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### The human cost of development

*Situating development-induced displacement in international human rights law*

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## Summary

### The human cost of development: situating development-induced displacement in international human rights law

#### **Chapter one: Introduction**

This chapter sets out the background, significance, research questions, and methodology of the study. The present study aims to explore how and to what extent international human rights law protects the rights of people(s) affected by development-induced displacement (DID). Accordingly, the study seeks to map out human rights norms and principles applicable to DID and assess their adequacy in addressing the peculiar features and consequences of DID. Using a human rights-based approach as a theoretical framework, the study (re)frames the adverse consequences of DID as human rights issues and explores how international human rights law addresses these issues. Hence, the study identifies the applicable human rights frameworks and norms, analyses their normative content and state obligations they entail, and assesses their application in the context of DID. To this end, the study uses both doctrinal and normative research methods to identify and analyse the applicable law and critically assess the adequacy of the law, respectively.

#### **Chapter two: Development-induced displacement: concept, causes, and consequences**

This chapter offers a conceptual background to the study. The chapter defines the concept of DID and explores the main causes and consequences of DID by drawing on relevant case studies. DID is a form of internal displacement where people(s) are involuntarily moved from their homes or residences to make room for development projects. Similar to other forms of internal displacement, the two main elements of this definition are the involuntary nature of the displacement and the fact that displacement occurs within the national borders of the state. However, DID is different from other forms of internal displacement as it is pre-planned, foreseeable, and prompted by the state or with the blessing and/or support of the state. DID can be caused by a range of small and large scale development projects including, *inter alia*, the construction of dams, infrastructure and urban (re)development projects, and the extraction of natural resources. While these development projects ostensibly have considerable economic potential and social benefits, the displacement they cause comes with a plethora of economic, social, and cultural consequences. DID often causes landlessness or a decrease in landholding, loss of housing, loss of employment or income, disruption of access to public services, disruption of social and communal arrangements, and disruption of cultural life, which in turn severely affect the livelihoods of displaced persons. Moreover, these adverse consequences often have long-term effects that can potentially lead to the chronic impoverishment of those affected. The consequences of DID often hit those who are economically or socially marginalized the hardest. Hence, DID potentially perpetuates existing vulnerabilities, and even creates new ones. Nevertheless, most of the adverse consequences of



DID are attributable to the lack or inadequacy of the procedural and substantive safeguards provided by the state. Hence, although DID is inherently disruptive, most of its adverse consequences can be avoided with the provision of adequate safeguards at all phases of displacement and resettlement.

### **Chapter three: The interference with human rights in the course of development-induced displacement**

This chapter (re)frames the adverse consequences of DID as human rights issues by exploring how the process and outcome of DID interfere with and potentially violate human rights. In doing so, the chapter seeks to map out the human rights safeguards available for people(s) affected by DID in general human rights instruments and norms. To this end, the chapter has selected three rights that are commonly interfered with in the course of displacement as well as offer normative standards applicable to DID, i.e. the right to housing, the right to property, and the right to work. The chapter has analysed the normative contents of these rights, the state obligations they entail, and how they apply in the context of DID.

DID interferes with the right to housing as it often involves the eviction of individuals or groups from their homes or residences. Interference to the right to housing can also be caused when DID results in homelessness and deterioration of housing conditions. Similarly, DID also interferes with the right to property when it involves expropriation or land acquisition and eviction or when it leads to landlessness or a decrease in landholding. The right to work can be interfered with when DID causes joblessness or loss of income and a decrease in income. Nevertheless, not all these interferences constitute a violation of the right concerned. As most human rights are not absolute and can be limited under certain circumstances, the interferences caused by DID can also be justified provided that the relevant conditions of limitations are fulfilled. Accordingly, the limitation needs to be provided by law, necessary to protect general welfare or the public interest, and proportionate to the interest pursued. If DID is justified as a permissible limitation, states need to put in place necessary human rights safeguards in order to prevent or mitigate its consequences. These safeguards include procedural safeguards, such as access to relevant information and meaningful consultation, and substantive safeguards, such as replacement land and/or housing and compensation. Consequently, a violation can occur if DID and its consequences are not justified based on the relevant conditions of limitations and/or if necessary safeguards are not provided. In addition, a violation also occurs if the process and outcome of DID involve direct or indirect discrimination, which is a cross-cutting human rights obligation. Overall, these human rights norms should guide the process of DID.

