Justice and Starvation in Cambodia: International Criminal Law and the Khmer Rouge Famine

by

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A thesis submitted in conformity with the requirements for the degree of Master of Laws (LL.M.)

Faculty of Law
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Abstract

Recently, an interdisciplinary discourse has emerged concerning the suitability of international criminal law as a legal response to severe famine. Despite this discourse, the topic of famine has received scant attention within actual international criminal law practice. This thesis scrutinizes this prosecutorial gap by considering whether former Khmer Rouge leaders could likely be successfully prosecuted for international crimes predicated on the catastrophic famine that occurred while the Khmer Rouge held power in Cambodia from 1975-1979. To do so, a detailed history of the Khmer Rouge period famine is developed and subsequently analyzed according to current formulations of international crimes. This analysis concludes that former Khmer Rouge leaders could likely be prosecuted for crimes against humanity, specifically those of extermination, persecution and other inhumane acts, predicated on their roles in enforcing famine conditions while in power.
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Chapter 1
Introduction

1 The Khmer Rouge Famine: Turaphik or Bong-Ot?

Cambodia suffered one of the worst famines\(^1\) in modern history under the Khmer Rouge\(^2\) during the period of Democratic Kampuchea (“DK”) from 1975-1979. During this time, famine claimed somewhere between 500,000 and 1.5 million lives through a combination of starvation\(^3\) and disease, representing an “excess death”\(^4\) toll somewhere between ten and twenty percent of the country’s total population\(^5\) and making it one of the deadliest famines in modern history.\(^6\)

\(^1\) There are many different understandings of the term famine within varying disciplines. For the purposes of this thesis, the term famine is used to refer to instances where lack of access to food amongst an affected population results in an increase in mortality rates.

\(^2\) The term “Khmer Rouge” is the popularly known name of Communist Party of Kampuchea (“CPK”). Although it is not technically correct to directly equate the two terms, as the more general Khmer Rouge movement originally included various revolutionary movements, this thesis uses the terms interchangeably for the sake of consistency and clarity.

\(^3\) For the purposes of this thesis, the term starvation is used to refer to death attributable directly to a lack of sufficient nourishment.

\(^4\) The term excess death refers to the increase in death rate above an established normal death rate and is used by famine demographers as the primary metric of gauging famine severity. See e.g. Cormac Ó Gráda, *Famine: A Short History* (Princeton: Princeton University Press, 2009) at 92 (“The death toll, or the excess death rate relative to some noncrisis norm, is the single most popular measure of a famine’s gravity. For most historical famines, however, establishing excess mortality is impossible.”).

\(^5\) The aggregate death toll attributable to the Khmer Rouge regime is controversial due to the lack of available statistics and the ideological and political interests at stake. The most comprehensive study of the issue to date has been an overview of available estimates of the Khmer Rouge period death toll and associated causation authored by two expert demographers and commissioned by the Co-Investigating Judges at the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) (for more information on the ECCC, see infra note 8). See Ewa Tabeau & They Kheam, “Demographic Expert Report: Khmer Rouge Victims in Cambodia, April 1975 – January 1975, A Critical Assessment of Major Estimates”, Doc D140/1/1 (30 September 2009) at 41-47 (Extraordinary Chambers in the Courts of Cambodia, Office of the Co-Investigating Judges), online: ECCC <http://www.eccc.gov.kh/en> (Analyzing previous estimates of the overall number of excess deaths during the Khmer Rouge period and concluding that the “prevailing view” is that the total number of victims is between 1.4 and 2.2 million lives. Tabeau and Kheam further estimate that approximately 50 percent of the total number of excess deaths can be attributed to direct violence, with the other half attributable to living conditions, including famine.). See also Central Intelligence Agency Foreign Assessment Center, “Kampuchea: A Demographic Catastrophe” (May 1980) at note 2. Stating that: Ordinarily, population estimates based on incomplete data are made by using demographic parameters from other countries at similar levels of development, or by using demographic models constructed for developing countries. In the case of Kampuchea, and especially for the period 1975-79, the reported events were so bizarre that it was impossible to assume a demographic similarity with any other country or with an existing model. Consequently, demographic estimates were linked to the unique conditions in the country as reconstructed from narrative reports by US Government sources for 1970-75 and by journalists, refugees, and relief workers for 1975-79.

Sung Phareth is a survivor of this famine. I met Phareth in February of 2010 while researching the Khmer Rouge famine in collaboration with the Documentation Center of Cambodia (“DC-Cam”). She had travelled to Phnom Penh with a group of villagers from Preah Net Preah commune in Banteay Meanchey province to learn about the work of the Khmer Rouge Tribunal (officially named the Extraordinary Chambers in the Courts of Cambodia (“ECCC”)) and to

Categorizing victims according to cause of death is even more difficult, as a virtually no forensic analysis of Khmer Rouge period mass graves has been conducted and victims were often buried haphazardly in unmarked locations. See Documentation Center of Cambodia (“DC-Cam”), “Forensic Pathology and Anthropology of Historical Mass Killing in Cambodia: Final Report on Phase 2 of the Forensic Project” (14 January 2004) online: DC-Cam <http://www.d.dccam.org>. Despite the wide variation in the aggregate death toll attributable to famine, it is clear that even according to conservative estimates, the Khmer Rouge period famine in Cambodia was clearly amongst the most deadly of the twentieth century. Further assessment of the total death toll attributable to famine during the Khmer Rouge period is outside the scope of this thesis and furthermore is unnecessary for legal analysis of the famine, as even at the low end of prevailing estimates, approximately 700,000 non-violent excess deaths occurred in Cambodia under the Khmer Rouge, with a large percentage of these deaths attributable to famine directly or indirectly. Thus, for the purposes of this thesis, it is assumed that at minimum, the Khmer Rouge period famine claimed several hundred thousand lives, with the actual number of excess famine deaths likely significantly higher.

While many more total deaths occurred in other twentieth century famines, such as those in the Soviet Union and China, the Khmer Rouge period famine in Cambodia is estimated to have been the most severe famine since the Irish potato famines of the nineteenth century in terms of the percentage of the total population killed, as it has been roughly estimated that over ten percent of the total Cambodian population perished from famine under the Khmer Rouge. See Ó Gráda, supra note 4 at 24 (Table I.I); see also Tabeau & Kheam, supra note 5.

7 DC-Cam is an independent research organization that is the world’s leading repository of information on the Khmer Rouge. For an overview of DC-Cam’s work, see online: DC-Cam <http://d.dccam.org/).

8 The ECCC is a hybrid Cambodian-United Nations (“UN”) tribunal created “to bring to trial senior leaders of [the Khmer Rouge] and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.” See 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, NS/RKM/1004/006 (27 October 2004) art 1, online: ECCC <http://www.eccc.gov.kh/en> [ECCC Law]. To date, the Court has completed one case (commonly referred to as “Case 001”) in which accused Kaing Guek Eav alias “Duch” was convicted of various crimes for his role as head of the notorious “S-21” prison in Phnom Penh during the Khmer Rouge period. See Case of KAING Guek Eav alias Duch, 001/18-07-2007, Judgement (26 July 2010) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber), online: ECCC <http://www.eccc.gov.kh/en> [Duch Trial Judgement]; generally aff’d Case of KAING Guek Eav alias Duch, 001/18-07-2007, Appeal Judgement (3 February 2012) (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber), online: ECCC <http://www.eccc.gov.kh/en>. Currently, the Court’s second case (commonly referred to as “Case 002”) against accused Nuon Chea and Khieu Samphan is in its trial phase. Case 002 previously included four accused who were the most senior former Khmer Rouge officials still alive at the time: Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith. See Case of Nuon Chea, 002/19-09-2007, Closing Order (15 September 2010) (Extraordinary Chambers in the Courts of Cambodia, Office of the Co-Investigating Judges), online: ECCC <http://www.eccc.gov.kh/en>. Accused Ieng Thirith was dismissed from the Case after being found unfit to stand trial due to dementia presumably brought on by Alzheimer’s disease. See Case of Nuon Chea, 002/19-09-2007, Decision on Ieng Thirith’s Fitness to Stand Trial (17 November 2011) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber), online: ECCC <http://www.eccc.gov.kh/en> [Ieng Thirith Fitness Decision]. Ieng Sary, who was also Ieng Thirith’s husband, died in March of 2013. See Press Release, “Accused Person Ieng
visit historical sites related to Khmer Rouge period.\textsuperscript{9} One stop on this trip was the *Tuol Sleng* Genocide Museum, located on the site of a high-school that was converted into the notorious “S-21”\textsuperscript{10} prison and torture center by the Khmer Rouge. At this sombre location, with the assistance of my colleague and translator, Sok Sreinith Ten, I approached a small group of participants after they had completed their tour of the prison. Sreinith explained to the group that we were researching the issue of famine during the Khmer Rouge period and were interested in hearing about their observations and experiences on this issue if they felt comfortable sharing them. Several members of the group responded that they were willing to share their experiences with us and related stories of extreme suffering from starvation conditions during the Khmer Rouge period. Each story was a both tragic and sadly predictable description of how each survivor was forced to perform hard labour under the Khmer Rouge while being given insufficient food rations and forbidden from growing, foraging for or even cooking additional food by their Khmer Rouge overseers, who themselves ate separately and much more abundantly.\textsuperscript{11}

As her companions told Sreinith and I about their experiences, Phareth quietly kept her distance. We concluded our interviews, thanked the interviewees for sharing such painful memories and moved a short distance away to compare notes. After several minutes, one of the interviewees approached Sreinith and informed her that one more person wished to share their story with us. Phareth then proceeded to quietly tell Sreinith and I about the tragedy that befell her family during the Khmer Rouge period.

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\textsuperscript{9} For a report on this trip, see Randle DeFalco, “Community Outreach Trip to Phnom Penh and the ECCC” (DC-Cam), online: DC-Cam http://www.d.dccam.org.

\textsuperscript{10} S-21 was code for “security center 21” during the Khmer Rouge period, as the Khmer Rouge set up a nationwide system of prisons, torture centers and execution sites throughout the country. Each prison (“security center”) was given a numerical designation.

\textsuperscript{11} Interview notes on file with author.
Shortly after the Khmer Rouge revolution in 1975, when she was eleven years old, Phareth was assigned to a children’s work unit. The main assignments of this unit were to carry soil, dig dikes and help with the construction of a local dam. While on work assignment Phareth and the rest of her unit lived at the work site, sleeping under a makeshift shelter made out of palm leaves. During this time Phareth received two daily food rations, which typically consisted of rice with rock salt and sometimes also included prahok or fish soup. Phareth and her coworkers received these rations, which were relatively plentiful, because the dam her unit was working on was considered a highly important revolutionary project. Nonetheless, Phareth recalls being perpetually hungry and exhausted, as the rations were insufficient to sustain such hard labour.

After spending approximately three months living at the dam worksite, Phareth’s unit finished its work assignment and a celebration was hosted by local government officials to commemorate their efforts. At the celebration Phareth recalls a play, revolutionary songs and a mass marriage ceremony consisting of approximately one hundred couples. She recalls feeling proud at the time, as she was praised for her hard work.

Only later did Phareth learn of the tragedy that had struck her family while she had been living at the work site. Her grandmother, who was old and unable to work, had been placed in charge of Phareth’s two younger sisters. Her grandmother was sickly and weak from lack of food and became unable to effectively supervise Phareth’s sisters. There was not enough food available and the unsupervised little girls ate dirt because they were so hungry. They soon became sick and swollen from lack of food and ingesting soil and both eventually died of illness and starvation.

For a short period after this first tragedy, Phareth’s grandmother survived despite being sick and weak from lack of food, because she had a stockpile of medicine from before the Khmer Rouge revolution to treat her various ailments. This cache of medicine was later confiscated however, along with the family’s only cooking pot by local Khmer Rouge cadres, who would search village houses every three days for “contraband” such as cooking equipment, rice or anything else deemed useful to the revolution or symbolizing a vestige of private property. This final indignity was too much for Phareth’s grandmother to bear and she told Phareth that she wanted to die because she could not bear to live any longer. Soon Phareth’s grandmother became even

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12 Prahok is a fermented fish paste that is a staple of the typical Cambodian diet and important source of protein.
weaker, leading Phareth’s aunt to secretly trade the last of the family’s hidden gold for three cans of rice to feed her starving grandmother. Phareth’s grandmother however, refused to eat the rice because she was determined to die and end her misery. Within a week, the grandmother got her wish and succumbed to a combination of illness and starvation.

Meanwhile, as Phareth’s family members starved to death while being forbidden from even eating one of their own chickens, local Khmer Rouge cadres ate plenty of food and even had their own special chef. Even foraging for food was forbidden and in desperation Phareth resorted to clandestinely searching for food in order to survive, while in constant fear of being discovered and killed. Today, Phareth remains angry with the Khmer Rouge regime, which she blames for starving her two sisters and grandmother. According to her, everyone knew that communal rations were insufficient because it was “obvious.” Nevertheless, villagers were expected to proclaim their love for the revolution, never complain about the lack of food and spend all their time labouring in service of the revolution.

The suffering of Sung Phareth and her family sadly exemplifies the trauma, suffering and death associated with famines, during which disease and other causes and can utterly decimate both individuals and entire societies. The physical and psychological tolls exacted by a famine are often incalculable and can span generations. When famine conditions begin to take hold, it first results in the spread of protein-energy undernutrition, which is a lack of energy due to chronic deficiency of all macronutrients. Infants, children, pregnant women, breastfeeding women and the elderly are all especially sensitive to undernutrition. Additionally, prenatal maternal undernutrition can cause a myriad of lifelong health issues for children born to severely

13 For a basic explanation of undernutrition see “Undernutrition” in Robert S Porter & Justin L Kaplan, eds, Merck Manual Home Healthbook, online: Merck <http://www.merckmanuals.com/home> [Merck Manual Home Healthbook]; for a more thorough analysis, see “Overview of Undernutrition” in Robert S Porter & Justin L Kaplan, eds, Merck Manual for Health Care Professionals, online: Merck <http://www.merckmanuals.com/professional> [Merck Manual for Professionals]. “Primary” protein-energy undernutrition occurs as a result of inadequate nutrient intake, while “secondary” protein-energy undernutrition occurs as a result of some separate disorder that decreases appetite or impairs nutrient digestion, absorption or metabolism.

14 Merck Manual Home Healthbook, supra note 13 (“Infants, children, and adolescents are at risk of undernutrition because they are growing and thus need a lot of calories and nutrients.”); see also Merck Manual for Professionals, ibid (“Requirements for nutrients increase during pregnancy and breastfeeding.”) Furthermore, “[a]l[ing—even when disease or dietary deficiency is absent—leads to sarcopenia (progressive loss of lean body mass), starting after age 40 and eventually amounting to a muscle loss of about 10 kg (22 lbs) in men and 5 kg (11 lbs) in women. Undernutrition contributes to sarcopenia, and sarcopenia accounts for many of the complications of undernutrition.).
undernourished mothers.\textsuperscript{15} As undernutrition worsens, victims become lethargic, experience wasting as muscle tissue is converted to energy in order to maintain basic bodily functions and begin to lose their hair.\textsuperscript{16} If left untreated, undernutrition is eventually fatal, although absolute starvation (death from a complete lack of nutrients) is typically preceded by organ failure or death from a disease as the immune system becomes compromised.\textsuperscript{17}

In addition to acute temporary symptoms, survivors of chronic or acute undernutrition often suffer lifelong health problems. Undernutrition causes the most serious lasting effects on child development. Prenatal maternal undernutrition has been linked to permanently stunted growth and mental health issues.\textsuperscript{18} For example, studies conducted on the Dutch famine of 1944-1945 and Chinese famine of 1958-1961 both found “more than a two-fold increase in risk for schizophrenia associated with malnutrition in midgestation.”\textsuperscript{19} Indeed, “nutritional inadequacy, in one form or another is one of the largest single non-genetic contributors to mental retardation and aberrant neural development” according to recent medical research.\textsuperscript{20} The full range of continuing effects of undernutrition are impossible to know in any single case, however, a long-term study of the Dutch famine found a strong correlation between prenatal maternal undernutrition and increased rates of later life health problems.\textsuperscript{21} When the mother suffered acute undernutrition during early gestation the study found significantly increased rates of numerous maladies in adulthood, including: glucose intolerance, atherogenic lipid profile, altered blood coagulation, obesity (women only), stress sensitivity, coronary heart disease and breast cancer.\textsuperscript{22}


\textsuperscript{16} See “Protein-Energy Undernutrition” in Merck Manual for Professionals, supra note 13, (“The initial metabolic response is decreased metabolic rate. To supply energy, the body first breaks down adipose tissue. However, later when these tissues are depleted, the body may use protein for energy, resulting in a negative nitrogen balance. Visceral organs and muscle are broken down and decrease in weight. Loss of organ weight is greatest in the liver and intestine, intermediate in the heart and kidneys, and least in the nervous system.”).

\textsuperscript{17} Ibid (“With acute or chronic severe [protein-energy undernutrition], heart size and cardiac output decrease; pulse slows and BP falls. Respiratory rate and vital capacity decrease. Body temperature falls, sometimes contributing to death. Edema, anemia, jaundice, and petechiae can develop. Liver, kidney, or heart failure may occur.”).

\textsuperscript{18} See Victora et al, supra note 15.

\textsuperscript{19} Ibid.

\textsuperscript{20} Bennet & Gunn, supra note 15.

\textsuperscript{21} See e.g. Roseboom, de Rooij & Painter, supra note 15.

\textsuperscript{22} Ibid.
The protracted suffering attendant to famine conditions also routinely causes mental health problems for survivors. In a 2005 report, the United States (“US”) National Institute of Health found that Post-Traumatic Stress Disorder (“PTSD”) and depression was at epidemic levels amongst Cambodian immigrants.\(^{23}\) Ninety-nine percent of participants in the study also reported being “nearly starved to death” during the Khmer Rouge period.\(^{24}\)

During and after such massive tragedies, its victims, such as Phareth and millions of other survivors who endured similarly devastating experiences\(^{25}\) are often left without any explanation as to why they were forced to watch family members weaken, sicken and die from lack of food and who, if anyone, is responsible for causing the famine in the first place. Like Phareth, many of these survivors want answers and accountability. In the Cambodian context, these fundamental questions of causation and culpability have lingered for over thirty years, as efforts aimed at achieving accountability, transitional justice and reconciliation for the abuses of the Khmer Rouge stalled for decades amidst protracted civil war, poverty and political corruption. Only recently has the ECCC begun trials of a handful of former Khmer Rouge senior leaders or


\(^{24}\) Ibid.

\(^{25}\) Famine was endemic throughout Cambodia by the end of the Khmer Rouge period and in interviews, survivors routinely report enduring experiences similar to that of Sung Phareth and her family. For example, DC-Cam has conducted numerous interviews with survivors of the Khmer Rouge period and many of these interviews include similar events. For an example of the experiences of a survivor of the Khmer Rouge period, see “Interviewed with Ing Yan”, DC-Cam Doc VOT0168 (“[Ing Yan’s] father died in Battambang Province in 1977 because of starvation. She has 7 siblings, but three of them died. In the Khmer Rouge regime, she was lacking of food, water, and shelter. ... She was close to death. ... Recently, she feels withdrawn from other people. She is unable to feel emotions. She is avoiding activities that remind her of the traumatic events. She is avoiding thoughts associated with the hurtful experiences.”) (translation by DC-Cam); see also Kim Cheam aka Kosal, “My Life During the Pol Pot Regime” Searching for the Truth: Magazine of the Documentation Center of Cambodia (2d Quarter 2005) 53, online: DC-Cam <http://www.d.dccam.org> (article by survivor of a work camp who risked death by stealing and secretly foraging for extra food); Chab Chanda Pheakdey, “Five Sons in the Khmer Rouge Butchery”, Searching for the Truth: Magazine of the Documentation Center of Cambodia (2d Quarter 2007) 56, online: DC-Cam <http://www.d.dccam.org> (Account of survivor who remembers her grandmother secretly bringing food to her great-grandmother, whom the local Khmer Rouge commune chief starved because she was too old to work. When the local Khmer Rouge authorities learned of the author’s grandmother’s acts, the grandmother was denied food and “starve[d] for a few days as punishment” at 56-57); Sotheany Hin, “To Be Starved Like a Prisoner”, Searching for the Truth: Magazine of the Documentation Center of Cambodia (2d Quarter 2007) 22, online: DC-Cam <http://www.d.dccam.org>.
others considered most responsible for the abuses of the Khmer Rouge period and it is highly unlikely that this Court will ever address the issue of famine head-on.26

Despite this lack of definitive answers, the very language used by victims such as Phareth, places responsibility for the famine they endure at the doorstep of the Khmer Rouge. These survivors do not use the Khmer language word for “famine” (turaphik)27 when discussing their experience under the Khmer Rouge, because the term connotes a widespread lack of food attributable to natural causes, such as flooding or drought. Turaphik reflects the traditional reliance on predictable weather patterns to grow rice and other staples in Cambodia. Periods of turaphik are not unknown in Cambodia; however the country’s abundant natural food sources, especially its freshwater fisheries28 have traditionally provided a crucial bulwark against severe famine and mass starvation events prior to the Khmer Rouge period.29 Instead of turaphik, survivors typically use the verb bong-ot, meaning “to starve” or “to withhold food”30 when discussing their experiences of hunger and deprivation under the Khmer Rouge.

Surviving former members of the Khmer Rouge government however, typically draw a vastly different picture of the famine that occurred while they held power. For example, several prominent former Khmer Rouge leaders have publicly proclaimed their innocence when confronted with allegations of having knowingly caused mass starvation during the Khmer Rouge period, through sheer denial or by shifting the blame to others.31 These former leaders, such as the four original accused in the landmark second case currently underway at the ECCC,32

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26 See supra, note 8 (explaining the makeup and jurisdiction of the ECCC); see also below at 10-11 (explaining various reasons why it is highly unlikely that the ECCC will ever address famine issues in a direct way).
27 Translation by Youk Chhang, Director, DC-Cam. Mr. Chhang is the world’s leading authority on the Khmer Rouge period in Cambodia and native speaker of the Khmer language.
28 Ben Kiernan, The Pol Pot Regime: Race, Power and Genocide in Cambodia under the Khmer Rouge, 1975-79, 2d ed (New Haven: Yale University Press, 2002) at 8 [Kiernan, Pol Pot Regime] (Stating that the Tonle Sap fishery is “the world’s richest fishing ground, yielding up to thirty times as much per square kilometer as the North Atlantic.”) (internal citation omitted).
29 Undernutrition continues to be a major public health concern in Cambodia however, the scope of this thesis is limited to the catastrophic famine that occurred in Cambodia between 1975 and 1979.
30 Translation by Youk Chhang, Director, DC-Cam.
31 See e.g. Nate Thayer, “Day of Reckoning” 160:44 Far Eastern Economic Review (30 October 1997) 14 (Quoting Pol Pot in his last published interview as stating that his “conscience is clear” and that during the Khmer Rouge period “[t]here was rice, but [Vietnamese agents] didn’t give rice to the population.”).
32 As mentioned supra at note 8, Case 002 at the ECCC originally involved four accused (Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan) who represented the most senior former Khmer Rouge officials still alive at the time and is universally viewed as the most important case at the Court. Due to its massive size, Case 002 has been divided into a series of topical trials, the first of which is currently underway before the ECCC Trial Chamber.
have claimed instead that any starvation during the Khmer Rouge period was due to some combination of bad harvests, drought, foreign interference and/or honest mistakes by Khmer Rouge leaders in providing local officials too much power.\(^{33}\) Essentially, these former leaders have argued that any lack of food was an instance of *turaphik* or bad acts by local Khmer Rouge cadres outside of their control, rather than resulting directly from the policies of the Khmer Rouge leadership that may have prevented civilians from feeding themselves (i.e. *bong-ot*).

