

Development Genocide and Ethnocide: Does International Law Curtail Development-Induced Displacement through the Prohibition of Genocide and Ethnocide?

by Stefanie Ricarda Roos*

A disproportionate number of people who are physically displaced in the context of development projects are from minority communities. Most of them are indigenous or tribal peoples. Development-induced displacement can give rise to severe risks for the resettled population. Forced relocation results in the disruption of the relationship between the relocated community and the natural, social, economic, and cultural environments upon which its means of livelihood are based. The loss of a people's base threatens the continuity of its traditions and practices as well as endangers its cultural survival. In addition, the conditions of the new locations often imperil the physical survival of relocated populations. The vice president of the World Council of Indigenous Peoples underscored the destructive consequences of the displacement of Indigenous Peoples from their land when he stated: "Next to shooting Indigenous Peoples, the surest way to kill us is to separate us from our part of the Earth."

Sociologists and historians have long argued that because of its devastating effects on both the physical and cultural existence of dislocated people, development-induced displacement may amount to "developmental genocide," "cultural genocide," or "ethnocide." Legal scholars, on the contrary, have traditionally focused on cases concerning conflict-induced displacement, such as forced dislocations of people that occur in conditions of armed conflict or civil strife. Only recently, some legal scholars have begun to evaluate forced relocations in the context of development projects through the perspectives of international law, in particular international human rights law. Referring to forced dislocations, Professor of Law and Development at MIT, Balakrishnan Rajagopal, has publicly raised concerns about the practice of "ethnically targeted development," and has called for the international indifference toward the "violence of development projects" to end. Rajagopal argued that the result of development-based resettlement is often "a soft form of genocide or crime against humanity involving systematic and deliberate destruction of ethnic, racial and religious minorities and indigenous peoples."

Given this recent concern about the implications of development-induced displacement and the realization that special legal protection must be made available, it seems timely to determine whether the international prohibition of genocide and ethnocide can curtail development-based resettlement. This question is not strictly academic. Rather, the question of whether forced relocation can amount to genocide can be crucial in deciding whether victims of development-induced displacement have cases for redress, in particular in courts outside their countries. For example, if the case can be made that development-induced displacement can under certain circumstances amount to genocide under international law, then the victims could, for example, seek redress in U.S. courts under the Alien Torts Claims Act (ATCA) which grants federal district



Representatives of indigenous groups at the UN World conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance hold signs reading "We are peoples and not populations" and "We are discriminated against."

courts original jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States," even when the case involves acts perpetrated in another country by a non-U.S. citizen.

Forced relocations in the name of development also jeopardize the survival of the host populations inhabiting the territories where the displaced resettle. The Qinghai Component of the China Western Poverty Reduction project (Qinghai Project), which in 1999 and 2000 was subject to an investigation by the World Bank's Inspection Panel, is exemplary. The Qinghai Project was challenged by a Request for Inspection, *inter alia*, because of its severe social effects. Under the original project design, approximately sixty thousand ethnic Chinese were to be transferred into the Tibet Autonomous Region (TAR) and the areas outside the TAR within historical Tibet. The settler infusion would have adversely impacted four thousand local people, including serious risk of escalation of ethnic tensions and conflicts over resources. Concerns have been voiced that the Qinghai Project would weaken the Tibetan and Mongolian character of the area, and threaten the lifestyles and the livelihoods of the Tibetan and Mongolian "host" communities.

Protection against the Extermination of an Indigenous Group as a Result of Development-Induced Displacement through the Prohibition of Genocide under International Law

The definition of genocide that is most widely accepted and generally recognized as the authoritative definition of this crime, inclusive for purposes of customary law, is that adopted by the United Nations through the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (Genocide Convention). According to

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Article 2 of the Convention, genocide means:

- any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
- (a) Killing members of the group;
 - (b) Causing serious bodily or mental harm to members of the group;
 - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - (d) Imposing measures intended to prevent births within the group;
 - (e) Forcibly transferring children of the group to another group.

The forcible transfer or dislocation of a group or its adult members is not explicitly included in the exhaustive list of acts forbidden under the Genocide Convention. The Genocide Convention does not, however, restrict the manner in which the acts listed in Article 2 can be committed.