### **Chapter four: Human rights safeguards in specialized human rights frameworks**

This chapter explores specialized human rights instruments that offer normative standards applicable to DID. Accordingly, the chapter has identified and analysed the contents of human rights instruments that

deal with specific groups affected by displacement or specific subject matters relevant to the DID discourse, i.e. instruments on internally displaced persons, indigenous peoples, and the right to development. The human rights instruments on internally displaced persons, i.e. the UN Guiding Principles on Internally Displaced Persons and the AU Convention for the Protection of the Rights of Internally Displaced Persons, enunciate normative standards that apply before, during, and after displacement in order to protect the rights of the people affected thereby. These norms include: the right not to be arbitrarily displaced; meaningful participation in the decision-making and process of displacement; human rights protections in the course of displacement; and return or resettlement and reintegration after displacement. While these norms can inform and guide the process of DID, they mainly reflect minimum standards that are seemingly more geared towards displacement caused by emergency situations. They do not specifically and compressively address the peculiar features of DID; nor do they stipulate a wide range of short-term and long-term remedies required to prevent or mitigate the adverse consequences of DID.

The instruments on the rights of indigenous peoples also offer normative standards that can apply to DID. These instruments particularly protect indigenous peoples' rights to their land and resources based on the special connection these peoples have to their ancestral land. These rights include, *inter alia*, the right to control and use their lands and other resources as they see fit, the right not to be removed from their lands or relocated without their full consent, and the right to maintain their spiritual connection with their lands or territories. Hence, indigenous peoples can only be subjected to DID with their full consent and upon the provision of adequate safeguards, including in-kind and monetary compensation.

The right to development recognized under the UN Declaration and the African Charter obliges states to take the necessary measures to facilitate the realization of economic, social, cultural, and political development. Meanwhile, it entitles all persons and peoples the right to participate in the process of development and equitably share the benefits therefrom. While the norms on the right to development do not directly deal with DID, they offer normative standards that can inform and guide the process of decision-making and the outcome of DID.

#### **Chapter five: the role of international financial instruments in protecting the rights of people(s) affected by development-induced displacement**

International financial institutions (IFIs) are important actors in the DID discourse as they finance development projects that potentially cause displacement and offer policy standards on involuntary displacement or resettlement. This chapter engages with these policy standards and comments on to what extent they advance the human rights of the people(s) affected by DID. The overarching objective of these policy frameworks is to avoid displacement, if feasible, and prevent or mitigate the adverse impacts of displacement when it is inevitable. To these ends, the policies have put in place various

procedural and substantive safeguards that apply at all phases of displacement and resettlement. These include, *inter alia*, meaningful consultation with those affected, provision of in-kind and monetary compensation, relocation assistance, and rehabilitation measures. While these policies go a long way in providing guidance for states concerning involuntary displacement prompted by development projects, they are not impervious to limitations or shortcomings. These shortcomings have contributed to the prevalent gap between the policy standards, which aim to prevent or mitigate the adverse consequences of involuntary displacement, and the practice—displacement caused by the development projects financed by IFIs often leads to impoverishment. These limitations include a lack of adequate integration of human rights norms into the policies and practices of the Bank, a lack of adequate follow-up procedures on the implementation of resettlement plans, and a lack of effective remedies and accountability procedures for violation of the Bank’s policies.

### **Chapter six: Conclusion: a guiding framework for a human rights-based approach to development-induced displacement**