Meanwhile, former local Khmer Rouge officials often claim that the edicts of the Khmer Rouge leadership, especially unrealistic rice production quotas and bans on private eating, rendered it impossible for them to provide for the civilian population and point out that even the slightest deviations from the leadership’s policies could result in internal party purges and mass executions.\(^{34}\)

Political manoeuvring, ideology, the dirty hands of key nations and a total lack of

However, only Nuon Chea and Khieu Samphan remain as accused in the Case. Accused Ieng Thirith was declared unfit to stand trial and severed from Case 002 due to the onset of dementia likely brought on by Alzheimer’s disease. See Ieng Thirith Fitness Decision, *supra* note 8. Ieng Sary died in custody on 14 March 2013. See Press Release, “Accused Person Ieng Sary Dies”, *supra* note 8.

\(^{33}\) See e.g. “Ieng Thirith Talks about Cambodian Genocide”, *Searching for the Truth: Magazine of the Documentation Center of Cambodia* 5 (May 2000) 4 at 5, online: DC-Cam <http://www.d.dccam.org/> (Transcript of interviews with Ieng Thirith and Ieng Sary appearing in the documentary file “Die Angkar” quoting Ieng Thirith as claiming that the Khmer Rouge had “had succeeded in giving our people sufficient food, sufficient clothes and free medical care for everybody” and blaming the Vietnamese for causing famine in Cambodia after ousting the Khmer Rouge in 1979. Ieng Sary is quoted as claiming that “[w]e [the Khmer Rouge leaders] weren’t aware of life at the grassroots, that is the way murders are able to happen. But the murderers were Vietnamese agents. That’s as plain as day.”); Sophal Ly, “Nuon Chea Denies Killing People”, *Searching for the Truth: Magazine of the Documentation Center of Cambodia* 30 (June 2002) 18, online: DC-Cam <http://www.d.dccam.org/> (Quoting Nuon Chea as stating “I am extremely regretful for the unintentional, enormous loss of human lives that occurred under the leadership of our party. [Our party] had no intention of killing her own people” and also claiming that people died from “starvation and disease only” during the Khmer Rouge period, apparently assuming that these deaths are not the result of criminal acts.); “Khieu Samphan: We Are Not Guilty of Genocide”, DC-Cam Doc D33566 (12 March 1980) (Copy of op-ed by Khieu Samphan in Bangkok Post on file at DC-Cam claiming that the Khmer Rouge did not commit genocide during the Khmer Rouge period and accusing Vietnam of “exterminate[ing]” Cambodian villages “by starvation.”).

\(^{34}\) For example, in his testimony before the ECCC Trial Chamber in Case 002 proceedings, former Khmer Rouge member Chhouk Rin explained how party members feared senior Khmer Rouge leaders, such as Case 002 accused Nuon Chea. See Doreen Chen, “‘We Were Afraid of Every Senior Leader’: Former Khmer Rouge Commander Provides Further Detailed Testimony”, Cambodia Tribunal Monitor Blog (23 April 2013), online: Cambodia Tribunal Monitor <http://www.cambodiatribunal.org/blog> [Chen, “We Were Afraid”]. Quoting Chhouk Rin as testifying that:

*The reason that we were afraid of [Nuon Chea] was because we knew that the political line of the CPK, which was Socialist revolution, was to be implemented. For that reason, everyone who attended the study session had reason to be afraid of the CPK and the senior leaders of the CPK, not necessarily [Nuon Chea] alone. We were afraid of every senior leader. We were afraid of making mistakes [because] mistakes could be very minimal, and people could be killed for a very small wrongdoing,*
reliable data and statistics from the time have allowed the conjecture on this issue to continue for over thirty years.

Muddying of historical facts and the passage of over three decades of time have not changed the fact that millions of survivors of the Khmer Rouge period believe that the famine conditions they endured resulted from criminal acts by their Khmer Rouge overseers. Sung Phareth and the many other survivors like her want former Khmer Rouge leaders criminally prosecuted for enforcing starvation conditions on them. Unfortunately, it appears unlikely that any such accountability will be meaningfully pursued. The most suitable setting for pursuing such justice is the ECCC, as the Court was created with the express goal of providing accountability for the crimes of the Khmer Rouge regime. It is highly unlikely however, that the ECCC will ever address the issue of famine head-on. The Court’s first case (Case 001) solely concerned crimes of direct violence related to the operation of the notorious Tuol Sleng “S-21” prison in Phnom Penh and therefore was an ill-suited forum to address national living conditions. If the Court were to address the issue of famine, the most suitable case for it to do so in would be Case 002, currently in its trial phase, in which the accused are the most senior former Khmer Rouge leaders still alive. Two of the four initial accused in Case 002 however, have already been dropped from the case, as Ieng Thirith was found unfit to stand trial due to dementia brought on by Alzheimer’s disease and her husband, Ieng Sary died mid-trial in early 2013. Moreover, the remaining two accused – Nuon Chea and Khieu Samphan – are both in their eighties, with the latter in a particularly fragile state of health.

Partially because of the fragile health of the remaining octogenarian accused, the Court has severed the indictment in Case 002 into a series of trials each focusing on specific issues and allegations. The first, and likely sole Case 002 trial is currently underway and is limited to crimes related to the April 1975 evacuation of Phnom Penh, killings at a specific execution site and the

for example losing a hoe or breaking something. People who attended study sessions could also be arrested when the sessions concluded. All this made it reasonable to believe that we were fearful.

35 See e.g. ECCC Law, supra note 8, art 1 (outlining the Court’s jurisdiction).
36 See generally Case 001 Judgement, supra note 8.
37 See supra note 32 and accompanying text.
forced transfer of thousands of civilians between late 1975 and 1977,\textsuperscript{38} which are all topics related at best tangentially to famine.\textsuperscript{39} More relevant to the issue of famine are charges in the Case 002 indictment\textsuperscript{40} predicated on conditions in cooperatives and at worksites. It is highly unlikely that a second trial exploring these issues in depth will ever reach judgment, due to the advanced age of both remaining accused and the fact that the ECCC has faced repeated budgetary crises throughout its operational lifespan thus far.\textsuperscript{41} Additionally, Cases 003 and 004 at the ECCC have stalled for years in the investigative phase amidst considerable controversy, may never go to trial and involve suspects whose roles are less relevant to famine issues than those of the accused in Case 002.\textsuperscript{42} In light of this unfortunate reality, this thesis assesses what role international criminal law could play in addressing the Khmer Rouge period famine and in providing justice for instances of modern famine more generally.

2 Famine and International Justice: Tentative Steps

In addition to mirroring the competing historical narratives of the Khmer Rouge period famine, the Khmer terms \textit{turaphik} and \textit{bong-ot} are also reflective of the two prevailing understandings of famine more generally in scholarship and popular discourses. For many centuries, famine was largely understood within a conception that mirrors the natural-disaster causation model implicit in the term \textit{turaphik}. These conceptions viewed famine as a largely unavoidable and ever-present risk associated with human civilization that resulted from decreases in aggregate food production

\textsuperscript{38} For an overview of issues related to the severance of the case into a series of trials, see Anne Heindel, “Trial Chamber Case 002 Severance Decision Upholds Status Quo” (29 April 2013), online: Cambodia Tribunal Monitor <http://www.cambodiatribunal.org/>.

\textsuperscript{39} As discussed below, one of the Khmer Rouge’s official stated reasons for evacuating Phnom Penh was to move urban dwellers closer to sources of food production and the motivation for the forced transfers of civilians appears to have been to supply areas with additional human labour in pursuit of higher rice yields in places such as Northwestern Cambodia. Although these topics are therefore related to the larger topic of famine, their exploration does not provide any opportunity to analyze famine conditions throughout Cambodia during the Khmer Rouge period and any associated culpability of former Khmer Rouge leaders therefor.

\textsuperscript{40} The ECCC utilizes civil law procedure and as such, the indicting document is officially the “Closing Order” issued by two Co-Investigating Judges, who oversee the investigatory phase of each case. See generally, ECCC Law, supra note 8.

\textsuperscript{41} See also Ciorciari & Heindel, supra note 8 at 11-12 (Voicing doubt as to whether any subsequent ECCC Case 002 trials will ever take place beyond the first trial currently underway.).

\textsuperscript{42} ECCC Cases 003 and 004 have been the source of significant controversy and have languished in the investigative phase for years. An overview of the complex issues related to these Cases is outside the scope of the current analysis of the Khmer Rouge period famine. For an overview of the controversy surrounding Cases 003 and 004, see ibid at 29-33.
due to natural disasters or simple overpopulation. Under this Malthusian conception of famine, prevention efforts focused on increasing food production capabilities and other technological challenges, such as improving transportation and storage capacities. Rapid technological advances rendered most of these challenges essentially solved by the early twentieth century. Nonetheless, paradoxically, famine persisted and indeed, grew more virulent in many areas, even as technology continued to render famine theoretically easier to prevent and more than 70 million victims died in twentieth century famines alone.

This incongruity between traditional understandings of famine causation and the realities of modern famine situations led scholars such as Nobel laureate Amartya Sen to re-examine the assumptions underlying traditional famine theories and propose alternative, more nuanced ways of understanding this deadly phenomenon. A major theme of these modern famine theories is an emphasis on food allocation mechanisms and processes, rather than on reductions in aggregate food production attributable to fluctuations in weather patterns and other natural occurrences. This paradigm shift in understandings of famine is neatly summarized by famine

43 Ó Gráda, supra note 4 at 2-11 (Providing an overview of historical understandings of famine and observing that despite the fact that impoverished populations throughout history have largely considered famines to be caused by humans, mainstream conceptions of famine have historically framed famine as a “inevitable” or “natural”).
45 See ibid at 3-5 (discussing the changing landscape of famine causation during the twentieth century as technological and other advances solved the main challenges previously understood as the main barriers to the eradication of famine globally).
47 See Ó Gráda, supra note 4 at 10 (arguing that given goodwill on all sides, famine should be fully preventable globally); accord Devereux, “Famine in the Twentieth Century”, supra note 46 at 29 (Arguing that the famines of the twentieth century were particularly “inexcusable” because they “occurred at the precise historical moment that the capacity to abolish famine – both technical (food production) and logistical (food distribution) – was first achieved.”); see also Amartya Sen, “Ingredients of Famine Analysis: Availability and Entitlements” (1981) 96 Quarterly Journal of Economics 433 (Arguing that there is no causal relationship between decreases in aggregate food availability and famine and that instead famines are the product of certain groups of people within a society lacking sufficient economic “entitlements” to gain access to sufficient food through either self-production or market mechanisms.); Francesco Sarracino, “Explaining Famines: A Critical Review of Main Approaches and Further Causal Factors” (Natural Resources, Agricultural Development and Food Security International Research Network, 2010) [unpublished] at 58-59, online: <http://economia.unipv.it/naf/Working_paper/WorkingPaperSarracino.pdf> (Providing an overview of the main famine causation theories and concluding that no single theory is sufficient, but that modern famines are instead the product of a complex set of causal factors, with “economic, political, social and environmental” factors labelled as “crucial”).
48 See Devereux, “From ‘Old Famines’ to New Famines”, supra note 44 at 7 (“Two factors are distinctive about ‘new famine’ thinking. The first is a focus on politics as central to explanations of famine causation, and the second is an analytical focus on failures to prevent famine, rather than on the triggers of food shortage or disrupted access to
historian Cormac Ó Gráda: “[h]uman action had a greater impact [in twentieth century famines] than, or greatly exacerbated, acts of nature. The relative importance of political factors--‘artificial causes or those within human control’--and food availability tout court was reversed.” Currently there are numerous proposed general famine causation theories, although there is a trend away from singular theories and towards more nuanced approaches. Links between famine and instances of armed conflict and repressive governance are also common themes in much of modern famine scholarship.

This fundamental shift in understandings of the dynamics of modern famine began in the mid-twentieth century and accelerated towards the end of the century with the findings of Sen and others. The timing of this shift also roughly coincided with the beginnings of modern international criminal law marked by the creation of International Military Tribunal (‘IMT’) at Nuremberg and other post-World War II prosecutions and the more recent exponential growth of international criminal law jurisprudence beginning in the early 1990s with the creation of international criminal tribunals in the former Yugoslavia and Rwanda in 1993 and 1994 respectively. After uncovering the links between human agency many famine scholars emphasized the need for new approaches to famine prevention and responses, often directly referencing the need for criminal accountability.

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food.”). This change in focus from food production to allocation is neatly summed up by the famous observation of economist and famine theorist Amartya Sen that “starvation is a matter of some people not having enough food to eat, and not a matter of there being not enough food to eat.” Sen, supra note 47 at 434.

49 See Ó Gráda, supra note 4 at 11.

50 See generally, Devereux, “From ‘Old Famines’ to New Famines”, supra note 44 at 5-14 (providing an overview of famine theories and their evolution over time).

51 See e.g. Ó Gráda, supra note 4 at 11-13 (Discussing the roles of armed conflict and totalitarianism in causing famine in the twentieth century and concluding at 11 that “Mars in his various guises accounted for more famines than Malthus” in the twentieth century.).

52 See Alex de Waal, Famine Crimes: Politics & the Disaster Relief Industry in Africa (Bloomington: Indiana University Press, 1997) [de Waal, Famine Crimes]; see also Devereux, “From ‘Old Famines’ to New Famines, supra note 44 at 13 (Stating that one implication of the paradigm shift away from Malthusian understandings of famine “relates to identifying who is responsible for causing famines, or at least allowing them to happen” and identifying the “twin themes of responsibility for famine causation and accountability for famine prevention” that inform the various chapters in his recent collection on the persistence of modern famine); Jenny Edkins, “The Criminalization of Mass Starvations: From natural disaster to crime against humanity”, in Stephen Devereux, ed, The New Famines: Why Famines Persist in an Era of Globalization (New York: Routledge, 2007) 50 (advocating for an international criminal law approach to modern famine).
One result of this simultaneous shift in understandings of famine and increased prominence of international criminal law, has been the fostering of a limited, but lively debate surrounding the question of what role international criminal law can and should play in suppressing and/or accounting for instances of modern famine. In 1998, human rights activist and famine scholar Alex de Waal published an influential book that sought to debunk popular myths about famine conditions in the African continent. In his analysis and indeed, in the very title of his work, de Waal employs the phrase “famine crimes” to describe the association between recent African famines and human agency. De Waal’s analysis does much to displace some of the popular, yet outdated myths surrounding modern famine conditions and causation in Africa and also powerfully argues that the massive humanitarian efforts on the continent have proven largely unsuccessful in preventing or mitigating famines. De Waal is a human rights activist and not a lawyer, however, and as a result employs the term “famine crimes” primarily in a descriptive, rather than purely legal sense and argues for political, rather than law-based mechanisms to prevent famine in the future. As such, although he notes that human rights law is useful “as a political idiom for exercising or curtailing power” and also calls for prosecuting individuals for the war crime of using starvation as a method of warfare, these brief observations are made wholly in service to de Waal’s larger argument that famine prevention should focus on political, rather than technical solutions.

The most notable legal analysis of the intersections between modern famine and international criminal law to date was produced by law professor David Marcus, who published an influential 2003 article discussing potential applicability of international criminal law to modern famine situations. Marcus argues that current international criminal law formulations provide only “patch-work coverage” of common famine situations and recommends the formal criminalization

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53 de Waal, Famine Crimes, supra note 52.
54 Ibid at 1-6 (Arguing that global famine could be eradicated through the overhaul of political processes and the adoption of anti-famine political contracts, wherein access to basic foodstuffs is viewed as a human right and violations of which could be prosecuted as war crimes when occurring during periods of armed conflict.).
55 Ibid.
56 Ibid at 6. Much of de Waal’s analysis focuses on the failings of humanitarian efforts in ending famine in Africa and what he perceives as the overemphasis on technical, rather than political solutions to famine and as, does not go into any depth in describing the coverage of international criminal law over modern famine situations, aside from a few cursory remarks. In relation to international criminal law applicability, de Waal does conclude that for “war famines, the challenge is to deter those who cause them” and suggests the prosecution of war crimes in such instances as useful in doing so.
of intentional (termed “first degree”) and reckless (termed “second degree”) “faminogenic” behaviour through the adoption of new international crimes.\textsuperscript{58} Graduate student Daniel Butler subsequently authored a similar paper, coining the term “faminism” to refer to actions of individuals causing famine.\textsuperscript{59} Butler’s conclusion concurs closely with Marcus’ “patch-work”\textsuperscript{60} description of the current coverage of international criminal law over famine and similarly advocates for the adoption of new international crimes.\textsuperscript{61} More recently, law professor Jens David Ohlin argued in a brief opinion piece that recent famines in portions of Somalia involved the commission of crimes against humanity by members of the Al-Shabaab militant group.\textsuperscript{62} Meanwhile, numerous other commentators and academics from various disciplines have more generally advocated for an international criminal law approach to modern famine.\textsuperscript{63} Some of these commentators have also argued that specific famines have involved the commission of

\textsuperscript{58} Ibid at 246-247 (Defining four proposed “degrees” of famine and arguing that first- and second-degree famines are criminalized under existing international criminal law.).


\textsuperscript{60} Marcus, supra note 57 at 247.

\textsuperscript{61} Butler, supra note 59.


\textsuperscript{63} Examples of legal scholarship include, e.g. Marcus, supra note 57; Butler, supra note 59; Randle C DeFalco, “Accounting for Famine at the Extraordinary Chambers in the Courts of Cambodia: The Crimes against Humanity of Extermination, Inhumane Acts and Persecution” (2011) 5 International Journal of Transitional Justice 142 [DeFalco, “Accounting for Famine”] (arguing that senior Khmer Rouge leaders could potentially be successfully prosecuted for crimes against humanity predicated on famine); J Solomon Bashi, “Prosecuting Starvation in the Extraordinary Chambers in the Courts of Cambodia” (2011) 29 Wisc Int’l LJ 34 (arguing that the ECCC has a “duty” to prosecute the “crime” of “starvation” generally); Grace M Kang, “A Case for the Prosecution of Kim Jong Il for Crimes Against Humanity, Genocide and War Crimes” (2006) 38 Colum Hum Rts LR 51 (article arguing that Kim Jong Il could be criminal liable for causing famine in North Korea that has killed over one million people); Sheri P Rosenberg, “Genocide is a Process, Not an Event” (2012) 7 Genocide Studies & Prevention 16 (arguing that genocide should be understood as a process, rather than an event though based on a non-legal definition of genocide that more closely resembles crimes against humanity). Examples of non-legal scholarship include, e.g. Alex de Waal, “Reflections on the Difficulties of Defining Darfur’s Crisis as Genocide” (2007) 20 Harv Hum Rts J 25 [de Waal, “Reflections”] (article by human rights and famine scholar arguing that the use of the term “genocide” has led to confusion and legal debates that have obfuscated key issues, including famine); Charles Kenny, “Famine is a Crime” (25 July 2011) Foreign Policy, online: Foreign Policy <http://www.foreignpolicy.com/articles> (op-ed by development economist); Helen Fein, “Genocide by Attrition 1939-1993 the Warsaw Ghetto, Cambodia, and Sudan: Links between human rights, health, and mass death” (1997) 2:2 Health & Human Rights 10 (article by criminal justice professor theorizing that famine can amount to genocide, albeit based on a non-legal definition of genocide that is much wider than that contained in the Genocide Convention); Rhoda E Howard-Hassmann, “State-Induced Famine and Penal Starvation in North Korea” (2012) [unpublished working paper, archived at Wilfred Laurier University Department of Global Studies and Balsillie School of International Affairs] online: <http://www.wlu.ca> (article by sociologist); Renate Stark, “Holodomor, Famine in Ukraine 1932-1933: A Crime Against Humanity or Genocide? (2010) 10 Irish Journal of Applied Social Studies 20 (undergraduate student paper); Edkins, supra note 52 (generally advocating for an international criminal law approach to famine).
international crimes, such as those in the Ukraine (1932-1933), Cambodia (1975-1979), Ethiopia (1982-1985), North Korea (1990s-ongoing intermittently), Darfur (intermittent since approximately 1985), and Somalia (intermittent since at least 2011), to name a few common examples.

Despite these academic arguments that these and other instances of mass famine have been intimately associated with the commission of international crimes, to date there has been a notable dearth of direct engagement with famine issues in international criminal law practice. Certain post-World War II cases partially took up the issue in relation to the starvation enforced on Jews in concentration camps and ghettos and living conditions suffered by civilians in occupied Poland, but failed to clearly lay out precisely how hunger and starvation fit within the elements of the charged crimes. Despite this early general support for applying international criminal law to severe instances of famine and starvation, modern international criminal law practice has largely failed to move the issue forward and for the most part, no meaningful attempt has been made to utilize international criminal law to punish individuals for causing mass famine.

There are likely several reasons for this avoidance of addressing famine issues directly within international criminal law practice. First, popular conceptions of famine as a natural disaster persist outside the field of famine studies, and lawyers and judges are likely to be ignorant of the recent paradigm shift in understandings of famine. Second and more generally, prominent international lawyer Hillary Charlesworth has argued that the entirety of public international law suffers from an overemphasis on crisis situations, while largely ignoring the structural day-to-

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64 See e.g. Marcus, supra note 57; Butler, supra note 59.
65 See e.g. DeFalco, “Accounting for Famine”, supra note 63; Bashi, supra note 63.
66 See e.g. de Waal, Famine Crimes, supra note 52; Marcus, supra note 57; Butler, supra note 59.
67 See e.g. Kang, supra note 63; Howard-Hassmann, supra note 63.
68 See e.g. de Waal, “Reflections”, supra note 63.
71 See e.g. Devereux, “From ‘Old Famines’ to New Famines” supra note 44 at 13 (Noting that “Old famine” thinking continues to dominate contemporary understandings of famine causation, long after it should have been superseded by more nuanced analyses.”).
day occurrences that produce injustice and human suffering.\textsuperscript{72} Famine issues very often sit squarely within the blind spot identified by Charlesworth, as famines can be caused and maintained without the use of direct violence. Such famines, such as for example those in North Korea in the 1990s, often trigger general condemnation and strong diplomatic language, but do not provide the kind of shocking violence that is typically a necessary impetus for drastic international measures such as intervention or at least the pursuit of international criminal law accountability. The doctrine of international criminal law appears to mirror this larger ignorance of indirect violence within public international law generally, as international crimes are traditionally associated with instances of extreme physical violence.

Third, the sheer difficulty of addressing famine issues via international criminal law likely also contributes to ignorance of famine issues within modern international criminal law jurisprudence. International criminal law is a dense and complex body of law, as it is routinely tasked with assigning and qualitatively describing individual culpability for crimes committed by vast networks of actors over large geographic and/or temporal expanses. Addressing famine issues would inevitably add to this burden of complexity, as the fundamental recurring challenge of “overdetermined atrocities” predicated on international criminal law’s “exclusive focus on individual accountability and the pervasive influence of collectivities”\textsuperscript{73} would be rendered even more daunting in typical famine scenarios, as establishing sufficient proof to satisfy the stringent causation and \textit{mens rea} requirements of international criminal law would be further complicated by the myriad of contributing causes to most famines and the fact that certain of these causes indeed may fall outside the scope of human control completely.

Fourth and finally, the application of existing conceptions of international criminal law to novel factual scenarios is always fraught with controversy and given the often difficult political climate within which international courts and tribunals typically must operate, relevant decision-makers may simply seek to avoid inviting additional controversy by seeking to pursue novel


\textsuperscript{73} The use of the term “overdetermined” here refers to instances where an event results from “multiple sufficient causes.” For an overview of how overdetermined atrocities fundamentally inform international criminal law, see James G Stewart, “Overdetermined Atrocities” (2012) New York University School of Law Public Law & Legal Theory Working Paper Series No 12-53 at 2. Stewart argues that overdetermination of causation amongst multiple actors creates a “moral quandary is, by and large, the leitmotif for international criminal justice.”
interpretations of international criminal law or addressing the often highly politicized historical narrative of a particular famine.

