007) [74]; Ibid No 126 (Triffiterer (ed), *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article*) 262.

¹⁷³ Ibid No 57 (CEDAW, 'Concluding observation on the fourth and fifth periodic reports of Cambodia') 10; Ibid No 69 (STAR Kampuchea, Shadow Report on Women's Land Rights in Cambodia - Analysis of the status of compliance with CEDAW articles 14, 15 and 16) 1; The conclusions that violations connected to land grabbing in Cambodia are grave has also been reached by the OHCHR, *see* OHCHR, UN Commentary and Guidelines on Eviction and Resettlement (2013) 1 < <http://cambodia.ohchr.org/en/content/united-nations-commentary-and-guidelines-eviction-and-resettlement> > last accessed 2 June 2017.

¹⁷⁴ Ibid No 57 (CEDAW, 'Concluding observation on the fourth and fifth periodic reports of Cambodia') 10.

¹⁷⁵ Ibid No 114 (CEDAW General Recommendation No 34) [78].

¹⁷⁶ Ibid No 69 (STAR Kampuchea, Shadow Report on Women's Land Rights in Cambodia - Analysis of the status of compliance with CEDAW articles 14, 15 and 16) 1.

¹⁷⁷ Ibid No 55 (Freeman et al (eds), *The UN Convention on the Elimination of Discrimination Against Women. A Commentary*) 358; Ibid No 2 (OHCHR, 'Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia') 59; Ibid No 22 (Behrmann et al, 'Gender Implications in Large-Scale Land Deals') 4; Ibid No 59 (Jäntarä-Jareborg & Tigroudja (eds), *Women's Human Rights and the Elimination of Discrimination*) 198; Ibid No 17 (Gironde et al (eds), *Large-Scale Land Acquisitions: Focus on South-East Asia*) 144-5.

lower security concerns.¹⁷⁸ Thus far, the Cambodian government has made no efforts to alleviate this unequal situation.¹⁷⁹ In summary, women and rural women¹⁸⁰ are experiencing unequal treatment in land reform and resettlement, which is threatening their means of subsistence.¹⁸¹ This situation thus amounts to a violation of Article 14(2)(g). This violation appears to be of sufficient gravity since the ICTY has considered similar violations as grave enough, namely when they threatened the livelihood of the affected population.¹⁸² The connection between the loss of land and threatened livelihoods was acknowledged by the CEDAW Committee in *E.S. and S.C. v Tanzania*.¹⁸³ Moreover, the fundamental rights violation of unequal treatment in land resettlement has similar consequences as the crime against humanity of forced relocation, which affirms this conclusion on sufficient gravity.¹⁸⁴

In summary, the fundamental right of equal treatment in land reform and resettlement constitutes an underlying act of persecution. This right appears to have been violated in the course of land grabbing in Cambodia.

This conclusion appears to be in line with the above-mentioned contextual aspects, since such a charge would be in the interest of justice as it would allow for the prosecution of perpetrators of land grabbing. Moreover, this charge would be considerate of a particularly vulnerable group of victims: women. Furthermore, the charge is supported by the well-established concept of destruction of livelihoods which the ICTY adopted and was supported by a thorough analysis that did not go beyond the letter of the law, which ensures compliance with legality. The contextualisation of human rights thus is successfully ensured regarding the material element.

¹⁷⁸ Ibid No 4 (De Schutter, 'The Green Rush: The Global Race for Farmland and the Rights of Land Users') 544; Ibid No 55 (Freeman et al (eds), *The UN Convention on the Elimination of Discrimination Against Women. A Commentary*) 376; Ibid No 114 (CEDAW General Recommendation 34) [48-9].

¹⁷⁹ Ibid No 114 (CEDAW General Recommendation 34) [77].

¹⁸⁰ Ibid No 114 (CEDAW General Recommendation 34) [5].

¹⁸¹ Ibid No 114 (CEDAW General Recommendation 34) [77]. On violations regarding means of subsistence as underlying acts, see *Prosecutor v Kupreskic et al* (Trial Chamber) IT-95-16-T (14 January 2000) [615].

¹⁸² *Prosecutor v Kupreskic et al* (Trial Chamber) IT-95-16-T (14 January 2000) [631]; Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 180.

¹⁸³ Here it was stated that women's property and land rights are central "to their ability to earn a livelihood", see Ibid No 13 (CEDAW, *E.S. & S.C. v Tanzania*) [7.3]; Other human rights committees have also delivered rulings on land-related cases, see Ibid No 17 (Gironde et al (eds), *Large-Scale Land Acquisitions: Focus on South-East Asia*) 236. See also, Ibid No 63 (Jochnik, 'Land Rights and Global Development').

¹⁸⁴ The conclusions that violations connected to land grabbing in Cambodia are grave has also been reached by the OHCHR, see Ibid No 173 (OHCHR, UN Commentary and Guidelines on Eviction and Resettlement) 17.

b. Mental Element: Persecution as a General Intent Crime

Persecution as such and as a crime under the Rome Statute has often been perceived as a special intent crime¹⁸⁵ and it is not contested in this paper that persecution can be committed with special intent under the Rome Statute. However, it appears that Article 7(1)(h) does not necessarily require special intent, as will be discussed below. The background for this discussion is that gender-based discrimination often occurs in very nuanced, subtle ways, which can render legal responses to it difficult, especially with regards to proving the *mens rea*.¹⁸⁶ In discussing and interpreting the mental element, the following will firstly define 'gender', and secondly, discuss the mental element of persecution, proposing a progressive interpretation.

'Gender', according to Art 7(3), "refers to the two sexes, male and female, within the context of society". This definition has been criticised as "curious"¹⁸⁷ and "circular".¹⁸⁸ A helpful clarification is contained in the 2014 policy paper of the OTP: "this definition (in Art 7(3)) acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys".¹⁸⁹ This understanding is very similar to and supported by the CEDAW Committee's definition of gender, while the latter adds that gender-based discrimination often affects women in particular: "gender refers to socially constructed identities (...) resulting in hierarchical relationships between men and women (...), disadvantaging women".¹⁹⁰ To ensure consistency with human rights, the concept adopted in the

¹⁸⁵ Ibid No 126 (Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article*) 257; Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 177; *Prosecutor v Kordic and Cerkez* (Appeals Judgment) IT-95-14/2-A (17 December 2004) [111]; Antonio Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 364.

¹⁸⁶ Ibid No 156 (Oosterveld, 'Gender, Persecution, and the International Criminal Court: Refugee Law's Relevance To The Crime Against Humanity Of Gender-Based Persecution') 55. In this respect, the CEDAW Committee noted that rural policies on land often appear gender-neutral, but impact women negatively in practice; while these policies are not intended to discriminate, their effect is discriminatory anyway, see Ibid No 85 (Freeman et al (eds), *The UN Convention on the Elimination of Discrimination Against Women. A Commentary*) 381.

¹⁸⁷ Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 143.

¹⁸⁸ Ibid No 156 (Oosterveld, 'Gender, Persecution, and the International Criminal Court: Refugee Law's Relevance To The Crime Against Humanity Of Gender-Based Persecution') 77.

