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PROSECUTING STARVATION AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

Solomon Bashi

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PROSECUTING STARVATION AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

J. Solomon Bashi

Although numerous governments have manipulated food supplies in an effort to control their constituents and/or target specific populations, there is no legal precedent for trying and convicting leaders for government induced famines. As the Extraordinary Chambers in the Courts of Cambodia ("ECCC") attempts to administer justice to the victims of the Democratic Kampuchea ("DK") regime, which held power from 1975-1979, the court should examine the feasibility of prosecuting the DK leaders for the starvation which they caused. While starvation may not have been the most brutal of the DK regime crimes, it was certainly the most prevalent.

The following paper discusses the evolution of starvation as an international crime and ascertains how these laws apply to any potential prosecution of DK leaders in the ECCC for starvation.

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INTRODUCTION

One of the purposes of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") is to grant justice, albeit thirty years late, to the victims of the Khmer Rouge. In order to maximize the effect of the tribunal, it is important to prosecute the crimes that are most important to the victims. In reading victim accounts, a consistent theme emerges. More than the murders and tortures, victims talk about the lack of food during the Democratic Kampuchea regime ("DK"). The hunger that victims talk about is to a certain extent even more traumatic than the murders they witnessed. "Food was my God" is a common theme espoused by survivors.[1] Even today, victims talk about how each meal they eat evokes a visceral memory of the hunger they endured 30 years ago. For many, this feeling of hunger encompasses their impression of the Khmer Rouge regime.

The ECCC is in the process of investigating the crimes committed by the Khmer Rouge during the DK regime from 1975 – 1979. The charged persons are accused of war crimes and crimes against humanity stemming from the thousands of executions that occurred during the DK regime. While these crimes cannot be ignored, the court would be remiss if it ignored the myriad of deaths that resulted from starvation. Thus, the court should prioritize the prosecution of crimes by those that, according to survivor accounts, defined the period.

Prosecuting starvation as a crime will not be easy. Although there is little doubt that hundreds of thousands of people died of starvation during the DK regime, the jurisdiction of the court, which is limited to senior leaders and those most responsible, combined with the indirect

1 Chaang, Youk, "How did I survive the Khmer Rouge?" , Phnom Penh Post Volume 14, number 7, In this biographical story about his experience during the Democratic Kampuchea regime, Youk Chaang states, "Food became my God during the regime" [hereinafter Chaang]

nature of the crime, make prosecuting starvation a challenge.[2] This paper will first set out the history of starvation as an international crime, and then demonstrate how the current law can apply to the ECCC.

HISTORY OF STARVATION AS AN INTERNATIONAL CRIME

Because manipulating food is an effective and inexpensive means of controlling a population, a number of governments in modern history have implemented regulations on the production and distribution of food in an effort to consolidate political control.[3] However, even though these government-induced famines have caused millions of deaths, they do not elicit the same outrage as other atrocities which claim only a fraction of the lives.[4] One reason that governments have historically been able to withhold food with impunity is the often held misconception that famine is caused by intervening conditions e.g. weather or poor harvest.[5] This misconception often shields governments from international pressure to reverse the policies that are causing the food shortage.

With the naissance of the international tribunal came an opportunity to expose government-induced famines in courts of law. However, although the international community has begun to hold leaders accountable for some murderous activities, up until now, no

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2 Fein, Helen Genocide by Attrition 1939–1993—The Warsaw Ghetto, Cambodia , and Sudan: Links Between Human Rights, Health, and Mass Death, in 2 HEALTH AND H UMAN RIGHTS 2, 10–45 (1997) Fein estimates that 2..2 million Cambodians died during the DK period and that 25% of those deaths resulted in starvation.

3 David Marcus, 97 Am. J. Int'l L. 245 [hereinafter Marcus] p. 252-253. Marcus cites the following examples of governments that have used food to control citizens: Stalin's collectivization policies in the Ukraine, Ethiopia in the 80's, North Korea.

4 The United States Institute of Peace estimates that between 2 and 3 million North Koreans died of starvation between 1994 and 1998. By contrast, the violence in Darfur and Eastern Chad is estimated to have caused between 63,000 and 146,000 deaths. Yet international media reports have devoted much more coverage to the crisis in Darfur.

5 Marcus, supra, note 3, p. 256. Marcus gives the following example: The outpouring of world sympathy and aid to Ethiopia during the famine of the 1980's, even though it was caused by the Ethiopian government.

international tribunal has prosecuted government leaders for withholding food from a civilian population.

STARVATION AS A WAR CRIME

In contrast to the international community's hesitance to criminalize starvation during peace time, it has long established guidelines for the treatment of civilian populations during times of war. One reason for this discrepancy could be that military forces often don't have the same excuses available as do peace-time governments. It is difficult for a government to argue that the cause of a famine in a city under siege is caused by weather or poor harvest while citizens outside of the siege have ample food.

Historically, withholding food as means of inducing surrender was an acceptable war tactic.[6] Even after internationally accepted laws of war were established, laying siege to a city, and starving out a population was not considered illegal. During the Nuremberg trials, the court reluctantly condoned the Nazi siege of Leningrad which killed more than one million Russians due to starvation. In the case of United States v. Von Leeb, the court stated:

> "a belligerent commander may lawfully lay siege to a place controlled by the enemy and endeavor by a process of isolation to cause its surrender. The propriety of attempting to reduce it by starvation is not questioned. Hence, the cutting off of every source of sustenance from without is deemed

6 Marcus, supra, note 3, p. 265

legitimate."[7]..."We might wish the law were otherwise but we must administer it as we find it."[8]

It wasn't until the 1949 Geneva Conventions that humanitarian law recognized that armies did not have the unfettered right to starve out a population in order to gain a military advantage. Even then recognition was limited. The Fourth Geneva Convention,, which applies to international armed conflicts, states that a military cannot prevent the delivery of food to "children under fifteen, expectant mothers, and maternity cases." Even this limited prohibition, however, is only applicable when the allowing the delivery of food would not endanger any military advantage. Thus, not only did the Fourth Geneva Convention limite the scope of who was protected limited, but also limited the circumstances when it would apply. In reality, because of the unpredictable and delicate nature of war, this convention granted little protection for civilians from starvation.[9]

Common article three, which is not restricted to international armed conflict, also offers civilians some protection from starvation, even if that protection is more symbolic than enforceable. Common article three states that "An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict."[10]

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7 Marcus, supra, note 3, p. 265-266. Citing united States v. Von Leeb, 11 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Concil Law No. 10 at 563 (1950).

8 ID

9 Marcus, supra, note 3, p. 266. Citing Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 23 6 UST 3515, 75 UNTS 287 [hereinafter Geneva Convention IV]. .

10 Common Article 3, Geneva Conventions of 1949

Although it is questionable whether this article places a legal obligation on a country to accept the offer of aid, the third article has "great moral and practical value."[11]

In 1977, additional protocols to the Geneva Convention took a less ambiguous stance on the starvation of civilians during times of war. Both the first and second Protocol, which govern international and internal conflicts respectively, state that "Starvation of civilians as a method of warfare/combat is prohibited."[12]

APPLICABILITY TO ECCC

The first element necessary to convict a defendant of grave breeches of the Geneva Convention and the First Protocol of 1977 is the existence of an armed conflict. Prosecutors at the ECCC will probably attempt to argue that Cambodia was in a constant state of war with Vietnam during the entire duration of the DK regime (1975 – 1979). If successful, Khmer Rouge leaders could then be charged with grave breeches of the Geneva Convention. However, under the International Criminal Tribunal for the Former Yugoslavia ("ICTY)" and the International Criminal Tribunal for Rwanda ("ICTR") jurisprudence, in addition to proving an international armed conflict existed, a nexus between the war crimes and the conflict must also be proven.[13] Although there does not have to be a causal relationship between the conflict and the crime, they

11 The quote is from a commentary to article 3 which can be found at http://www.icrc.org/ihl.nsf/COM/375-590006?OpenDocument

12 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, (Protocol I) art. 54, 8 June 1977, 1125 UNTS 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 14, 8 June 1977 [hereinafter Additional Protocol II].