Given these considerable challenges standing in the way of a potential shift within international criminal law practice to address famine issues head-on, the question of what would be gained from such a shift comes to the fore. Modern conceptions of famine resonate with both the moral and consequentialist underpinnings of international criminal law. Individual victims of famine often experience famine as abuse committed against them by others. It is the traditional role of criminal law to respond to these types of harms by formally declaring who is responsible and to what degree, if any. Furthermore, modern famine scholarship now lays the vast majority of the estimated 70 million lives claimed by famine in the past century squarely at the doorstep of human agency. Under a moral or deontological theory of criminal justice, such massive harmful conduct demands criminal accountability when resulting from human agency. Put more simply, famine victims morally deserve justice for being subjected to the horrors of famine.

A consequentialist justificatory inquiry reaches a similar conclusion, as practical goals of deterrence and reconciliation could be served through application of international criminal law to famine. Scholar Jenny Edkins argues that a shift in the “vocabulary” surrounding famine towards an international criminal law approach could also have potentially massive implications for political responses to existing and future famines. For example, the situations in Darfur, Somalia and North Korea, where intermittent famine continues to be inextricably linked to violence and oppression, would likely be discussed in more accurate terms under an international criminal law approach, rather than continuing to be framed in terms of more amorphous legal concepts, such as international human rights law. Recasting instances of modern famine in international criminal law terms could also change understandings of the nature of the suffering during famines. This suffering would cease to be discussed in the out-dated, yet persistent neutral language of tragedy (i.e. turaphik), but would shift to language of assessing individual responsibility attendant to criminal law (i.e. bong-ot). Famines could become popularly understood as “crimes” rather than mere “tragedies” or “mistakes”.

74 See 11-13, above.
75 See Edkins, supra note 52 at 57 (discussing the implications of an international criminal law approach to famine and discussing the potential results of such a shift on the “vocabulary” surrounding famine).
Despite the current dearth of actual prosecutions to date, some progress appears to already be underway towards recasting famine as a proper subject of international criminal law. In Darfur, the International Criminal Court (“ICC”) has issued indictments against Sudanese President Omar Al-Bashir and others for various crimes including genocide, war crimes and crimes against humanity, based partially on the terrible living conditions enforced on civilians in the Darfur region.  

Famine is a major component of these living conditions that has contributed to the spread of disease and increased mortality rates in Darfur and thus would likely be explored should the case against Al-Bashir or others ever go to trial. There is also growing momentum for the proposition that the Somali famines of recent years have involved the commission of war crimes and crimes against humanity by members of the Al-Shabaab militia.

Meanwhile, concerning the situation in North Korea, in early 2013 Marzuki Darusman, the United Nations (“UN”) Special Rapporteur on the situation of human rights in the Democratic People’s Republic of Korea, issued a report to the UN Human Rights Council calling for an investigation into patterns of human rights violations and potential crimes against humanity in North Korea. In the report, Darusman identified nine “inter-linked” patterns of human rights violations in North Korea since 2004 that potentially rise to the level of crimes against humanity, including violation of the right to food, “in particular the effect of State-controlled food

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76 See e.g. Prosecutor v Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”), ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (4 March 2009) (International Criminal Court, Pre-Trial Chamber I), online: ICC <http://www.icc-cpi.int/> [Bashir, Arrest Warrant I] (entering charges of war crimes and crimes against humanity based on attacks against civilians in Darfur); Prosecutor v Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”), ICC-02/05-01/09, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir (12 July 2010) (International Criminal Court, Pre-Trial Chamber I), online: ICC <http://www.icc-cpi.int/> [Bashir, Arrest Warrant II], (entering charges of genocide against Al-Bashir, including those predicated on “deliberately inflicting conditions of life calculated to bring about physical destruction”).

77 See e.g. Alex de Waal, “On Famine Crimes and Tragedies” (1 November 2008) 372:9649 The Lancet 1538, online: The Lancet <http://www.thelancet.com>; see also de Waal, “Reflections”, supra note 63 at 30 (Discussing the problematic nature of the use of the term “genocide” to describe the abuses in Darfur and calling for the combination of genocide studies and more general scholarship on Sudan’s civil wars and humanitarian crises and concluding that one welcome result of such an approach would be “a sharper conceptualization of the creation of famine as a crime against humanity.”).


distribution policies on the nutritional status and health of the population and the restricted entry of international humanitarian aid to deal with the endemic food crisis. On 18 March 2013, the UN Human Rights Council voted to establish a one-year commission of inquiry to investigate the violations outlined in Darusman’s report. These initial steps could ultimately portend a larger, more general movement towards a more international criminal law-centric understanding of famines in the future.

Despite this incremental movement, legal scholarship and practice nonetheless remains scattershot, even confused, and has yet to satisfactorily assess whether international criminal law could be successfully applied to a specific real-world famine scenario, instead mostly focusing on advocacy for legal reform or the development of further theory. Human rights activists have made forceful moral arguments for the application of international criminal law to modern famine scenarios, but have not explained whether the law could sufficiently do so under current formulations. Famine scholars and historians have provided compelling analyses of the complex causal factors involved in specific modern famines, but have failed to develop these factual accounts with an eye to satisfying the exacting requirements of specific international crimes. Meanwhile, the few lawyers who have analyzed the potential application of international criminal law to famines have thus far focused on more generalized hypothetical applications of international criminal law to largely underdeveloped factual scenarios and in doing so, have failed to fully address key issues of proof that would be central to any attempted adjudication of international criminal law based on famine. The result of this scattershot body of scholarship and political advocacy efforts has mostly been further confusion concerning the

80 Ibid at para 6(a).
82 E.g. de Waal, Famine Crimes, supra note 52 (generally referring to instances of intentional creation of famine as crimes, without providing a detailed set of legal reasons for doing so).
83 E.g. Sen, supra note 47.
84 E.g. Marcus, supra note 57 (mentioning famines in the Ukraine, North Korea and Ethiopia as potentially involving the commission of international crimes based on broad summaries of each factual scenario); Butler, supra note 59 (also mentioning the famines in the Ukraine, North Korea and Ethiopia as examples based on broad factual summaries); DeFalco, “Accounting for Famine”, supra note 63 (highlighting crimes against humanity as a potential framework for prosecuting famine-related crimes of the Khmer Rouge based on a summary of key factual issues); Bashi, supra note 63 (arguing that the ECCC should prosecute “starvation” crimes based on broad factual conclusions drawn from several secondary sources, interviews and translated primary documents); Ohlin, “Somalia famine”, supra note 62 (arguing that the International Criminal Court (“ICC”) should indict members of the Al-Shabaab militia in Somalia predicated on famine causation).
critical topic of whether the next logical step towards achieving a suitable international criminal law response to famine issues is legal reform or merely the application of existing international criminal law provisions to real-world scenarios.

These limitations within the general discourse on intersections between famine and international criminal law have also been reproduced within the context of scholarship on the Khmer Rouge period famine. In 2011, law student J Solomon Bashi published an article advocating for an international criminal law approach to famine at the ECCC.\(^{85}\) In it, Bashi argues that the ECCC should pursue criminal charges based on “starvation” because it is a “crime” that, for many victims, “defined the [Khmer Rouge] period.”\(^{86}\) This language suggests that starvation is a crime in and of itself, but is subsequently replaced by analysis of existing traditional international crimes and Bashi concludes that “although it seems likely that there is enough evidence to prove that the crime against humanity of extermination took place, it is unlikely that prosecutors would be able to convict senior Khmer Rouge leaders [of extermination predicated specifically on causing famine] using traditional legal doctrine.”\(^{87}\) What is left unclear is precisely where the crucial failure points in a potential case against Khmer Rouge leaders would be, aside from general references to mens rea-based defences based on lack of knowledge.\(^{88}\) In 2011, I also published an article arguing that it would be a worthwhile endeavour for the ECCC to attempt to criminally account for the Khmer Rouge period famine. That paper proposes that the crimes against humanity of extermination, persecution and other inhumane acts present an ideal entry point, should the ECCC seek to account for famine during the Khmer Rouge period and reaches the contrary conclusion to Bashi that convictions appear possible.\(^{89}\)

Subsequently, legally-trained anthropology professor Howard De Nike critiqued my suggestion that convictions for crimes against humanity could be achievable based on famine at the ECCC, by pointing out that my article was lacking a “description of a causal nexus between alleged

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85 Bashi, supra note 63.
86 Bashi, supra note 63 at 35.
87 Ibid at 48.
88 Ibid at 68 (Concluding that “[p]rosecuting the leaders of the [Khmer Rouge] regime will certainly be a challenge. The accused will likely claim that they were unaware of 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.”).
89 DeFalco, “Accounting for Famine”, supra note 63.
perpetrators and victims of famine.” De Nike’s concludes that “any prosecution using mass starvation as a factual starting point must demonstrate that the law on this question, from 1975-1979, was sufficiently defined to support the charge” and that “even by 1979, this level of legal surety is doubtful.”

Language utilized by both Bashi and De Nike exemplifies how the issue of the potential application of international criminal law to modern famine is often confused within current scholarship on the issue. Both authors utilize language suggesting that the relevant question is whether “starvation” or “famine” are “crimes” recognized under international criminal law. Although both authors in other places clarify that established international crimes would have to be utilized to attach liability predicated on famine or starvation, using language suggesting that “famine” is potentially a “crime” confuses the true issue, especially for non-legal practitioners attempting to make sense of complicated international criminal law provisions and how such provisions relate to their own work on famine.

De Nike in particular, provides no legal analysis of the status of customary international law vis-à-vis provisions relevant to famine as of 1979, yet concludes that it is “doubtful” that customary law was “sufficiently defined to support” charges predicated on mass starvation in Cambodia during the Khmer Rouge period as of 1979. This assertion reflects another misconception prevalent within current discourses on intersections between international criminal law and famine: confusion between factual and legal challenges. De Nike appears to suggest that if there is no clear precedent within international criminal law practice for prosecuting individuals for international crimes predicated on famine, then consequently customary law could not support such charges. While previous practice would certainly aid in any attempt to prosecute an international crime predicated on an instance of famine (and does indeed exist), such practice is in no way a prerequisite, and to hold otherwise would improperly retard the progressive development of international criminal law to respond to novel factual scenarios.

91 Ibid at 6.
92 See e.g. Ibid at 6 (Concluding that “it is no surprise that human rights advocates focus attention on obtaining legal redress where avoidable mass starvation can be framed as a crime against humanity. But as with any other courtroom matter, evidentiary facts and causation must be proved.”); see also Bashi, supra note 63 at 35-39 (Analyzing the “History of Starvation as an International Crime” and “Starvation as a War Crime”).
93 De Nike, supra note 90 at 6.
In the case of De Nike’s arguments concerning the state of customary international law between 1975 and 1979, it appears that his analysis is predicated on a mistaken interpretation of the international criminal law concept of *nullum crimen sine lege* (“no crime without law”), also referred to as doctrine of “legality” which forbids the application of *ex post facto* laws. This doctrine, while protecting accused from being prosecuted for crimes that did not exist during the period of time when the alleged crime actually occurred, in no way bars the application of existing international crimes to novel factual scenarios. If an accused mounts a legality challenge to a relevant provision of international criminal law, the prosecution must demonstrate only that the challenged law “(1) existed at the relevant time in a manner providing for individual liability; (2) in a form sufficiently specific to render the imposition of criminal sanctions for the acts of the accused foreseeable; and (3) accessible to the particular accused.” Indeed, the doctrine of legality is precisely the mechanism that would ban any attempt to prosecute instances of famine or starvation as discrete crimes in and of themselves, which in turn, underscores the importance of avoiding language suggesting that either of these two phenomena amount in any sense to constituting an international crime. Conversely, while the doctrine of legality does forbid the creation of new crimes at trial, it in no way stands in the way of convictions predicated on a novel underlying factual scenario, such as one involving famine, so long as it was foreseeable that that acts of the accused in causing or perpetuating famine conditions could potentially satisfy the elements of an established international crime.

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95 *Ibid*, citing *Prosecutor v Mitar Vasiljević*, IT-98-32-T, Judgement (29 November 2002) at para 198 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <http://www.ictr.org/> [Vasiljević, Trial Judgement] (stating that the offense must be defined “with sufficient clarity for it to have been foreseeable and accessible, taking into account the specificity of customary international law.”); accord *Prosecutor v Milan Milutinović*, IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – Joint Criminal Enterprise (21 May 2003) at para 21 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), online: ICTY <http://www.ictr.org/>. The twin inquiries of specificity and accessibility are sometimes grouped as subsets of the requirement that the law was defined with sufficient “clarity” at the relevant time. See e.g. *Streletz, Kessler & Krenc v Germany*, Nos 34044/96, 35532/97 & 44801/98, [2001] II ECHR 31 at para 91 (stating that to satisfy the principle of *nullum crimen*, the proper inquiry is “whether at the time when they were committed, the applicants’ acts constituted offences defined with sufficient accessibility and foreseeability under international law.”).

96 In any international criminal law prosecution, for a conviction to be proper, the acts of the accused must be connected to the substantive charged crime(s) via an established international mode of liability. Of course, this would be true of crimes predicated on famine. While reference is generally made to international modes of liability
This is not to deny that significant factual and legal hurdles would stand in the way of a successful prosecution at the international level predicated specifically on famine. Such challenges are quite real and potentially daunting, if not insurmountable. Indeed, De Nike raises some of these challenges, positing:

What exactly did the Khmer Rouge leadership do (or not do) that brought famine to the population? Is it enough to simply prove that thousands of deaths from lack of food occurred during the Khmer Rouge rule? Is there a legal doctrine that shifts the burden of proof to the defendants under these circumstances? What specific policies were adopted that caused inadequate rice harvests? And, where these policies known, or ought to have been known, as highly likely to result unfavourably? To the contrary, according to Khmer Rouge declarations, the expectation was bounteous agricultural crops, not drastic shortages.97

Some of these questions raise important issues that go to the core of the topics scrutinized within this thesis. For example, this thesis will show that De Nike is correct in asserting that in any pursuit of criminal accountability for the Khmer Rouge famine it would be insufficient to demonstrate simply that thousands of deaths occurred. Instead, the specific elements of key international crimes are outlined and considered against available information on the Khmer Rouge famine. This thesis will also illustrate however, that De Nike is mistaken in asserting that utilization of some form of burden shifting mechanism is necessary to establish the requisite mens rea for relevant international crimes within the context of famine, at least in specific context of the Khmer Rouge famine. The assertion of the need for such a mechanism appears to be predicated on an improperly static view of the relationship between Khmer Rouge policy and resultant famine conditions by positing that the relevant inquiry is whether Khmer Rouge leaders were aware that their policies would cause famine at the moment they were enacted. This thesis demonstrates that such an approach focuses wrongly on a single moment in time, while in actuality, the critical determination is whether Khmer Rouge leaders were made aware while still

within this thesis, a fulsome analysis of whether and how such modes could be used to attach liability for crimes predicated on famine to former Khmer Rouge leaders is outside the scope of the current inquiry. Nonetheless, the choice to analyze the potential criminal culpability of the Khmer Rouge “Party Center” is motivated partially because of the author’s belief that some or all members of the Party Center could be held individually responsible for the acts of the Center as an entity through modes of liability such as, inter alia, joint criminal enterprise, command responsibility, ordering and/or instigating.

97 De Nike, supra note 90 at 6.
in power, of the fact that their draconian policies were enforcing severe famine conditions on the civilian population, as there is no evidence suggesting that these leaders ever took any steps to alleviate famine conditions or even to deviate from famine-inducing policies in the slightest.

These arguments are developed in this thesis through detailed factual and legal analyses of the Khmer Rouge period. Chapter Two of this thesis provides a detailed overview of the famine that occurred in Cambodia during the Khmer Rouge period under the Khmer Rouge-dominated Communist Party of Kampuchea (“CPK”) government. This evidence strongly suggests that the Khmer Rouge period famine was a direct, foreseeable and wholly avoidable consequence of Khmer Rouge policies and that over time the regime’s leaders were made aware of these facts, but chose to continue strictly enforcing famine-inducing policies despite their disastrous effects on the civilian population. Consequently, it is concluded that while the mere existence of famine in Cambodia may have been the product of numerous contributing causes, all of the main contributing factors can be traced back to the Khmer Rouge leadership, rendering causation challenges complex, yet surmountable if criminal accountability was pursued. Similarly, while no single document or piece of evidence singularly demonstrates that members of the Khmer Rouge leadership became aware that their policies were enforcing famine throughout the country, the totality of the evidence strongly suggests such knowledge. Thus, it is concluded that from a factual standpoint, available evidence appears sufficient to establish beyond any

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98 The term “Khmer Rouge” was popularized by King Sihanouk, who referred to generally to the “Red Cambodians” (“Khmer Krahom”) during his repression of leftist movements while he was Prime Minister of Cambodia prior to the 1970 coup d’état that installed the Lon Nol regime. The official name of what is popularly known as the “Khmer Rouge” was the Communist Party of Kampuchea (“CPK”). Various anti-Lon Nol factions united with the CPK during the 1970-1975 civil war. When the Lon Nol government folded and Phnom Penh was captured on 17 April 1975, the rebel forces wore a variety of uniforms and appeared to have a confused, diffuse command structure. See Kiernan, Pol Pot Regime, supra note 28 at 19-20, 31-39. After the Khmer Rouge seized power on 17 April 1975, a group of hardline CPK members, led by Pol Pot, Nuon Chea and Ieng Sary amongst others, took control of the newly formed government and purged perceived opposition groups (see ibid at 51-101); see also David Chandler, Voices from S-21: Terror and History in Pol Pot’s Secret Prison (Berkeley: University of California Press, 2000) [Chandler, Voices from S-21] at 43-49; see also Ben Kiernan, “Introduction” to “Planning the Past: The Forced Confessions of Hu Nim” in David P Chandler, Ben Kiernan & Chanthou Boua, eds & translators, Pol Pot Plans the Future: Confidential Leadership Documents from Democratic Kampuchea, 1976-1977 (New Haven: Yale Southeast Asian Monograph Series, 1988) 227 at 228 [Introduction to Planning the Past] (Introduction to the translation of the forced confession of former prominent Khmer Rouge member Hu Nim in translated anthology of key primary Khmer Rouge documents with introductory commentary on each document by scholars of Khmer Rouge period. Stating that the elimination of prominent public Khmer Rouge figures Hou Yuon and Hu Nim “completed the political supremacy of four men (Pol Pot, Ieng Sary, Son Sen, and Khieu Samphan) who had studied together in Paris in the 1950s, and the wives of the first three (Khieu Ponnary, her sister Khieu Thirth, and Yun Yat.”).
reasonable doubt, that high-level Khmer Rouge leaders knowingly enforced severe famine conditions on the civilian population under their control while in power.

This factual account of the Khmer Rouge period famine is followed in Chapter Three by an analysis of whether individual former Khmer Rouge leaders could theoretically be convicted of one or more international crime(s) predicated specifically on causing famine. To do so, provisions of international criminal law drawn from genocide crimes, war crimes and crimes against humanity are all considered, both in regards to their general applicability to famine scenarios and specifically to the facts adduced in Chapter Two concerning the Khmer Rouge period famine. Chapter Three concludes that available evidence suggests that the famine conditions enforced on the civilian population by the Khmer Rouge regime involved the commission of the crimes against humanity of extermination, persecution and/or other inhumane acts. It is further concluded that individual former high-level Khmer Rouge leaders could potentially be held individually responsible for these three crimes against humanity based on their contributions to and knowledge of famine and starvation.

Chapter Four subsequently offers some general conclusions concerning the potential role international criminal law could play in responding to and hopefully, suppressing famine moving forward.
Chapter 2
Famine in Cambodia under the Khmer Rouge

1 "He Who Has Rice Possesses All"99

To discuss food availability in Cambodia is essentially to discuss rice production and distribution. Rice is far and away, the primary staple of the Cambodian diet, accounting for up to eighty percent of the total caloric intake and up to seventy percent of the protein intake of the average Cambodian.100 The early 1960s was a period of increased productivity in Cambodia’s rice fields and prior to 1970, the average Cambodian ate 600 grams of rice per day, an amount approximately 100 grams greater than the average intake of citizens of most other rice-producing nations.101 When Cambodia descended into civil war in 1970, the rice crop predictably suffered. Planting, harvesting and processing rice were all inhibited by the fighting between the Lon Nol government and the Khmer Rouge.102 The massive US bombing campaign in support of the Lon Nol government103 further reduced Cambodia’s agricultural production, as the bombs killed

99 Survivor-reported slogan from the Khmer Rouge period. See Henri Locard, Pol Pot’s Little Red Book: The Sayings of Angkar (Chiang Mai: Silkworm Books, 2005) at 238 (Collection of reported Khmer Rouge slogans. Accuracy verified by author with experts at DC-Cam).

100 J L Maclean et al, eds, Rice Almanac, 3d ed (Wallingford: CABI Publishing, 2002) at 141, online: International Rice Research Institute <http://books.irri.org/0851996361_content.pdf> (country profile statistics for Cambodia); see also K A S Murshid, “Food Security in an Asian Transitional Economy: The Cambodian Experience” (1998) online: United Nations Research Institute for Social Development <http://www.unrisd.org/> (Report, observing that in Cambodia “[t]he contribution of rice to total calories is high, indeed higher than is conventionally assumed. Our estimates put the figure at around 80 percent, suggesting an extremely heavy dependence on rice.”) (internal citation omitted); Vincent Tickner, “Food Security in Cambodia: A Preliminary Assessment” (1996) UN Research Institute for Social Development, Discussion Paper 80 at 7 (Noting that “[t]he [Cambodian] diet is strongly based on rice (supplying about 75 per cent of calories)”).

101 Mclean et al, supra note 100 at 163. 1963 and 1964 yielded successive record rice harvests and Cambodia experienced a trade surplus for the first time in almost a decade. See also Kiernan, Pol Pot Regime, supra note 28 at 16-17 (“In 1963, Cambodia had a record rice harvest. In 1964, that record was broken. Rice exports soared, and the country’s balance of trade was positive for the first time since 1955.”); H J Nesbitt, ed, Rice Production in Cambodia (Manila: International Rice Research Institute, 1997) at 5. This surplus vanished in the second half of the decade as mass quantities of Cambodian rice were smuggled into Vietnam and sold to both warring factions, although production appears to have remained high. Kiernan, Pol Pot Regime, supra note 28 at 17 (Stating that from 1965 onwards, “[l]arge amounts of Cambodian rice began to be smuggled across the Vietnamese border to the armies of both sides.”).

102 Nesbitt, supra note 101 at 5 (internal citations omitted). Lon Nol was a general in the Sihanouk government who took power in Cambodia in 1970 pursuant to a coup d’état widely believed to be supported by the US government. The US was a close ally of the Lon Nol government, providing aid and air support in the civil war against the Khmer Rouge from 1970-1975 before abruptly pulling out of Cambodia in April of 1975 just prior to the Khmer Rouge victory of 17 April 1975.

103 Recently declassified US military records regarding the bombing campaign in Cambodia show that this bombing was even more extensive than previously believed. For a summary of this new information, see Taylor Owen & Ben
farmers and draught animals and damaged large swaths of croplands. By 1975, Cambodia’s rice production had dropped by eighty-four percent compared to the 1970 crop according to official records.