Rather, any means of carrying out a prohibited action with the requisite intent to destroy the group constitutes genocide. Therefore, the forced relocation of ethnic and racial minorities and indigenous groups may, for example, meet the elements of the international crime of genocide, if the dislocation is meant to inflict on the group conditions of life which can extinguish the displaced community.

Numerous cases of development-induced displacement of indigenous and tribal peoples, such as the forced resettlement in 1981 of the Waimiri-Atroari, a native tribe living in the state of Amazonas (Brazil), to make way for hydroelectric projects, and the forced relocation of ten thousand indigenous Kenyah and Kayan people from their ancestral homes on the island of Borneo to make way for the Bakun Dam, demonstrate the effects of forced relocation. Such effects, including the deprivation of livelihood, resettlement on unproductive land, and the introduction of diseases, often subject the displaced populations to life-threatening conditions. Genocidal acts do not necessarily entail the immediate destruction of a group, but can be part of an overall plan which aims at the destruction of the essential foundations of the life of a national, ethnic, racial, or religious group. Hence, forced relocation into an environment in which the security, health, dignity, and traditional way of living of a minority group is not secured, may constitute genocide within the meaning of Article 2 of the Genocide Convention.

The “Intent to Destroy” Requirement of Genocide (Mens Rea)

The essence of genocide is, however, not the actual destruction of the group, but the intent to destroy it as such, *i.e.*, the *mens rea* of the offense. Although forced relocation may have the effect of causing the extinction of a group, it may not qualify as genocide under the definition

set forth in Article 2. The critical determination as to whether forced relocation amounts to genocide is whether the affected community has been forcibly dislocated from its land with the requisite “intent” to extinguish the group. The government responsible for forcibly relocating a vulnerable minority group will, however, rarely openly announce that it intended resettlement to contribute to the destruction of the people dislocated. Rather, states assert that the displacement and the threats it poses to the resettled group are unintentional by-products of a development project with a legitimate public purpose, such as economic or social development. The argument about genocide may, therefore, collapse at this juncture.

The argument would not collapse, however, if the Genocide Convention’s “intent to destroy” requirement were to be interpreted broadly, *i.e.*, that either knowledge or a general awareness of the likely consequences of the enumerated acts with respect to the immediate victims of forced relocations would meet this requirement. Can one, however, convincingly argue that knowledge or foreseeability is the correct standard of genocidal intent? In other words, could the forced displacement of a minority community amount to genocide

absent purpose to exterminate the peoples relocated on the grounds of their ethnic difference or “otherness”? If the answer is in the affirmative, given that the effects of forced resettlement, unless mitigated, are not only devastating but easily foreseeable, almost any case of development-induced forced dislocation of people belonging to ethnic and racial minorities and indigenous groups would constitute genocide, and would therefore be curtailed by the international prohibition of this crime.

The Interpretation of Genocide as a Specific Intent Offense by International Criminal Tribunals and United States Courts

Some commentators contend that genocide embraces those acts whose foreseeable or probable consequences are the total or partial destruction of the group without any necessity of showing that destruction was the goal of the act. The stricter interpretation, according to which genocide is a specific intent offense, has prevailed, however. In this context, the case law on genocide of the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR), both of which have been crucial in defining the crime of genocide, is relevant. In *The Prosecutor v. Radislav Krstic*, the ICTY dealt in depth with the question of how to interpret the intent requirement. In *Krstic*, the Trial Chamber invoked the preparatory work of the Genocide Convention, the 1996 Report on the Draft Code of Crimes against the Peace and Security of Mankind of the International Law Commission (ILC), the International Court of Justice’s advisory opinion, the *Legality of the Threat or Use of Nuclear Weapons*, as well as relevant case law of the ICTR. The Trial Chamber found that the definition of the crime of genocide required a “specific intent,” *i.e.*, that

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genocide encompasses only acts committed with the *goal* of destroying all or part of the group.