¹⁸⁹ Ibid No 90 (International Criminal Court Office of the Prosecutor, 2014 Policy Paper on Sexual and Gender-Based Violence). Gender thus is understood as "not simply a biological matter" but as the social construct determining "roles and power disparities" between men and women, see Ibid No 126 (Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article*) 712, 273; Ibid No 156 (Oosterveld, 'Gender, Persecution, and the International Criminal Court: Refugee Law's Relevance To The Crime Against Humanity Of Gender-Based Persecution') 75.

¹⁹⁰ Ibid No 115 (CEDAW General Recommendation No 28) [5]; Ibid No 55 (Freeman et al (eds), *The UN Convention on the Elimination of Discrimination Against Women. A Commentary*) 15; this mirrors the "United Nations usage" of the term, see Ibid No 126 (Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article*) 273.

OTP policy paper should be the one informing the Court's understanding of gender.¹⁹¹ In this regard, it is instructive to keep in mind that gender-based discrimination often affects women, as the CEDAW Committee stated, without excluding the application of a gender perspective to crimes affecting men. Specific factors that can influence one's position in society, i.e. one's gender, are "age, religion, profession, socioeconomic status, legal status, family status, political beliefs, and sexual orientation".¹⁹²

Moving on to the main point of discussion, the mental element of persecution will be determined by analysing Article 7(1)(h) according to the three main points of interpretation of the VCLT.¹⁹³

Starting with the textual analysis, the provision criminalising persecution – Article 7(1)(h) – does not make reference to any mental element.¹⁹⁴ It merely requires persecution to occur against one of the listed groups, one of which is gender. This wording suggests that discrimination is a factual element in the crime of persecution rather than a mental one. Absence of a mental element from the definition of a crime is significant¹⁹⁵: it suggests that the *mens rea* is the one contained in general stipulation on the mental element, which is Article 30 of the Rome Statute¹⁹⁶.

In regards to the contextual interpretation, the provision as a whole and other relevant provisions as well as relevant practice will be discussed.¹⁹⁷ As determined above, Article 7(1)(h) is the primary definition of persecution. While other definitions of crimes in the Statute, such as the definition of genocide, state specific mental elements in the paragraph prohibiting the crime, this is not the case for persecution.¹⁹⁸ For persecution, mental elements are only mentioned in the explicatory paragraph Article 7(2)(g) and the Elements of Crimes¹⁹⁹, which suggest that special

¹⁹¹ Ibid No 156 (Oosterveld, 'Gender, Persecution, and the International Criminal Court: Refugee Law's Relevance To The Crime Against Humanity Of Gender-Based Persecution') 82-3.

¹⁹² Ibid No 156 (Oosterveld, 'Gender, Persecution, and the International Criminal Court: Refugee Law's Relevance To The Crime Against Humanity Of Gender-Based Persecution') 78.

¹⁹³ Ibid No 134 (VCLT).

¹⁹⁴ Ibid No 14 (Rome Statute) art 7(1)(h).

¹⁹⁵ Ibid No 135 (Gardiner, *Treaty Interpretation*) 167.

¹⁹⁶ Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 666.

¹⁹⁷ Ibid No 91 (Jones, 'Insights Into an Emerging Relationship: Use of Human Rights Jurisprudence at the International Criminal Court') 714; *see also*, Ibid No 135 (Brown, *A Common Law of International Adjudication*) 46.

¹⁹⁸ Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 474.

¹⁹⁹ Geert-Jan Alexander Knoops, *Mens Rea at the International Criminal Court* (Brill Nijhoff 2017) 137; *Prosecutor v Kordic and Cerkez* (Trial Judgment) IT-95-14/2-T (16 February 2001) [212].

intent is required.²⁰⁰ These references' supplementary and non-binding²⁰¹ character, respectively, and the fact that they do not mirror or align with the primary definition, suggest that specific intent may not be a mandatory element for the crime of persecution.²⁰²

Relevant practice on persecution can shed more light on the issue. Generally, the mental element of persecution has been subject to debate and differing interpretations. The ICTY held on a few occasions that discriminatory intent for the purposes of persecution can be inferred from 'knowingly participating' in a system that compromises human rights of certain groups, which suggests a lower threshold than specific intent since it does not require purpose, but merely knowledge.²⁰³ Moreover, the Canadian *Finta* case also suggested a lower threshold than special intent.²⁰⁴ However, on other occasions, the ICTY maintained that persecution requires specific intent.²⁰⁵ Specific intent is the same level of *mens rea* that is required for genocide. Requiring such a high threshold for persecution could blur the distinction between persecution and genocide, setting the bar for persecution unnecessarily high. An indication for this futile conflation of the two crimes is the *Al Bashir* arrest warrant²⁰⁶, which lists the charge of genocide and several counts of crimes against humanity, but not persecution. Although the facts give rise to persecution, the strict interpretation of this crime seems to have made charging persecution redundant considering the close similarity to genocide.²⁰⁷ In view of the historically important role of the crime of persecution, such a development would be worrying. Moreover, in brief reference to the object and purpose²⁰⁸, a strict interpretation requiring special intent in all instances appears to compromise the interest of justice and victims. In fact, it might prevent the effective prosecution of persecution, which would

²⁰⁰ Ibid No 185 (Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary*) 364.

²⁰¹ The Elements of Crimes are non-binding. The fact that the content of Article 7(2)(g) and the Elements of Crimes are the same on the point of mens rea for persecution suggests that this mental element may not be mandatory in character.

²⁰² Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 474.

²⁰³ Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 179.

²⁰⁴ This case found that for all crimes against humanity, responsibility may arise when the perpetrator was "wilfully blind to the facts or circumstances that would bring his or her actions within the provisions of these offences, see Johan D. Van der Vyver, 'The International Criminal Court and the Concept of *Mens Rea* in International Criminal Law' (2004) 12 University of Miami International and Comparative Law Review 57, 75.

²⁰⁵ *Prosecutor v Kordic and Cerkez* (Appeals Judgment) IT-95-14/2-A (17 December 2004) [111]. See also, Ibid No 185 (Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary*) 364.

²⁰⁶ *Prosecutor v Bashir*, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Pre-Trial Chamber I) ICC-02/05-01/09 (4 March 2009). Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 178.

²⁰⁷ Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 178.

²⁰⁸ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal (Appeals Chamber) ICC-01/04 (13 July 2006) [33].

contradict the preamble.²⁰⁹ This arguably occurred in the *Al Bashir* arrest warrant.²¹⁰ In connection with this, Article 10 should be pointed out, which requires the progressive interpretation of the Statute when necessary, which would allow for interpretation of the mental element in line with the interest of justice.²¹¹

A view on human rights law is instructive as well, since persecution and the human rights prohibition of discrimination are tightly linked.²¹² In this respect, it is important to note that Article 21(3) explicitly prohibits discriminatory interpretations of the Rome Statute.²¹³ Pellet found that the explicit and distinct nature of this obligation of non-discrimination confers a status of “super-super-legality”²¹⁴, creating absolute superiority of non-discrimination law.²¹⁵ Gender is the first group mentioned in regards to this obligation of non-discrimination. In this respect, it is important to note that gender-based discrimination encompasses both direct and indirect discrimination, both of which are prohibited to the same degree.²¹⁶ Direct discrimination is understood by the CEDAW Committee as discrimination that has the purpose of discriminating²¹⁷, while indirect discrimination is an act that has the *de facto* effect of discrimination, “because pre-existing inequalities are not addressed by the apparently neutral measure (or act)”²¹⁸, while lacking the premeditated purpose. Based on these definitions, direct discrimination is comparable to special intent since special intent requires intent to bring about a certain consequence; whereas indirect discrimination is comparable to general intent as general intent does not require purpose, but merely the intent to engage in an act which brings about the material elements of the offence.²¹⁹ A high mental threshold is often particularly difficult to prove in regards to gender-based crimes,

²⁰⁹ Ibid No 14 (Rome Statute) preamble.