13 The Prosecutor v. Dario Kordic and Mario Cerkez, IT-95-14/2-T Para 32 (February 26, 2001) (hereinafter Kordic, Trial Chamber); Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4, Judgment, Para 438 (Appeals Chamber, June 1, 2001) [hereinafter Akayesu, Appeal Chamber]; Prosecutor v. Clement Kayishema & Ruzindana, ICTR-95-1-T, Judgment, Para 169 (Trial Chamber II, May 21, 1999)[hereinafter Kayishema Trial Chamber]

do have to be substantially related.[14] In the present case, the inhumane treatment of Cambodian civilians does not appear to be substantially related to the war with Vietnam and will most likely be ruled distinct from the international armed conflict. Thus, while the demonstration of an international armed conflict may be relevant to crimes involving mistreatment of Vietnamese soldiers and other protected persons, it most likely will not help the case for starvation.

Prosecutors could try to charge the accused under the Second Protocol of 1977, but would then face the issue of *nullum crimen sine lege.* The Second Protocol was enacted in 1977, during the midst of the DK regime. However, Cambodia did not become a party to the second protocol until 1998.[15] Thus, in order to be applicable during the DK regime, the substance of the second protocol would have to be demonstrated to have been incorporated as part of customary international law sometime before 1979. While most of the First Protocol is now accepted as customary law, the Second Protocol is not as widely accepted. Although some ICTY jurisprudence has eroded the distinction between internal and international conflicts as it affects customary international law,[16] the Rome Statue, which criminalizes the starvation of civilians during an international conflict, is conspicuously silent on the issue of the starvation of civilians during an internal conflict. Thus, it seems unlikely that the court would find that the Second Protocol was customary international law before 1979.

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14 Prosecutor v. Dragoljub Kunarac, Radomir Kovac & Zoran Vukovic, IT- 96-23/1, Judgment, para. 58-59 (Appeals Chamber, June 12, 2002) [hereinafter Kunarac Appeals Chamber]

15 http://www.aiipowmia.com/legis/protocoles.pdf

16 The Prosecutor v. Furundzija Case No. IT-95-17/1-T Para 258 (Trial Chamber Dec 10, 1998); Prosecutor v. Tadic, Case No. IT-94-1-AR71, Decision on the Defense Motion for Interlocutory Appeal on

Jurisdiction, Para 137 (Appeals Chamber, Oct. 5, 1995) [hereinafter Tadic Appeals Chamber 1995]

However, prosecutors may have a hurdle even more difficult to overcome than the *nullum crimen* issue. Even if the Second Protocol was part of customary law prior to 1979, there is still the question of whether an internal conflict existed. In *Prosecutor v. Tadic,* the ICTY defined an armed conflict as "protracted armed violence between governmental authorities and organized armed groups or between such groups within a state."[17] The ICTR elaborated on the Tadic decision by distinguishing internal armed conflict from internal disturbances, which are not covered by the second additional protocol. "An armed conflict is distinguished from internal disturbances by the level of intensity of the conflict and the degree of organization of the parties."[18] Because there was very little organized internal resistance to the DK regime, especially early on, it is unlikely that the court would find that an internal armed conflict existed.

GENOCIDE

One of the most controversial issues facing the prosecutors and judges at the ECCC is whether or not to charge the Khmer Rouge leaders with genocide. Although some accounts report that 1/5 of Cambodia's population was killed during the DK regime, most of the victims were ethnic Cambodians.[19] The ECCC law, which mirrors the Genocide convention of 1948, defines genocide as "any acts committed with the intent to destroy, in whole or, in part, a national, ethnical, racial or religious group,"[20] The statute goes on to say that "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in

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17 Id. at Para 70

18 Prosecutor v. Akayesu, Judgment, No. ICTR-96-4-T, para 619 (Sept. 2, 1998) [hereinafter Akayesu Trial Chamber]

19 http://www.yale.edu/cgp/. The Yale Genocide program estimates that 1.7 million Cambodians, or 21% of the population were killed between 1975 and 1979. \

20 Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Art. 3 NS/RKM/1004/006, Oct. 27, 2004 [hereinafter ECCC Statute]

whole or in part." would constitute genocide.[21] This indicates that starvation can be a means of genocide However, according to the statute, persons targeted for political or social reasons are not protected under the genocide statute. While a strong argument can be made that the Khmer Rouge did target certain protected classes, such as the Cham and Vietnamese, there is no evidence that the withholding of food was used as the weapon of extermination. Additionally, because of the high standard of mens rea necessary to prove genocide, it is not enough to prove that these groups were targeted and that many of them starved to death. In order to convict Khmer Rouge leaders of genocide through starvation, prosecutors must prove that Khmer Rouge leaders intended to exterminate a protected class of people by starving them to death.

CRIMES AGAINST HUMANITY

Because of the scale of the atrocities that took place during the DK regime, people often mischaracterize the crimes committed against the general Cambodian population as genocide. The international media has even referred to the ECCC proceedings as "Cambodia's genocide tribunal,"[22] even though no one, as of yet, has been accused of genocide. Although the starvation deaths of thousands of Cambodians probably should not be classified as a genocide because special intent is lacking (as discussed *supra*), it is important that the gravity of the crime be appreciated in the charge.

Crimes against humanity are considered to be of similar gravity to the crime of genocide in that both "particularly shock the collective conscience."[23] In particular, the crime against humanity of extermination is similar, not just in gravity, but also in substance to genocide in that

21 ECCC Statute, supra note 20 at Art. 3

22 http://www.cnn.com/2007/WORLD/asiapcf/11/20/khmer.rouge/index.html accessed 11 May 2008

23 Prosecutor v Jean Kambanda, Case No: ICTR 97-23-S, Para 12-14 (Trial Chamber September 4, 1998)

both criminalize the large scale slaughter or people. The ICTY has even likened extermination to genocide without the special intent.[24] Therefore, if the elements could be met, extermination seems an appropriate charge for the starvation deaths of hundreds of thousands of Cambodian people.

The ECCC's definition of crimes against humanity is as follows: "Crimes against humanity, which have no statute of limitations, are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds such as: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial, and religious grounds, other inhumane acts."[25]

It is important to note that there are two distinct parts of a crime against humanity. Not only must the act, enumerated or otherwise, be proven, but that act must also be demonstrated to have been perpetrated as part of the greater attack. In addition, the accused must have some knowledge that his act was part of the overall context of the overarching attack.[26]

Thus, to prove that a crime against humanity took place, prosecutors will first have to demonstrate that there was a widespread or systematic attack on a civilian population on national, political, ethnical, racial or religious grounds. International jurisprudence has been quite liberal in determining what constitutes the overarching attack. The attack itself does not necessitate there being an armed conflict. "Any mistreatment of the civilian population" is

24 Prosecutor v. Radislav Krstic Case No. IT-98-33-T Para 497 (Trial Chamber August 2, 2001) [hereinafer Krstic Trial Chamber].

25 ECCC Statute, supra note 20, art. 5

26 Prosecutor v. Eliezer Niyitegeka Case No. ICTR-96-14-T Para 442 (Trial Chamber 16, May 2003)

considered an attack for the purposes of a crime against humanity.[27] Likewise, the courts have been fairly liberal in defining what constitutes discriminatory intent for the attack.[28]

The prosecutors, however, may face slightly more of a challenge proving the widespread or systematic requirement. Because of the large number of people who died of starvation, the widespread requirement, which refers to the magnitude of the attack,[29] would seem fairly easy to prove. Since the statute is disjunctive, prosecutors would not need to prove that the attack was systematic. However, they may, in fact, have to prove that the attack was part of an overall state policy. The Rome statute states that the attack must have been part of state policy in order to satisfy the widespread or systematic requirement.[30] While the language of the ECCC statue closely resembles the ICTR statute, which does not require a policy element, Article 9 of the Agreement that established the ECCC, states that for subject matter jurisdiction, the definition of crimes against humanity would be imported from the Rome Statute.[31] Based on the language in Article 9, the tribunal may interpret the ECCC statute as implicitly mirroring the Rome Statute's requirement that the attack be part of an overall policy. On the other hand, both ICTR and ICTY jurisprudence clearly reject any requirement that the overarching attack be part of a broader state

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27 Prosecutor v. Milomir Stakic, IT-97-24 para 623 (Trial chamber II, July 31, 2003), See also Akayesu Trial Chamber supra 18 at para 578. The Trial chamber replaced the word "attack" with "act".