In its 1997 decision *Beanal v. Freeport-McMoRan, Inc.*, the United States District Court for the Eastern District of Louisiana adopted the same interpretation. This case addressed the claim of genocide by an Indonesian citizen and leader of the Amungme tribe against Freeport, an American corporation that owned a subsidiary which operated open-pit copper, gold, and silver mines in Indonesia. The plaintiff alleged that Freeport's conduct resulted in the displacement, relocation, and "purposeful, deliberate, contrived and planned demise of a culture of indigenous people." In interpreting genocide as a specific intent offense, the court in *Beanal* relied on the 1995 decision of the United States Court of Appeals, *Kadic v. Karadzic*, which upheld that specific intent was an element of genocide. The *Beanal* court found that a claim of genocide was not sufficiently clear and that the plaintiff should therefore be given the opportunity to make a more definite statement clarifying whether he meant that Freeport was destroying the Amungme culture, or whether Freeport was committing acts with the intent to destroy the Amungme group.

The question remains whether the prevailing interpretation of genocide as a specific intent crime must necessarily be followed. In considering the object and purpose of the Genocide Convention, an argument could be made both for the specific intent interpretation, and for the broad interpretation of the intent requirement of Article 2. The International Court of Justice observed in its 1951 advisory opinion on *Reservations to the Convention on the Prevention and Punishment of Genocide*, that the Genocide Convention's object and purpose is "to safeguard the very existence of certain human groups." If the Convention seeks to protect human groups' right to existence, however, in the interest of the most effective protection of minority groups from a rights-based approach, one might make a case for a broad interpretation of genocidal intent.

Proving Specific Intent

Even if specific intent were the correct standard of genocidal intent, however, governments cannot escape charges for "development genocide" simply by invoking the absence of intent to destroy the relocated group as a separate and distinct entity. In cases in which ethnic and racial minorities and indigenous groups are forcibly resettled in order to free their traditional land for economic development, the purpose of the displacement might be to further economic development. A project may, however, have more than one purpose, as demonstrated by the actions taken against Paraguay's Northern Aché population between 1962 and 1972. In this case, fifty percent of the Aché population was killed to make way for development projects. Scholars have

characterized the factual situation as genocidal, despite the fact that the Paraguayan Defense Minister denied the requisite genocidal intent existed.

Indeed, governments often use development-induced displacement as a means of undermining disfavored minority cultures. Indigenous Peoples living in remote areas of a country are particularly vulnerable to practices of "ethnically targeted development" because they are often perceived as "primitive." In practice, the real challenge will be to find an "intent" to extinguish the resettled group *qua* group. How can intent, for example, be proved if a development-induced relocation lacks an openly declared objective to destroy the group in its collective sense?

Commentators have drawn a parallel to race discrimination claims, and have argued that plaintiffs probably must prove intent indirectly, by inferences from the actions of the government. Both the ICTY and the ICTR have followed similar approaches, and have asserted that the intent to destroy a protected group can be derived from certain facts, such as political speeches or plans, or other methods or actions which are not part of the genocide itself, but constitute part of the attack on the group, or the objective cir-

cumstances or consequences of an act. One would, therefore, have to study the facts closely to discover an implicit genocidal intent. In cases in which a long-term state policy of annihilating a particular minority group exists, and in which forced relocations support the country's general policy of repression toward a minority community, or in which a country's developmental agenda is specifically and knowingly tailored toward the destruction, development-induced forced resettlement could merit the characterization of genocide.

Proving intent, even if indirectly, will be difficult unless a pattern of rights violations with the foreseeable result of group destruction exists. In sum, according to the prevailing interpretation of genocidal intent, the incident of forcible dislocation alone will not suffice to establish that genocide has been committed, even if the displacement can be reasonably expected to result in the extinction of the relocated group. Rather, further evidence would be necessary to prove that a state, in forcefully relocating a particular group, did not only want to take the land of the people, but destroy the people as such.

The Prohibition under International Law of Cultural Genocide (Ethnocide)

Forced resettlement might fall short of interfering with a group's physical survival, but may still undermine its cultural survival. Although physical destruction is the most obvious method to extinguish a group, one may, as has been conceded by the Trial Chamber of the ICTY in the *Krstic* case "also conceive of destroying a group through purposeful

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eradication of its culture and identity resulting in the eventual extinction of the group as an entity distinct from the remainder of the community.” Development-induced forced relocations often cause foreseeable, irreparable harm to the cultures of peoples whose religious, economic, or social practices, traditions, and norms are based on the land from which they are dislocated. Displacement often results in the disintegration of local cultures, the weakening of community institutions and social networks, and the dispersion of kin groups, resulting in the cultural destruction of the affected group. The question therefore arises, whether in such cases the displaced people can make out a claim for genocide provided that the cultural destruction was intended.