²¹⁰ Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 178.

²¹¹ Alain Pellet, ‘Applicable Law’ in Antonio Cassese et al (eds), *The Rome Statute of the International Criminal Court: a Commentary* (Oxford University Press 2002) 1083.

²¹² Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 175; Ibid No 94 (Zeegers, *International Criminal Tribunals and Human Rights Law*) 104.

²¹³ Ibid No 14 (Rome Statute) art 21(3).

²¹⁴ Ibid No 211 (Pellet, ‘Applicable Law’) 1083.

²¹⁵ Ibid No 211 (Pellet, ‘Applicable Law’) 1083.

²¹⁶ Ibid No 115 (CEDAW General Recommendation 28) [16].

²¹⁷ Ibid No 80 (CEDAW) art 1. “On the basis of” is to be understood as synonymous to “by reasons of”; Ibid No 55 (Freeman et al (eds), *The UN Convention on the Elimination of Discrimination Against Women. A Commentary*) 60.

²¹⁸ Ibid No 115 (CEDAW General Recommendation 28) [16].

²¹⁹ Ibid No 115 (CEDAW General Recommendation 28) [5], [10], [16]; these paragraphs also point out that under the CEDAW, there is the obligation to take positive measures in order to prevent indirect discrimination; i.e. indirect discrimination can be committed by omission.

even when discrimination occurred in fact.²²⁰ Therefore, requiring a high level *mens rea*, especially considering that this is not explicitly required in the definition of persecution²²¹, might discriminate against some victims, and female victims in particular.²²² The absolute superiority of non-discrimination under Article 21(3) would prohibit such an outcome. Therefore, both direct and indirect discrimination should be taken into account when assessing the mental element of persecution.²²³ This finding is in line with the apparent core of the crime of persecution: the ICTY found that where discriminatory intent exists, but no discrimination results, there is no persecution.²²⁴ From this it can be deduced that factual materialisation of discrimination is the core of persecution, not the debatable element of specific discriminatory intent.

To summarise, the text of the crime of persecution does not include a mental element. Moreover, the mental element of specific intent contained in the explanatory references is not in line with the context, object and purpose of the Rome Statute and human rights. It is therefore suggested that Article 30 applies. Article 30 requires intent and knowledge.²²⁵ General intent, more specifically *dolus directus* of the second degree, suffices under this Article, according to the Court and scholars.²²⁶ This mental element is comparable to the human rights concept of indirect discrimination, thus ensuring conformity with human rights. Based on the above analysis, it can be

²²⁰ Ibid No 156 (Oosterveld, 'Gender, Persecution, and the International Criminal Court: Refugee Law's Relevance To The Crime Against Humanity Of Gender-Based Persecution') 55. In this respect, the CEDAW Committee noted that rural policies on land often appear gender-neutral, but impact women negatively in practice; while these policies are not intended to discriminate, their effect is discriminatory anyway, *see* Ibid No 55 (Freeman et al (eds), *The UN Convention on the Elimination of Discrimination Against Women. A Commentary*) 381.

²²¹ This is referring to Article 7(1)(h) of the Rome Statute and the above textual analysis, *see* Ibid No 14 (Rome Statute) art 7(1)(h).

²²² Ibid No 156 (Oosterveld, 'Gender, Persecution, and the International Criminal Court: Refugee Law's Relevance To The Crime Against Humanity Of Gender-Based Persecution') 55. In this respect, the CEDAW Committee noted that rural policies on land often appear gender-neutral, but impact women negatively in practice; while these policies are not intended to discriminate, their effect is discriminatory anyway, *see* Ibid No 55 (Freeman et al (eds), *The UN Convention on the Elimination of Discrimination Against Women. A Commentary*) 381.

²²³ This approach ensures consistency with human rights since Article 1 of CEDAW and General Recommendation 34 prohibit "all forms" of gender-based discrimination, including indirect discrimination, *see* Ibid No 80 (CEDAW) art 1; Ibid No 114 (CEDAW General Recommendation 34) [7].

²²⁴ Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 179.

²²⁵ Ibid No 198 (Knoops, *Mens Rea at the International Criminal Court*) 37.

²²⁶ Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 475; *Prosecutor v Lubanga*, Decision on the Confirmation of Charges (Pre-Trial Chamber I) ICC-01/04-01/06-803-tEN (29 January 2007) [351-5]; Ibid No 198 (Knoops, *Mens Rea at the International Criminal Court*) 138; Ibid No 196 (Stahn (ed), *The Law and Practice of the International Criminal Court*) 655; Ibid No 185 (Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary*) 365.

concluded that persecution requires a minimum of second degree *dolus directus* in connection with the factual element of discrimination, required under Article 7(1)(h).²²⁷

ii. Application to the Situation in Cambodia

Moving on to the application, it must be established that the perpetrators of land grabbing in Cambodia are targeting women with second degree *dolus directus*. To this end, it must be established that the perpetrators meant to engage in the criminal conduct, aware that it would almost inevitably bring about the material elements of the crime, and having knowledge that victims belong to a protected group.²²⁸

The proper assessment of the mental element depends on further determination as to who the perpetrators of land grabbing in Cambodia are, which would go beyond the scope of this paper. However, generally, government officials involved in land grabbing could be perpetrators, amongst others. In Cambodia, socio-economic gender-based disadvantages which affect women disproportionately, prevail. Due to this gender-based inequality, acts that aggravate poverty in a certain community, such as land grabbing, are often leaving women in especially vulnerable positions. Cambodian government officials can be assumed to be aware of these circumstances since those are well known in and beyond Cambodia.²²⁹ Land grabs in Cambodia are often targeting vulnerable communities, a large part of which is particularly vulnerable due to gender-based inequalities.²³⁰ Based on this, it can be concluded that land grabbing conducted with the awareness of the circumstances that would bring about the unequal suffering of women and with intent to bring about the materialisation of the underlying act, while having knowledge that many or most of the targeted persons are belonging to the group of gender, will amount to the intentional unequal treatment in land reform and resettlement, thus amounting to persecution.

This conclusion seems to be in the interest of the victims, since it might be the only tangible way of attaining justice for persecution perpetrated on a gender-basis in the course of land

²²⁷ This finding is in line with the opinions of scholars, *such as* Ibid No 146 (Quirico, 'The Evolving Notion of Persecution in the Law and Jurisprudence of International Criminal Tribunals') 210.

²²⁸ Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 478.

²²⁹ This can be inferred from the intention the OHCHR has paid to Cambodia, as well as news on the country, such as reporting on 'rape cultures' in Cambodia, normalising the perpetration of gang rape (*see* Aljazeera, 'It's a Man's World' (Aljazeera, 12 December 2016) <<http://www.aljazeera.com/programmes/rewind/2016/12/man-world-rape-cambodia-161212122925546.html> > last accessed 11 June 2017) and its violent past from which the country still is not fully rehabilitated.