Drawing on the doctrinal analysis provided in the preceding chapters, this concluding chapter proposes a human rights-based guiding framework that can inform and guide the process of DID. The application of the HRBA to DID entails (re)framing the adverse consequences of DID as human rights issues and seeking rights-based solutions to address those consequences. This not only gives the process of DID legitimacy but also leads to a better outcome—in terms of restoring the livelihoods and protecting the rights of those affected. The first step of applying the HRBA to DID involves framing DID as a human rights interference and justifying it based on the norms on limitations of human rights. Generally, a justified limitation needs to comply with three cumulative conditions: it needs to be provided by law, pursue a legitimate aim, and be necessary and proportionate to the aim pursued. If the interference is justified, the state needs to put in place various procedural safeguards, such as access to information, public participation, and access to (judicial remedies), and substantive safeguards, such as replacement of real properties, compensation, and rehabilitation, in order to prevent or mitigate the adverse consequences of DID. In addition, states need to avoid direct and indirect discrimination in the process and/or outcome of DID and take positive measures in order to address structural problems that marginalize certain groups. The overall process of DID needs to be guided by the duty of due diligence, which requires states to take reasonable measures in order to identify, prevent, and rectify the human rights impacts of their development endeavours. In the context of DID, this particularly entails taking human rights impact assessment in various stages of displacement and putting in place remedial procedures. While the human rights norms that apply to DID can be derived from existing human rights frameworks, there are substantial gaps and inconsistencies in international human rights law vis-à-vis DID. These normative gaps and limitations can be summarised under three main categories: gaps in the recognition of land rights, the inadequacy of normative guidance on the substantive safeguards that need to be provided in the course of DID, and a lack of contextualization of the existing norms to

sufficiently respond to DID. These limitations need to be rectified to make human rights more responsive to DID and its adverse impacts.



## Samenvatting

### De menselijke kosten van ontwikkeling: een mensenrechtelijke analyse van door ontwikkeling veroorzaakte ontheemding

#### Hoofdstuk 1: Inleiding

Dit hoofdstuk beschrijft de achtergrond, de betekenis, de onderzoeksvraag en de methodologie van dit onderzoek. Dit project onderzoekt op welke wijze het internationale mensenrechten regime de rechten beschermt van mensen die door ontwikkeling ontheemd raken (*development-induced displacement – DID*). Daartoe brengt het onderzoek eerst in kaart wat de mensenrechtelijke normen en beginselen zijn die van toepassing zijn op het fenomeen “door ontwikkeling veroorzaakte ontheemding” (hierna DID, naar de afkorting van de Engelse benaming: *development-induced displacement*). Vervolgens evalueert dit onderzoek in welke mate deze normen en beginselen toereikend zijn om de specifieke kenmerken en gevolgen van DID te adresseren. Het theoretisch kader van dit onderzoek wordt vormgegeven vanuit een mensenrechtelijk benadering. Dit betekent dat de negatieve gevolgen van DID worden behandeld als mensenrechten probleem en wordt geanalyseerd hoe het internationale mensenrechtenregime deze problemen benadert. Met andere woorden, dit onderzoek identificeert de bestaande mensenrechtelijke kaders en normen, analyseert de inhoud van die normen en welke verplichtingen deze normen creëren ten opzichte van staten, en evalueert de toepasbaarheid van deze normen op DID. Voor de uitvoering van deze analyse, gebruikt het onderzoek doctrinaire en normatieve onderzoeksmethoden.

#### Hoofdstuk 2: Door ontwikkeling veroorzaakte ontheemding: definities, oorzaken en gevolgen

Dit hoofdstuk schetst de conceptuele achtergrond van het onderzoek. Het begint met het vaststellen van een definitie van het fenomeen DID. Daarnaast onderzoekt het hoofdstuk, aan de hand van enkele casus, wat de belangrijkste oorzaken en gevolgen van DID zijn. DID is een vorm van interne ontheemding waarin mensen op onvrijwillige basis hun woongebied moeten verlaten om plaats te maken voor ontwikkelingsprojecten. Net als bij andere vormen van interne ontheemding, zijn de twee belangrijkste elementen van deze definitie dat de ontheemding onvrijwillig gebeurt en dat de ontheemden zich verplaatsen binnen de grenzen van de betreffende staat. Echter, DID verschilt van andere vormen van interne ontheemding in die zin dat DID is vooropgezet, gepland, voorzien en veroorzaakt door de staat en/of met steun of medeweten van de staat. DID kan worden veroorzaakt door uiteenlopende kleinere en grotere ontwikkelingsprojecten, waaronder de bouw van dammen, infrastructuur en stedelijke (her)ontwikkelingsprojecten, alsmede de winning van natuurlijke bronnen. Hoewel deze ontwikkelingsprojecten ogenschijnlijk vele economische en sociale voordelen opleveren, veroorzaakt de ontheemding die deze projecten teweeg brengen evenzeer aanzienlijke economische, sociale en culturele problemen. De gevolgen van DID omvatten onder meer het verlies van toegang tot of