28 Prosecutor v. Laurent Semanza, Case No. ICTR-97-20, Judgment and Sentence, para 332 (Trial Chamber III, May 15, 2003)"There is no requirement that the enumerated acts, other than persecution be carried out with discriminatory intent."

29 Prosecutor v. Tihomir Blaskic, Case No. IT-95-14, Judgment, para 206 (Trial Chamber I, Mar. 3, 2000). "The widespread characteristic refers to the scale of the acts perpetrated and to the number of victims [hereinafter, Blaskic Trial Chamber].

30 Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, art. 7 (July 17, 1998) [hereinafter Rome Statute]

31 Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, NS/RKM/1004/004 (2004), amending NS/RKM/0801/12 (2001), art. 9.

policy.[32] Although not settled, since the ECCC does not explicitly include a policy requirement for crimes against humanity, it is likely that the ECCC will follow both ICTR and ICTY jurisprudence in rejecting the policy requirement for crimes against humanity. Thus, the starvation deaths of hundreds of thousands of Cambodian civilians should meet the elements of overarching attack.

Once the contextual elements of a crime against humanity are established, the criminal act itself must be proven. The ICTR, which has a very similar definition for crimes against humanity as the ECCC, states that extermination can take place through "the creation of conditions of life that lead to the mass killing of others, through his act(s) or omission(s)."[33]

Both ICTR jurisprudence and the Rome statute specifically state that the withholding of food could constitute creating conditions of life, and consequently extermination.[34] Thus the challenge for prosecutors in satisfying the actus reus elements of extermination will be proving that the conditions that led to starvation were manufactured, rather than a natural occurrence.[35] In other words, the starvation must have been preventable.

APPLICATION TO THE FACTS

One of the principals of the DK regime was the abolishment of private property. This meant that everything grown in a coop belonged to Angkor and its distribution was controlled by

32 Kunarac Appeals Chamber, supra note 14 at Para 98 "Neither the attack nor the acts of the accused needs to be supported by any form of policy or plan."

33 Kayishema ,Trial Chamber, supra note 13 at Para 144; Prosecutor v. Bisengimana, ICTR-00-60-TJudgment and Sentence, para 72 (Trial Chamber II, Apr. 13, 2006)

34 Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-1A-T, Judgment, para 90 (Trial Chamber I, June 7, 2001); Rome Statute supra note 30 art. 7(2)(b).

35 One of the ways to demonstrate this would be to examine neighboring countries with a parallel agricultural system. The absence of a shortage of food there would indicate that the starvation was not caused by nature. However, this is beyond the scope of this paper.

the coop chief. Yet each coop had to give a portion of their harvest to the Center as a tax. This tax was viewed by the Center as essential, for it was the primary means of generating revenue needed to finance the party. The result was that that coop chiefs, acting either out of fear or an eagerness to please the Center, often prioritized meeting the tax quota over feeding the starving population. Survivors report seeing the food but were not permitted to eat it. "There were piles of rice as big as a house, but they took it away in trucks. We raised chicken and ducks and vegetables and fruit, but they took it all. You'd be killed if you tried to take anything for yourself."[36] Lock Leng, a cook in Sya commune Kandang District Pursat, echoed these claims. Leng reported that even when sufficient rice was harvested, people died of starvation. He reported that the coop chief restricted the amount of rice the people received despite the full warehouses. The coop chief gave strict orders on how much rice he was allowed to take from the warehouse to cook for the coop. The amount varied from 3–15 cans for 60 people, which was insufficient causing people to starve.[37] Sick people were especially prone to starvation because they did not receive a full ration if they did not work.[38] Another policy that exacerbated the lack of rice was forbidding people from foraging for food without permission. If people were caught more than once they would usually be arrested and sometimes executed.[39]

The defendants will likely argue that these actions were not caused by the Center's policies but were independent decisions made by lower level officials. To prove otherwise, the prosecution will either have to directly connect senior officials to practices resulting in starvation

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36 Ebihara, 1993 "Beyond Suffering: The Recent History of a Cambodian Village," p. 154 in The Challenge of Reform in Indochina, ed. Borje Ljunggren (1993 pp. 149-166)

37 Interview with Solomon Bashi and Koko Huang, Battambang Province, July 2006.

38 ID

39 ID

or provide evidence of the similarity of such practices in different areas of the country to show that they must have originated in the Center. In addition, as discussed later in the paper, Khmer Rouge leaders may be libel for the actions of their subordinates through the doctrine of superior responsibility.

The suspects may also try to raise the defense that the deaths resulting from starvation were not preventable. While Cambodia may have been "on the brink of starvation" when the Khmer Rouge took over,[40] it is unlikely that the defense could successfully argue that the food shortage that the DK government inherited accounted for all of the starvation deaths that occurred between 1975 and 1979. While it is unlikely that the defense will be able to successfully claim that all of the starvation deaths were inevitable, it will have a considerably stronger case arguing that senior Khmer Rouge leaders lacked the requisite mens rea necessary for the crime against humanity of extermination.

MENS REA NECESSARY FOR CRIMES AGAINST HUMANITY

If a connection is established between the Center's policies and food deprivation, the prosecution will still need to show that the leaders acted with criminal intent in adopting or enforcing these policies. The ICTR has defined the necessary criminal intent for extermination as "having intended the killing, or being reckless, or grossly negligent as to whether the killing would result."[41] Thus, at a minimum the prosecutors would have to prove that the senior Khmer Rouge leaders were grossly negligent in creating the conditions of life that led to the starvation deaths of thousands of people.

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40 Ben Kiernan, The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge 1975-1979 p. 63 (1st ed. 1996). Citing USAID end of year report. [hereinafter Kiernan]

41 Kayishema ,Trial Chamber, supra note 13 at Para 144; The court stated that the accused is guilty if he/she "intended the killing, or being reckless, or grossly negligent as to whether the killing would result"; Prosecutor v. Bisengimana, ICTR-00-60-T Judgment and Sentence, Para 72 (Trial Chamber II, Apr. 13, 2006)

The party viewed rice as Cambodia's most important resource, and the main means of generating revenue necessary to finance the party.[42] The four year plan, which was supposed to outline the country's "super-great-leap forward" from 1977 - 1980, called for 29% of Cambodia's rice to be exported.[43] During the life of the plan, Cambodia's rice production was projected to double.[44] In order to do this, rice yields would have to increase from just over 1 ton per hectare to 3 tons per hectare (6 tons on land that was to be cultivated twice).[45] Despite the fact that these expectations were unrealistic, the party was relying on them to generate revenue. According to the plan, rice exports would generate $1.4 billion. This amounted to 90% of the country's expected foreign trade.[46] Thus, the party viewed these agricultural goals as essential to the revolution.

Although much of the Khmer Rouge propaganda discusses the goal of producing three tons of rice per hectare, very little technical explanation is given as to how this goal was to be met. Instead, revolutionary zeal and the unproven method of cultivating land twice were the means by which these dramatically increased expectations were to be achieved. The belief that faith in the revolution could surmount any obstacle often hurt production. People were chosen to supervise agricultural projects based on their dedication to the revolution, rather than agricultural expertise. Peasant knowledge of the land that they had cultivated for years was dismissed as

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42 David P. Chandler, Ben Kiernan, Chantou Boua (Translators and editors) (Preface by David P. Chandler and Ben Kiernan) Pol Pot Plans the Future: Confidential Leadership Documents from Democratic Kampuchea, p. 131 (1988) [hereinafter Chandler]

43 Maud Sundqvist, Why did they kill so many? : A study of the Mechanisms of Genocide in Cambodia. p.22 (Swedish Committee for Vietnam, Laos and Cambodia 2004). [hereinafter Sunqvist]

44 Chandler supra note 42 p. 37

45 Id.

46 Chandler supra note 42 p. xiv

imperialist. As a result, farming and irrigation projects were often inefficient. Thus not only did rice production not increase, but by some accounts it decreased.[47]