Some legal scholars argue that, although the framers of the Genocide Convention considered and then expressly rejected cultural genocide, the notion of genocide today covers not only the physical or material eradication of a group, but also the cultural destruction of a group. In this context, one might argue that the prohibition of cultural genocide has at least ascended to the level of customary international law. A narrow definition of genocide excluding the cultural destruction of a group still prevails, however. In the *Krstic* case, the Trial Chamber concluded that “an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide.” Similarly, in *Beanal*, the court held that genocide included deliberate acts which inflict on the group conditions of life “calculated to bring about its physical destruction,” but did not purport to include acts which cause “displacement” and “relocation” absent any physical destruction.

Regardless of the difficulty of proving the *mens rea* requirement of the international crime of genocide, a rights-based approach to the protection against threats to the cultural survival of minority groups appears to be more suitable than a criminal law approach. The framers of the Genocide Convention argued in a rights-based direction, and decided to leave the explicit prohibition of cultural genocide to future human rights and minority rights protections. In past decades, significant advances had been made in the development of the law on Indigenous Peoples’ rights, most noteworthy through the standard-setting activities of the UN and the Organization of American States (OAS). For example, Article 7 of the 1993 UN Draft Declaration on the Rights of Indigenous Peoples contains the explicit language, “collective and individual right not to be subjected to ethnocide and cultural genocide.” The Proposed American Declaration on the Right of Indigenous Peoples contains an explicit prohibition of forced assimilation, the right to cultural integrity, and a prohibition of arbitrary transfer or relocation of Indigenous Peoples without their free and informed consent. Both drafts reflect growing awareness for the special needs of protection of indigenous and tribal peoples against activities that may result in the destruction of the culture or the possibility of the extermination of

an indigenous group.

To date, no single human or minority rights treaty exists which explicitly prohibits cultural genocide or ethnocide. The lack of a specific treaty does not mean that international human rights law currently fails to protect against the cultural destruction of minority groups. The prohibition of cultural genocide is encompassed in the right of members of a minority group to culture as protected, in particular, in Article 27 of the International Covenant on Civil and Political Rights (ICCPR). Logically, the destruction of a culture is a violation of the right to culture.

Controversy remains, however, as to whether the right to enjoy one’s own culture implies that a minority community’s traditional way of life must be preserved at all costs. Even among the members of the Human Rights Committee,

opinions diverge on this question. This disparity is illustrated by the individual opinion of Committee member Nisuke Ando in *B. Ominayak and Members of the Lubicon Lake Band v. Canada*. In their communication, members of the Lubicon Lake Band argued that the province of Alberta had allowed private oil and gas exploration activities to threaten their way of life. The violation was manifested

by the threat of destruction of the band’s economic base and the continuity of its indigenous traditions and practices, thus endangering the group’s survival as a people. Whereas the Committee found a violation of Article 27, Committee member Ando argued in his individual opinion that “the right to enjoy one’s own culture should not be understood to imply that the band’s traditional way of life must be preserved intact at all costs. Past history of mankind bears out that technical development has brought about various changes to existing ways of life and thus affected a culture sustained thereon. Indeed, outright refusal by a group in a given society to change its traditional way of life may hamper the economic development of the society as a whole.” A decade later, the Committee in its considerations regarding the communication *Länsmän et al. v. Finland* argued that although a state may understandably wish to encourage development, measures whose impact amount to a denial of the right of a member of a minority to enjoy his or her culture would not be compatible with the obligations under Article 27. The Committee contended, however, that measures having a limited impact on the way of life of persons belonging to a minority would not necessarily amount to a denial of the right to culture under Article 27. Applying this argument to cases of development-induced displacement, one would have to conclude that the right to cultural integrity as protected under Article 27 of the ICCPR curtails forced relocations which prevent the relocated from sustaining their cultural life.