The importance of rice production and food security in Cambodia was not lost on the Khmer Rouge leadership and the movement gained members by portraying its brand of radical socialism as a path towards better living conditions, more food and a more equitable division of wealth. Khmer Rouge propaganda lionized Cambodia’s farming peasantry and portrayed the movement’s leaders as the heralds of a new era of agricultural prosperity in Cambodia. For example, in a 1973 propaganda film shot in “liberated” Kampong Cham province, Khmer Rouge representative Khieu Samphan leads a visiting delegation from North Vietnam on a tour of a model collective farm teeming with agricultural bounty. The workers in the cooperative grin for the camera as they thresh rice and perform other chores. Food is everywhere and storehouses burst forth with crops and fattened livestock.

Kiernan, “Bombs Over Cambodia” The Walrus (October 2006), online: The Walrus Magazine <http://thewalrus.ca/> (Stating that newly declassified information “reveals that from October 4, 1965, to August 15, 1973, the United States dropped far more ordnance on Cambodia than was previously believed: 2,756,941 tons’ worth, dropped in 230,516 sorties on 113,716 sites. Just over 10 percent of this bombing was indiscriminate, with 3,580 of the sites listed as having ‘unknown’ targets and another 8,238 sites having no target listed at all.”).

See generally, ibid; see also Kiernan, Pol Pot Regime, supra note 28 at 16-25.

Nesbitt, supra note 101 at 5 (internal citations omitted) (It should be noted that large-scale smuggling of rice into Vietnam presumably accounts for some of the decrease in official production, along with the effects of the 1970-75 civil war). These amounts represent rough estimates only and are used as general, illustrative figures only.


The Khmer Rouge referred to areas under their full control as “liberated zones” during the 1970-1975 civil war.

Original footage viewed by author at DC-Cam. Footage, titled “The Vietnamese footage: Khmer Rouge Liberated Zone in 1973” available for viewing in DC-Cam’s Public Information Room (66 Sihanouk Boulevard, Phnom Penh, Cambodia) upon request.

Indeed, in many areas, Khmer Rouge commune-based agricultural reorganization may have presented a welcome alternative to the repressive ramassage du paddy [state rice collection] program enforced by the Lon Nol regime. The ramassage du paddy policy forced Cambodian rice farmers to sell their crop to the government at fixed prices. These prices were often significantly lower than those offered by the North Vietnamese military. For a discussion of the ramassage du paddy campaign, see Elizabeth Becker, When the War was Over: Cambodia and the Khmer Rouge Revolution (New York: Public Affairs, 1998) at 103-104.
The Khmer Rouge began implementing cooperative farming in liberated areas early in the 1970-1975 civil war against the US-backed Lon Nol regime.\footnote{See \textit{ibid} at 147-149.} In these cooperatives everyone was put to work in the fields, providing the community and the Khmer Rouge military with precious rice.\footnote{These initial collective reorganizations were not wholly alien to the rural peasant population, as the Sihanouk government had created the \textit{sahaka} ("collective") system in the 1960s. Interview of Youk Chhang, Director, Documentation Center of Cambodia, by Randle DeFalco (May 2010) [Chhang Interview].} Indeed, as the Khmer Rouge took over more and more of Cambodia’s countryside, the movement scored a major strategic advantage by choking off the domestic rice supply into Phnom Penh, thereby forcing the Lon Nol government to rely on US airdrops for food.\footnote{See Kiernan, \textit{Pol Pot Regime}, supra note 28 at 62-63. The Khmer Rouge military still needed more rice to continue fighting and unconfirmed rumours suggest that the Khmer Rouge secretly bought rice from corrupt Lon Nol officials, often with gold extracted from the population under its control.} Meanwhile, the price of rice in Phnom Penh and other cities began skyrocketing due to shortages and rampant corruption.

Against this backdrop, the Khmer Rouge swept into power after seizing control of Phnom Penh on 17 April 1975.\footnote{See e.g. Khamboly Dy, \textit{A History of Democratic Kampuchea} (1975-1979) (Phnom Penh: Documentation Center of Cambodia, 2007) at 14 (discussing the Khmer Rouge victory of 17 April 1975). In a rare 1978 public statement, Nuon Chea described the maintenance of absolute secrecy a “fundamental” precept of the Khmer Rouge. Nuon Chea, “Denmark Statement”, \textit{supra} note 106 at 20 (Stating “[o]ur party chose two forms of struggle: political struggle and armed struggle. These are interrelated. Political struggle was promoted through legal struggle and illegal struggle, with the illegal being the basic form of struggle. Now we struggle openly and in secret, with secret forms of struggle being the basis of our struggle.”).} Shortly thereafter, the Khmer Rouge-dominated CPK\footnote{As mentioned \textit{supra} at note 2, it is technically incorrect to completely equate the Khmer Rouge and the CPK, however the most senior leaders of Democratic Kampuchea from 1975 to 1979 had also been prominent members of the CPK and for the purposes of this thesis, the two terms will be used interchangeably.} became the official government of Cambodia, itself renamed Democratic Kampuchea.\footnote{“Constitution of Democratic Kampuchea”, chapter 1 (5 January 1976) (“The official name of the State of Kampuchea is ‘Democratic Kampuchea’”), translation by DC-Cam, available online: DC-Cam <http://www.d.dccam.org/>}. The stage was thus set for the Khmer Rouge to deliver their promised agricultural bounty. Instead, the new government, controlled by the secretive and dictatorial “Party Center” immediately began planning a radical overhaul of Cambodian society that would ultimately lead the nation down the path to catastrophic famine and violence.
1.1 Evacuating the Cities and Consolidating Power

Cambodia was already on the brink of famine when the Khmer Rouge took power in April of 1975. Nonetheless, the first acts of the new regime were to order the forced evacuation of Phnom Penh and to expel all foreigners, including food aid organizations. While the exact motivations behind the evacuation orders remain unclear, at the time CPK officials publicly claimed that food shortages in the capital were a prime motivating factor for the evacuation. In August of 1975, CPK Prime Minister Khieu Samphan went so far as to announce that the CPK had “been able to solve the essential problem” of feeding the people by moving them to the countryside.

Even as Cambodia’s cities were being evacuated and its borders closed off, Pol Pot and a select group of other Khmer Rouge leaders began to consolidate power in the CPK Party Center while

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116 Kiernan, Pol Pot Regime, supra note 28 at 153. A USAID report from April 1975 reportedly stated that to “avert a major food disaster” Cambodia required “from 175,000 to 250,000 metric tons of milled rice” to take its population through to February 1976 (ibid at 154, citing United States Agency for International Development (USAID), draft Termination Report for Cambodia, April 1975, Part 6, “Cambodia’s Food and Fiber Needs: The PL 480 Assistance Program to Cambodia for Rice and Other Commodities” at 5).

117 See ibid at 39-44.

118 Various sources and Khmer Rouge statements cite possible air raids, dispersal of possible anti-communist elements and the shortage of food in Phnom Penh as the motivation for the forced evacuation. It is clear however, that regardless of whether these other motivations existed, the evacuation of cities was part of the Khmer Rouge leadership’s overall plan to reorganize Cambodia as a rural socialist agrarian state. See generally Dy, supra note 113 at 14-17; Kiernan, Pol Pot Regime, supra note 28 at 31-64; see also Karl D Jackson, “Cambodia 1977: Gone to Pot” (January 1978) 18 Asian Survey 76 at 77, quoting “Pol Pot’s Press Conference in Peking,” New China News Agency, 3 October 1977, BBC Summary of World Broadcasting, 4 October 1977. Quoting Pol Pot as having stated: … [o]ne of the important factors for Cambodia’s successes after April 1975 is the evacuation of the city residents to the countryside. This was decided before victory was won, that is, in February 1975, because we knew that before the smashing of all sorts of enemy spy organizations, our strength was not strong enough to defend the revolutionary regime. Judging from the struggles waged from 1976 and 1977, the enemy’s secret agent network lying low in our country was very massive and complicated. But when we crushed them, it was difficult for them to stage a comeback. Their forces were scattered in various cooperatives which are in our grip.

119 For example, CPK Deputy Prime Minister in Charge of Foreign Affairs Ieng Sary was quoted in 1976 as stating “[t]he problem [facing the new regime in April 1975] was to find ways to feed these people by our own means.” He went on to claim that “[t]his problem has brought us tremendous experience, experience that makes us determined to increase our food supply. Although there is not now a great quantity, there is enough to feed one another. Today, people are working in the countryside and participating in productive activities.” Gareth Porter & George C Hildebrand, “From Starvation to Self-Sufficiency in Cambodia” (February/March 1976) 47 Indochina Chronicle 7 (quoting Ieng Sary, CPK Deputy Prime Minister in Charge of Foreign Affairs) (hard copy on file at DC-Cam) [Porter & Hildebrand, “From Starvation’’]; see also George C Hildebrand & Gareth Porter, Cambodia: Starvation and Revolution (New York: Monthly Review Press, 1976) (book by US authors arguing that international media coverage had unfairly labeled the evacuation of Phnom Penh by the Khmer Rouge an act of fanaticism, when the reality was that the evacuation was the only possible way to alleviate the starvation conditions in Phnom Penh caused by the US interventionist policies in Cambodia prior to the Khmer Rouge period.).

120 Porter & Hildebrand, “From Starvation”, supra note 119 at 17 (quoting CPK Prime Minister Khieu Samphan).
setting up the new Democratic Kampuchean government. This new government was dominated
by hard line Khmer Rouge members and had a highly centralized, yet extremely secretive
authority structure. 121 Officially, the CPK’s “Central Committee” had final authority over
decisions of national importance and the very highest level CPK officials were members of the
smaller “Standing Committee” within the Central Committee. 122 Indeed, the very existence of the
Standing Committee was kept secret until after the Khmer Rouge period, when former CPK
leaders acknowledged its existence and role as the de facto supreme authority in Democratic
Kampuchea. 123 Meanwhile, it was decreed by the Party Center that throughout the countryside
the leadership of the CPK was to be referred to only collectively, as “the Party” or “Angkar
Padevat” (the “revolutionary organization”). 124 As a result of this anonymous, yet dictatorial
command structure, during the Khmer Rouge period policy simply emanated from the Party
Center and was disseminated through written propaganda and local CPK study sessions where
policy decisions were handed down to local officials for implementation. According to Khmer
Rouge historian Ben Kiernan, the term “Party Center” generally referred to “members of the
Standing Committee of the Central Committee with national responsibility, not specifically
responsible for a regional area such as one of the Zones 125 of the country.” 126 Amongst others,
the term Party Center referred to individuals such as CPK Party Secretary and overall Khmer Rouge leader Pol Pot, CPK Deputy Prime Minister and Minister of Foreign Affairs Ieng Sary, CPK Prime Minister Khieu Samphan and Deputy CPK Secretary Nuon Chea. For the sake of brevity, throughout this thesis the term “Party Center” is used to refer to this highest echelon of command within the CPK government.

1.2 Socio-Economic Policies

Once firmly in control, the CPK Party Center set about implementing its planned radical overhaul of Cambodia’s agricultural sector and its extreme version of socialism throughout Cambodia. At a large meeting in Phnom Penh on or around 20 May 1975, fundamental CPK policies were outlined, most likely by Pol Pot and Nuon Chea, including plans for creating cooperatives, the abolishment of money and the establishment of communal eating and living. These policies became part of what the Party Center referred to as Democratic Kampuchea’s plan to achieve a “Super Great Leap Forward” towards a utopian agrarian-socialist state. This “leap” was to be achieved independent of any foreign aid according to the strict policy of extreme self-reliance, referred to as “independence self-mastery.” In order to maintain this
independence, the Center decreed that the revolution would “stand” (i.e. rely) on agriculture, especially rice production. To produce sufficient rice to both feed the population and finance the CPK’s planned development projects, the Party Center announced a plan to nearly triple the country’s rice crop to an average of three tons of rice per hectare. Despite the manifest impossibility of rapidly tripling rice production, the Party Center apparently believed that attaining its production targets was simply a matter of revolutionary willpower and ordered military-style agricultural “offensives” throughout the country. These offensives involved a nationwide system of forced labour.

The Party Center’s practice of relying on human labour and applying socialist theory to agricultural production resulted in deeply flawed agricultural policies. Nonetheless, it appears that an appreciable rice crop was still harvested each year during the Khmer Rouge period, although yields never even approached the fantastical three tons per hectare goal. Meanwhile, other CPK socio-economic policies only served to worsen famine conditions. As part of the pursuit of pure socialism, any perceived vestiges of “individualism” or “privatism” were banned, including cultivation of private subsistence gardens, private ownership of foodstuffs and even the act of cooking privately. Absolute socialism also meant that all natural resources became the property of the revolution and as a result famine victims were forbidden from foraging for alternative food sources.

Despite the extreme demands the Super Great Leap Forward plan placed on agricultural production, there is no indication that the Party Center ever second-guessed the soundness of its various famine-inducing policies. Instead, the Center blamed inevitable shortfalls in rice production on local CPK officials or the acts of “enemies” and saboteurs. This practice of blame-shifting and denial, combined with the Party Center’s well-documented penchant for extreme violence, maintained the fiction of the infallibility of Party Center’s leadership, even in the face of overwhelming evidence to the contrary. Anyone, including veteran Khmer Rouge cadres, who criticized the policies of the Party Center or complained about the terrible living conditions or

anthology of primary Khmer Rouge documents which contain numerous references to the concept of independence self-master or more generally for the need for absolute self-reliance).
lack of food, were branded enemies of the revolution and subject to arrest, torture and summary execution. This mixture of impossible rice production quotas, forced labour, violence and denial, thereby actively enforced severe famine conditions on virtually the entire civilian population, resulting in extreme suffering and mass mortality.

In 1976, Pol Pot instructed CPK party members that “the basic line” of the CPK was to “build” Cambodia “rapidly” into a powerful, self-sufficient socialist nation. He explained that the Party Center had compared the Cambodian revolution to those of China, Korea and Vietnam and concluded that “[w]e are faster than they are. If we examine our collective character, in terms of a socialist system, we are four to ten years ahead of them.” This obsession with speed appears to also have stemmed from the Party Center’s pervasive fear of perceived enemies, as the leaders sought to achieve revolutionary goals quickly to entrench themselves in power.

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132 CPK Party Center, “The Party’s Four-Year Plan to Build Socialism in All Fields, 1977-1970” (June 1976) translated by Ben Kiernan in David P Chandler, Ben Kiernan & Chanthou Boua, Pol Pot Plans the Future: Confidential Leadership Documents from Democratic Kampuchea, 1976-1977 (New Haven: Yale Southeast Asian Monograph Series, 1988) 36 at 45 [Four-Year Plan] (Stating that “[a]ccording to documents from other countries, after a war, they had three-year plans in order to prepare the economy. At the end of their three-year plans, they prepared their own five-year plans … [however] we [the CPK Center] want to build the country quickly, and build socialism quickly … [and therefore] it isn’t necessary to wait three years like them.”); see also David P Chandler, “Introduction” to “Preliminary Explanation Before Reading the Plan, by the Party Secretary (Party Center, 21 August 1976)” in David P Chandler, Ben Kiernan & Chanthou Boua, Pol Pot Plans the Future: Confidential Leadership Documents from Democratic Kampuchea, 1976-1977 (New Haven: Yale Southeast Asian Monograph Series, 1988) 119 at 120-123; see also CPK Party Center “Preliminary Explanation Before Reading the Plan, by the Party Secretary” (July-August 1976) translated by David P Chandler in David P Chandler, Ben Kiernan & Chanthou Boua, Pol Pot Plans the Future: Confidential Leadership Documents from Democratic Kampuchea, 1976-1977 (New Haven: Yale Southeast Asian Monograph Series, 1988) 119 at 126-128 [Preliminary Explanation] (Record of speech delivered by Pol Pot stating “[o]ur socialism is characterized by its speed [and when] [c]ompared to other countries, in terms of method, we are extremely fast.”); Four Year Plan, ibid at 46 (Stating that the “[CPK] doesn’t hesitate. We didn’t go through a period of land reform or social change. Instead we leaped from a people’s democratic revolution into socialism.”).

133 Four-Year Plan, supra note 132 at 46.

134 See e.g. CPK Party Center “Excerpted Report on the Leading Views of the Comrade Representing the Party Organization at a Zone Assembly” (June 1976) translated by Ben Kiernan in David P Chandler, Ben Kiernan & Chanthou Boua, Pol Pot Plans the Future: Confidential Leadership Documents from Democratic Kampuchea, 1976-1977 (New Haven: Yale Southeast Asian Monograph Series, 1988) 9 at 24 [Excerpted Report] (Translation of Khmer Rouge propaganda magazine Tung Padevat (“Revolutionary Flag”) (The speaker, who was presumably Pol Pot, stated “[i]f we are not strong and do not leap forward quickly, outside enemies are just waiting to crush us. Enemies of all kinds want to have small countries as their servants. So, in order to prevent them from crushing us, we have to be strong. For that reason we must strive to move fast.”); see also ibid at 25 (Stating that from the “position” of “hold[ing] full state power” the Party Center “wants to build socialism quickly” and thereby make Cambodia “change quickly,” and thereby make “our people … glorious quickly.” However, this was “especially” important as a measure to “prevent the enemy from making us suffer.”); see also Preliminary Explanation, supra note 132 at 126-128 (Record of Pol Pot stating in a speech to party members that the “most important element is that we must move rapidly, in ever mightier leaps. This is basic.”); see also CPK “Statute of Communist Party of Kampuchea” in Tung Padevat Special Issue (October-November, 1977) translated by DC-Cam in Searching for the
The planned Super Great Leap Forward also had to be achieved without substantial foreign aid in order to adhere to the policy of independence self-mastery. The complete self-reliance dictated by this policy meant that neither food nor goods and equipment to assist with rice production would be imported in any significant quantities, even as output was supposed to vastly increase and large quantities of rice to be set aside for export. Furthermore, the independence self-mastery policy was also implemented locally, down to the local cooperative level, resulting in complete reliance on local food production for subsistence.

1.3 “Standing” on Agriculture

In order to maintain self-sufficiency while simultaneously pursuing the rapid development integral to the Super Great Leap Forward plan, the CPK Party Center dictated that the revolution would “stand” (i.e. rely) on agriculture. In practice, this reliance on rice to fund the revolution placed an enormous burden on Cambodia’s already weakened agricultural sector, as the Party Center sought to achieve a massive surplus of rice on a remarkably aggressive schedule. The CPK’s basic economic policies are laid out most comprehensively in the Party’s draft “Four-Year Plan to Build Socialism in All Fields” completed in August of 1976. The Plan dictated

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Truth: Magazine of the Documentation Center of Cambodia 8 (August 2000) 11, online: DC-Cam <http://www.d dccam.org/> (“First, the reason for our party to be named Communist Party of Kampuchea is because it is clean, has no involvement with foreign countries, especially those countries who are intending to pounce on us.”). Preliminary Explanation, supra note 132 at 144 (Record of speech delivered by Pol Pot stating that “[i]n rural areas, don’t move old houses yet, or build new places. We must think of agriculture first, and then of factories and workshops. In this way every base area will be independent in economic terms. If we are independent, we have mastery in peace and war.”); see also Four-Year Plan, supra note 132 at 92 (The plan called for “everyone [to] be self-supporting 100% throughout the year in terms of fresh, dry and preserved vegetables.”). Various CPK slogans reminded Cambodian civilians that they would receive no assistance from the central government. See e.g. Locard, supra note 99 at 78-79 (Reported slogans of “[e]veryone has to rely solely on his own strength” and “[e]veryone must minister to his own needs” respectively.).

135 For example at a 1976 meeting, a representative of the Party Center, most likely Pol Pot himself, stated “[w]e stand [i.e. rely] on agriculture in order to expand other fields; industries, factories, metals, oils, etc. The basic key is agriculture. Self-reliance means capital from agriculture.” Excerpted Report, supra note 134 at 31 (emphasis added).

136 For example at a 1976 meeting, a representative of the Party Center, most likely Pol Pot himself, stated “[w]e stand [i.e. rely] on agriculture in order to expand other fields; industries, factories, metals, oils, etc. The basic key is agriculture. Self-reliance means capital from agriculture.” Excerpted Report, supra note 134 at 31 (emphasis added).

137 Four-Year Plan, supra note 132 at 46. It appears that the Four-Year Plan is the result of a meeting of the CPK Standing Committee from 21 July to 2 August 1976. See David P Chandler, “Introduction” to “The Party’s Four-Year Plan to Build Socialism in All Fields, 1977-1980” in David P Chandler, Ben Kiernan & Chanthou Boua, Pol Pot Plans the Future: Confidential Leadership Documents from Democratic Kampuchea, 1976-1977 (New Haven: Yale Southeast Asian Monograph Series, 1988) 36 at 37 [Introduction to Four-Year Plan]. The Four-Year Plan was never officially released or implemented during the Khmer Rouge period because by December 1976, the CPK leadership had become convinced of a “sickness in the Party” and believed “unspecified documents have revealed that enemies have tried to defeat us using every possible method.” Chandler, Voices from S-21 supra note 98 at 60;
that the “capital base” of the revolution was to be rice. To produce enough rice to remain self-sufficient while simultaneously funding national development, the Four-Year Plan called for increasing yields nearly threefold, to a national average of three tons per hectare of cultivated land. This goal was effectively impossible to achieve, as Cambodia had never even approached this level of production, even during the relatively bountiful harvests of the 1960s. Nonetheless, the quixotic optimism of the CPK leadership at the time knew few bounds and in 1976 Pol Pot projected that the CPK “can gain three tons per hectare on single harvests, and from six to seven tons per hectare on land that is harvested twice; and that’s not all, for we can [occasionally] exceed these targets.”

The Four-Year Plan included a meticulously detailed forecast of expected rice crops for the period of 1977-1980. During this period, the Plan forecasted that Cambodia would export 6,955,400 tons of rice and receive $1,390,640,000 USD in return. This figure was based on the fantastical projection that total rice production over the same four-year period would be 26,660,000 tons. Despite the sheer fantasy of rice production projections in the Four-Year Plan, Pol Pot stated at a Party meeting that the rice production and export figures in the Plan had
been “estimated fairly precisely.” To make matters worse, assigned rice quotas were all based on the assumed production of three tons per hectare and were expressed as numerical requirements based on this fallacious assumption, rather than percentages of actual production, meaning that the Party Center had a specific amount of rice it expected to receive from each of the country’s administrative zones.

In order to achieve the massive rice harvests necessary to pursue its Super Great Leap Forward plan, the Party Center sought to transpose the guerrilla warfare tactics that had worked so well for the Khmer Rouge during the civil war onto agricultural policy. In 1976, Pol Pot stated that the country faced three main difficulties: it had “just emerged from a war”; “lack[ed] technology”; and “lack[ed] capital equipment” that had to be imported. Amazingly, he then proceeded to dismiss these massive problems, stating “[t]hese difficulties are minor. We can solve them all in a short period of time.” At a previous 1976 meeting with Northwest Zone CPK officials, Pol Pot had discussed how these massive problems could be overcome through sheer revolutionary effort and discipline, stating that “[w]hen we were united, we were strong and courageous; the enemy could not successfully withstand us; we could attack the American imperialists. The economic fight is not as difficult as the fight against the American imperialists.” He then explained how revolutionary warfare tactics could be applied directly to agriculture, stating “[w]e raised the principle of attacking wherever we (could) win, wherever the enemy was weak. And the same goes for the economy. We attack wherever the opportunities are greatest. … We must prepare offensives for the whole country.” Indeed, Pol Pot reasoned that

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144 Four-Year Plan, supra note 132 at 155.
145 Preliminary Explanation, supra note 132 at 125. Pol Pot goes on to explain:
We have examined the plans of some socialist countries. . . . [that] put down aggregates in percentage form. We read them without much understanding, because we don’t know what to think of their percentages. Similarly, the masses read them without understanding. . . . They don’t say much about details, they speak only about goals. In light of these observations, we should strive to produce a plan that is accessible to all of the people, and to all of the army, and can be understood quickly. . . . [thus, along with the rationale of simplicity] we must give our figures in a form easy for people to understand, so they can know what the figures are, and can understand them.