²³⁰ Ibid No 84 (Global Diligence, Communication Under Article 15 of the Rome Statute of the International Criminal Court([6]; Ibid No 2 (OHCHR, 'Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia') 129.

grabbing, thus allowing for a response to the nuanced, i.e. direct and indirect, forms of grave gender-based discrimination. The OTP noted that the interests of victims “generally weigh in favour of the prosecution”.²³¹ Moreover, prosecution on the above basis seems to be in the interest of justice as it would bring to justice persons that might otherwise not be prosecuted.²³² Furthermore, the principle of legality is protected since the conclusions reached do not go beyond the parameters of the offence. This conclusion thus is consistent with the context of the application of human rights relevant to this matter.

E. Chapeau Elements of Crimes against Humanity in Relation to Cambodia

The jurisdictional threshold²³³ of crimes against humanity requires their commission within a widespread or systematic attack against the civilian population, with knowledge of the attack²³⁴ that amounts to a massive violation of rights targeting humanity as such.²³⁵

Widespread attacks have been defined by the Court as being large-scale and involving a large number of victims²³⁶ as well as extending for a period longer than a few months, involving a large number of acts and affecting large areas.²³⁷ Land grabbing in Cambodia has been happening for protracted periods of time, well longer than the minimum suggested by the Court.²³⁸ Moreover, an estimated 22% of the country's total land area across almost all provinces has been transferred

²³¹ Ibid No 128 (International Criminal Court Office of the Prosecutor, 2007 Policy Paper on the Interest of Justice) 5.

²³² Ibid No 128 (International Criminal Court Office of the Prosecutor, 2007 Policy Paper on the Interest of Justice) 3.

²³³ Ibid No 126 (Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article*) 168.

²³⁴ Ibid No 14 (Rome Statute) art 7(1) and art 7(2)(a).

²³⁵ Antonio Cassese & Paola Gaeta, *International Criminal Law* (3rd ed, Oxford University Press 2013) 92; Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 147.

²³⁶ *Prosecutor v Bashir*, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Pre-Trial Chamber I) ICC-02/05-01/09 (4 March 2009) [81]; Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 148; Ibid No 126 (Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article*) 178; Ibid No 33 (Oehm, 'Land Grabbing in Cambodia as a Crime Against Humanity – Approaches in International Criminal Law') 480.

²³⁷ The attack can, however, also be widespread if the geographical area is small as long as a large number of victims is concerned, see *Prosecutor v Blé Goudé*, Decision on the Confirmation of Charges (Pre-Trial Chamber I) ICC-02/11-02/11 (11 December 2014) [131]; Ibid No 126 (Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article*) 178.

²³⁸ The minimum was set at four months in *Prosecutor v Blé Goudé*, Decision on the Confirmation of Charges (Pre-Trial Chamber I) ICC-02/11-02/11 (11 December 2014) [131]; crimes associated with land grabbing in Cambodia have been occurring for 20 years, see Ibid No 2 (OHCHR, 'Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia') 7.

to foreign companies, affecting 6-10% of Cambodia's population, which amounts to over 770,000 people, half of which can be assumed to be women and girls.²³⁹ Considering that the Court has previously stated that affecting a few thousand victims is sufficient²⁴⁰, these numbers are well beyond the minimum of what constitutes 'widespread'. Moreover, in the course of land grabbing, a large number of acts are being committed against the civilian population apart from gender-based persecution, including counts of murder, forcible transfer and illegal imprisonment.²⁴¹ The large geographical spread, the protracted nature, the large number of acts and the large number of victims and female victims indicate a widespread nature of the attack constituting of acts related to land grabbing, such as gender-based persecution.²⁴²

Systematic attacks entail an "organised nature of the acts of violence"²⁴³, excluding isolated and spontaneous acts. Indicative of such an organised nature is the existence of a pattern or motive.²⁴⁴ Moreover, the attack has to be carried out "pursuant to a preconceived plan or policy".²⁴⁵ Thus, there has to be an organisational element facilitating the non-random and regular repetition of similar crimes.²⁴⁶ The policy does not have to be discriminatory as such.²⁴⁷ In

²³⁹ Ibid No 21 (Embree, 'Criminalising Land Grabbing: Arguing for ICC Involvement in the Cambodian Land Concessions Crisis') 400; Ibid No 17 (Gironde et al (eds), *Large-Scale Land Acquisitions: Focus on South-East Asia*) 141; Ibid No 33 (Oehm, 'Land Grabbing in Cambodia as a Crime Against Humanity – Approaches in International Criminal Law') 470; Ibid No 84 (Global Diligence, Communication Under Article 15 of the Rome Statute of the International Criminal Court) [7].

²⁴⁰ *Prosecutor v Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (Pre-Trial Chamber I) ICC-01/05-01/09 (4 March 2009) [84]; Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 148.

²⁴¹ Ibid No 84 (Global Diligence, Communication Under Article 15 of the Rome Statute of the International Criminal Court). The attack can be consistent of a multiplicity of different acts, see Ibid No 126 (Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article*) 176. Ibid No 2 (OHCHR, 'Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia') 32.

²⁴² *Prosecutor v Katanga et al*, Decision on the Confirmation of Charges (Pre-Trial Chamber I) ICC-01/04-01/07 (30 September 2008) [395]. For the facts, see Ibid No 2 (OHCHR, 'Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia') 67.

²⁴³ *Prosecutor v Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (Pre-Trial Chamber I) ICC-01/05-01/09 (4 March 2009) [81].

²⁴⁴ *Prosecutor v Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (Pre-Trial Chamber I) ICC-01/05-01/09 (4 March 2009) [81]; *Prosecutor v Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Trial Chamber II) ICC-01/05-01/08 (15 June 2009) [160]; Ibid No 126 (Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article*) 179, citing the *Akayesu* Trial Chamber; Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 148.

²⁴⁵ Ibid No 14 (Rome Statute) art 7(2)(a); Ibid No 33 (Oehm, 'Land Grabbing in Cambodia as a Crime Against Humanity – Approaches in International Criminal Law') 480.

²⁴⁶ *Prosecutor v Katanga et al*, Decision on the Confirmation of Charges (Pre-Trial Chamber I) ICC-01/04-01/07 (30 September 2008) [397-8].

²⁴⁷ Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 179.

Cambodia, the only instance authorised to grant land concessions is the state itself, specifically the Ministry of Agriculture.²⁴⁸ It appears that the state is encouraging and promoting the above-discussed gender-based persecution and other acts relating to land grabbing in pursuit of an economic policy as there appears to be a pattern to the violations which follows a motive of self-enrichment of the ruling elite, foreign investors and the Cambodian state apparatus.²⁴⁹ Whether an economic policy by the state constitutes a state policy has not yet been discussed by the Court²⁵⁰; however, it is important to note that land grabs have been occurring in Cambodia for over 20 years²⁵¹ and that they have been committed in a similar way throughout this time²⁵² – they are thus not spontaneous, nor isolated acts. Furthermore, there are frequent reports of the government deliberately interfering with legal limitations on the size of land concessions, allowing larger swaths of land to be seized than is permitted under the law.²⁵³ The Elements of Crimes and the Court itself recognise that a state's deliberate failure to act can amount to a policy.²⁵⁴ The fact that the Cambodian government has not stopped land grabbing in the 20 years of its occurrence and even fuels it by granting larger concessions than permitted, suggests that there is a policy by the state to encourage and promote²⁵⁵ the attack consisting of acts related to land grabbing. It must be noted that these systematic acts are often targeted at rural communities due to their vulnerability and lacking means to fight expropriation.²⁵⁶ Within this vulnerable group of victims, the particular vulnerability of female victims has been recognised by the Special Rapporteur, who documented systematic and re-occurring violations against women over the years.²⁵⁷ These considerations

²⁴⁸ Ibid No 2 (OHCHR, 'Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia') 26.