eigenaarschap over land, het verlies van huisvesting, werkloosheid of inkomensverlies, beperkte toegang tot publieke diensten, verstoring van en beperkingen in toegang tot sociale instelling, structuren en gemeenschapsleven, en verstoring van cultureel leven wat ernstige consequenties voor de levenswijze en levensonderhoud van ontheemde personen heeft. Bovendien hebben deze gevolgen van DID vaak lange termijn effecten die mogelijk leiden tot een chronische verarming van de getroffen bevolking uit deze gebieden. Sterker, de al gemarginaliseerde personen worden vaak disproportioneel geraakt door de negatieve effecten van DID. DID leidt er dus potentieel toe dat al bestaande kwetsbaarheden voortduren, worden versterkt of dat nieuwe kwetsbare situaties worden gecreëerd. Opmerkelijk is dat de negatieve effecten van DID worden voornamelijk veroorzaakt doordat de staat geen of inadequate procedurele en inhoudelijke waarborgen creëert. Met andere woorden, ook al kan DID op zichzelf desastreuze gevolgen hebben, de meeste van deze gevolgen kunnen worden voorkomen als er voldoende waarborgen worden gecreëerd gedurende het gehele traject van ontheemding en hervestiging.

### **Hoofdstuk 3: De inbreuk op mensenrechten als gevolg van door ontwikkeling veroorzaakte ontheemding**

Dit hoofdstuk scheidt een nieuw kader waarin de gevolgen van DID worden beoordeeld door deze gevolgen te zien als mensenrechtenproblemen en te analyseren hoe de processen en resultaten van DID inmenging in en potentieel een inbreuk op mensenrechten opleveren. Het hoofdstuk brengt eerst in kaart welke mensenrechtelijke waarborgen de internationale mensenrechten instrumenten en normen eventueel geven voor mensen die geraakt worden door DID. Het hoofdstuk selecteert daaruit drie rechten die gebruikelijk in het gedrang komen wanneer er sprake is van DID en die normatieve standaarden schetsen die van toepassingen zijn op DID. Deze zijn het recht op huisvesting, het recht op eigendom, en het recht op werk. Dit hoofdstuk evalueert de normatieve inhoud van deze rechten, welke verplichtingen zij creëren voor de staat, en op welke wijze ze van toepassing zijn op de context van DID.

DID levert mogelijk een inmenging op het recht op huisvesting op, nu DID vaak gepaard gaat met uitzetting uit woon- of verblijfplaatsen. DID kan zelfs leiden tot dakloosheid of verslechtering van de woonomstandigheden tot gevolg hebben. DID kan eveneens leiden tot een inmenging in het recht op eigendom als er gebruik wordt gemaakt van onteigening en grondaankoop door de staat en wanneer dat leidt tot een afname in eigenaarschap van land. Ook kan DID een inmenging in het recht op arbeid veroorzaken, wanneer DID leidt tot meer werkloosheid, inkomensverlies of inkomensafname. Die inmenging leidt niet ook altijd automatisch tot een inbreuk op die rechten. Deze mensenrechten zijn niet absoluut en onder bepaalde omstandigheden kan een inmenging op die rechten gerechtvaardigd zijn. Daartoe moet voldaan zijn aan de volgende voorwaarden: de inmenging of beperking van het recht moet zijn voorzien bij wet, noodzakelijk zijn om het algehele welzijn of het publiek belang te

beschermen, en proportioneel zijn in verhouding tot het belang dat wordt gediend. Als op grond van deze voorwaarden een beperking van de rechten door DID is toegestaan, dan dienen staten de nodige mensenrechtelijke waarborgen vorm te geven om de negatieve gevolgen van DID te voorkomen of te beperken. Deze waarborgen zijn zowel procedureel van aard, zoals de toegang tot relevante informatie en zinvolle consultatie, als inhoudelijk, bijvoorbeeld vervanging van land of huisvesting of compensatie voor het verlies daarvan. Met andere woorden, een schending van voornoemde mensenrechten door DID kan plaatsvinden als niet is voldaan aan de voorwaarden die inmenging rechtvaardigen en/of het DID-proces met geen of onvoldoende procedurele en inhoudelijke waarborgen is omkleed. Ten slotte, kan er ook sprake zijn van mensenrechtenschendingen als het proces of de uitkomst van DID leidt tot directe of indirecte discriminatie, nu het verbod op discriminatie een algemeen geldende (dwarsdoorsnijdende) mensenrechtenverplichting omvat. De combinatie van deze mensenrechten dienen de leidraad te zijn voor het DID-proces.