The unacknowledged impact of this decision was, of course, that the CPK Center had a specific amount of rice it expected from each Zone that was not contingent on actual production, meaning that shortfalls would often result in reduced civilian rations, rather than a reduction in the amount of rice given to the CPK government.

146 Preliminary Explanation, supra note 132 at 128.
147 Ibid.
149 Ibid at 20.
achieving the planned massive increase in rice production was a relatively easy task in comparison to waging the civil war, stating:

the preparations for offensives to build up the country are like our past military offensives and not even as difficult. In building up the country the obstacles are direct: whether there is water or not, what kind of fertilizer, what kind of seed. As for the military battlefields, they involve sacrifices. Comparing thus, we see that there is nothing to worry about.\footnote{Ibid at 31 (emphasis added).}

Pol Pot’s 1976 Northwest Zone speech also roughly coincided with the publication of an issue of the CPK’s propaganda magazine \textit{Tung Padevat} (“Revolutionary Flag”)\footnote{\textit{Tung Padevat} was the official publication of the CPK outlining Party policies and was distributed to party members to use in mandatory party study sessions.} which also announced this new phase in the revolutionary struggle and which stated “our peasants, in the cooperatives throughout the country, our cadres and youths, every ministry, every office, our workers in every factory, and every unit of our Revolutionary Army have the mission of going on the offensive to achieve the party’s strategic plan for this year: achieving three tons per hectare.”\footnote{\textit{Tung Padevat} (“Revolutionary Flag”) Magazine (June 1976), translation by Extraordinary Chambers in the Courts of Cambodia, ECCC Doc No E3/36 at 00509610, online: ECCC <http://www.eccc.gov.kh/en>.}

Various CPK slogans repeated throughout the countryside reinforced this conception of agricultural warfare. Workers were reminded: “[i]n the battlefield of agriculture, industry and handicrafts, let us be determined to battle to fulfill one hundred percent of the plan and even go beyond.”\footnote{Locard, supra note 99 at 227.} The enemy in this struggle was nature itself, as another slogan proclaimed “let us not be defeated by nature!”\footnote{Ibid at 249.}

The “army” in the CPK’s agricultural battlefield was the entire civilian population and manual labour was portrayed as the key to achieving a high revolutionary consciousness.\footnote{Excerpted Report, supra note 134 at 30 (The CPK Center representative stated that “[r]ice production is a very great lesson. The city people do not know what a rice field is, what a cow is, what harvesting [is]. Now they know and understand; they are no longer scared of cows and buffaloes.”).} Work teams were ordered to “work together, as if [they] were on a battlefield”\footnote{Ibid at 162.} and to “strike, crush and win absolutely the production goal of three tons per hectare.”\footnote{Locard, supra note 99 at 242.} The purpose of every
Cambodian’s existence was to work and struggle to advance the revolution and a CPK slogan stated that good revolutionaries were “born straight from the plough’s furrow in a rice paddy.”158 The labour conditions that resulted from this militaristic agricultural push were horrendous. The entire civilian population was forced to work from sunrise to sunset every day in the rice fields or on massive irrigation projects without the benefit of modern machinery.159 These workdays would range from around ten to fourteen hours, based on seasonal hours of daylight and many survivors report working until midnight or later during busy times such as harvesting when moonlight permitted.160 The physical demands of this labour were tremendous and workers burned calories at a greatly accelerated rate. There was no letup however, as revolutionary slogans instructed workers to “pledge to sacrifice your life to accomplish Angkar’s work”161 and to remain “on the work site until death!”162

The CPK Center appears to have soon become aware that labour conditions had severely weakened the population. For example, already in August of 1976, Pol Pot observed at a meeting that “some regions managed to harvest three tons” of rice but “they became tired, because we were attacking everywhere at once [and] [t]o attack in this way over a long period of time is impossible.”163 This concern for the health of the civilian workforce however, was quickly brushed aside and Pol Pot stated that a “rearranged” and “improved” party “line, classifying some places as ones which could be harvested once a year and other places as ones which could be harvested twice a year” would fully solve this issue.164

158 Ibid at 236.
159 Due to the lack of mechanized equipment, trained engineers and Cambodia’s closed borders, which prevented the importation of machinery and expertise, major infrastructure projects were attempted using human labour alone. Most of these projects were irrigation-related and often conditions at worksites were abysmal, with workers dying regularly of starvation, exhaustion and diseases. See Dy, supra note 113 at 37-38 (providing an overview of the national system of forced labour enforced by the CPK during the Khmer Rouge period).
160 See e.g. ibid (“Nearly everyone worked more than 12 hours a day, 7 days a week without rest or adequate food [during the Khmer Rouge period].”). Survivors also consistently report 10-15 hour workdays in interviews conducted by the author as well as those on file at DC-Cam. A CPK slogan told Cambodian workers that “[i]f you do not complete your task during the day, you will complete it by night.” Locard, supra note 99 at 222.
161 Locard, supra note 99 at 230.
162 Ibid at 306.
163 See Preliminary Explanation, supra note 132 at 131.
164 Ibid.
1.4 Agricultural Incompetence

CPK Agricultural policy also suffered from practical flaws in implementation, further widening the gap between expectations and reality. The largest of these flaws was the Party Center’s assumption that massive irrigation projects could rapidly solve the “water problem”\(^{165}\) and thereby achieve a second rice crop in fertile areas.\(^{166}\) To solve the water problem, the Center ordered the creation of a national system of dikes, canals and dams to capture, store and redistribute seasonal monsoon rainwater year-round.\(^{167}\) Again, the Center ignored the enormous challenges standing in the way of achieving multiple rice crops, as the irrigation and introduction of fast-growing rice varietals necessary to even attempt a second crop in Cambodia at the time would have required years of work, research and international collaboration.\(^{168}\) The CPK simply lacked the technology, resources and expertise necessary, even within a more realistic time frame\(^{169}\) and even if the new influx of labour could rapidly complete the planned massive irrigation projects, a second crop would have still likely been impossible.\(^{170}\)

The CPK Center brushed aside these difficulties, again assuming that a mix of revolutionary zeal and ingenuity could overcome any problems. In an April 1977 radio address marking the second

\(^{165}\) *Ibid* at 145 (“In the plan we have raised the issue of water. This problem is not new. We raise it again in order to solve it. To grow one or two crops of rice per year, we must have water. If we understand the problem of water, we must solve it so adequate water will be available.”).

\(^{166}\) A second rice crop had never been achieved in Cambodia on a large scale prior to the Khmer Rouge period. See Kiernan, *Pol Pot Regime*, *supra* note 98 at 8. Typically, Cambodian rice farmers have grown small amounts of “dry-season rice” irrigated by makeshift water retention devices located along receding waterways. This rice is known as “recession rice” because the planting follows the receding water during the dry season. See “Topography, Climate and Rice Production” in Nesbitt, *supra* note 101 at 15.

\(^{167}\) See e.g. Preliminary Explanation, *supra* note 132 at 145-147 (Portion of speech to CPK officials delivered by Pol Pot outlining plan to achieve multiple annual rice crops through overhauling national irrigation systems.).

\(^{168}\) For example, through decades of infrastructure and irrigation work, combined with the introduction of “high-yielding short season varietals” of rice by the International Rice Research Institute (“IRRI”) and Australia Agency for International Development (“AUSAID”), many farmers were able to grow two to three crops a year as of 2008. See United States Department of Agriculture Foreign Agricultural Service, “Commodity Intelligence Report: Cambodia” (26 January 2010), online: USDA Foreign Agricultural Service <http://www.pecad.fas.usda.gov/>.

\(^{169}\) See Jeffrey Himel, “Khmer Rouge Irrigation Development in Cambodia” (11 April 2007), online: Genocide Watch <http://www.genocidewatch.org/images/Cambodia> (Report sponsored by DC-Cam and authored by owner of Aruna Technology Ltd, whose expertise is in irrigation and water management infrastructure); see also, Marie Alexandrine Martin, “Rice Culture and Water Control in Democratic Kampuchea” (July-September 1983) Rural Studies Magazine, available at DC-Cam Doc D01062 (Unofficial English translation by Jeffrey Himel and Nathalie Schnuriger).

\(^{170}\) It is possible that the CPK leaders subscribed to the now-debunked theory that the Angkorian Empire rose to power by producing a double-rice crop through extensive irrigation. See Kiernan, *Pol Pot Regime*, *supra* note 28 at 8 (internal citations omitted).
anniversary of the Khmer Rouge victory, CPK Prime Minister Khieu Samphan boasted that when building dams, workers “learn technical skills and implement them while working.” In the same address, he admits that the irrigation systems hastily thrown together by the CPK might not last, but argues that “[w]hether the dams and reservoirs that we have built last only five or 10 years does not matter [because] [i]n the five or 10 years to come we shall be much more developed, richer and more experienced than we are now, and we will grasp many more technical skills than we do now.” The result of this reckless rush forward was a series of fundamentally flawed irrigation projects that cost thousands of lives to build and yet were prone to collapse or failure during annual floods.

Other aspects of the CPK’s plan to achieve three tons per hectare illustrate the Khmer Rouge leadership’s utter lack of understanding of the basic requirements of large-scale agricultural production. First, in many areas, Cambodia’s individual plots of land that spread across the countryside in a variety of shapes and sizes were reorganized into uniform one hectare squares. This required a series of new rice paddy walls that often interfered with existing irrigation channels.

A severe lack of drought animals was another major problem the Party Center failed to address in an efficient manner. The civil war and the US bombing campaign had reduced the number of

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171 “Khieu Samphan, 1977 Anniversary Address”, DC-Cam Doc D29015. Khieu Samphan goes on to deride “so-called agricultural experts of the previous era” saying that if it had been up to these “Japanese, French, [or] British experts” Cambodia “would have remained deprived of water for rice planting and rice for national construction for years and years to come.”
172 Ibid.
173 See Nesbitt, supra note 101 at 6 (“The Khmer Rouge irrigation systems were a disaster due to lack of technical knowledge. One estimate indicated that by the mid-1980s, 70-80% of these structures were unusable or useless.”); see also Himel, supra note 169.
174 Ibid (internal citations omitted); see also Kiernan, Pol Pot Regime, supra note 28 at 167-168.
175 See Himel, supra note 169. This reorganization also had the unfortunate effect of allowing the Party Center to set rice production quotas with exacting specificity and produce a target amount of rice for each zone to remit as a “gift to the state.” See Preliminary Explanation, supra note 132 at 125 (Record of speech in which Pol Pot explains that the Center had “examined the plans of some socialist countries [and] see[n] that these [were] clearly based on national needs” however, the speaker claimed that these countries, which “do not put down specific numbers” but rather “aggregates in percentage form” were too confusing in their planning. Thus, the Center decided to avoid such plans, which “don’t say much about details” but instead “speak only about goals.” In doing so, the Center decided to “give [official CPK Party] figures [for planned production] in a form easy for people to understand, so they can know what the figures are, and can understand them.”).
oxen and water buffalo in Cambodia to critical levels by 1975.\textsuperscript{176} These animals were crucial to rice production, as they were used to till rice fields and perform all types of heavy labour. The Center acknowledged that drought animals were in low supply and “skinny” in some areas, but simply concluded that the revolution would grow feed, breed more animals and thereby quickly solve this problem.\textsuperscript{177} There is no evidence that this planned aggressive breeding program ever got off the ground while the Khmer Rouge held power.

Fertilizer was also in extremely short supply and again this problem was simply brushed aside by the Party Center, which viewed this major problem as “not difficult” to solve.\textsuperscript{178} The proposed fix to this problem, in line with the general policy of independence self-mastery, was to assign workers, usually children and the elderly, to collect human and animal excrement to use as fertilizer.\textsuperscript{179} In some areas, survivors have even reported being forced to strip the flesh off of fresh corpses and burn their bones to use the ash as fertilizer.\textsuperscript{180} The results were substandard

\textsuperscript{176} When a US bomb attack occurred, villagers ran for shelter and into the jungle to avoid the bombs. However, there was no time to move animals and slow moving, large animals such as oxen and buffaloes were killed at a high rate. For a history of the US bombing campaign in Cambodia, see Kiernan, \textit{Pol Pot Regime}, supra note 28 at 16-25; see also Owen & Kiernan, \textit{supra} note 103.

\textsuperscript{177} Excerpted Report, \textit{supra} note 134 at 22-23 (The CPK representative proposes to “resolve the problem” of insufficient oxen and buffaloes by having the Zone redistribute available animals and using only one buffalo with each plough. Furthermore, the representative states that the problem of “skinny” buffaloes and oxen is merely an “infantile disease of socialism” that will be resolved.). The draft Four-Year Plan forecasted that Cambodia’s supply of oxen would double from 200,000 to 400,000 animals from 1977-1980 and that the supply of water buffaloes would more than triple, from 30,000 to 100,000 animals over the same period. See Four-Year Plan, \textit{supra} note 132 at 94. No detailed explanation appeared in the plan concerning how this massive increase was to be achieved.

\textsuperscript{178} Excerpted Report, \textit{supra} note 134 at 28-29 (“As for … problems such as fertilizers, they are not difficult. … As a vanguard view we estimate that for the country as a whole, we will produce at least 500,000 tons of fertilizer, by calculating that one Subdistrict produces 1,000 tons. Kampuchea has more than one thousand subdistricts; but we take only 500 subdistricts as being able to produce fertilizer. If we had to buy it from abroad, we do not know where we would get the money. If we build a factory, we have to buy it first, and we do not know how many factories either. So this fertilizer movement is very strong. This shows that our people have a very strong combative consciousness, they believe in the revolution.”); Four-Year Plan, \textit{supra} note 132 at 89 (Table outlining planned types and amounts of fertilizer for 1977-1980); Preliminary Explanation, \textit{supra} note 132 at 146-147 (Stating that there are “natural fish” that can be “turned into fertilizer” and that the “Tonle Sap also has many fish that go upstream; many get caught in traps, many tens of tons, and we can increase our strength greatly by turning these fish into fertilizer. … There is the possibility of making a good deal of capital from fertilizer.” This statement helps to explain the Center’s belief that Angkar owned all of Cambodia’s natural resources (e.g. fish stocks), which in turn made it illegal for civilians to privately harvest natural or wild food sources, such as fish.).

\textsuperscript{179} \textit{Ibid} at 18 (“They say people have never used excrement before [as fertilizer], and now the revolution uses it to make fertilizer. Some members of the co-operatives believe the[se anti-revolutionaries]. But if we go down personally and explain cause and effect to [cooperative workers], they will understand [that human excrement can be used successfully as fertilizer].”).

\textsuperscript{180} See e.g. Sophearith Chuong, “Grandmother of Fertilizer”, \textit{Searching for the Truth: Magazine of the Documentation Center of Cambodia} 11 (November 2000) 45 (translated transcription of interview with survivor of the Khmer Rouge period who claims to have been forced to strip dead bodies of flesh and burn the bones to make fertilizer), online: DC-Cam <http://www.d.dccam.org>; Sadie Blanchard, “You will be Soil for the Rice Field”,
fertilizer and the further spread of famine-related diseases through lack of sanitation. Finally, a lack of pesticides also plagued the agricultural sector and pests such as rats, crabs and insects reportedly further damaged rice crops.\footnote{43} Thus, despite extolling the virtues of Cambodia’s farming peasantry, the Party Center ignored their knowledge of farming in favour of seriously flawed alternatives which only served to further brutalize the civilian population and deepen famine conditions.

### 1.5 State Expropriation of Rice

To achieve a Super Great Leap Forward, the Party Center decreed that the CPK government had to “sell the maximum possible of [its] agricultural production” to raise capital.\footnote{182} Party rhetoric claimed that “[t]he state is not taking exports from the people. Instead, we exchange goods for agricultural products on a collective basis.”\footnote{183} There is no evidence however, to suggest that the CPK “exchanged” resources to assist civilians living in Cambodia’s countryside. Instead, beginning in 1976, the government exacted large quotas of rice for party use and export\footnote{184} and provided virtually nothing in return.\footnote{185}
There are no surviving CPK documents that provide any specific aggregate amounts of rice exported during the Khmer Rouge period. Nonetheless, evidence does exist suggesting that the CPK did export large quantities of rice throughout the Khmer Rouge period. First, numerous survivors of the period, including Khmer Rouge cadres, have stated in interviews that they witnessed large quantities of rice being expropriated by the CPK government and apparently prepared for export. For example, recently former CPK state warehouse official Ros Suoy testified before the ECCC Trial Chamber that he worked at two warehouses in and around Phnom Penh between 1975 and 1979 and that he was aware that at least several other similar state warehouses existed in the area at the time. Ros Suoy further testified that only unmilled rice was consumed within the country and that his warehouse often had to keep “four to five” rice mills operating constantly in order to process sufficient rice to meet the CPK’s demands for exports. Meanwhile, Ros Suoy stated that unmilled rice was kept in reserve for export orders and despite the fact that other goods, such as salt and cement, were distributed from the

with unknown quantities of rice and other goods. See “Commerce Dossier” (hard copy available at DC-Cam, selected documents translated for author by DC-Cam).

What little imports did come into Cambodia arrived mostly in the form of weapons and machinery rather than food, save for several shipments of Chinese “assistance rice” beginning in mid-1975 and ending in 1976. See State Commerce Committee, “33 Assistance Rice” documents, DC-Cam Docs D20468 (15 March 1976) (Listing “income” of rice as 4,970,122 kg); D20469 (30 April 1976) (Listing “income” of rice as 1,720,122 kg); D20470 (31 May 1976) (Listing “income” of rice as 844,122 kg). This assistance rice was then distributed throughout the country according to available documentation at DC-Cam, but it is unclear whether the rice was used as food or seed for the planned push to increase rice yields. The use of the name “33 Assistance Rice” suggests the latter, as it is likely this phrase referred to a fast-growing strain of Chinese rice that only grows to approximately thirty-three centimetres in height.

Chhang Interview, supra note 111. There is however, what Mr. Chhang refers to as the Khmer Rouge “Commerce Dossier” which is a large volume of correspondence between China and Cambodia regarding trade issues and sometimes discussing specific quantities of rice. This document, written in a mix of Khmer and Chinese languages, is available at DC-Cam. It is clear however, that Chinese ships regularly docked at Cambodia’s deep-water port in Kampong Som, throughout the Khmer Rouge period. CPK dock workers have claimed that they loaded tons of rice onto these ships in interviews granted after the Khmer Rouge period. The only known official CPK documents that report the exportation of rice are a pair of communiqués dated 15 September 1977 which reports to the CPK Center that the following day a ship was scheduled to transport 5,000 tons of rice to Madagascar.

“Production exporting to Madagascar from 1/1/77 to 11/6/77”, DC-Cam Doc D20715; “Rice production exported to Madagascar from 1/1/77 to 11/6/77”, DC-Cam Doc D22941 (Communiqué from “Sarin” copied to “Oum, Van [Ieng Sary], Vorn and Kieu.”).


Ibid. Ros Suoy further testified that the warehouse he supervised regularly prepared large amounts of rice for export (ibid).
warehouse to locations within Cambodia, rice was never redistributed within the country whatsoever.\textsuperscript{189}

Certain primary CPK documents also generally support this assertion, such as surviving documents of the CPK’s “State Commerce Committee,” based in Kampong Som, Cambodia’s sole deep-water port, which accounted for “income” and “expenditure” of rice in reports transmitted to the Party Center.\textsuperscript{190} Many of these documents were signed by a person named Roeung, whom Ros Suoy testified was his superior, suggesting that the CPK operated a system whereby rice would be shipped from all locations in the countryside to state warehouses in Phnom Penh where it was processed, packaged and sent to Kampong Som seaport for export under the supervision of Roeung and the State Commerce Committee.\textsuperscript{191} Meanwhile, a more limited number of surviving CPK documents discuss specific instances of actual or planned rice exportation\textsuperscript{192} and a 1977 article in the \textit{Far Eastern Economic Review} reported that the CPK

\textsuperscript{189} \textit{Ibid.}


\textsuperscript{191} See Chen, “Former Warehouse Official”, supra note 187.

\textsuperscript{192} E.g. “Business Meeting Between Democratic Kampuchea and Korea’s Ministry of Commerce Committee 51”, DC-Cam Doc D22718 (6 December 1976), translated version available in \textit{Searching for the Truth: Magazine of the Documentation Center of Cambodia} (3d Quarter 2004) 8, online: DC-Cam <http://www.d.dccam.org> (Internal CPK report on a trade meeting, stating “[r]ice: This year rice production is very good. We plan to sell some to other countries.” [sic]).
government had purchased large quantities of jute sacks, used to transport rice, in an apparent attempt to prepare for massive rice exporting activities. Thus, while precisely how much rice was exported from Cambodia during the Khmer Rouge period is likely unknowable, there appears to be ample available evidence, in the form of primary CPK documentation, potential witness testimony and circumstantially, proving the basic fact that the CPK government exported large quantities of rice over extended periods of time while in power, even as Cambodian civilians died by the thousands of famine.

2 Deepening Famine: Purity, Paranoia and Violence

While the CPK Party Center set Cambodia down the basic path to famine through the implementation of flawed agricultural practices, overwork and state expropriation of rice, additional policies emanating from the Center only served to worsen famine conditions. Khmer Rouge leaders sought to achieve absolute socialism rapidly by banning all perceived vestiges of private ownership. This desire for purity ended individual cultivation of subsistence gardens as well as the famine prevention and coping activities of foraging, hunting and fishing. The Center also distrusted anyone who had lived in the urban power centers of the Lon Nol government during the civil war and subjected these groups to especially harsh labour and living conditions, making famine especially acute within this group. Finally, the healthcare sector was also dismantled by the Party Center leading to the further spread of disease amongst a population already compromised by famine.

These additional policies were ruthlessly enforced through acts of horrific violence and both CPK cadres and civilians were routinely brutalized and executed for criticizing or deviating from CPK policy in even the slightest ways. Through this mix of absolutism, paranoia, hubris and violence, the Party Center cut off any opportunity for local CPK officials to mitigate famine conditions and prevented famine victims from engaging in crucial coping mechanisms. As such, not only did the Party Center enact basic famine-inducing economic policies, but also actively

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deepened famine once it began through a series of policies which prevented any action to better cope amongst the affected population.

2.1 The Pursuit of Pure Socialism

A surviving unsigned CPK document dated 20 December 1976 states “[t]he socialist revolution encompasses everything. This is what is basic about our revolution.” Along this party line of all-encompassing socialism, money was immediately banned and Cambodian villages were reorganized into cooperatives shortly after the final victory of 17 April 1975. Communal eating was established nationwide by early 1977. All private ownership was abolished and personal belongings, including cookware, were confiscated. Literally everything officially became the property of the revolution, including all agricultural production and even wild food sources. CPK party slogans warned the starving civilian population: “[h]ands off the people’s property! Not a single grain of rice, a single chilli, a single needle!” Other slogans drove the point home, reminding the people that “enemies” of the revolution included “[t]hose who boil rice in secret or in private”. The CPK government also severely restricted civilian freedom of movement and there was a constant search for perceived enemies of the revolution, rendering it difficult and dangerous for famine victims to secretly search for food.