The result was that coops found it impossible to meet their production goals. However, for many coop chiefs, failing to live up to the Center's expectations was not an option. Many were indoctrinated with party propaganda and believed that failing to achieve the Center's stated goals was a sign of disloyalty. Others feared the repercussions of failing to achieve targets. As a result, coop chiefs often reported better yields to their supervisors than they had actually achieved. The coop was then taxed on the rice it reportedly produced. Rice was taken out of the people's mouths and given to the Center to make up for these inflated numbers.[48]

Despite the starvation going on in much of the country, the center exported rice that was grown in the countryside to Phnom Penh in order to feed government workers and the military. [49] The center also exported some of the rice aborad. Beginning in 1976, a ship loaded with rice departed the port of Kompon Som for China nearly every day.[50] A DK document also shows that in 1976, Cambodia exported 150,000 tons of rice.[51] Exports continued despite the deteriorating situation in the coops. A document sent to Brother Khiev Samphan stated that from January to September of 1978, Cambodia exported 29,758 tons of rice valued at $5,911,883 to China.[52] Other documents show that tons of rice were also exported to Madagascar, while non-

47 Chandler supra note 42 p. 38-40

48 Chandler supra note 42 p. xv

49 Kiernan, supra note 40 at p. 219

50 Sundqvist supra note 43 p. 32

51 DC-Cam Document # 2.5.07

52 DC-Cam Document # D23948

food items, such as bags and lotion, were imported.[53] In addition, there is evidence that rice was exported to other countries such as Yugoslavia and Hong Kong.[54]

Although reckless DK policies appear to have resulted in starvation, prosecutors may have difficulty convicting Khmer Rouge leaders because of how far removed, both in daily activities and proximity, some of the Khmer Rouge leaders were from the villages where the starvation was taking place. While the Appeals Chamber in Kunarac held that a perpetrator need not know the details of the overarching attack,[55] for the mens rea of the act of extermination to be satisfied, the accused must know that his conduct would contribute to a crime.[56] Furthermore, because of the jurisdiction of the court, which is limited to senior leaders and those most responsible, prosecutors would need to show attribute the acts or omissions that led to starvation to the senior leaders. Thus, while it seems likely that there is enough evidence that the crime against humanity of extermination took place, it is questionable whether prosecutors will be able to convict senior Khmer Rouge leaders using traditional legal doctrine.

JOINT CRIMINAL ENTERPRISE

Alternatively, prosecutors have the option of charging Khmer Rouge leaders with starvation using a joint criminal enterprise theory (JCE). JCE is often used by prosecutors in international tribunals when trying leaders for actions which they did not directly commit. In *Tadic,* the court established three types of JCE. The third type of JCE, which is the one relevant to this paper, holds an accused culpable for the foreseeable crimes committed by any of the co-

53 DC –Cam Document # D23138

54 Smyth p. 7.

55 Kunarac Appeals Chamber, supra note 14 at Para 98 102

56 Kayishema ,Trial Chamber, supra note 13 at Para 207

conspirators of the initial criminal enterprise.[57] The common actus reus elements for all three of the JCE types are:

1. There must be a plurality of persons.
2. There must be a common plan, design or purpose which involves the commission of a crime provided for in the statute.
3. The accused must participate in the common design involving the perpetration of one of the crimes.[58]

The court went on to list the mens rea elements for JCE-3:

1. it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and
2. the accused willingly took that risk.[59]

Thus, prosecutors would need to prove that senior Khmer Rouge leaders conspired with others to participate in a joint criminal enterprise, and that starvation was a foreseeable consequence of that enterprise. Specifically, prosecutors could attempt to prove that senior Khmer Rouge leaders conspired to deport, imprison and enslave the Cambodian people, and that it was foreseeable that these acts would lead to massive starvation.

THE EVACUATION OF PHNOM PENH

After the Khmer Rouge seized control of Phnom Penh on 17 April 1975, they ordered the residents of Phnom Penh to leave the city and go to the countryside. The Fourth Geneva

57 Prosecutor v. Tadic Case No. IT-94-1 Para 227-228(Appeals Chamber, July 15, 1999) (hereinafter Tadic Appeals Chamber)

58 Id.

59 Id. (emphasis in original)

Convention prohibits the forced relocation of civilians.[60] However, in order for the convention to be applicable, a nexus between the act and international armed conflict must be established (as discussed *supra*). Although the living conditions in the countryside were probably not related to the war with Vietnam, prosecutors could attempt to invoke the Geneva Conventions for crimes relating to the evacuation of Phnom Penh by arguing that the deportation of citizens of Phnom Penh was a calculated military strategy for the impending war with Vietnam.

A 1979 CPK document explains how evacuating Phnom Penh achieved the party's military goals. "The departures were presented as a guerrilla tactic to dissuade the Vietnamese from bombarding the capital".[61] Although this document is dated 1979, there is evidence that the initial evacuation of Phnom Penh, was at least in part, a military tactic. In a special meeting held on 20 May 1975 for Khmer Rouge officials, Pol Pot outlined an 8-point plan which sheds insight on the military objectives of the evacuation. Point one of the plan was to "evacuate people from all towns." Point eight was to "dispatch troops to the borders, particularly the Vietnamese borders.[62] This plan indicates that the Khmer Rouge leadership was anticipating a war with Vietnam from the beginning. When read with the hindsight of the 1979 document, it seems that the evacuation of Phnom Penh was part of the Khmer Rouge's preparation for war with Vietnam. By evacuating the capital, the Khmer Rouge was eliminating what they perceived as a vulnerable target for the Vietnamese. Although ICTY jurisprudence has ruled that the armed conflict does not need to occur in the same place,[63] or at the same time[64] as the crime in order to establish a

60 Geneva Convention IV, supra note 9; Additional Protocol II, supra note 12

61 Kiernan, supra note 40 at p. 64.

62 Kiernan, supra note 40 at p. p. 55

63 Blaskic Trial Chamber, supra note 29 at para 69

nexus, it is questionable whether the courts would find a close enough link between the evacuation and the war with Vietnam to invoke the Geneva Conventions.[65]

Even if the Geneva Conventions do not apply, prosecutors could still try to make the case that the initial evacuation of Phnom Penh was illegal under customary international law in 1975. The prohibition against deporting civilians during international armed conflict has long been established in international humanitarian law. Article 46 of the 1907 Hague Convention, when read in conjunction with other provisions of the convention, can be interpreted to protect civilians from deportation and forced transfer.[66] As international law evolved, numerous treaties and documents, including the Fourth Geneva convention, unequivocally declared deportation illegal during times of war.[67] Although the universal prohibition against deportation would likely make it part of international customary law, the prohibition only applied to international armed conflict. It was not until the second additional protocol to the Geneva Convention that deportation was deemed illegal during times of internal armed conflict.[68] Although the transfer would probably satisfy the second protocol's requirement that the act have a nexus to a domestic armed conflict,[69] the second protocol was not enacted until two years after the evacuation of Phnom Penh. However, recent ICTY jurisprudence erodes the distinction between international

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64 Tadic, Appeals Chamber 1995, supra note 16 at Para 70. The Tadic court stated that humanitarian law applies from the initiation of the armed conflict, but may continue after the initiation of hostilities. Therefore, it is unclear whether an act that is a crime that is deemed to have been committed in preparation for an armed conflict would be fall under the Geneva Convention.

65 Prosecutor v. Brdjanin, Case No. IT-99-36-T para 123. (Trial Chamber, September 1, 2004).[hereinafter Brdjanin Trial Chamber]

66 M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law p. 302(1st ed. 1992).

67 Geneva convention IV, supra note 9, art. 49, Universal Declaration of Human Rights GA Res. 217A, arts. 13, 14,

68 Additional Protocol II, supra note 12

69 The city was evacuated almost immediately after the Khmer Rouge seized control of Phnom Penh from the Lon Nol Regime in a civil war

and internal armed conflict in relation to international customary law, thus possibly making the evacuation illegal under international customary law, despite its internal nature.[70] Furthermore, the ICTY has made it clear that forcible "displacements both within a state and across a national border are crimes under customary international law."[71] While the defense will argue that these relatively recent decisions do not mean that forced relocation was illegal in 1975, the prosecution can claim that the second protocol of 1977 merely codified what was already customary law in 1975.