²⁴⁹ Ibid No 84 (Global Diligence, Communication Under Article 15 of the Rome Statute of the International Criminal Court) 6.

²⁵⁰ Ibid No 33 (Oehm, 'Land Grabbing in Cambodia as a Crime Against Humanity – Approaches in International Criminal Law') 481.

²⁵¹ Ibid No 2 (OHCHR, 'Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia') 7.

²⁵² Ibid No 2 (OHCHR, 'Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia') 7.

²⁵³ Ibid No 2 (OHCHR, 'Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia') 39.

²⁵⁴ *Prosecutor v Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Trial Chamber II) ICC-01/05-01/08 (15 June 2009) [159]; Ibid No 145 (Elements of Crimes) Crimes Against Humanity, Introduction, para 3.

²⁵⁵ Ibid No 145 (Elements of Crimes) Crimes Against Humanity, Introduction, para 3.

²⁵⁶ Ibid No 84 (Global Diligence, Communication Under Article 15 of the Rome Statute of the International Criminal Court) [6]; Ibid No 2 (OHCHR, 'Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia') 129.

²⁵⁷ Ibid No 2 (OHCHR, 'Report of the Special Rapporteur on the situation of human rights in Cambodia: A Human Rights Analysis of Economic And Other Land Concessions In Cambodia') 168-173.

indicate that a state policy stands behind land grabbing in Cambodia and that the gender-based persecution and other acts related to the land grabs are repetitive and regular acts, making the attack systematic.

Land grabbing consisting of gender-based persecution and other acts constitutes an 'attack' because of the multiple of commission of acts against civilians, who are the primary object of attack²⁵⁸, in pursuit of a policy.²⁵⁹ Moreover, it can be inferred from the two-decade long existence of the issue in Cambodia and from the existence of a motive of targeting civilians for economic gains that the perpetrators of land grabs are having knowledge of the attack.²⁶⁰ Moreover, there appears to be a nexus between the gender-based persecution and the widespread and²⁶¹ systematic attack as the acts affecting women discriminatorily are part of and furthering the attack against the civilian population consisting of land grabs and associated crimes.²⁶² The chapeau elements are thus met.²⁶³

F. Summary

This chapter proposed a dynamic interpretation of the crime of persecution under the Rome Statute, guided by a human-rights based approach, finding that violations of fundamental human rights suffice as underlying acts of persecution and that persecution can be committed with general intent. The application to Cambodia allowed for the conclusion that land grabbing in Cambodia is amounting to the crime against humanity of gender-based persecution, which is being committed in the context of a widespread and systematic attack on the civilian population, carried

²⁵⁸ Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 153; Ibid No 126 (Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article*) 180-1.

²⁵⁹ Ibid No 14 (Rome Statute) art 7(2)(1). Moreover, any violation of Article 7 can be considered an attack, see *Prosecutor v Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Trial Chamber II) ICC-01/05-01/08 (15 June 2009) [151]; William Schabas, *An Introduction to the International Criminal Court* (4th ed, Cambridge University Press 2011) 111. For the facts, see Ibid No 84 (Global Diligence, Communication Under Article 15 of the Rome Statute of the International Criminal Court) [21].

²⁶⁰ Ibid No 259 (Schabas, *An Introduction to the International Criminal Court*) 114; Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 156; Ibid No 126 (Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article*) 182.

²⁶¹ The elements of widespread and systematic are disjunctive; however, in the case of land grabbing in Cambodia, both are fulfilled, so they are both mentioned here, connected by 'and'. See, Ibid No 126 (Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article*) 176.

²⁶² Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 155.

²⁶³ The same conclusion was reached in: Ibid No 84 (Global Diligence, Communication Under Article 15 of the Rome Statute of the International Criminal Court) [21].

out in pursuit of government policies. These conclusions are in line with the principle of legality and the interest of justice and victims, which constituted the contextual framework of this analysis.

This chapter made extensive use of human rights in its analysis, presupposing a status of normative superiority of human rights under Article 21(3). Women's rights were used to affirm the textual interpretation of Article 7(1)(h) in regards to the material and the mental element. This rendered the oft-perceived restriction to Statute violations as underlying acts inapplicable. Moreover, it overrode the supplementary paragraphs suggesting that persecution necessarily requires special intent. In order to justify this role for human rights to affirm and override the text of the Statute, the following chapter will discuss Article 21(3) in more detail.

CHAPTER III. Arguing in Favour of Normative Superiority of Human Rights

The following attempts to determine the role of human rights under the framework of Article 21(3).²⁶⁴ Specifically, the questions that are going to be answered here are: can the ICC refer to human rights, and women's rights in particular, when interpreting substantive provisions of the Rome Statute? And if so, can these human rights affirm or override the Statute?

A. Textual 'Super-legality' of Article 21(3)

According to Pellet, Article 21(3)²⁶⁵ and the associated obligation to ensure conformity with human rights in interpretation and application of the Statute, occupy an overriding role which is derived from the word "application", expressing the obligation of their practical application.²⁶⁶ This would allow human rights to override the sources of law laid down in Article 21(1), such as the Rome Statute.²⁶⁷ This overriding position appears to be a mandatory as the word "must"

²⁶⁴ Ibid No 101 (Sheppard, 'The International Criminal Court and "Internationally Recognized Human Rights": Understanding Article 21(3) of the Rome Statute') 51.

²⁶⁵ Article 21(3) reads: "the application and interpretation of law must be consistent with internationally recognised human rights, and be without any adverse distinction founded on grounds such as gender (...), *see* Ibid No 14 (Rome Statute) art 21(3).

²⁶⁶ Ibid No 211 (Pellet, 'Applicable Law') 1079; Ibid No 101 (Hafner & Binder, 'The Interpretation of Article 21(3) ICC Statute Opinion Reviewed') 168; Mahnoush Arsanjani, 'The Rome Statute of the International Criminal Court' (1999) 93 *American Journal of International Law* 22, 29.

²⁶⁷ Ibid No 211 (Pellet, 'Applicable Law') 1079-80; some scholars have different views, only attributing a generative function to human rights when the Court is faced with an interpretative problem in the Statute, *see* Ibid No 101 (Hafner & Binder, 'The Interpretation of Article 21(3) ICC Statute Opinion Reviewed') 172.

suggests.²⁶⁸ The overarching and mandatory position of human rights is even more obvious when comparing the phrasing of Article 21(3) with the remaining paragraphs of Article 21 which use “shall” and “may”.²⁶⁹ Zeegers notes that the scope of Article 21(3) should not be understood as less far-reaching than superior, as the drafters could have simply worded the provision in a way that excludes the Statute from the binding superiority of human rights; however, they did not do so.²⁷⁰ Several scholars conclude that human rights are to be seen as an overriding norms, which Pellet famously calls “super-legality”.²⁷¹

As to the fields of law super-legality applies to, in *Lubanga*, the Court stated that human rights inform the interpretation and application of the Statute, “first and foremost (... in regards to) the right to a fair trial”.²⁷² This seems to suggest that Article 21(3) primarily applies to procedural rights of the accused. A number of scholars are interpreting this provision similarly, stressing that it was intended to ensure fair trial protections for the accused.²⁷³ The text of Article 21(3), though, does not limit the requirement of consistency with human rights law to procedural provisions and fair trial rights; instead, it generally refers to “law”, indicating that no distinction is made between certain areas of law. The absence of such a qualifying term is significant²⁷⁴ and renders the confinement of a human rights-based interpretation to procedural safeguards and the rights of the accused unjustified.²⁷⁵

²⁶⁸ Georgios M. Pikiş, *The Rome Statute of the International Criminal Court* (Nijhoff, 2010) 89.