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196 Kiernan, *Pol Pot Regime, supra* note 28 at 58 (“Communal eating was probably foreshadowed in May 1975, but it was not ordered until 1976.”). Although not officially implemented, the Four-Year Plan foreshadows the complete implementation of communal eating. Four-Year Plan, *supra* note 132 at 107 (In the introduction to “Part Two” of the Four-Year Plan, the Center explains its rationale for forced communal eating, stating “[i]n the socialist part of the world at present the problem has been posed that too strong an emphasis on collectivization leads to a disappearance of the individual or family nourishment. That’s why they allow some privateness and still use money. As we see this path doesn’t completely repress capitalists. … So long as the capitalist system exists, it will strengthen itself and expand and become an obstacle to the socialist revolution. As for us [the CPK], we organize collective eating completely. Eating and drinking are collectivized.”).

197 As one CPK slogan put it: “[a]bsolutely everything belongs to the Angkar”. Locard, *supra* note 99 at 277.

198 *Ibid* at 83.

199 *Ibid* at 183.

200 See e.g. Cheam, *supra* note 25 (article by survivor of a work camp and prison who risked death by stealing and secretly foraging for extra food); Pheakdey, *supra* note 25 at 57 (Account of survivor who remembers her grandmother secretly bringing food to her great-grandmother, whom the local CPK chief starved because she was
2.2 Mistreatment of “New” People

CPK propaganda promoted an ideology modeled on Chinese-Marxist theory, which blamed “feudalists” and capitalists for the economic woes of Cambodia’s peasantry.201 The stated goal of the revolution was to eliminate Cambodia’s social class structure altogether and turn everyone into a worker-peasant, under the party’s “proletarian dictatorship.”202 The minutes from a CPK Standing Committee meeting held on 11 March 1976 state:

it is necessary to put an end to feudalism. We have reached this stage. The whole feudal regime has been destroyed and definitively dismantled by the Revolution. The Monarchy existing for over 2000 years has finally been dismantled. We do not have any other alternatives. Reactions will certainly take place, but we must follow the path of the Revolution in order to win.203

After the CPK swept into power, Cambodia’s pre-existing social structures were quickly dismantled and despite Khmer Rouge rhetoric extolling the virtues of a classless society, a new and rigid three-tiered caste system quickly developed. At the top of this class structure were CPK party members,204 followed by “base” people who were rural-based civilians that had lived in areas under Khmer Rouge control prior to 17 April 1975.205 The bottom rung of this new system was occupied by so-called “new” or “17 April” people who had lived in the areas controlled by the Lon Nol regime when the CPK took power.206 Despite the fact that many of these “new people” actually hailed from the countryside, but had fled to urban areas to escape the civil war,

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201 See Dy, supra note 113 at 5-12 (providing a basic overview of the formation of the Khmer Rouge movement and stating that key Khmer Rouge leaders who were students in Paris, France in the 1950s “saw peasants and poor people throughout the world as enslaved and repressed by capitalism and feudalism. They thought a Marxist-Leninist revolution was the only way Cambodia could attain independence and social equality.”).

202 See Jackson, supra note 118 at 78, citing radio address by Pol Pot of 27 September 1977.


204 For an explanation of the process whereby Cambodians could become eligible for membership in the CPK, see “Statue of Angkar”, DC-Cam Doc D21490.

205 See e.g. Dy, supra note 113 at 30-31.

206 See ibid. For an anthropological analysis of how and why new people were reduced to a sub-human level by the CPK, see Alexander Hinton, “Agents of Death: Explaining the Cambodian Genocide in Terms of Psychological Dissonance”, Searching for the Truth: Magazine of the Documentation Center of Cambodia 32 (August 2002) at 38, online: DC-Cam <http://d.dccam.org> [Hinton, “Agents of Death”].
they were scorned by the CPK and Party slogans labeled them “prisoners of war.” As such, new people were viewed as a source of hidden enemies, working to undermine the revolution and denied even the most basic rights and freedoms.

New people were also subject to forced transfers at a moment’s notice to wherever the CPK decided to send them. These transfers were conducted without any regard for health and well-being and many people died along the way. Upon arriving in their designated cooperative, new people were scorned and essentially enslaved in service of the revolution. One CPK slogan stated that “[w]here there are 17 April people, no development is possible.” Another slogan viewed new people as useless hungry mouths to feed, stating “[t]he new people bring nothing but stomachs full of shit, and bladders bursting with urine.” Still another slogan derided new people as “parasitic plants” sapping strength from the revolution.

As a result of this scorn and mistrust, new people were constantly under surveillance, forced to eat in communal dining halls and toiled at hard labour endlessly in service of the revolution. Armed cadres patrolled the cooperatives and work sites where new people lived and worked and exacted violent punishments for the slightest miscues. One survivor’s experience illustrates the scorn with which starving new people were treated:

[in 1977] I became emaciated and was sent to a hospital. However, Angkar’s medical staff were heinous. They accused me of having a consciousness illness. In fact I was sick. I was starved. I became smaller and smaller to the point that my knees appeared to be bigger than my head. Even with such conditions, they still could not see what was really wrong with me. They hated April 17 People so much.

One result of the Party Center’s scorn towards new people was especially severe famine conditions within this group, as new people were provided the worst of everything, including rations, work assignments, housing, medical care and basic sanitation. One major example of how the general mistreatment of new people led to more severe famine conditions was the mass

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207 Locard, supra note 99 at 186.
208 See Hinton, Agents of Death, supra note 206.
209 Ibid.
210 See generally, Dy, supra note 113 at 14-17.
211 Locard, supra note 99 at 184.
212 Ibid at 185.
213 Ibid.
214 See Sokhym Em, “Female Patients”, Searching for the Truth: Magazine of the Documentation Center of Cambodia 33 (September 2002) 25 online: DC-Cam <http:d.dccam.org> [Em, “Female Patients”].
forced transfer of new people to the Northwest Zone in 1976. Northwest Cambodia, long-known as the country’s rice bowl, was the site of especially severe famine conditions during the Khmer Rouge period.  

215 The Northwest Zone was subjected to especially high rice production quotas by the CPK Party Center. In 1976, the Center announced that the Zone needed “additional forces” to achieve the rice production targets assigned to it and ordered the evacuation of 500,000 to 800,000 new people to the Zone.  

216 The areas these evacuees were sent to utterly lacked the capacity to house and feed them, creating especially high famine mortality amongst new people and in the Northwest Zone.  

2.3 Revolutionary Medicine: Denial of Basic Medical Care

Another consequence of the mixture of the policies of independence self-mastery and the CPK’s distrust of new people was a complete denial of basic medical care.  

218 The CPK systematically dismantled Cambodian civil society, including the nation’s already weak medical infrastructure. Many of the nation’s experienced doctors were executed or hid their educational background from the suspicious Angkar because indicators of a privileged or urban background such as education or professional training were viewed with extreme skepticism by the Khmer Rouge and created a high risk of summary execution if discovered.  

219 Revolutionary “hospitals” were often no more than depots where the injured and sick were deposited and subsequently ignored, staffed largely by illiterate teenage girls with “clean” revolutionary biographies.  

220 Additionally,  

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215 For an overview of conditions in the Northwest Zone, see e.g. Kiernan, *Pol Pot Regime*, supra note 28 at 216-250.  

216 See *ibid*. The true motives for this decision are less clear, as the CPK officials and party members in the Northwest Zone were not trusted by the Party Center as they had few personal ties to the inner circle of the CPK. The people sent to the Northwest Zone were also disfavoured by the Party Center because of their urban sensibilities and perceived ties to previous regimes. As such, it appears the true motivation of the Center may have been to consolidate its potential opponents and extract especially high rice quotas from the areas under their control.  

217 See *ibid*.  

218 “New” people included urban dwellers and Cambodia’s educated elite and thus virtually all Cambodian medical professionals and doctors fell into this category.  

219 See e.g. de Walque, *supra* note 5 at 358-361 (Section entitled “[m]ortality by socioeconomic status and religion” which estimates that Cambodians with at least a secondary school education had a nearly 30% probability of dying during the Khmer Rouge period, a significantly higher percentage than non-educated and/or younger population cross-sections.). For a review of the estimates of de Walque and others, see Tabeau & Kheam, *supra* note 5.  

220 See Em, “Female Patients”, *supra* note 214 at 26 (Confirming through interviews that “most of Angkar’s medical staff were very young—from 14 to 15 years of age—with at most three months of technical training.”); see also Sokhym Em, “Revolutionary Female Medical Staff in Tram Kak District”, *Searching for the Truth: Magazine of the Documentation Center of Cambodia* 34 (October 2002) 24, online: DC-Cam <http://d.decamb.org> [Em, “Revolutionary Female Medical”]; Keo Kanitha Kim, “Clean-Cut Children, A Failure of the Revolution; *Searching for the Truth: Magazine of the Documentation Center of Cambodia* 21 (September 2001) 20, online: DC-Cam
the party line of independence self-mastery meant that medicines would only be imported from China or other preferred nations, resulting in massive deficits of basic medicines. What little medicine the CPK did have was used primarily by party members and the military.221

The CPK Center addressed the pervasive lack of medicine in two equally ineffectual ways. First, a 1976 CPK document described food as “the important medicine to prevent sickness,” stating that “[i]f there were enough to eat, there would also be little sickness.”222 Abundant food for civilian consumption—that never materialized—was thus, the first of two equally non-existent lines of defense against the spread of disease. When sickness did strike, often as a result of endemic famine, the second, equally ineffectual line of defense, consisting of “traditional” or revolutionary medicines was employed.223 These pseudo-medicines were usually made of a mixture of various plant products that had been rolled into balls and subsequently administered orally or worse, dissolved in unsanitary liquids, such as coconut juice, and injected by untrained nurses with dirty, reused needles.224 When administered, such medicines were ineffectual at best and often only served to worsen a victim’s health. This “revolutionary medicine” likely only served to increase, rather than decrease the number of famine-related deaths across the country.225 Nonetheless, the CPK again rejected reality in favour of promoting the glory of the revolution and at times apparently boasted of the regime’s “mastery” of medical care. 226

<http:d.dccam.org> (article discussing how the Khmer Rouge viewed children as “blank” slates who could be fully indoctrinated and how as a result of this preference for children members, hospitals were largely staffed by young teenagers during the Khmer Rouge period).

221 There are CPK documents that show the importation of medicines but there are no reports by civilians of receiving any actual medical care. There are documents listing the importation of medicines from Korea and China and also bought apparently from Hong Kong (likely in exchange for state-expropriated rice), but these medicines appear to have been reserved only for Party members and possible the military. DC-Cam documents on file with author and available at DC-Cam.

222 Excerpted Report, supra note 134 at 30 (Thus, the Center representative states that “[h]ealth services and social action also [along with the revolutionary government] stand [rely] on agriculture.”).

223 See Sokhym Em, “‘Rabbit Dropping’ Medicine”, Searching for the Truth: Magazine of the Documentation Center of Cambodia 30 (June 2002) 22, online: DC-Cam <http:d.dccam.org> (“‘Rabbit dropping’ medicine consisted of plant roots, tree bark, the sap of the tropical thlund tree, and other ‘natural’ compounds. It was produced by female medical staff (many of whom were illiterate or semiliterate) during the [Khmer Rouge] regime. Made without proper scientific testing, it was rarely known to help patients, and often made them worse or killed them.”).

224 These balls were referred to as “Rabbit Medicine” because they resembled rabbit droppings in both appearance and bitter taste. See ibid.

225 Em, “Revolutionary Female Medical”, supra note 220 at 26 (“An interview with Thaong Sin, currently a medical doctor in charge of provincial health in Takeo province who has documented Pol Pot’s crimes against Phnom Penh
Not only were Cambodians suffering from the symptoms of undernutrition not given any true medical treatment, but it was also dangerous to even admit to being sick during the Khmer Rouge period. The suspicious CPK Center accused overworked and underfed workers of feigning illness to avoid work and obtain more food. Various CPK slogans mocked sick and starving Cambodians, telling them that “[t]he sick are victims of their own imagination,”[227] “[t]he ill are sly as rabbits, and can swallow a whole pot of rice”[228] and that “[w]e must wipe out all those who imagine they are ill, and expel them from our society.”[229] In typical hypocritical fashion, another slogan mocked Cambodians wracked by hunger, telling them that they had caught an “imaginary disease.”[230] There was no respite for the exhausted, underfed and disease-plagued civilian population and many victims simply collapsed and died from exhaustion, undernutrition and disease.

2.4 Using Violence: Enforcing Policy and Blame-Shifting

The CPK Center not only enacted policies that created mass famine, but also enforced these policies through acts of extreme violence. The revolution, embodied by the members of the Party Center, was infallible according to CPK rhetoric and ideology.[231] This myth of infallibility was dwellers, confirmed that Angkar’s medical staff did try to help the people, but had almost no technical proficiency. The fact was that no matter what the disease was, the same medicines would be delivered.”).  

Phat Kosal, Ben Kiernan & Sorya Sim, translators, Ieng Sary’s Regime: A Diary of the Khmer Rouge Foreign Ministry, 1976-79 (New Haven: Yale Center for International & Area Studies, 1998) at 33 (Translation of diary of individual believed to have served as a personal assistant to CPK Deputy Prime Minister for Foreign Affairs Ieng Sary. The diary appears to be handwritten notes from meetings attended by Ieng Sary and quotes Ieng Sary as having stated at one such CPK meeting that “[w]e have built up medical specialists. We are able to produce medicine. We master this field 100% at the moment.”).  

Locard, supra note 99 at 188.  

Ibid at 190.  

Ibid at 188.  

Ibid at 190 (“You shiver with fever, you shake like a tractor, you vibrate like a motor car, you ache for food, you quiver from laziness, you’ve caught an imaginary disease.”). See also Em, “Female Patients”, supra note 214 (Interview with Khmer Rouge period survivor named Vanna, wherein she states “[i]n 1977 I became emaciated and was sent to a hospital. However, Angkar’s medical staff were heinous. They accused me of having a consciousness illness. In fact I was sick. I was starved. I became smaller and smaller to the point that my knees appeared to be bigger than my head. Even with such conditions, they still could not see what was really wrong with me. They hated April 17 People so much” at 25).  

CPK propaganda and rhetoric from the time reflected this myth of the infallible revolution. See e.g. Locard, supra note 99 (Reported Khmer Rouge slogans, “[t]he clear-sighted and radiant revolution” at 75, and “[w]e, the Communist Party, we follow the correct and clear-sighted line” at 112). The CPK leadership also explicitly considered high-level CPK party members indispensable in contrast to other Cambodian citizens. See e.g. Nuon Chea, “Denmark Statement”, supra note 106 at 31 (“The leadership apparatus must be defended at any price. If we
jealousy guarded throughout the Khmer Rouge period despite the obvious flaws in CPK policy by a mix of denial and blaming any admitted shortcomings on fabricated anti-revolutionary groups working to sabotage the revolution.\(^\text{232}\) These perceived “internal enemies” were to be sought out and “smashed” (i.e. killed) according to official CPK policy.\(^\text{233}\) This mix of hubris and paranoia resulted in a nationwide system of violence and terror.\(^\text{234}\) The smallest miscue or perceived slight against the revolution could result in brutal violence. Even veteran revolutionaries were not immune from the wrath of Angkar, especially as internal purges began

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\(^{232}\) Officially, throughout the Khmer Rouge period, the Party Center appears to have clung to the official myth of the “clear-sighted and radiant revolution.” See Locard, \textit{supra} note 99 at 75. As such, the CPK Party Center consistently presented itself as infallible and therefore blamed any failures in achieving its impossible dictates on either local CPK officials or acts of sabotage. See e.g. Preliminary Explanation, \textit{supra} note 132 at 161 (Here, Pol Pot explains that after the Party, the “workers and peasants, the people who work” are the second strength of the revolution. He goes on to foreshadow CPK Center suspicion of non-achieving areas as being havens for internal enemies, stating that “[i]f workers and peasants are strong politically and in terms of consciousness, the application of the plan will be strong. If workers and peasants are weak politically and in terms of consciousness, the application of the plan will also be weak.”). Even well-established revolutionaries were not immune from the all-encompassing suspicion of CPK Center. Party members who did not follow the absolutist line of the Pol Pot faction that controlled the CPK Center were systematically purged in successive waves, beginning as early as 1973 and continuing throughout the Khmer Rouge period. There was no room for questioning or dissent from the Center’s misguided socio-economic policies, only blind obedience. See Kiernan, \textit{Pol Pot Regime, supra} note 28 at 59-96, 313-356, 368-376 and 411-427. For example, in 1976 Ieng Thirith was sent to investigate reports of problems in the Northwest Zone, including starvation, after the Zone had no failed to meet rice quotas set by the CPK Center. Ieng Thirith later told journalist Elizabeth Becker that she found evidence of “problems” and that “conditions were very queer.” However, when Ieng Thirith saw that civilian workers were starving, overworked and suffering from malaria and other diseases, she did not begin to question the CPK’s socio-economic policies and desire for rice that had caused this suffering. Instead, as she told Becker, Ieng concluded that “agents had got into our ranks” all the way to the “highest ranks” and that these enemies “had to behave with double faces in order to make as if they were following our line [policies].” Becker, \textit{supra} note 109 at 236. Ieng Thirith’s report, a written record of which did not survive the regime, resulted in a massive purge of Northwest Zone CPK officials, who were forced to confess to sabotaging the revolution under torture. See Chandler, \textit{Voices from S-21 supra} note 98 at 68-70.

\(^{233}\) See CPK Central Committee, “Proclamation of the Central Committee of the Communist Party of Kampuchea: The Party’s Policy towards Those who accidentally joined the CIA, Vietnamese Agencies or the KGB against the Party, the Revolution, the People, and Democratic Kampuchea”. DC-Cam Doc D21228, translation in \textit{Searching for the Truth: Magazine of the Documentation Center of Cambodia} 22 (October 2001) 11, online: DC-Cam <http://d.dccam.org> (“For obstinate people who continue to carry out their activities against the CPK, the power of revolutionary workers and peasants, the regime of socialist collectivism, the Kampuchean people, and the [CPK government], our party must consider them to be guilty. For they performed their traitorous activities deliberately, with obstinate resistance to us, and with total commitment to the CIA, Vietnamese, or the KGB. These people defined their role clearly, and therefore, the CPK must eliminate them.”).

\(^{234}\) DC-Cam has mapped 19,440 mass grave sites as of March 2010, see Documentation Center of Cambodia “Mapping Project”, online: DC-Cam <http://www.d.dccam.org/Projects/Maps/Mapping.htm>.
to spread throughout all levels of the CPK. Anyone who complained about working conditions or insufficient food rations, including CPK party members, risked being arrested, tortured and executed. In some instances local officials were directly scapegoated for causing starvation in rather transparent attempts to shift blame away from CPK policies. Through this process of denial, blame-shifting and systematic murder, the CPK Party Center effectively avoided acknowledging its responsibility for famine and responded to reports of hunger and starvation with violent purges that only made conditions worse.

Early in the Khmer Rouge period the Party Center began to purge party members who showed any resistance to its quixotic social or agricultural policies. For example, prominent left-wing intellectual Hou Yuon, who had served as a public CPK figure for years leading up to the Khmer Rouge period was secretly purged early in the Khmer Rouge period, reportedly for opposing the CPK party line on issues such as the abolishment of money and foreign relations. As the

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235 A detailed history of the purges conducted by the CPK Center are outside the scope of this research. For a history of the purges of the Eastern Zone, See Kiernan, *Pol Pot Regime*, supra note 28 at 369-376, 393. For a history of the purge of the West, see *ibid* at 68-80; see also generally Dy, *supra* note 113 at 38-40.

236 See e.g. Sophal Ly, “Confession Summary: Pouy Tvang”, *Searching for the Truth: Magazine of the Documentation Center of Cambodia* (4th Quarter 2004) 3, online: DC-Cam <http:d.dccam.org>. Pouy Tvang was an ordinary Khmer Rouge cadre member prior to his arrest on 6 December 1978. In his confession Pouy Tvang confesses to a wide array of traitorous activities against the CPK revolution. He is accused of organizing internal enemies to destroy Angkar’s farm equipment, seedlings and crops as well as sowing dissent amongst the people. One specific allegation is that Pouy Tvang “caus[ing] people to resist the party’s rice policy.” In another instance, Pouy Tvang is accused of causing the people to ask for more food by telling them that “[a]t other cooperatives, people are fed 3 to 4 cans of milled rice a day, plus unlimited potatoes, bananas, pork, and chicken.” These complaining workers made it difficult for a road to be completed on schedule.

237 Farina So, “Confession Summary: Mok Heng, Chamkar Leu District Ministry of Commerce Chief”, *Searching for the Truth: Magazine of the Documentation Center of Cambodia* (4th Quarter 2008) 6, online: DC-Cam <http:d.dccam.org>. Mok Heng was in the unfortunate position of being responsible for allocating and remitting rice to the CPK Party Center. He was arrested and sent to S-21 prison on 1 March 1977, where he was became a direct victim of scapegoating by the Party Center based on the abject failure to achieve the three tons per hectare rice production quota. He was forced to confess to “export[ing] rice, corn, beans, oxen, and buffalo to the CIA base zone, and wr[iting] letters ordering villagers to bring sugar, rice, and banana preserves to sell in the Lon Nol-controlled zones” during the 1970-1975 civil war. Between May and July, 1970 Mok Heang’s anti-revolutionary activities include sending “7,200 kg of rice and 6 sacks of banana preserves to [hidden enemy] agents, and kill[ing] pigs to sell to villagers.” After the Khmer Rouge victory in April of 1975, Mok Heang allegedly continued his acts of economic sabotage unabated by urging only base people to work in the fields, while allowing evacuated city people to just stay home and eat. This allegedly caused the base people to work less because they were angry with the Khmer Rouge, leading to starvation that year in the district. In 1976, Mok Heang supposedly mixed up rice seeds and delayed the harvest, causing much rice to be ruined and “kept” food such as salt and fish paste, causing further starvation in 1976. Finally, in 1977, “when Angkar asked Heang to take charge of distributing rations to people, he did not provide them on time.”

238 Four-Year Plan, *supra* note 132 at 64.

Khmer Rouge period progressed and famine worsened, it was considered a crime against the revolution, punishable by execution, to criticize CPK policy or even acknowledge the existence of famine or starvation. For example, Cambodian expatriate intellectual returnee Chin Suon was arrested, tortured and executed, ostensibly for having attended meetings “to discuss starvation, overwork, the loss of freedom, the stealing of collective goods, and the conditions of families living in foreign countries.”

The Party Center’s penchant for responding violently to reports of agricultural failure is exemplified by events in the Northwest Zone, where the combination of especially high rice quotas and the arrival of hundreds of thousands of new people in early 1976 caused severe famine conditions. In mid-1976, newly appointed CPK Minister for Social Affairs Ieng Thirith was sent to the Northwest Zone to “investigate charges of shortcomings in the health, diet, and housing of the worker-peasants.” In a subsequent interview with journalist Elizabeth Becker,

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from Democratic Kampuchea, 1976-1977 (New Haven: Yale Southeast Asian Monograph Series, 1988) at 304 [Confessions of Hu Nim]. Hou Yuon was known as one of the “three ghosts” along with Hu Nim and Khieu Samphan, who were prominent leftist politicians who fled Phnom Penh due to persecution by the Sihanouk government in 1967 and were presumed dead before re-emerging as members of the Khmer Rouge. Introduction to Planning the Past, supra note 98 at 228 (“To outsiders who did not hear the name Pol Pot until 1976, Hou Yuon, Khieu Samphan, and Hu Nim were the leaders of Khmer communism.”). It is unclear exactly what happened to Hou Yuon, but evidence suggests that he was purged sometime in 1975 for resisting CPK Center policies. Hu Nim was arrested in 1977 and sent to S-21 prison, where he was tortured and forced to write a series of lengthy “confessions.” See ibid at 227-232. In one of these confession documents, Hu Nim wrote:

Hou Yuon was the one who frontally and openly opposed the party and the party line before and after the liberation. Hou Yuon did not respect the party line and did not listen to anyone. He was very individualistic. After the coup in 1970, he thought that Vietnam must be asked to help in the offensive to liberate the east bank of the Mekong River. During a revolutionary livelihood concept study session with the Organization in 1970, Hou Yuon dared to scold the brothers, saying that the party was using his name as a screen by making him a puppet Minister. Hou Yuon wanted the party to contact the Soviet Union during the war. Hou Yuon was always angry, he did not agree with the party on any problem. After liberation, when the party abolished money and wages and evacuated the people from the cities, Hou Yuon again boldly took a stand against the party line (ibid at 304).