DEPORTATION

Although deportation is one of the enumerated crimes against humanity, it is unclear whether the forced relocation of the Cambodian people would satisfy the elements for conviction. Whether or nor prosecutors will be able to prove the enumerated crime against humanity of deportation largely depends on which definition the ECCC chooses to adopt. The ICTY has defined deportation as the unlawful forcible transfer of people across state boundaries.[72] While the transfer across *de facto* borders may constitute deportation,[73] the transfer of people within a state's unequivocal boundaries, which it labels forcible transfer, clearly does not.[74] However, the Rome statute eliminates the distinction between forcible transfer and deportation. It defines deportation as the forced displacement or expulsion of

70 Tadic, Appeals Chamber 1995, supra note 16 at Para 137; Prosecutor v. Limaj, Bala and Musliu, Case No. IT-03-66-T, Para 85 (Trial Chamber, November 30, 2005), [hereinafter Limaj, Trial Chamber].

71 Prosecutor v. Krnojelac, Case No. T-97-25-A Para221-224 (Appeals Chamber, September 17, 2003).

72 Brdjanin Trial Chamber, supra note 65 at Para 544

73 Prosecutor v. Milomir Stakic, Judgment Case No. IT-97-24-T Para 677-679 (Trial chamber, July 31, 2003) [hereinafter Stakic Trial Chamber], but see also Brdjarin (Trial Chamber) Para 542 where the court specifically rejects Stakic and maintains that deportation must include the transfer of people across internationally recognized borders.

74 Stakic Trial Chamber, supra note 73 at Para 671-672.

persons, without grounds permitted under international law, from a place in which they are lawfully present.[75] Since the evacuation of Phnom Penh and subsequent relocation to the Northwest did not traverse international borders, it would not constitute deportation according to the ICTY, although it would fit the crime of deportation according to the Rome Statute. Even if prosecutors fail to convict Khmer Rouge leaders for deportation, the ICTY made clear that the forcible transfer of persons within national borders falls under the crime against humanity of inhumane acts.[76]

CRIMES STEMMING FROM FORCED EVICTIONS

Prosecutors could also choose to charge senior Khmer Rouge leaders for the crime against humanity of persecution stemming from the forcible transfers. Persecution is one of the broader enumerated acts, but does require the crime to be "based on political, racial, and religious grounds."[77] While the ECCC statute, like the ICTR statute, includes a requirement for all crimes against humanity that the overarching attack have a discriminatory intent, persecution requires that the act itself have a discriminatory intent. However, unlike the genocide statute, political dissidents are a protected class under the crime against humanity of persecution.[78]

In defining what specific acts constitute persecution, the ICTY has stated that although the acts need not be enumerated in the statute,[79] they must be of equal gravity to the other

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75 Rome Statute supra note 30, art. 7(2)(d)

76 Brdjanin Trial Chamber, supra note 65 at Para 544 "Displacement within the boundaries of a State constitutes 'forcible transfer,' punishable as 'other inhumane acts"

77 ECCC Statute, supra note 20, art. 5

78 ECCC Statute, supra note 20 art. 5. The ECCC statute defines the crime against humanity of Persecution as "persecutions on political, racial, and religious grounds" Law on the Establishment of the ECCC for the prosecution of crimes committed during the period of Democratic Kampuchea

79 Brdjanin Trial Chamber supra note 65 at Para 994

enumerated acts.[80] In numerous decisions, the ICTY has held that forcible transfers have amounted to persecution when they were carried out with a discriminatory intent.[81] Thus, even if the evacuation of Phnom Penh and subsequent transfer of Cambodian citizens to the Northwest is not deemed to be a violation of an act enumerated in the statute, Khmer Rouge leaders may still be culpable for the forcible transfers under the crime against humanity of persecution.

Because the forcible transfer of civilians is undisputed, prosecutors should not have much trouble proving the actus reus elements. The defense, however, may claim that the evacuation of Phnom Penh was necessitated by a military and or humanitarian crisis, and therefore legal.[82] While the Khmer Rouge initially justified evacuating Phnom Penh as a military necessity to protect the civilian population from an anticipated U.S. bombing campaign, the fact that the people were not allowed to return for almost four years bellies the notion that the evacuation was carried out with a humanitarian aim.[83]

In order to prove the mens rea element for persecution, prosecutors will need to demonstrate that the act of forcible transfer was conducted on discriminatory grounds. The evidence suggests that, in forcibly transferring Cambodian citizens, the Khmer Rouge leaders targeted those people whom they considered political enemies.

One of the main goals of evacuating Phnom Penh was to weaken the opposition to the revolution. Before Phnom Penh fell in 1975, the capital's minority population outnumbered the

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80 Prosecutor v. Simic, Tadic, and Zaric Case No. IT-95-9-T Para 47 (Trial Chamber, 17 October 2003), [hereinafter Simic Trial Chamber].

81 Blagojevic and Jokic Case No. IT-02-60-T Para 602 (Trial Chamber January 17, 2005) [hereinafter Blagojevic Trial Chamber]; Brdjanin Trial Chamber, supra note 65 at Para 1025; Simic Trial Chamber, supra note 80 at Para 121.

82 Blagojevic Trial Chamber, supra note 81 at Para 597-598.

83 Blagojevic Trial Chamber, supra note 81 at Para 600. The evacuation for military necessity is only allowed in extreme circumstances and must be temporary.

ethnic Khmers. The Khmer Rouge viewed all non-ethnic Khmers as enemies of the revolution. In addition, even the city dwelling ethnic Khmer were viewed as bourgeoisie and therefore a threat. The Khmer Rouge viewed cities as a haven for people who opposed the revolution. Thus, the evacuation of Phnom Penh was part of a calculated policy of displacing city residents whom they viewed as a threat. Chap Lonh, the deputy secretary of region 37, stated that the evacuation of Phnom Penh was a "long-standing plan". "The slogan was 'Dry up the people from the enemy'."[84]

A 1975 article published in the secret CPK publication, Revolutionary Flag, further articulated this rationale for the deportation:

> "If we had kept Phnom Penh, it would have had much strength. It was true that we were stronger and had more influence than the private sector when we were in the countryside. But, in Phnom Penh we would have become their satellite. However, we did not keep them in Phnom Penh . . [Thus] . . . the bourgeoisie have nowhere to go. They have become satellite of the worker-peasant power. They have been forced into carrying out manual labor as peasants… Their classes have already collapsed, but THEIR VIEWS STILL REMAIN, THEIR ASPIRATIONS STILL REMAIN. Therefore, they continue to conflict with the revolution. Whether they can carry out activities against us is the concrete condition which prompts us to continue the." (emphasis in original).[85]

84 Kiernan, supra note 40 at p. 80, also p. 64

85 Kiernan, supra note 40 at p. 97

Thus, the evacuation of Phnom Penh appears to be, at least partly, motivated by discrimination toward political and ethnic enemies of the DK government.

Shortly after the initial evacuation of Phnom Penh, the Khmer Rouge leadership instituted a policy of re-deporting former Phnom Penh residents, many of whom were in the Southwest, to the Northwest. In deporting the former Phnom Penh residents to the Northwest, the Khmer Rouge placed political objectives ahead of the lives of the people. The Center wanted to clear the Southwest, which had long been a Khmer Rouge stronghold, of all city residents whom it considered against the principles of the revolution. The Center labeled these former city residents as "new people" to denote their purported anti-revolutionary background. By contrast, peasants who had supported the Khmer Rouge during the civil war were called "base people". The Northwest, which had long been a stronghold of the Lon Nol government, was a logical choice to send new people because even the peasants there were not considered loyal to the revolution. This second deportation would, in effect, cleanse the Southwest from all new people and concentrate the majority of undesirables in one place.[86]

PERSECUTION STEMMING FROM DISCRIMINATORY POLICIES

In addition to the forced transfers, prosecutors can also argue that senior Khmer Rouge leaders are guilty of persecution stemming from a national policy that placed an undue burden on the people of the Northwest. According to the ICTY, acts of persecution do not need to stem from a physical act, but can derive from discriminatory policies that cause psychological or economic harm.[87] Examination of Cambodia's four-year plan, which was supposed to outline

86 Kiernan, supra note 40 at. p. 216

87 Prosecutor v. Kvorka Para 323 (Appeals Chamber Feb. 28, 2005). The court found that harassment, humiliation or psychological abuse may constitute persecution; Blaskic Trial Chamber, supra note 29 at Para 227, 233, finding that destruction or confiscation of property may constitute persecution.

the country's super-great leap forward, reveals that the people in the Northwest were intentionally targeted because they were considered undesirable.