²⁶⁹ Ibid No 268 (Pikiş, *The Rome Statute of the International Criminal Court*) 89.

²⁷⁰ Ibid No 94 (Zeegers, *International Criminal Tribunals and Human Rights Law*) 74. Ibid No 92 (Grover, *Interpreting the Crimes in the Rome Statute of the International Criminal Court*) 113.

²⁷¹ Ibid No 101 (Bitti, ‘Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC’) 303; Ibid No 211 (Pellet, ‘Applicable Law’) 1079-80; Attributing relevance to human rights in the context of international criminal law is not new: the ICTR found that “what may constitute a prohibition in international human rights law is also an international crime”, see Ibid No 92 (Grover, *Interpreting the Crimes in the Rome Statute of the International Criminal Court*) 113. This approach credits the human rights movement as the instance that facilitated the creation of international criminal law. From this perspective of historical development and progression of law, the interpretative supremacy of human rights law in the interpretation of crimes thus is logical, see Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 397; Ibid No 94 (Zeegers, *International Criminal Tribunals and Human Rights Law*) 104.

²⁷² *Prosecutor v Lubanga*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006 (Appeal Chamber) ICC-01/04-01/06-772 (14 December 2006) [37].

²⁷³ Ibid No 92 (Grover, *Interpreting the Crimes in the Rome Statute of the International Criminal Court*) 115; The ICTY mostly applied human rights to fair trial rights as well, see *Prosecutor v Tadić*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses (Trial Chamber II) IT-94-1-T, T.Ch. II (10 August 1995) [25].

²⁷⁴ Ibid No 135 (Gardiner, *Treaty Interpretation*) 167.

²⁷⁵ The Court's lack of application of human rights when interpreting substantive law may well be due to the nature of the offences it addressed so far, see Ibid No 91 (Jones, ‘Insights Into an Emerging Relationship: Use of Human Rights Jurisprudence at the International Criminal Court’) 715.

Some have rejected a status of supremacy²⁷⁶ of human rights as not envisioned by the drafters.²⁷⁷ The ordinary meaning of the words of Article 21(3), however, leaves little room to doubt that human rights occupy a position of normative superiority.²⁷⁸ Grover, a critic of the status of normative superiority of Article 21(3), even concedes that “this status (of super-legality ...) finds support in the ordinary meaning of its words”.²⁷⁹

B. Contextual Superiority of Human Rights Norms

The textual analysis must be substantiated with the contextual and teleological interpretation.²⁸⁰ In this respect, Article 21(3) will be discussed in the context of the whole provision and the treaty as such. Moreover, relevant practice and other agreements between the parties will be considered.

Regarding the context as far as Article 21 itself goes²⁸¹, the structure of Article 21 puts the listed sources of law in a “substantive hierarchy of norms”²⁸², with human rights being put in an overriding position, suggesting that the application and interpretation of all other sources must be in conformity with human rights norms.²⁸³ Human rights are thus not to be seen as a distinct source of law nor as a subsidiary source²⁸⁴, but as a guiding principle for interpreting and applying the sources contained in Article 21(1). This view has been rejected by some scholars, arguing that the structure of Article 21, which puts the human rights reference in the last paragraph, is suggesting a lack of supremacy of Article 21(3).²⁸⁵ The ICC, however, has clarified that this structure is due to the logical approach that has to be taken to the sources of law and the overarching

²⁷⁶ Ibid No 92 (Grover, *Interpreting the Crimes in the Rome Statute of the International Criminal Court*) 113, 116; see also, Ibid No 101 (Hafner & Binder, ‘The Interpretation of Article 21(3) ICC Statute Opinion Reviewed’) 174.

²⁷⁷ Ibid No 96 (Davidson, ‘Human Rights Protection before the International Criminal Court: Assessing the Scope and Application of Article 21(3) of the Rome Statute’) 95.

²⁷⁸ Ibid No 211 (Pellet, ‘Applicable Law’) 1080; Ibid No 94 (Zeegers, *International Criminal Tribunals and Human Rights Law*) 73. Critique of this approach, see Ibid No 101 (Hafner & Binder, ‘The Interpretation of Article 21(3) ICC Statute Opinion Reviewed’) 174.

²⁷⁹ Ibid No 92 (Grover, *Interpreting the Crimes in the Rome Statute of the International Criminal Court*) 114.

²⁸⁰ Ibid No 134 (VCLT) art 31; Ibid No 135 (Gardiner, *Treaty Interpretation*) 165-6.

²⁸¹ Ibid No 135 (Gardiner, *Treaty Interpretation*) 199-201.

²⁸² Ibid No 94 (Zeegers, *International Criminal Tribunals and Human Rights Law*) 78.

²⁸³ Ibid No 211 (Pellet, ‘Applicable Law’) 1079; Ibid No 101 (Bitti, ‘Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC’) 294; Ibid No 94 (Zeegers, *International Criminal Tribunals and Human Rights Law*) 78.

²⁸⁴ Ibid No 94 (Zeegers, *International Criminal Tribunals and Human Rights Law*) 78; Ibid No 101 (Hafner & Binder, ‘The Interpretation of Article 21(3) ICC Statute Opinion Reviewed’) 164-5.

²⁸⁵ Ibid No 92 (Grover, *Interpreting the Crimes in the Rome Statute of the International Criminal Court*) 116; Ibid No 101 (Hafner & Binder, ‘The Interpretation of Article 21(3) ICC Statute Opinion Reviewed’) 174; Ibid No 96 (Hochmayr, ‘Applicable Law in Practice and Theory’) 657.

human rights norms, stating that first, the applicable source of law has to be located using Article 21(1), and that this source subsequently has to be interpreted according to the “analysis required by Article 21(3)”.²⁸⁶

Regarding the context of the treaty as a whole, the consideration of related provisions and the preamble is relevant.²⁸⁷ The most solid argument by critics can be mentioned in this regard, which is that Article 22 requires to safeguard the principle of legality, which might call for a limited application of human rights.²⁸⁸ However, attention should then equally as much be drawn to other provisions, such as Article 36(3)(b) which requires judges to have expertise in either in international criminal law or human rights law. That these two fields of law are put on an equal footing here affirms that human rights highly relevant under the Rome Statute. Moreover, the preamble famously states the purpose of the Court as contributing to the prevention of international crimes. Considering this, there is a strong rationale for ensuring that human rights are respected, as bringing justice to post-conflict states and to victims of gross human rights violations is only truly possible if the Court respects human rights itself in all aspects of its operations.²⁸⁹ Another article worth mentioning here is Article 10 on the obligation to allow for the development of international rules.²⁹⁰

Regarding practice, the Court and its organs have applied human rights on multiple occasions. One example of practice of the Court are the policy papers of the OTP. In its 2014 policy paper on sexual and gender-based crimes, the OTP defined gender notably more progressively than how it is defined in the Statute. The content and scope of the OTP's definition is closely related to the understanding of gender in human rights law²⁹¹, indicating application of human rights, and women's rights specifically.