Shortly after the 17 April 1975 victory, Party Center member Ieng Sary issued a public call for the numerous highly educated Cambodians living abroad at the time to return to Cambodia in order to assist with the reconstruction of the country. The vast majority of those who returned as requested were shortly thereafter arrested and sent to S-21 prison where they were tortured and executed, often along with their entire family. For an overview and analysis of S-21 prison, see Chandler, Voices from S-21 supra note 98.


See Becker, supra note 109 at 236.
Ieng Thirith said that she found evidence of “problems” and that “conditions were very queer.” Specifically, Ieng Thirith said that:

[i]n Battambang I saw [local party members] made all the people go to the rice fields. The fields were very far away from the villages. The people had no homes and they were all very ill … I know the directive of the Prime Minister [Pol Pot] were that no old people, pregnant women, women nursing babies, or small children were to work in the fields. But I saw everybody in the open rice fields, in the open air and very hot sun, and many were ill with diarrhea and malaria.243

Despite witnessing the suffering wrought by the CPK Center’s obsession with rice production firsthand, Ieng Thirith did not consider the possibility that the Party’s socio-economic policies needed to be revised. Instead, as she told Becker, Ieng Thirith concluded that “agents had got into our ranks” all the way to the “highest ranks” and that these enemies “had to behave with double faces in order to make as if they were following our line [i.e. policies].”244 Thus, it was not the attempted implementation of the Party line, but deviance from the line by “internal enemies,” that was responsible for causing famine and disease according to Ieng Thirith’s interpretation.245 The Northwest Zone was subsequently violently purged in 1977 and CPK officials from the Zone were forced to confess to sabotaging rice crops under torture before being executed.246

Similarly, in the North Zone, perceived opposition to famine-inducing policies and complaints about living conditions were also used as a pretext for an internal purge. Koy Thuon aka “Thuch” was a veteran revolutionary who had been the North Zone Secretary from 1970 until April of 1976,247 when he was reassigned by the Party Center to the CPK’s Commerce Ministry in Phnom Penh.248 Ke Pauk, a CPK Central Committee member and Thuch’s political rival who was known for his ruthlessness and willingness to enforce more extreme policies replaced Thuch.

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243 Ibid.
244 Ibid.
245 Ibid at 236-237.
246 Chandler, *Voices from S-21*, supra note 98 at 68-70.
as North Zone Secretary.\(^{249}\) Shortly after assuming control of the Zone in April of 1976, Ke Pauk sent a telegram to the Party Center which reported on “the enemy, the masses, and cultivation in the northern zone” and stated that “[t]he enemy says that the revolution is too strict. They oppose the idea of cooperatives and the construction of new dikes. They also complain about starvation.”\(^{250}\) To combat these “enemies”, Ke Pauk informed the Center that he “advised regions to investigate the above-mentioned enemy activities closely. We have already arrested the former cooperative chiefs. In addition to these actions, the enemy has a hidden network, which we are investigating. We will take appropriate measures to deal with this.”\(^{251}\)

In 1977 Thuch was arrested and sent to S-21 prison where he was forced to “devalue his career and blacken the reputations of everyone he had worked with except those in the Party Center,” and his “copious, neatly written confession implicated over a hundred people.”\(^{252}\) Thuch was forced to claim that he had been party to a subversive plan to “produce confusion” by reinstating private property.\(^{253}\) After Thuch was executed, the prison staff at S-21 who had tortured and executed him were told that eliminating the “strings” or “networks” of traitors associated with Thuch had solved “problems of defense and construction and problems affecting people’s livelihood.”\(^{254}\)

Hu Nim, another prominent Cambodian leftist who became the CPK Minister of Propaganda during the Khmer Rouge period, was secretly arrested in April of 1977.\(^{255}\) According to one report, Hu Nim suggested that the Party reintroduce money to incentivize peasant workers to produce more crops in 1977 after a particularly bad harvest.\(^{256}\) A former CPK regimental

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\(^{250}\) “Telegram 94”, *Searching for the Truth: Magazine of the Documentation Center of Cambodia* (2d Quarter 2003) 11, online: DC-Cam <http:d dccam.org>. The document was also copied to “Brother Nuon [Chea],” and “Brother Khieu” (most likely fellow CPK leadership member Son Sen).

\(^{251}\) *Ibid.*

\(^{252}\) Hinton, *Why Did They Kill?*, supra note 249 at 62.

\(^{253}\) *Ibid* at 63.

\(^{254}\) *Ibid.* The following excerpt is provided from the 25 July 1978 notebook entry of senior S-21 interrogator “Tuy”: In the old Northern Zone before the problem of Khuon’s [aka Koy Thuon’s] ‘strings’ or ‘networks’ was solved there were problems of defense and construction and problems affecting people’s livelihood. After the contemptible Khuon’s ‘strings’ were clear, the movement was able to leap along in every aspect (*ibid*).

\(^{255}\) The CPK Party Center kept the arrest a secret until 1979 after being ousted from power. See Introduction to Planning the Past, *supra* note 98 at 227-228.

\(^{256}\) *Ibid* at 230-231.
commander who defected to Thailand in 1978 has also “claimed that ‘several members of the Party such as Hu Nim and [Ros] Nhím asked the Party to have mercy on the people’“ and this led to them being purged.\textsuperscript{257} After being arrested, Hu Nim was transferred to S-21 where he was systematically tortured and forced to author a series of “confessions” until his execution in August of 1977.\textsuperscript{258}

In some of these confessions, Hu Nim managed to subvert the interrogation process somewhat by pointing out some of the basic problems with CPK policy. For example, as part of his confession, Hu Nim described of the actions of four supposedly fellow anti-revolutionary “intellectuals”, Chiv aka Yith Kim Sent, Prom Sam Ar, Chum Narith aka Nak and Tran Veng aka Phen, as follows:

> When the Office [Hu Nim worked with all four individuals at an office code-named K-33] was short of food and we ate only gruel, the four of them attacked collectivization. At open meetings with the masses, Prom Sam Ar did not speak, but he got Nak to speak. When there were only the four of them, it was Prom Sam Ar who did the talking. So Nak was the courageous one in the group. Nak accused our radio of telling lies. One day during a general meeting of the Office, Nak took a stand against collectivization and criticized the collective system, giving reasons such as the shortage of medicine, the shortage of food, and the inability to grow vegetables, catch fish, or raise animals.\textsuperscript{259}

For taking this anti-revolutionary stance, Nak was later arrested and sent to S-21 on 29 October 1976.\textsuperscript{260} Prom Sam Ar had already been placed under house arrest under the supervision of Hu Nim before Hu Nim’s arrest for having made anti-revolutionary remarks\textsuperscript{261} and managed to hang himself in the bathroom when Hu Nim’s guards became lax.\textsuperscript{262}

\textsuperscript{257} \textit{Ibid} at 231, citing the account provided by Lim Mean, a defector who crossed into Thailand on 2 November 1978, and was interviewed by Thai officials on 15 December 1978. Further quoted as stating that Hu Nim “said that the working people must not be persecuted, and foreign aid must be accepted so that the Kampuchean people do not suffer too much. Such opinions were regarded by the Party as subversion” (\textit{ibid}).

\textsuperscript{258} \textit{Ibid} at 227.

\textsuperscript{259} Confessions of Hu Nim, \textit{supra} note 239 at 287-288.

\textsuperscript{260} \textit{Ibid} at 288, note 120.

\textsuperscript{261} \textit{Ibid} at 312. According to Hu Nim’s confession, the substance of these anti-revolutionary remarks were that “’[he] does not agree with the abolition of money. We must use money, we must have wages. If money is not in circulation and there are no wages, it is unjust. [He also] oppos[ed] the collective system, I oppose the party. I have a grievance against the party because the party has made me suffer. [Finally, Prom San Ar did ] not agree with the class documents and the class struggle; and intellectuals are not another class’ … [claiming that] Evacuation of the people led to their death.”

\textsuperscript{262} \textit{Ibid} at 312-313.
Elsewhere in his confession, Hu Nim implicated then-Northwest Zone Secretary Nhim Ros, by claiming that Nhim Ros had “[disagreed] with the party on the path of agricultural construction.” The “crimes” Hu Nim implicated Ros Nhim in, amounted to simply resisting the Party Center’s fundamentally flawed famine-inducing agricultural and social policies. Hu Nim goes on to explain that contrary to CPK policy, “brother Nhim’s concept was of a system of plenty. The concept of a system of plenty and of not relying on labour power are concepts opposed to the basic political line of the party, which is independence - self reliance - mastery.” He later described this line of “plenty” as “brother Nhim’s fundamental anti-party position.” Hu Nim then stated that Nhim focused his efforts to cultivate fellow internal enemies in Northwest Zone “regions 3, 4, and 5” which are the “granary of Kampuchea” explaining that this area can only produce the “hundreds of thousands of tons of rice exported overseas” as it had before, by utilizing modern farming techniques, including machinery. Finally, Hu Nim also confessed that Nhim Ros had committed the crime of blaming the Party Center for demanding impossible production targets. Later in the confession, Hu Nim similarly implicated Eastern Zone Secretary Sao Phim in sharing Nhim’s desire to open Cambodia’s borders and to accept foreign aid.

Finally, in his confession Hu Nim also recalled a meeting he had with Pol Pot around “the end of January 1977,” during which Pol Pot instructed Hu Nim to focus future radio broadcasts on congratulating model districts that had achieved the production quotas set by the CPK Center. Hu Nim claimed in his confession that at this meeting Pol Pot explained the CPK’s policy of

263 Ibid at 290.
264 Ibid (Quoting Ros Nhim as having allegedly stated that “[t]he standpoint of the [CPK] Standing Committee on agricultural construction is basically to rely on labor power. I do not agree with that. In the Northwest, especially in Regions 3, 4, and 5 which are the granary of [Cambodia], there are vast farms kilometers long. In ploughing, harvesting, and threshing, the use of labor power alone has a retarding effect. Tractors and machinery must be used.”).
265 Ibid.
266 Ibid.
267 Ibid at 292.
268 Ibid at 293 (Quoting Nhim Ros as having stated ‘[n]ow for the this year, 1976, the party has assigned us the task of achieving three tons per hectare throughout the whole country. As for the Northwest, in particular Regions 3, 4, and 5, the party has assigned us four tons per hectare … How can we [fulfill this quota], if there is no solution to the problem of tractors, machinery, and petrol? We cannot. This is not my fault, it’s the fault of the Standing Committee.’).
269 Ibid at 296 (Hu Nim quoted Sao Phim as having stated “‘[b]uilding agriculture is the same as making the country prosper quickly. We cannot just depend on our own forces, we must also rely on foreign aid’.”).
270 Ibid at 314.
absolute reliance on human labour and rejection of foreign and this explanation made him
“realize that brother Nhím’s stand, for a system of plenty, was a great deal different from the
party line.”

The confessions of several key CPK officials, including Hu Nim, along with former prominent
CPK members Koy Thuon and Doeun, implicated Eastern Zone Secretary Sao Phím in an
elaborate scheme to overthrow the Party Center. Sao Phím was a long term revolutionary and by
most accounts, a popular leader and the Eastern Zone was a relatively good place to live, with
less executions and better rations that many other areas. The Eastern Zone was always viewed
with suspicion by the CPK Center leaders, who feared Sao Phím’s autonomy, popularity and ties
with the hated Vietnamese communists. The Eastern Zone was thoroughly purged throughout
1977 and it was only a matter of time before Sao Phím was arrested and sent to S-21. In June of
1977, Sao Phím shot himself as CPK internal security officers were on their way to arrest him.
Shortly after Sao Phím’s suicide, Sok Thuok, alias Vorn Vet, CPK Second Deputy Prime
Minister and Minister of the Economy was arrested and also forced to implicate Sao Phím in a
plot against the CPK Center. In Vorn Vet’s confession, he explains how Sao Phím’s deviation
from the strictures of the official CPK line had bettered living conditions in the Eastern Zone:

[Sao Phim] informed me on the good situation in the East Zone. [The alleged
enemy group, the ‘Workers Party of Kampuchea’] had been able to build itself up
in the ranks of the military and among the people. Cooperatives had already been
established, but the harvest was distributed and there was a private standard of
living in accordance with the demands of the people [who] did not want to eat in
common because they perceived that this meant shortages of everything. If they
… lived privately, eating in families as in China, the people would be very
happy.

Purged Northwest Zone Secretary Nhím Ros, implicated in Hu Nim’s extensive confessions
discussed above, was similar to Sao Phím in that both were long-time revolutionaries

271 Ibid.
272 Chandler, Voices from S-21 supra note 98 at 71-74.
273 The Eastern Zone shared a long land border with Vietnam and Sao Phím, as a long-time revolutionary fighter had
spent time with Viet Cong forces. See Hinton, Why Did They Kill?, supra note 249 at 164-167 (describing the
background of Sao Phím and how he became mistrusted by the CPK Party Center).
274 Ibid (describing the Party Center’s decision to purge the Sao Phím and the Eastern Zone and Sao Phím’s eventual
suicide to prevent imminent arrest, torture and execution).
275 First Congress Meeting, supra note 248..
276 Chandler, Voices from S-21 supra note 98 at 72.
independent from their affiliations with the Khmer Rouge movement and were thus presumably perceived as a threat to the absolute authority of the CPK Party Center. Additionally, available evidence suggests that both men also critiqued and/or strayed from the strictures of the CPK line regarding the requirements of the Super Great Leap Forward plan. As the Secretary of the Northwest Zone, Nhim Ros was put in an especially untenable position, as he was asked to produce thirty percent of the country’s rice for export, without the benefit of the modern machinery that previously allowed Northwestern Cambodia to become the nation’s rice-producing capital. Thus, both men were seemingly purged simply because they were not trusted by the Pol Pot-led faction that made up the CPK Center and evinced a willingness to oppose some of the more extreme CPK policies that were also the primary causes of famine at the time.

While underperforming or mistrusted areas were violently purged, districts that reported achieving assigned rice production goals were labeled “model” cooperatives and earned the right to fly the Great Leap Forward flag, denoting their special achievement. This system of purging underperforming areas, while honouring others, created the incentive for local CPK officials to issue false reports to the Center in order to avoid its deadly scrutiny. In 1978, Nuon Chea

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277 See generally, Kiernan, Kiernan, _Pol Pot Regime_, supra note 28 at 216-250 (providing an overview of living conditions, rice production quotas and purges of the Northwest Zone).

278 See CPK Central Committee, “Decisions of the Central Committee on a Variety of Questions” translated by Ben Kiernan, in David P Chandler, Ben Kiernan & Chanthou Boua, eds & translators, _Pol Pot Plans the Future: Confidential Leadership Documents from Democratic Kampuchea, 1976-1977_ (New Haven: Yale Southeast Asian Monograph Series, 1988) at 3 [Decisions of the Central Committee]. For example, in 1977, the Central Committee of the CPK awarded the districts of Prasot, Kampong Tralach Leu and Tram Kak honorary red flags denoting their model status. See “Honorary Red Flag Award to the Districts of Prasot, Kampong Tralach Leu and Tram Kak”, _Searching for the Truth: Magazine of the Documentation Center of Cambodia_ 28 (April 2002) 7, online: DC-Cam <http://www.d.dccam.org>. (original document, on file with DC-Cam, dated 30 June 1977); see also “1976 Decisions of the Central Committee”, _Searching for the Truth: Magazine of the Documentation Center of Cambodia_ 26 (February 2002) 2, online: DC-Cam <http://www.d.dccam.org> (Translation of CPK Central Committee document that explains why certain areas were given the honor of flying the revolutionary flag. These flags were most often awarded to areas within Cambodia’s Southwest Zone, which was an area filled with cadres trusted by the Party Center and controlled by feared Zone Secretary Ta Mok. See generally Dy, supra note 113. Ta Mok (“grandfather Mok” in Khmer, born Chhit Choeun) was a member of the Standing Committee who had risen through the military ranks of the CPK, as he was one of the few high-level CPK members who was not highly educated and had never left Cambodia prior to the Khmer Rouge period. Mok earned the nickname of the “one-legged butcher” because he had lost the lower part of one leg in military action sometime around 1970 and led units responsible for CPK internal purges both before and during the Khmer Rouge period. For example, Southwest Zone forces were involved in massive purges both the Northwest Zone and Eastern Zone during the Khmer Rouge period, as mentioned above. It is thus likely not a coincidence that the Southwest Zone was assigned relatively modest rice production quotas during the Khmer Rouge period, while Zones associated with untrusted CPK factions, such as the Northwest and Eastern Zones, were assigned much higher rice production quotas.
explained how the CPK Center assumed that problems with living conditions were the work of internal enemies, stating “the party had to give directives to a branch concerning the living conditions of the people. When nothing changed, we realized something was wrong. Where there were deviations to the left or to the right, we looked carefully into the backgrounds of the cadres. We also sought the opinion of the masses. We have thus been able to uncover enemy agents step-by-step.”

3 The Result: Famine and Denial in Cambodia

By late 1975, the evacuation of Cambodia’s cities was complete, the borders closed and the Party Center was firmly in control of national policy. The stage was thus set for the Khmer Rouge leadership to deliver on its promise of a new, more bountiful Cambodia. Instead, through what Cambodian history scholar David Chandler has aptly referred to as a “volatile mixture of hubris, paranoia, and wishful thinking”, Pol Pot and the Party Center almost immediately set the nation down a path to catastrophic violence and famine.

1975 did not present the CPK with a true opportunity for it to overhaul national agricultural policies, as the final throes of the civil war had left much of the country unprepared to begin the rice planting season. As such, for the remainder of 1975, the Party Center established its power base and prepared to implement its planned radical overhaul of Cambodian society in 1976 in earnest. Indeed, during this period of consolidation and preparation, it appears that the meagre 1975 rice crop was left largely free from state expropriation policies. Moreover, the Center’s full range of social policies, including bans on private cooking and eating and absolute collectivized living, were not yet nationally implemented during this time. Despite the trauma of the recently ended five year civil war, ending receipt of international food aid and the chaos caused by the evacuation of Phnom Penh, famine does not appear to have been widespread in 1975, although hunger was not unknown and many evacuees were left to fend for themselves, resulting in food shortages and the spread of disease.

280 Chandler, Voices from S-21, supra note 98 at 44.
281 The planting season for Cambodia’s main wet-season rice crop is May through July and rice shoots are then transplanted from late June through September. Fields must be prepared for planting and seed selected and allocated prior to planting season. See e.g. UN Food & Agriculture Organization, “Cambodia: Country Profile”, online: UNFAO <http://coin.fao.org/cms/world/cambodia/CountryInformation.html>. 
Throughout 1975, the government also imported rice from China, which was received at Kampong Som seaport and subsequently distributed throughout the country. The imported rice however, appears to have been destined for use as seed, rather than consumption, as part of the CPK’s preparations to overhaul Cambodia’s agricultural sector. By the end of 1975, the Khmer Rouge-dominated CPK Center had assumed full power, with the entire nation under its direct control. The absence of mass famine in 1975 likely stoked the Center’s belief in the superiority of the Cambodian revolution, contributing to the air of unrealistic optimism that reigned at the time within the upper echelons of the CPK. For example, in the handwritten minutes of a 10 July 1976 CPK meeting attended by Deputy Prime Minister and Minister of Foreign Affairs Ieng Sary, under the heading “The Current Political Tasks of Democratic Kampuchea” it states:

Emerging from the war, we focus on agricultural tools. This year, we have made these agricultural necessities available to a great extent both in the rural and urban areas, but we have never met with starvation. This year alone, we have rice, cassava and corn. Since 17 April 1975, we have opened a new historical page in which we have brought back the entire production mechanism.

If we are compared to Vietnam and Laos, we see that Vietnam still remains a mixture of classes like Cambodia in 1965, whereas we have a complete class purification. In terms of rice production, Vietnam lacked 1,200,000 tons and Laos invited French

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282 Kampong Som is Cambodia’s sole deep-water port and is currently named “Sihanoukville”.
283 See “33 Assistant Rice”, DC-Cam Doc D22459 (2 April 1976); see also “Weekly Report on Rice,” State Commerce Committee, DC-Cam Doc D21985 (8 October 1975) (Showing income of 10,300 tons from a ship named “San Yin,” of which 2,000, 1,500 and 1,000 tons were sent to the Southwest, West and Northeast Zones respectively.); “State Commerce Committee Report on Rice for 28 August to 30 September 1975”, DC-Cam Doc D21975 (30 September 1975) (Stating that during the month of September, “Angkar” had distributed 6,000 tons of rice to the West Zone, 8,100 tons to the Southwest Zone, 3,000 tons to the East Zone and smaller amounts to other areas of Cambodia. Some of this rice had come from the port at Kampong Som and the document lists the “overall income” of rice as 18,890 tons, 18,105 tons of which having been used, leaving only 785 tons in the Phnom Penh state storehouse.). A report from the following week shows that another ship, carrying 10,300 tons of rice arrived in Kampong Som and that this rice was distributed as follows: 2,000 tons to the Southwest Zone, 1,500 tons to the West Zone, 1,000 tons to the Northeast Zone, 1,000 tons to the military and 300 tons to “region 106” (Oddar Meanchey region north of the Tonle Sap lake). “State Commerce Committee Weekly Report on Rice from 1 to 8 October 1975”, DC-Cam Doc D21985 (8 October 1975).
284 Surviving documentation repeatedly refers to rice imported in 1975 as “33 Assistance Rice”. The CPK Party Center planned to increase rice production and national income partially by cultivating fast-growing rice varieties suitable for sale on the international market, especially to the regime’s main trade partner, China. The Center sought to achieve a second annual rice crop through this focus on fast growing varieties. As such, it is probable that “33 Assistance Rice” referred to a Chinese variety of rice reaching only approximately thirty-three centimetres in height but maturing for harvest more rapidly than longer Cambodian varieties. Chhang Interview, supra note 111.
285 See Kiernan, Pol Pot Regime, supra note 28 at 65-101; see also Excerpted Report, supra note 134 at 25 (CPK report quoting Pol Pot as stating at a June 1976 meeting “[a]ll the people are in our grasp. We hold full state power, as well as the whole economy.”).
companies to help, but we met basic needs which is unique in our history. In China, it is not good and in Russia, pretty good.286

Despite the lack of an organized national plan, lower level CPK officials were instructed to follow, unquestioningly, the Center’s broad policies in pursuit of the Super Great Leap Forward. These local leaders were instructed by the Center to “grasp hold of [the workers’] consciousness [and] make things clear to them”287 in order to achieve rice production targets and not to complain about the CPK’s overly rapid Super Great Leap Forward expectations, but to simply “do the plan” regardless of what difficulties they encountered.288 In order to “grasp hold of the cooperatives” and thereby ensure that its agricultural policies were strictly followed, the Party Center “suggest[ed] that the majority of the armed forces … stay with the people”, which resulted in armed soldiers being dispersed amongst the people to serve as local militia and oversee implementation of CPK policies.289

As a result of the CPK’s military-style all-out push to increase rice production in 1976, Cambodian civilians spent almost every waking moment working to produce rice or on irrigation projects in support thereof. The caloric output of Cambodia’s workforce during the Khmer Rouge period was tremendous and if anything, the typical 2,000 calorie per day diet of the average Cambodian290 needed to be increased in order to avoid famine. Instead, the rations given to the labour force fell far short of even the modest traditional diet of most Cambodians. While CPK rhetoric commonly referenced the need for adequate food in order to support the civilian workforce291 and nominally, every Cambodian was entitled to a ration equivalent to

286 Kosal, Kiernan & Sim, supra note 226 at 17.
287 Excerpted Report, supra note 134 at 17 (“Don’t allow the difficulties you encounter to encourage you to say that they are due to the fact that the plan is being implemented too rapidly. … The important issue is that we must do the plan.”).
288 Ibid at 128 (emphasis added); see also, ibid at 130-131, stating that: [w]e know the road that we have to walk along, we are happy to do so, walking in a group, collectively very strong and brave. We see that we will reach our destination. It is certain that obstacles exist along the road, sometimes there is a broken bridge—or the bite of a snake, centipede, or poisonous ant. But these are not basic matters. The real point is that sometimes when there is too much water, or too little, we go ahead and pump it away or sprinkle it on. When our cows are skinny, we fatten them. It was the same in the war.
289 Ibid.
290 Rice Almanac, supra note 100 at 7.
291 See e.g. Preliminary Explanation, supra note 132 at 158 (Discussing the issue of “[e]dible materials belonging to the people.” Pol Pot stated that fish and vegetables must be raised without explaining how this is to be accomplished. Pol Pot even claimed that soon workers would be given desserts on a regular basis. Again Pol Pot does not explain how this was going to be accomplished. Typically, the question of “can we accomplish this?” is
approximately 0.85 kilograms of rice per day,292 there was never any systematic oversight of food rations. In sharp contrast, the Party Center took careful note of the amount of rice collected from each administrative Zone and shortfalls created the risk of a violent purge. This voracious demand for rice by the CPK, mixed with the potential for violent repercussions for failure, potently incentivized local CPK officials to report fictitious amounts of rice production in order to evade the volatile scrutiny of the Party Center, while the brunt of inevitable actual production shortfalls was borne by the civilian population.293 The resulting rations were woefully insufficient294 in most, if not all, areas and in 1976 a significant number of Cambodians, answered with circular logic. Pol Pot provides no analysis but simply concludes that “[i]t’s clear that we must accomplish this. We have nothing to do apart from serving the people. We have the capacity to solve this problem fully.”)