The plan called for the Northwest to shoulder a disproportionate share of the rice production. By the end of the plan in 1980, the Northwest zone would have been responsible for 60% of Cambodia's rice exports. The Northwest was supposed to increase the amount of land it was harvesting twice by 140,000 hectares, without reducing the amount of land it was harvesting once. No explanation was given as to where these 140,000 hectares of land were to come from.[88] In addition, unlike other zones, no provisions for feeding the people were established. The Northwest zone was expected to produce 1.62 million tons of rice, but was not allocated any consumption rations. In contrast, 470,000 tons out of the 1.14 millions tons that the Southwest produced was set aside to feed the people living in the region.[89] The Northwest was also taxed more heavily. While the plan called for all other zones to give 20% of their rice production as a tax, one half of the Northwest zone's rice was earmarked as a "gift to the state".[90] The four-year plan implies that the Northwest was specifically targeted because the center believed that most of the people there were not loyal to the revolution. Thus, it appears the plan itself falls under the crime against humanity of persecution.

Prosecutors could also try to prove that senior Khmer Rouge leaders conspired to enslave and imprison the Cambodian population, and that starvation was a foreseeable consequence of these crimes. Enslavement, which is one of the enumerated crimes against humanity in the

88 Chandler supra note 42 pp. 37-38

89 Kiernan, supra note 40 at p. 245-246

90 Chandler supra note 42 p. xiv

ECCC Statute, has long been considered a violation of customary international law.[91] Enslavement is generally defined as "the exercise of any or all powers attaching to the right of ownership over a person."[92] Elaborating on that definition, the ICTY has stated that the crime of slavery is characterized by "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, thereat of force, or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality, and forced labour."[93] Although the Rome Statute's definition of enslavement, which has evolved with the crime, focuses more on trafficking,[94] it is hard to imagine the ECCC finding the actions of the Khmer Rouge, which were geared at controlling every aspect of people's lives, not meeting the elements of enslavement.

Like enslavement, the crime of imprisonment, which is generally defined as the deprivation of liberty without due process, of law, has long been prohibited under international law[95]. Although the original prohibition, codified in the Geneva Convention, only pertains to international armed conflicts,[96] the ICTY has held that imprisonment, like other fundamental violations of human rights, are crimes against humanity, even if they occur in the absence of an

91 Bassiouni supra note 66 p. 293-294.

92 Prosecutor v. Kunarac, Kovac, & Vukovic, IT-96-23&23/1, Judgment Para 539 (Trial Chamber, Feb. 22, 2001);[hereinafter Kunarac Trial Chamber]; Rome Statute, supra note 30, art. 7(2)(c)

93 Kunarac Trial Chamber Para 543.

94 Rome Statute, supra note 30, art. 7(2)(c)

95 Convention Relative to the Protection of Civilian Persons in Times of War, 75 U.N.T.S. 287, 6 U.S.t> 3516, T.I.A.S. 3365, art. 42. (Oct. 21, 1950).

96 Id.

armed conflict.[97] Again, the court will have to decide whether this was customary international law in 1975.

WAS THE STARVATION A FORSEEABLE CONSEQUENCE OF THE FORCED RELOCATIONS?

For Khmer Rouge leaders to incur criminal responsibility for the starvation under JCE, that starvation must have been a foreseeable consequence of one of the above crimes: deportation, persecution, imprisonment or enslavement. After the Khmer Rouge seized Phnom Penh on 17 April 1975, different Khmer Rouge military units controlled different parts of the city. Consequently, the callousness with which the evacuees were treated differed depending on what unit was in control of that part of the city. While some people report being brutally escorted out of the city, other people were treated compassionately by the Khmer Rouge soldiers.[98] However, what was consistent in all parts of the city was that every ordinary citizen was forced to leave regardless of his or her condition. The old, young and sick were all evacuated with everybody else and told to go to the countryside. People were not given any provisions for journeys that lasted up to six weeks. Consequently many starved to death trying to make it back to their familial village.[99] Although it cannot be determined exactly when the decision to evacuate Phnom Penh was made, the evidence suggests that senior leaders of the Khmer Rouge had a long standing plan to evacuate all cities.[100] This plan, which constituted an illegal act, was

97 Prosecutor v. Dario Kordij and Mario Erkez Case No. IT-95-14/2-A Para 116 (Appeals Chamber Dec. 17, 2004) [hereinafter Kordij Appeals Chamber].

98 Kiernan, supra note 40 at p. 41, See also Chaang, supra note 1 Chaang reports being given food by Khmer Rouge soldiers after being evacuated from Phnom Penh

99 Kiernan, supra note 40 at p. 48

implemented despite the real risk that many of the evacuees would starve to death as a result of the evacuation.

According to most reports, the deportation of people to the Northwest was even more arduous than the evacuation of Phnom Penh. Beginning in mid 1975, approximately 800,000 people, mostly former Phnom Penh residents, were forcibly relocated from the Southwest and West to the Northwest.[101] From the outset of the deportation to the Northwest, people died of starvation. Many people were dropped in Pursat and told to wait for a train to Battambang. While some were lucky enough to board a train immediately, others waited one month or more. Again, no provisions were provided to the deportees and consequently, many starved to death in Pursat.[102]

WAS STARVATION A FORSEEABLE CONSEQUENCE OF THE DISCRIMINATORY POLICIES THAT PUNISHED THE NORTHWEST ZONE?

Once the deportees arrived in the Northwest, they were forced to work in coops. The Northwest was overwhelmed by this sudden influx of people and did not have the resources to feed the new deportees once the planting season ended. The Khmer Rouge leadership was aware that the deportation, which nearly doubled the Northwest's population, could be devastating.[103] The Northwest leadership warned the Center that deporting such a large amount of people to the Northwest would cause widespread starvation. Hang Teav, a member of the Northwest zone CPK committee, says that Moul Sambath, one of the cadres in charge of the Northwest, resisted

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100 Kiernan, supra note 40 at p. 80 This was not the first time the Khmer Rouge used the tactic of evacuating cities. In 1974, after capturing the 19th century capital, Oudong, the Khmer Rouge forcibly evacuated the 40,000 residents. See note 84 Supra

101 Kiernan, supra note 40 at p. 214 note 4; Kiernan, supra note 40 at p. 97 note 122

102 Kiernan, supra note 40 at p. 217-219

103 Kiernan, supra note 40 at p.97 note 22 In 1968, the population of the Northwest was 908,000, citing Chandler p. 52

the deportation: "When he learned of the Center's plans in 1975, he warned the Center leadership: 'Don't transport them here. They were throwing them away'".[104]

Although the Khmer Rouge leadership knew that the forced relocation, and subsequent internment in coops could be disastrous, they sacrificed the lives of the people in order to advance the goals of the party. The Khmer Rouge leadership thought that the deportation was necessary to achieve the Center's unrealistic agricultural production goals. The Khmer Rouge wanted Cambodia to be a model for all communist revolutions. Therefore, they set unrealistic production and export goals. In attempts to achieve these goals, the Center focused on increasing production in the Northwest, which was to shoulder much of the rice producing burden of the country. In 1975, the Center thought that the Northwest was under populated and needed 500,000 additional workers in order to maximize efficiency and achieve its production goals. However, after the planting season ended, there was no way to feed the additional people.[105]

The evacuation of Phnom Penh, the deportation to the Northwest, and the subsequent forced labor in the coops were all illegal criminal enterprises that the senior Khmer Rouge leaders took part in. They were carried out in a way that starvation was not only foreseeable, but almost a certainty.