Another prominent example of human rights use by the Court is the referral to human rights sources on numerous occasions in its judgements.²⁹² The Court has used human rights mostly to achieve one of two objectives: it has either used human rights to affirm interpretations of the

²⁸⁶ Ibid No 94 (Zeegers, *International Criminal Tribunals and Human Rights Law*) 78.

²⁸⁷ Ibid No 135 (Gardiner, *Treaty Interpretation*) 199-201.

²⁸⁸ Ibid No 92 (Grover, *Interpreting the Crimes in the Rome Statute of the International Criminal Court*) 114.

²⁸⁹ Cedric Ryngaerd, 'Editorial Introduction: International Criminal Tribunals And Human Rights' 3 *Human Rights & International Legal Discourse* 3 (2009) 4.

²⁹⁰ Ibid No 14 (Rome Statute) art 10; Ibid No 211 (Pellet, 'Applicable Law') 1081.

²⁹¹ Ibid No 55 (Freeman et al (eds), *The UN Convention on the Elimination of Discrimination Against Women. A Commentary*) 15.

²⁹² The human rights sources it referred to include regional and international human rights treaties, judgements and soft law, see Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 400.

Statute²⁹³ or to expand provisions contained in the Statute.²⁹⁴ The latter method was used by the Court the above-mentioned asylum claims matter and in the *Lubanga* proceedings where the judges recognised the doctrine of abuse of process, a doctrine which is not included in the Rome Statute.²⁹⁵ The Court argued that where human rights – in that case the right to a fair trial – would be violated, “it would be a contradiction (...) to put the person on trial”.²⁹⁶ The Court applied human rights in a similar manner in the asylum claim of ICC witnesses mentioned in the previous chapter.²⁹⁷ This application of Article 21(3) by the Court affirms that there is a superior obligation to ensure that human rights are upheld. This practice supports the conclusion that the Rome Statute is “subordinate, and subject to, the interpretative obligation of Article 21(3)”.²⁹⁸

Regarding the relevance of women's rights, the positioning of the term ‘gender’ in the non-discrimination clause in Article 21(3) is noteworthy: the first group that shall be protected from discrimination is gender. This strongly suggests that human rights protecting from gender-based discrimination, such as the CEDAW, are of high relevance in the interpretation of the Statute.²⁹⁹ The special status of gender within the article has been acknowledged even by critics of the superiority of human rights.³⁰⁰

C. The Purpose of the Rome Statute as a ‘Living Document’

Considering the object, Article 21 is located in the chapter of the Rome Statute titled “Jurisdiction, admissibility and applicable law”. This is a fundamental chapter ensuring that the

²⁹³ Ibid No 96 (Davidson, ‘Human Rights Protection before the International Criminal Court: Assessing the Scope and Application of Article 21(3) of the Rome Statute’) 90; Ibid No 91 (Jones, ‘Insights Into an Emerging Relationship: Use of Human Rights Jurisprudence at the International Criminal Court’) 719; Ibid No 94 (Zeegers, *International Criminal Tribunals and Human Rights Law*) 79; Ibid No 96 (Hochmayr, ‘Applicable Law in Practice and Theory’) 662.

²⁹⁴ Ibid No 91 (Jones, ‘Insights Into an Emerging Relationship: Use of Human Rights Jurisprudence at the International Criminal Court’) 720.

²⁹⁵ Ibid No 91 (Jones, ‘Insights Into an Emerging Relationship: Use of Human Rights Jurisprudence at the International Criminal Court’) 720; Ibid No 96 (Davidson, ‘Human Rights Protection before the International Criminal Court: Assessing the Scope and Application of Article 21(3) of the Rome Statute’) 98.

²⁹⁶ *Prosecutor v Lubanga*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006 (Appeal Chamber) ICC-01/04-01/06-772 (14 December 2006) [37].

²⁹⁷ *Prosecutor v Katanga et al*, Decision on the Application for the Interim Release of Detained Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 (Trial Chamber II) ICC-01/04-01/07-3405 (1 October 2013).

²⁹⁸ Ibid No 96 (Davidson, ‘Human Rights Protection before the International Criminal Court: Assessing the Scope and Application of Article 21(3) of the Rome Statute’) 92.

²⁹⁹ Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 400; Ibid No 211 (Pellet, ‘Applicable Law’) 1081.

³⁰⁰ Ibid No 92 (Grover, *Interpreting the Crimes in the Rome Statute of the International Criminal Court*) 116

Court is operational. The object of Article 21(3) therefore is to help facilitate the operation of the Court. This must be understood both in regards to the technicalities of its operation and the quality of its operating. The application of Article 21(3) thus should ensure that the judicial process is not obstructed or overcomplicated, but it should also ensure that the Court can be perceived as an integer and reputable institution. The due consideration of human rights can be a means to this end.

It has been argued that the purpose of Article 21(3) is to ensure an evolutive interpretation and application of the Statute.³⁰¹ A look at the preamble seems to confirm this line of argumentation as it states that one of the functions of the Court is “*effective* prosecution (emphasis added)” in order to bring to justice those responsible for crimes under the Statute.³⁰² Considering that conflicts, weapons and global problems evolve constantly, *effective* prosecution is crucial and must not be undervalued in defining the Court’s purpose. This view ties in with the ‘living document’ doctrine, according to which the words of a treaty should be interpreted “purposively in light of evolving social attitudes”.³⁰³ In this regard, the consideration of human rights law is important. Especially the consideration of human rights-related soft law is critical in this respect, since the core human rights treaties were adopted in a time much different from today; the continuous interpretation by the respective treaty administering bodies is thus critical in identifying the state of the art of human rights norm interpretation.³⁰⁴ Moreover, the Court itself held that Article 21(3) supports an evolutive interpretation of the Statute.³⁰⁵ This has also been supported by scholars, such as Pellet, stating that human rights are interpretative guiding principles under the Rome Statute.³⁰⁶ Grover, in providing a counter argument to this position, states that the object and purpose also includes respect for the principle of legality as codified in Article 22(2).³⁰⁷ She argues that the overarching consideration of human rights would result in “maximum

³⁰¹ Ibid No 96 (Davidson, ‘Human Rights Protection before the International Criminal Court: Assessing the Scope and Application of Article 21(3) of the Rome Statute’) 85.

³⁰² Ibid No 14 (Rome Statute) preamble.

³⁰³ Ibid No 96 (Davidson, ‘Human Rights Protection before the International Criminal Court: Assessing the Scope and Application of Article 21(3) of the Rome Statute’) 86.

³⁰⁴ The *travaux préparatoires* support the interpretation that human rights must be considered and that soft law norms fall under the ambit of the human right norms to be considered under Article 21(3), *see* Ibid No 96 (Davidson, ‘Human Rights Protection before the International Criminal Court: Assessing the Scope and Application of Article 21(3) of the Rome Statute’) 86-7.