#### **Hoofdstuk 4: Mensenrechtenwaarborgen in gespecialiseerde mensenrechtenregimes**

Dit hoofdstuk onderzoekt in welke mate gespecialiseerde mensenrechteninstrumenten normatieve standaarden scheppen die van toepassing zijn op DID, met name de instrumenten die bescherming bieden aan specifieke groepen of specifiek door DID geraakte onderwerpen. Deze betreffen de instrumenten ter bescherming van intern ontheemde personen, inheemse volkeren en het recht op ontwikkeling. De mensenrechten instrumenten met betrekking tot intern ontheemde personen – te weten, de Leidende Beginselen van de Verenigde Naties over Interne Ontheemding (*the UN Guiding Principles on Internal Displacement*) en de Conventie van de Afrikaanse Unie voor de Bescherming van de Rechten van Intern Ontheemde Personen (*the AU Convention for the Protection of the Rights of Internally Displaced Persons*) – zetten de normen uiteen ter bescherming van de rechten van mensen voor, tijdens en na ontheemding. Deze normen omvatten het recht om niet arbitrair ontheemd te worden, het recht op zinvolle deelname in besluitvormingsprocessen rondom ontheemding, bescherming van mensenrechten in het ontheemdingsproces, en het recht op terugkeer of hervestiging na ontheemding. Hoewel deze normen het DID proces kunnen leiden, zijn deze normen toch meer een weergave van minimumstandaarden die gelden in het geval van ontheemding door noodsituaties. Ze gaan niet in op de specifieke kenmerken van DID en benoemen evenmin korte en lange termijn maatregelen ter voorkoming of beperking van de negatieve gevolgen van DID.

Daarnaast bieden de instrumenten ter bescherming van inheemse volken normatieve standaarden die van toepassing zijn op DID. Deze standaarden zien met name op de bescherming van de rechten van inheemse volken op (toegang tot) hun land en bronnen, wat is gebaseerd op de speciale connectie die deze mensen hebben met hun voorouderlijk land. De rechten zijn onder meer het recht op controle en gebruik van hun land en bronnen, het recht om niet verwijderd te worden van hun land of verplaatst te worden zonder hun volledige instemming, en het recht om hun spirituele band met het land en



territorium te onderhouden. Met andere woorden, inheemse volken kunnen alleen worden onderworpen aan DID als ze daarmee volledig instemmen en onder de voorwaarde dat er adequate waarborgen worden geschapen, waaronder compensatie (monetair en anderszins).

Het recht op ontwikkeling zoals neergelegd in voornoemde VN Beginselen en Conventie van de Afrikaanse Unie verplicht staten om de noodzakelijke maatregelen te nemen om de realisatie van economische, sociale, culturele en politieke ontwikkeling te faciliteren. Daarnaast biedt het alle personen en volkeren het recht om deel te nemen in het ontwikkelingsproces en op gelijke wijze te profiteren van de opbrengsten. Weliswaar gaan de normen betreffende het recht op ontwikkeling niet direct over DID, maar deze normen kunnen wel degelijk het DID proces alsmede het daarmee samenhangende besluitvormingsproces informeren en daartoe als leidraad fungeren.

### **Hoofdstuk 5: De rol van internationale financiële instrumenten in de bescherming van de rechten van personen en volken die worden geraakt door DID**