SUPERIOR RESPONSIBILITY

Like JCE, superior or command responsibility is another legal theory where an accused can be found libel for crimes stemming from another's actions. However, unlike JCE, the crimes do not have to be the consequence of other criminal activity. Rather, the theory of superior

104 Kiernan, supra note 40 at p. 216

105 Kiernan, supra note 40 at p. 216

responsibility holds superiors culpable for their subordinates' criminal activity if the superior acted recklessly in failing to prevent the crime. Article 29 of the ECCC statute, discusses superior responsibility:

> "The fact that any of the acts referred to in Articles 3 new, 4,5,6,7 and 8 of this law were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators."[106]

It is important to note that superior responsibility is not a form of strict liability. A superior is culpable only if he had a legal obligation to act, and failed to do so.[107] The obligation of a superior to prevent or punish the acts of his subordinate is established by demonstrating the superior's effective control over the subordinate, as well as the superior's knowledge—actual or constructive—of the subordinates criminal activity.

Although a formal superior-subordinate relationship is not sufficient in its own to prove effective control, *de jure* authority is a strong indication that such control exists.[108] Conversely, even if *de jure* authority is lacking, a superior-subordinate relationship can still be established by

106 ECCC Statute supra note 20 Art. 29

107 Kordic, Trial Chamber, supra note 13 at Para 365

108 Blagojevic Trial Chamber, supra note 81 at Para 791

demonstrating that the superior had effective control, which is defined as "the material ability to prevent and punish the commission of these crimes."[109] Thus, while courts are more likely to recognize superior responsibility if a formal hierarchal authority structure exists, it is by no means necessary to prove effective control.

In the present case, senior Khmer Rouge leaders had both *de jure* and *de facto* control over the Khmer Rouge cadres in the coops. The *de jure* authority can be demonstrated by the 1976 constitution which organized the government in a strict hierarchal manner. The Khmer Rouge leaders in Phnom Penh tried to control all aspects of life in the coops. They required written reports from the coop level on any new developments including births, deaths, and food production. Likewise, Khmer Rouge leaders in Phnom Penh exerted their will on the people living in the coops by giving orders to the zone chiefs who in turn, passed them on to local cadres.[110]

The fact that those committing the crimes in the coops might not have reported directly to the center does not negate the center's *de jure* authority. Superiors may still incur liability for their subordinates' actions even if the superior's authority was neither direct[111] nor immediate.[112] Thus, by establishing that senior Khmer Rouge leaders had formal authority over their Khmer

109 Prosecutor v. Tihomir Blaskic Case No. IT-95-14-A Para 484 (Appeals Chamber 29 July 2004) [hereinafter Blaskic Appeals Chamber].

110 Sundqvuist supra note 43 p.19

111 Prosecutor v. Halilovic, Case No. IT-01-48-T Para 63 (Trial Chamber November 16, 2005), [hereinafter Halilovic, Trial Chamber].

112 Prosecutor v. Strugar, Case No. IT-01-42-T, Judgment, Para 361 (Trial Chamber, Jan. 31, 2005), "there is no requirement that the superior-subordinate relationship be immediate in nature for the commander to for the commander to be found libel for the acts of his subordinate."

Rouge cadres, prosecutors can make out a prima facie case of effective control.[113] The burden would then be on the defense to offer evidence rebutting the existence of effective control.

Senior Khmer Rouge leader's effective control over the cadres in the coops can be established not only from their official positions, but also from their actions. The Center's goal of maintaining complete control over local cadres can be demonstrated by their declaration that they had "an absolute monopoly of leadership in all domains."[114] Any cadre who expressed opposition to the party line was usually arrested. These arrests were especially prevalent in the Northwest Zone where the starvation was the most severe. However, these purges were not carried out as punishment for the mistreatment of civilians. In fact, some were arrested for the very fact that they requested assistance be given to the starving people.[115] By most accounts, after major purges in 1977 and 1978 in which many of the Northwest zone's leaders were replaced with cadres from the Southwest whom the center felt were more loyal to the party, the situation in the coops got worse.[116] These purges demonstrate that senior Khmer Rouge leaders in Phnom Penh had the ability to punish, and presumably prevent, the activities of the cadres in the individual zones. Yet they never used that power to prevent the actions of their subordinates which resulted in the starvation deaths of thousands.

Once effective control is established, prosecutors will then need to prove that mens rea element of superior responsibility—knowledge. However, both the ECCC statute and ICTY

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113 Prosecutor v. Delalic, Mucic, Delalic and Landzo, Case No. IT-96-21 Para 197 (Appeals Chamber February 20, 2001), [hereinafter Delalic, Appeals Chamber].

114 Sundqvuist supra note 43 p.19

115 Kiernan, supra note 40 at p. 216, Hu Nim, Rhoss Nhim, and Moul Sambath were all Northwest leaders who advocated for humanitarian assistance for the people living in the Northwest Zone. All were subsequently arrested and executed.

116 Kiernan, supra note 40 at p. 246

jurisprudence make clear that it is not necessary that the superior actually know the actions of his subordinate. A superior is deemed to have constructive knowledge if information was available to him that would have put him on notice of offenses committed by subordinates.[117] Because the senior leaders were so far in proximity to their subordinates, the court may require a relatively high standard of proof indicating that the senior leaders should have been aware of the criminal activity of their subordinates.[118] However, the superiors do not need to know details of that criminal activity.[119] In fact, the information does not necessarily need to lead to a conclusion that a crime has or is about to take place. General information that would put a superior on notice of the likelihood that criminal activity has occurred, and thus which justifies further investigation, is sufficient to establish constructive knowledge [120]

KNOWLEDGE OR CONSTRUCTIVE KNOWLEDGE

Although there is not a lot of documentation that demonstrates that top Khmer Rouge leaders knew exactly what was going on at the local level, there is some evidence to suggest that they were aware that people in the coops were starving. However, not only did the senior Khmer Rouge not take action to alleviate the food shortage, they continued the policies that exacerbated the situation.

During a speech given in 1975, Pol Pot talked about the hardship of the Cambodian people, but said that they should expect no relief for five years. Additionally, the Khmer Rouge was intent on keeping the living conditions of the Cambodian people hidden from the outside

117 Blaskic, Appeals Chamber, supra note 108 at Para 62

118 Halilovic, Trial Chamber, supra note 109 at Para 66

119 Delalic, Appeals Chamber, supra note 111 at Para 238

120 Limaj, Trial Chamber, supra note 70 at Para 525

world. Ha Thi Que, a Vietnamese dignitary who visited Cambodia in February 1977, remembers the Khmer Rouge going through great lengths to ensure that she had no contact with Cambodian workers. Her requests to speak with ordinary Cambodian people were ignored; instead she was only allowed to speak to carefully selected party members.[121] One explanation for the Khmer Rouge's refusal to allow contact between the Vietnamese and ordinary Cambodians is because the sight of malnourished Cambodians would expose the inhuman living conditions of the Cambodian people, which would expose the fallacy that the revolution was a success.

There is also evidence that specific reports detailing the starvation in the Northwest reached Phnom Penh. In mid-1976, Pol Pot sent Ieng Thirith, the minister of social action and Ieng Sary's wife, to "investigate charges of shortcomings in the health, diet, and housing of the workers" in the Northwest. She reported that the conditions in the Northwest were "queer." and that people were dying of disease and malnutrition. Although Thirith blamed these horrendous conditions on enemies that infiltrated the Northwest zone's ranks, this report, which presumably reached Phnom Penh, indicates that the Center knew that the people in the Northwest were dying of starvation as early as 1976.[122]

Nhik Ly, a coop chief in Odambang sub-district reports seeing other senior leaders visiting the coops in the Northwest as well. He also said that the Center sent spies into coops to report back what was happening.[123] Although there is no documentation showing what these reports stated or whether they reached the Center, it unlikely that these visits could have taken

121 Kiernan p160

122 Kiernan, supra note 40 at p. 212

123 Interview with Solomon Bashi and Koko Huang, Battambang Province, July 2007.

place without the Khmer Rouge leaders being alerted to the fact that people in the coops were starving to death.