³⁰⁵ Ibid No 96 (Davidson, ‘Human Rights Protection before the International Criminal Court: Assessing the Scope and Application of Article 21(3) of the Rome Statute’) 97.

³⁰⁶ Ibid No 211 (Pellet, ‘Applicable Law’) 1081. *See also*, Ibid No 101 (Hafner & Binder, ‘The Interpretation of Article 21(3) ICC Statute Opinion Reviewed’) 171.

³⁰⁷ Ibid No 92 (Grover, *Interpreting the Crimes in the Rome Statute of the International Criminal Court*) 114.

protection for the victims”, which would undermine Article 22(2).³⁰⁸ Article 22(2), however, does not demand interpretation in favour of the accused by default, but only in case of ambiguity. It is therefore important not to assign so much relevance to legality as to override Article 21(3) as this would render the latter provision meaningless.³⁰⁹ Moreover, it is worth to note that the support of victims is a key element and purpose of the ICC as well, making up a profound part of its legitimacy.³¹⁰

An overriding role of human rights norms thus fosters to the Court's purpose and object and is in line with the text and context of Article 21(3).³¹¹

D. Summary

The obligation for the ICC to adhere to human rights norms as superior interpretative guidelines is firmly manifested in the ordinary meaning of the text of Article 21(3), the Court's practice of applying human rights³¹², and the object and purpose of Article 21(3) and the Statute as such. Accordingly, human rights can be referred to in interpretation and can be applied to affirm or override the Statute. Women's rights deserve particular attention, especially in regards to matters concerning gender-based discrimination.

In Chapter II, women's rights were used to affirm and override provisions in the Statute. This use of human rights is warranted as the above analysis demonstrated.

CONCLUSION

Land grabbing, as discussed in Chapter I, is one of the most pressing international challenges of this time.³¹³ Land grabs in Cambodia and elsewhere mainly occur for the purpose of

³⁰⁸ Ibid No 92 (Grover, *Interpreting the Crimes in the Rome Statute of the International Criminal Court*) 114.

³⁰⁹ Ibid No 92 (Grover, *Interpreting the Crimes in the Rome Statute of the International Criminal Court*) 54; Ibid No 135 (Brown, *A Common Law of International Adjudication*) 43, 116, 167.

³¹⁰ See generally, K'Shaani O. Smith, 'Prosecutor v. Lubanga: How the International Criminal Court Failed the Women and Girls of the Congo' (2011) 54 *Harvard Law Journal* 467; Lucia Catani, 'Victims at the International Criminal Court Some Lessons Learned from the Lubanga Case' (2012) 10 *Journal of International Criminal Justice* 905. See also, Ibid No 91 (Jones, 'Insights Into an Emerging Relationship: Use of Human Rights Jurisprudence at the International Criminal Court') 704-6.

³¹¹ Ibid No 96 (Hochmayr, 'Applicable Law in Practice and Theory') 663; Ibid No 126 (Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article*) 712.

³¹² Ibid No 94 (Zeegers, *International Criminal Tribunals and Human Rights Law*) 104.

³¹³ Coalition for the International Criminal Court, 'Six Global Challenges the ICC Can Take' (*Coalition for the International Criminal Court*, 31 May 2017) < http://www.coalitionfortheicc.org/explore/global-challenges-ICC?utm_source=CICC+Newsletters&utm_campaign=2b63b89559-

food production to the benefit of Western consumers, but they cause deep poverty in the communities they affect. The disparity between the purpose of land grabbing and its local impact is truly disturbing. Finding a timely and appropriate response to this phenomenon is thus critical and has been recognised as such by civil society, scholars, the UN and the ICC. This paper takes the position that in finding such an appropriate response, the harm suffered by all victims should be taken into consideration. In this respect, the suffering of female land grabbing victims deserves special notice, since they often suffer the gravest impacts as land grabs threaten many women's very subsistence and existence as such.

Against this backdrop, this paper proposed a dynamic and progressive interpretation of the Rome Statute crime of gender-based persecution in an endeavour to reflect the harm suffered by the female victims of land grabbing. To this end, Chapter II of this paper challenged the conventional interpretation of the crime³¹⁴, coming to the conclusion that fundamental human rights violations suffice as underlying acts in combination with general intent. This conclusion was reached in a thorough analysis of Article 7(1)(h) on persecution and in close consideration of relevant human rights. Applied to the situation of land grabbing in Cambodia, it was found that gender-based persecution is indeed occurring there in connection with land grabs, as part of a widespread and systematic attack.

Since the conclusions reached in Chapter II partly relied on the applicability of human rights to the Rome Statute, this approach of normative superiority of human rights was justified in Chapter III under close consideration of the text, context, and purpose of Article 21(3).

In summary, the research question can be answered in the affirmative, since land grabbing in Cambodia amounts to gender-based persecution under consideration of relevant women's rights, as shown in this paper. It is, however, important to emphasise that the charge of gender-based persecution is not meant to the exclusion of other charges which can cover acts of land grabbing.³¹⁵ However, in light of the Court's failure to sufficiently address gender-based

EMAIL_CAMPAIGN_2017_10_05&utm_medium=email&utm_term=0_68df9c5182-2b63b89559-408862605 > last accessed 11 June 2017.

³¹⁴ According to the status of quo of interpretation of persecution, persecution crime requires the commission of a war crime or crime against humanity as the underlying act in combination with special intent, *see* Ibid No 126 (Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article*) 257; Ibid No 85 (Schabas, *The International Criminal Court: A Commentary on the Rome Statute*) 177.

³¹⁵ In fact, the crimes against humanity of forcible transfer and other inhumane acts might be the most important charges in regards to land grabbing.

crimes to date³¹⁶, despite the affirmation of its commitment to gender justice³¹⁷, it is of critical importance to mainstream a gender perspective into the interpretation and application of the Rome Statute, as this paper did. Greater relevance attributed to women's rights can positively influence the coherence of international law, the reputation and integrity of the ICC and the quality of its case law.³¹⁸ Moreover, it allows for the evolution of international criminal law, making it fit to respond to contemporary legal challenges, such as land grabbing. *All* victims of this crime deserve justice and the present paper aimed to propose the legal perspective to attain that.

³¹⁶ See generally, Ibid No 90 (Chappell, *The Politics of Gender Justice at the International Criminal Court*); Ibid No 310 (Smith, 'Prosecutor v. Lubanga: How the International Criminal Court Failed the Women and Girls of the Congo'); Ibid No 310 (Catani, 'Victims at the International Criminal Court Some Lessons Learned from the Lubanga Case').

³¹⁷ Ibid No 90 (International Criminal Court Office of the Prosecutor, 2014 Policy Paper on Sexual and Gender-Based Violence).

³¹⁸ Ibid No 91 (Jones, 'Insights Into an Emerging Relationship: Use of Human Rights Jurisprudence at the International Criminal Court') 704-6. Arguments against human rights use are that especially regional human rights might introduce cultural bias in favour of a certain region and that the rights of the accused may be infringed, see Ibid No 91 (Jones, 'Insights Into an Emerging Relationship: Use of Human Rights Jurisprudence at the International Criminal Court') 706-708, 723. See also, Ibid No 96 (Davidson, 'Human Rights Protection before the International Criminal Court: Assessing the Scope and Application of Article 21(3) of the Rome Statute') 75.

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