To date, the Human Rights Committee has not yet decided a case of forced relocation as such. The Committee’s concluding observations with regard to Chile’s State Report of 1999, indicate, however, which standard the Committee is likely to use in such cases. In the observations,

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education because the TRC fosters the children's total rehabilitation and social reintegration in accordance with Sierra Leone's obligation to "take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of . . . armed conflict," according to Article 39 of the Convention on the Rights of the Child (CRC). The child combatant's unique position of first victim and then victimizer requires a special accountability mechanism such as the TRC. Such an approach also is consistent with Article 40.3 of the CRC, which emphasizes the importance of using alternatives to judicial proceedings when dealing with children who have violated the law, provided that human rights and legal safeguards are respected.

In pursuing the difficult task of determining the accountability of a child combatant, many experts argue that accountability would best be established through a non-punitive truth telling process, a form of catharsis allowing the victim and perpetrator to heal emotionally and psychologically. Experts argue also that it would be unfair to hold children to the same standards of criminal liability as adults who orchestrated armed attacks and forced abductions of children. As such, truth telling before the TRC complies with international human rights standards in the CRC, and appears to be the most effective accountability mechanism for children.

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the Committee raised concerns about hydroelectric and other development projects that might affect the way of life and the rights of persons belonging to the Mapuche and other indigenous communities, and concluded that "relocation and compensation may not be appropriate in order to comply with article 27 of the Covenant," and that "when planning actions that affect members of indigenous communities, the State party must pay primary attention to the sustainability of the indigenous culture and way of life and to the participation of members of indigenous communities in decisions that affect them."

Conclusion

It is questionable whether an overemphasis on the drafting history of the Genocide Convention serves the Convention's purpose to protect the right to existence of minority groups. When interpreting genocide, should one be guided by the realization that international law is not static, but an evolving body of standards and directives that must be interpreted and applied in a contemporaneous fashion? Despite the encouragement engendered by the emerging genocide approach toward development-induced displacement, however, one must certainly be careful not to stretch the law to make it fit one's vision. Hence, the crucial question to be answered is whether the concept of genocide is adequate to deal with forced relocations in the context of development projects that result in both the physical and cultural extinction of an ethnic and racial minority and indigenous group. The concept of genocide is not quite adequate to deal with the destructive consequences of development-induced displacement of minority communities. In most cases, it will be difficult, if not impossible, to prove that forced dislocations in the context of a development project, including those leading to the physical or cultural destruc-

Conclusion

The moral dilemma of holding juvenile offenders accountable for war crimes is addressed collaboratively by the Special Court and the TRC. The Special Court focuses on prosecuting war criminals with the greatest responsibility, while the TRC focuses on fostering national peace and reconciliation. There is strong support from Sierra Leone for the prosecution of juvenile offenders in order to comply with the international obligation to punish perpetrators of human rights and humanitarian law violations. The lack of prosecution, some argue, could perpetuate impunity and pose a risk of similar abuses recurring in the future. In light of the special circumstances of the forcibly recruited child soldier, however, it appears that the RUF adult leaders primarily qualify as "individuals with the greatest responsibility," and should therefore be targeted for prosecution. The unique position of the child combatant, first victim then perpetrator, would best be served by truth telling before the TRC to facilitate effective social rehabilitation and reintegration. At the same time, the TRC promotes national reconciliation, which is essential for the population to heal after nine years of armed conflict. ☹

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tion of a minority group, constitute genocide within the meaning of the Genocide Convention.

The case law of the international criminal tribunals does not support the application of the concept of genocide to development-induced displacement either. The factual situations the tribunals have dealt with were fundamentally different from most cases of forced relocations in the context of development projects. In the cases before the tribunals, states and individuals accused of having committed the crime of genocide set out to exterminate the members of the particular victim groups simply on the grounds of their ethnic difference. Yet to prove that a government intentionally uses development-induced displacement as a means to extinguish a minority group *qua* group will be a difficult, if not impossible, endeavor. Whether forced relocations in the context of development projects are referred to as a "soft form" or "special category" of genocide, the apparently insurmountable hurdle of establishing the elements of genocide remains. One may argue that in cases in which an individual is held liable for the tort of genocide and not the crime, that in these cases the intent requirement might be less stringent. With regard to protection against cultural genocide or ethnocide, it remains to be seen whether the proposed declarations by the UN and the OAS on Indigenous Peoples' Rights, once adopted, will be used as standards against which the practice of ethnically targeted development in general, and of development-induced displacement of minority communities in particular, are measured. ☹

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