Knowledge of the dire situation in the Northwest can also be demonstrated from reports of party meetings. In early 1977, at a meeting of the standing committee, Hu Nim, the Minister of Information and the chief of the Northwest Zone, spoke about the lack of food in the Northwest. Nim reportedly requested money be introduced in order to provide an incentive to produce more food in hopes that it might alleviate the food shortage that was occurring in the Northwest after a particularly bad harvest. Nim's request to take action to ease the food shortage in the Northwest was confirmed in an interview with Lim Mean, a CPK regional commander who defected to Thailand in 1978. Mean reported that several leaders, including Hu Nim, asked the party to have mercy on the people. Mean also named Ros Nhim, the head of the Northwest zone until 1977, as one who advocated on behalf of the starving people. Nhim reportedly went as far as to ask the Center to go against the constitution and reintroduce money and accept foreign aid in order to ease the suffering of the Cambodian people.[124] However, the Center viewed both the reintroduction of money as well as accepting foreign aid as anathema to the revolution and dismissed the suggestions.[125]

Some Khmer Rouge cadres worried about the effect food shortage were having on the revolution. Malnutrition was so rampant that a nurse working in a DK hospital estimated that 90% of women stopped menstruating.[126] This was problematic because Khmer Rouge leaders valued child soldiers for their impressionable minds and unfettered loyalty. As such, children

124 Kiernan, supra note 40 at p. 351

125 Both Hu Nim was arrested and executed at Tuol Sleng a short time later

126 Kiernan, supra note 40 at p. 226

were viewed as essential to the revolution. However, malnutrition was drastically diminishing birth rates. Over the four-year Khmer Rouge regime, it is estimated that living conditions reduced the number of births by 570,000.[127] This figure does not take into account the dramatically increased infant and child mortality rate which further reduced the number of Cambodian children. To facilitate pregnancies, the party arranged forced marriages. The party was so determined to breed children for the revolution that some survivors even report that soldiers enforced the consummation of the marriage. But Khmer Rouge cadres knew that malnourished brides were not able to conceive. To solve this problem, many newlywed brides were given increased rations including protein once they were moved out of the singles camp. After years of eating only meager rice rations, some new brides reported being given as much meat as they wanted.[128] While it is difficult to document who ordered these increased rations, the treatment of the new brides does indicate that Khmer Rouge cadres who were in positions to implement and change policies knew of the extensive starvation most people faced. Furthermore, it demonstrates that provisions existed to alleviate these conditions when it suited the party. However, there is no evidence that these increased rations were ordered by senior Khmer Rouge leadership in Phnom Penh. The above evidence indicates that the senior Khmer Rouge leaders knew or should have known that their subordinates in the coops were creating conditions of life that led to the starvation of Cambodian citizens.

If the Khmer Rouge leaders are guilty of the extermination of Cambodian people who died of starvation, what legal culpability, if any, do they have for those people who suffered from

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127Judith Banister & Paige Johnson, After the Nightmare: The Population of Cambodia , in Genocide and Democracy in Cambodia: The Khmer Rouge, the United Nations, and the International Community 90 (Ben Kiernan ed., 1996).

128 Burki, Elizabeth Anne (1987) Cambodian and Laotian mothers and daughters in Chicago: Surviving crises and renegotiating identities. "The communists say we must have many babies" p 151

a lack of food and undernourishment yet survived? The ICTR has held that an accused can be charged with both the crimes of humanity of extermination and persecution for crimes stemming from the same actions. The key distinction is the effect those actions have on the victims. Thus, while senior Khmer Rouge leaders cannot be tried with starvation and extermination for all of the deaths resulting from starvation, they can be charged with extermination for the deaths and persecution for the lesser harm inflicted on the survivors.[129]

CUSTOMARY INTERNATIONAL LAW

Because the defendants in the ECCC are being tried thirty years after the fact, prosecutors will face challenges not present in other tribunals. Perhaps the greatest challenge will be defining what constituted customary international criminal law at the time of the DK regime. This facet becomes particularly important when the defendants are accused of a crime, like starvation, which has never been prosecuted in an international tribunal. In order to be successful, prosecutors at the ECCC will have to demonstrate that even if the act of starvation was not specifically criminalized in 1975, a foundation in international law existed at the time under which the Khmer Rouge leaders could reasonably have been expected to know that their actions were illegal.

While the defense will likely concede that the 1975 definition of extermination included the large scale intentional murder of civilians, it will probably challenge whether indirectly starving civilians over an extended period was a violation of customary international law at that time. Thus, it will be incumbent on the prosecution to demonstrate that a reasonable person in 1975 would have known that creating conditions that ultimately cause the death of another would

129 Prosecutor v. Nahimana, Barayagwiza and Ngeze, Case No. ICTR-99-52-T, Para 1080, (Trial Chamber, December 3, 2003).

give rise to individual criminal responsibility, even if the killer does not specifically know the victim, and the killer's actions were not the immediate cause of death.

Although murder and extermination are specifically prohibited by both the International Military Tribunal's Charter ("IMTC")[130] and the Nuremberg Principles Resolution of 1950,[131] neither document gives a definition of these crimes. While extermination is generally regarded as murder on a large scale, a precise definition of murder is absent. Therefore, in order to understand whether starvation was a crime in 1975, one must examine how the international community defined murder at that time.

One of the most compelling arguments that the indirect killing of a person via starvation was illegal at the time of the DK regime stems from the language of the Genocide Convention. In defining what acts constitute genocide, the convention states that "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction" would constitute the acts of genocide.[132] This definition, which resembles the Rome Statute's definition of extermination, makes it clear that a person can be guilty of genocide, even if that perpetrator was not the person who committed the final murderous act. Furthermore, the words "inflicting conditions of life" indicate that even actions that do not directly cause another's death, such as government induced famines, may qualify as an act of genocide for which a person could incur individual criminal responsibility as far back as 1950. Although this convention is specific to genocide, it sheds light onto what was the universally accepted definition of murder at the time.

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130 Charter of the International Military Tribunal, Annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), Aug. 8, 1945, 82 U.N.T.S. 59, 279 Stat. 1544.

131 Formulation of the Nuremberg Principles, Gen. Ass. Res. 488 (Dec. 12, 1950)

132 Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III) (A), U.N. GAOR, 3d Sess., pt. 1, at art. 2, U.N. Doc. A/810 (December 9, 1948).

Because the actus reus of genocide is so similar to that of extermination,[133] it only makes sense that if customary international criminal law regards creating life-endangering conditions as murder in the context of genocide, it would similarly do so with regards to extermination.

In addition to treaties, the customary practice of states can give insight into what the universally accepted definition of murder was in 1975. Examining individual states' international and national military prosecutions reveals that creating conditions that were likely to cause death was considered murder.[134] As such, one of the foremost scholars on international law, Cherif Bassiouni, has concluded that "the crime of murder as intended under Article 6(c) [of the IMTC] includes a closely related form of unintentional but foreseeable death which the common law labels manslaughter."[135]

This expanded definition of murder, which includes indirect killing, is especially relevant as it pertains to the crime of extermination. Because of the scale of killing and the policy element that was required under the IMTC, extermination could not be carried out by one person. However, the Charter did not intend to protect those who planned the act, but were not present during the actual killing. Therefore, implicit in the IMTC's definition of extermination is that these crimes include some types of indirect and unintentional killing.[136]

CONCULUSION

For many, the DK era is marked by unbelievable atrocities including torture and executions. However, although these atrocities were widespread, they were not universal. By

133 Krstic Trial Chamber supra note 24 Para 497.

134 Bassiouni supra note 66 p. 291

135 Id.

136 Id.

contrast, the one experience that almost all who lived through the DK regime suffered through was a shortage of food. Prosecuting senior Khmer Rouge leaders for the starvation that occurred during the DK regime would not only honor the hundreds of thousands of victims, but would also serve as a precedent, alerting future generations that the international community will no longer tolerate tyrannical governments using food as a means to enhance their power.

To be sure, prosecuting leaders of the DK regime for starvation will be a challenge. The accused will likely claim that they were unaware of the conditions at the local level. This defense can be especially effective against a charge like starvation in which the resulting deaths are slow and indirect. But the ECCC's mandate is to prosecute crimes that were committed during the DK regime. Starvation, while maybe not the most brutal, was certainly the most extensive of the crimes committed. As such, the ECCC has a duty to prosecute this crime. The international community failed the Cambodian people once; it should be careful not to do so again.