Internationale financiële instellingen (IFI's) zijn belangrijke actoren in ontwikkelingen rondom DID aangezien deze instellingen ontwikkelingsprojecten financieren die mogelijk kunnen leiden tot ontheemding en omdat zij beleidsstandaarden formuleren over onvrijwillige ontheemding en hervestiging. Dit hoofdstuk analyseert op welke wijze deze standaarden de mensenrechten die geraakt worden door DID bevorderen. Het overkoepelende doel van deze beleidsraamwerken is om, zoveel als mogelijk, ontheemding te voorkomen en wanneer dat niet mogelijk is, om de negatieve impact van ontheemding te beperken of te voorkomen. Met dat in het oog, hebben deze beleidsstukken meerdere procedurele en inhoudelijke waarborgen geformuleerd die van toepassing zijn op alle fasen van het ontheemdings- en hervestigingsproces. Deze omvatten, onder andere, zinvolle consultatie van degenen die worden geraakt door DID, verstrekking van compensatie (monetair of anderszins), assistentie bij verplaatsing en herstelmaatregelen. De standaarden bieden aanzienlijke bescherming en kunnen als goede leidraad fungeren, maar kennen ook hun beperkingen. Om te beginnen is er een significant gat tussen het beleid en de praktijk, waarin de ontwikkelingsprojecten gefinancierd door IFI's in werkelijkheid vaak leiden tot verarming. Daarbovenop zijn mensenrechtelijke normen onvoldoende in deze standaarden en in de praktijk van de IFI's geïntegreerd, zijn er geen of onvoldoende procedures die de implementatie van hervestigingsplannen volgen en evalueren, en is er een gebrek aan effectieve rechtsmiddelen en procedures om IFI's verantwoordelijk te houden voor schendingen van de eigen beleidsregels.

### **Hoofdstuk 6: Conclusie: Een raamwerk voor een mensenrechtenbenadering voor DID**

Op basis van de doctrinaire analyse uitgevoerde in de voorgaande hoofdstukken, stelt dit concluderende hoofdstuk een raamwerk voor waarin het DID proces kan plaatsvinden volgens mensenrechtelijke kaders. Om DID te kunnen benaderen volgens deze mensenrechtelijke benadering is het nodig om DID

te zien als mensenrechten issues en mensenrechtelijke oplossingen te bieden voor de negatieve gevolgen van DID. Niet alleen zorgt dit voor een grotere legitimiteit van DID, maar zorgt dit ook voor betere resultaten waar het gaat om het herstellen van levenswijzen en bescherming van rechten van diegenen die door DID worden geraakt. De eerste stap in deze benadering is het erkennen van DID als een inmenging in mensenrechten en om deze inmenging te rechtvaardigen aan de hand van mensenrechtelijke standaarden en voorwaarden. Een dergelijke inmenging moet over het algemeen voldoen aan de volgende drie cumulatieve voorwaarden: de inmenging moet voorzien zijn bij wet, een legitiem doel nastreven, en noodzakelijk en proportioneel zijn in het licht van dat doel. Als de inmenging voldoet aan deze voorwaarden, dient de staat vervolgens procedurele waarborgen te creëren, zoals toegang tot informatie, mogelijkheid tot publieke deelname, en toegang tot juridische procedures en maatregelen, alsmede inhoudelijke waarborgen, waaronder de vervanging van bezittingen (inclusief vastgoed), compensatie- en herstelmogelijkheden. Deze waarborgen moeten de negatieve gevolgen van DID voorkomen en beperken. Bovendien moeten staten directe en indirecte discriminatie in het DID-proces en -uitkomst voorkomen en maatregelen nemen tegen structurele problemen die bepaalde groepen marginaliseren. Het DID proces omvat een verplichting tot *'due diligence'*, waarin staten verplicht worden om redelijke maatregelen te nemen om de mensenrechtenimpact van DID-projecten te identificeren, voorkomen en herstellen waar nodig. Dit betekent specifiek dat er mensenrechten impact assessments dienen te worden uitgevoerd in verschillende stadia van ontheemdingsprocessen en dat het proces dient te worden omkleed met procedurele waarborgen. Hoewel er bestaande mensenrechtelijke normen van toepassing kunnen worden verklaard op DID, bestaan er eveneens significante tekortkomingen en inconsistenties in deze normen ten aanzien van DID. De gebreken kunnen als volgt worden gecategoriseerd: tekortkomingen in de erkenning van rechten ten aanzien van het land, gebreken in de normatieve standaarden die zouden moeten gelden tijdens het DID-proces, en de onmogelijkheid om de bestaande normen voldoende in de context van DID te plaatsen. Deze beperkingen moeten worden aangepakt om beter te de problemen van DID te kunnen adresseren.