292 Four-Year Plan, supra note 132 at 55 (Accounting for rice “for the livelihood of the people … throughout the country.”). This figure would have been sufficient to prevent major famine, had the ration been actually implemented throughout the countryside. 312kg of paddy rice would result in approximately 180kg of milled rice. See Nesbitt, supra note 101 at 98 (“Polished grain yields vary from 55 to 60%.”). Traditionally, in pre-war twentieth century Cambodia, average consumption was approximately 165kg of milled rice per year. Rice Almanac, supra note 100 at 7. The Party Center even went so far as to project in the Four-Year Plan that dessert would be served every day by 1979, “so people live collectively with enough to eat.” Four-Year Plan, supra note 132 at 107 (“In 1977, there are to be two desserts per week. In 1978 there is one dessert every two days. Then in 1979, there is one dessert every day, and so on.”). The Plan further stated that because the population will be “nourished with snacks” people would be “happy to live in this system” (ibid). These fictitious government rations are even cited at another party meeting as a bulwark against outbreaks of disease, as party officials were told “[h]ealth services and social action also stand [rely] on agriculture.” Excerpted Report, supra note 134 at 31 (“Health services and social action also stand [rely] on agriculture. Hospitals are to cure those who are already sick. The important medicine to prevent sickness is food. If there were enough to eat, there would also be little sickness.”).

293 Recently, expert witness Philip Short, a journalist and author of the book Pol Pot: Anatomy of a Nightmare, testified in Case 002 at the ECCC that in his opinion, the CPK Party Center did not affirmatively seek to control the population by providing starvation rations, but instead failed to supervise local leaders, who in turn reduced civilian rations in order to satisfy the CPK.

Committee had ordered that people be fed properly; these orders were not implemented because the population was dysfunctional. Local officials were caught in a web of contradictions as they tried to follow orders from the center, control their populations, and push people to work hard enough to produce large amounts of rice, thus electing in most cases to apply very harsh policies, Mr. Short said. The expert witness emphasized that Pol Pot and the leadership were responsible for allowing the situation to arise and leaving it unaddressed but they did not directly order that food be used to control the population.

294 Survivors from various locations throughout Cambodia have reported a typical ration of two small ladles of watery rice or corn gruel per day, sometimes supplemented with salt or a vegetable such as trakuon (water morning glory) and rarely, small amounts of meat or fish. This ration has been reported by survivors from various areas of Cambodia. See e.g. Barry Kramer, “Tales of Terror: Cambodian Refugees Tell a Story of Hunger, Repression and Death” The Wall Street Journal (22 November 1978) at 1 (Stating that refugees in Surin, Thailand reported that “they were always hungry … [and] got only two meals a day of a thin rice gruel, often just with salt but sometimes
numbering at least into the thousands began to perish from a mixture of undernutrition and disease as famine spread across the countryside. Reports of famine however, only led the Center to respond with more violent purges, such as the purge of the Northwest Zone following Ieng Thirith’s 1976 investigatory visit there. Meanwhile, the actual policies responsible for causing famine to begin in the first place were treated as infallible and left completely unchanged, even as the death toll continued to rise well into the hundreds of thousands.

Despite the fact that famine conditions were already becoming severe in various parts of the country as a result of their policies, the Party Center viewed the 1976 rice crop as a modest success. At a December 1976 CPK Party meeting, Pol Pot discussed the successes and failures of the preceding year. In his speech, Pol Pot declared that the Center had “scrutin[ized]” the results of implementing the socialist revolution for the year and that the “outcome of our

with vegetables and occasionally with meat.”); Henry Kamm, “The Agony of Cambodia” The New York Times Magazine (19 November 1978) 40 at 42. Survivors also consistently cite variations on this ration, depending on where they lived during the Khmer Rouge period, in interviews with the author and DC-Cam staff members. Additionally, certain areas were trusted by the CPK Center more so than others, providing crucial leeway for local leaders. For example, the Southwest Zone, under the trusted authority of Ta Mok enjoyed much greater autonomy than other Zones and regions. Furthermore, areas where conditions deteriorated the most rapidly were mostly those where expected rice production was relatively high and which experienced an influx of urban deportees. For example, the Northwest Zone was expected to produce thirty percent of Cambodia’s rice for export according to the Four-Year Plan, and had numerous areas assigned to achieve double rice crops. Famine and starvation also appear to have been particularly acute in this Zone. The only broad group apparently spared from the reach of famine were mid-to-high ranking CPK officials, who ate separately from the general civilian population and often even had their own special cooks.

As noted supra at note 5, the death toll of the Khmer Rouge period is subject to wide variation, both in estimates of total deaths and causes thereof. Nonetheless, it is clear that famine-related deaths during the Khmer Rouge period numbered at the minimum in the hundreds of thousands. While famine conditions were present in certain areas during the 1970-1975 civil war and food scarcity was prevalent in 1975, it appears that mass starvation events began in earnest in 1976. See e.g. Kiernan, Pol Pot Regime, supra note 28 at 235-236 (Estimating that “[o]ne reason for the 1976 starvation (5,017 to 2,982 people in Peah Net Preah village) was the Center’s demand for rice for its own staff and for export to China. Every day in each harvesting season, a hundred workers loaded twelve hundred to sixteen hundred tons of grain onto trains of thirty to forty wagons that headed ‘downriver towards Phnom Penh,’ taking about forty thousand tons of rice per season.”) (internal citations omitted); see also Chen, “Former Warehouse Official”, supra note 187.

Report of Activities, supra note 194 at 195 (Summarizing that “[o]n the whole in 1976, a period when we had real difficulties, we performed quite well.”).

Pol Pot is not named as the speaker in the primary CPK document which consists of the transcript of a speech by a comrade “representing the party.” However, Khmer Rouge researchers have concluded that the speech was very likely written by, and likely delivered by Pol Pot himself. See David P Chandler, “Introduction” to “Report of Activities of the Party Center According to the General Political Tasks of 1976”, in David P Chandler, Ben Kiernan & Chanthou Boua, eds & translators, Pol Pot Plans the Future: Confidential Leadership Documents from Democratic Kampuchea, 1976-1977 (New Haven: Yale Southeast Asian Monograph Series, 1988) 177 [Introduction to Report of Activities].
scrutiny is that we can see increased results for 1976.” These successes were despite the fact that “some shortcomings can be noted,” including “the matter of assembling food reserves for our people,” which the speaker admits “is our [the CPK’s] fault.” In an uncharacteristic moment of candour, Pol Pot even acknowledges that “three-quarters of the country has failed [to adequately feed] the civilian population and that this affects the health of the people.” The purported reason for this shortfall in food reserves however, was that “the party line has not yet filtered down,” to all areas. These shortfalls, Pol Pot then states, would be avoided in the future by adhering more strictly to the political line of the Party Center, rather than altering the party “line” in any way, as the Center still believed in itself “completely.” Meanwhile, despite the spread of famine, in December of 1976, the CPK estimated that a national “surplus” of 247,000 tons of milled rice had been achieved and in January of 1977, Phnom Penh radio announced that 150,000 tons of rice was being prepared for export “to earn capital for national defence and construction efforts.”

After these perceived “increased results” of 1976, the Party Center sought to continue its pursuit of the Super Great Leap Forward plan and put aside the fact that they had worked thousands of civilians to death already and the surviving civilian population was already suffering the ravages of a severe famine. In a late 1976 “Report on Political Tasks” the Party Center announced a production target of 5,400,000 tons of milled rice for 1977 in order to harvest a “surplus” of

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298 Report of Activities, supra note 194 at 182.
299 Ibid at 188.
300 Ibid.
301 Ibid.
302 Ibid at 189 (“We take note of these problems so as to step more forcefully into the future.”).
303 Ibid (“From our stance to our actions, we believe in ourselves completely.”).
304 Ibid at 195.
306 The CPK Center appears to have been aware of the fact that the workforce was depleted, especially in areas that had been assigned especially high quotas of rice production. The Center assumed however, that this problem would be solved through pure revolutionary zeal and strict adherence to the party line. See generally Preliminary Explanation, supra note 132 at 131 (Admitting that “[t]here was a fault in the 1976 [draft] plan where the plan set a target of three tons of padi [unmilled rice] per hectare. When we started out with the 1976 plan, the line was to struggle and to scatter everything before us in disorder. Some regions managed to harvest three tons. They did so because their political consciousness was particularly strong, but they became tired, because we attacked everywhere at once. To attack in this way over a long period of time is impossible.”).
841,000 tons.\textsuperscript{307} The resulting renewed push to again multiply Cambodia’s rice production soon escalated the severity of the national famine. To make matters worse, at the beginning of 1977 a flood occurred in Cambodia, followed by a drought throughout Southeast Asia, reducing crop yields throughout the region.\textsuperscript{308} Cambodia, along with Vietnam, Laos, Thailand and Myanmar all suffered reduced rice output however, this drought was not catastrophic outside of Cambodia and none of these bordering nations experienced any famine.\textsuperscript{309} Adding to these difficulties were the internal party purges that began in 1976 and continued unabated throughout the rest of the Khmer Rouge period, as these mass killings further disorganized the economy and decreased agricultural production.\textsuperscript{310} Around the end of 1976, Cambodians began starving to death in massive waves and in particularly hard-hit areas entire villages virtually disappeared due to mass starvation events.\textsuperscript{311}

Despite this continual worsening of famine conditions, there is no evidence that the Center ever considered changing its famine-inducing policies or even slowing down.\textsuperscript{312} The CPK Center, faced with overwhelming evidence that the goal of three tons per hectare was unachievable and its rice exports were coming at the expense of a starving civilian populace, continued to make a concerted effort to shift any blame for famine to wholly fabricated networks of enemies and in October of 1977, CPK propaganda magazine \textit{Tung Padevat} (“Revolutionary Flag”) blamed “bad class elements” for administering cooperatives “without rice to eat.”\textsuperscript{313} Meanwhile, the Party Center continued to expropriate and export rice from the countryside throughout the remainder

\textsuperscript{307} Report of Activities, \textit{supra} note 194 at 196 (The Center considered this figure, which would result in 500,000 tons of milled rice for export was a “low estimate” and that if a higher estimate is used, then the surplus could be 1,241,000 tons of padi rice, resulting in “approximately 700,000 tons of milled rice” as a surplus for export and other CPK uses.). Even though these estimates were far below those announced by the CPK Center in its proposed Four-Year Plan, which estimated a surplus of 1,304,800 tons to be exported in 1977 and a total surplus of 2,297,700 tons of milled rice, Four-Year Plan, \textit{supra} note 132 at 56.

\textsuperscript{308} Jackson, \textit{supra} note 118 at 81.

\textsuperscript{309} See Rice Almanac, \textit{supra} note 100 at 105, 109, 113 and 183 (Vietnam, Thailand, Myanmar and Laos PDR rice production charts respectively).

\textsuperscript{310} In a 1977 report, Karl Jackson described the CPK as “already staggering from the effects of previous bloodlettings.” Jackson, \textit{supra} note 118 at 81.

\textsuperscript{311} For example, Ben Kiernan’s research found that anywhere from 2,982 to 5,017 people died of starvation in Preah Net Preah village in 1976 alone. Kiernan, \textit{Pol Pot Regime, supra} note 28 at 235-236.

\textsuperscript{312} Chandler & Kiernan, Preface, \textit{supra} note 182 at xv (“There is no evidence that [CPK leaders] ever considered doing things differently. People who proposed going slowly were ignored or put to death.”).

\textsuperscript{313} Chandler, \textit{Voices from S-21 supra} note 98 at 69, quoting \textit{Tung Padevat}, October 1977.
of the Khmer Rouge period while continually publicly denying the existence of mass famine, especially in international media.\(^{314}\)

In late 1978, the Vietnamese military invaded Cambodia and swept the Khmer Rouge from power, taking control of Phnom Penh on 6 January 1979, effectively ending the Khmer Rouge’s reign.\(^{315}\) The horrendous results of the Khmer Rouge’s socio-economic policies were evident in the refugee camps that many Cambodians fled to in 1979 as the Vietnamese advanced across the countryside and the Khmer Rouge forces became disjointed and unable to control the population. Undernutrition and associated diseases, along with malaria, were the main causes of death amongst newly arrived refugees at the Thai camps.\(^{316}\) According to an account written by John Collins Harvey, a doctor who worked in a refugee camp for Cambodians in Thailand in 1979, “[a]mong the refugees, the most serious problems were starvation … in the children, vitamin deficiencies, particularly beri-beri, unattended war wounds compounded with starvation, untreated malaria . . . and anaemia.”\(^{317}\) Additionally, Harvey observed that “[m]ost of the children suffered from diarrhea,”\(^{318}\) a common symptom of undernutrition. In fact, the “chronic

\(^{314}\) See e.g. “The Dialogue between Pol Pot, Secretary of the Central Committee of the CPK and First Minister of the Democratic Kampuchea Government, and a Delegation of the Belgian-Kampuchean Association Phnom Penh August, 1978”, Searching for the Truth: Magazine of the Documentation Center of Cambodia (2d Quarter 2004) 15, DC-Cam Doc D00108. Report by Chinese news agency quoting Pol Pot as stating: 95% of the people are better off than they were in the old regime, because in that regime they did not have land, jobs, water, or money, so they sold their son and daughter or even wife. Life was so uncertain. Moreover, they were under oppression, working under the status of slave, and did not receive as many results as they should. They were exploited. Now the people are the masters of their work and the products they make. They are working as hard as or less than they used to, but their lives are better and more ensured. Only 5% are working harder than before because they did not work or worked too little in the past. But now they have realized that living is working and working to help build the country, defending it and improving people’s living conditions in general. Therefore, people’s lives are ensured and improving little by little in all sectors. People everywhere are happier as their lives and country are recovering” at 16.

\(^{315}\) While the Vietnamese ended the Khmer Rouge period, the Khmer Rouge regrouped in Northwestern Cambodia and Cambodia suffered intermittent periods of civil war until approximately 1998, when Ta Mok, the final Khmer Rouge military leader to continue fighting against government forces was defeated and captured. Ta Mok subsequently died of natural causes awaiting trial in a Cambodian military prison.


\(^{318}\) Ibid at 31.
undernutrition so altered growth patterns that boys who looked to [Harvey] to be eight to 11 years of age reported ages anywhere from 16 to 20 years.”

Only the ouster of the Khmer Rouge from power brought any famine relief to Cambodia. Indeed, the speed with which famine conditions improved in the post-Khmer Rouge Cambodia is both a testament to the agricultural prowess of Cambodian farmers and a powerful indictment of CPK policies. The fighting between the invading Vietnamese military and retreating Khmer Rouge forces and the exodus of newly freed Cambodians back to their homes resulted in scattershot planting of the 1979 rice crop. It was impossible to know exactly how much rice had been planted however, one estimate placed the national rice crop for 1979 at 265,220 tons, an approximate shortfall of eighty percent of typical yields in prewar times. The world press predicted mass famine and starvation in Cambodia under the new Vietnamese-backed People’s Republic of Kampuchea (“PRK”) government.

The popular perception at the time was that only a herculean international aid effort could head off the looming famine catastrophe. These prognostications of catastrophic famine turned out however, to be overblown. The PRK allowed international food aid into the country, but various problems—both logistical and political—limited the amount of this aid and where it could be distributed. When food aid did start to arrive, the PRK government appropriated much of it to feed the reformed administrative and urban populations and did little to dispense the food in the

319 Ibid.
320 Maggie Black, The Children and the Nations: Growing up Together in the Postwar World (Melbourne: MacMillan, 1987) at 380 (“The tremendous dislocation of people in the early months of the year had coincided with the pre-monsoon and early monsoon planting season. Millions of acres of rice paddies had been left unplanted at a time when planting should be far advanced. Estimates of the probable consequences on the 1979 crop were pure guesswork. If anything resembling a survey had been undertaken, no-one in the international aid community was aware of it.”).
321 This is the figure put out by the PRK government and listed in the Cambodian Ministry of Education’s social science textbook, available online: DC-Cam <http:d.dccam.org>.
322 See e.g. “The National: Genocide and Famine in Cambodia” CBC News (16 October 1979) (CBC television news), online: CBC News Archives <http://archives.cbc.ca> (Reporting that estimates suggest 2.5 million people could die from hunger and/or disease due to lack of food in Cambodia due to the fact that the rice crop had not been planted and the infrastructure problems facing relief efforts.); see also “Cambodia: And Now the Horror of Famine” Time Magazine (22 October 1979), online: Time <http://www.time.com/time/magazine>.
323 See e.g. “Cambodia: Blocking Food” International Herald Tribune (20 December 1979) at 6; “Relief Agencies Slow Down Food Aid to Kampuchea” The Times (3 January 1980). For a detailed history of the events and negotiations leading up to the provision of food aid to Cambodia in 1980, see Black, supra note 320, 378-393.
Ousted Khmer Rouge leaders responded with propaganda accusing the PRK government of committing crimes of “genocide” and “extermination” by using “famine as a weapon” against the Cambodian people. Nonetheless, although food was scarce and famine did occur in some areas, when left to their own devices and free from government expropriation or any grain tax, most Cambodians were able to gain enough food to survive through a mixture of food crops, hunting, fishing and foraging. As observed by humanitarian aid historian Maggie Black:

[t]he main reason that the famine was not as severe as forecast was that the tropical climate and natural productivity of [Cambodian] soil produced food, willy nilly. People had cultivated maize, cassava, bananas and other crops in garden plots; and they harvested fish from the many rivers and from the large lake of Tonle Sap. They did manage, in addition, to grow some kind of a rice crop. In November, they brought in a harvest thought to approximate 300,000 tons, or one-third of the 900,000 tons needed.

Black’s observations neatly summarize how various Khmer Rouge policies combined to enforce famine conditions on the population, as even following the devastation of the Khmer Rouge period, mass famine could be avoided in Cambodia by essentially leaving the civilian population to its own devices. This fact on its own serves as a strong moral indictment of the Khmer Rouge for the famine and starvation that took place in Cambodia from 1975 to 1979.
3.1 Conclusions

Several important conclusions can be drawn from the foregoing overview of the Khmer Rouge period famine. First, it is clear that as a general matter, responsibility for basic famine causation can be laid squarely at the doorstep of the Khmer Rouge regime. The country avoided mass famine during both the pre and post Khmer Rouge periods, despite the devastation of the civil war during the former and the total absence of a state infrastructure during the latter. Meanwhile, though there was a minor Southeast Asian drought in 1977, Cambodia was the only nation in the region to experience any famine, demonstrating that natural variations in food production conditions played at best, an exceedingly minor role in the famine. Finally, on a more general level, Cambodia had not experienced severe famine ever in its modern history prior to the Khmer Rouge period.

In addition to these general observations concerning famine causation, it is also clear that specific CPK policies, enacted by the Khmer Rouge Party Center, were critical factors in triggering, maintaining and continually deepening famine conditions throughout Cambodia for the duration of the Khmer Rouge period. CPK socio-economic policies eschewed virtually all sources of national revenue save for that gained through the export of rice, placing an enormous strain on production of the country’s main food staple. This strain was made all the more severe by the Party Center’s desire to achieve production increases at a manifestly impossible pace and independent of foreign aid. Poor agricultural planning only served to make rice production targets even more fantastical and to make matters worse, the Party Center continually refused to reconsider its deeply flawed policies, even as evidence of their abject failure mounted and starvation spread.

Third, the Party Center’s desire for purity and use of extreme violence to enforce its policies and destroy any perceived opposition actively enforced both the Center’s famine-inducing policies and prevented any efforts by local officials or civilians to ameliorate the severity of famine conditions. Civilians were forbidden from growing or foraging for food and even the acts of private cooking or eating were outlawed. Furthermore, these policies were rigorously enforced through routine acts of extreme violence. Finally, there was no room for local leaders to deviate from, or even critique Party Center policy, as those who did—even high-level CPK officials, such
as Sao Phim, Nhim Ros, Hu Yuon and Hu Nim—were systematically arrested and executed, often along with all of their subordinates and their extended families. These facts, combined with the sheer ferocity of the Khmer Rouge period famine, demonstrate that hunger and starvation at the time were not mere products of bad weather or simple mistakes, but the logical and foreseeable products of Khmer Rouge socio-economic, agricultural and security policies that continually brutalized the Cambodian population for over three years.

Fourth, the foregoing analysis also provides insights into the critical legal issue of how much key Khmer Rouge leaders knew concerning how their policies were individually and cumulatively causing extreme famine. This topic is perhaps the most controversial in post-Khmer Rouge period discussions of potential culpability of Khmer Rouge leaders for the mass suffering and death caused by the abhorrent living conditions under their rule. As a general matter, members of the Party Center created a governmental structure that centralized power in the Center itself and involved a national system of reporting, suggesting that members of the Center were made generally aware of conditions in the countryside. Party Center members also received specific reports mentioning civilian starvation, including Ieng Thirith’s report on living conditions in the Northwest Zone in 1976. Furthermore, as famine conditions worsened and mass starvation events began to occur in numerous locations, the sheer scale of the Khmer Rouge period famine renders the continued ignorance of famine’s existence amongst Party Center members implausible. Finally, it appears that the Party Center was at least made aware of international concern that mass starvation was occurring, as throughout CPK propaganda one can observe a concerted effort to publicly deny the existence of mass famine while simultaneously seeking to shift responsibility for famine conditions away from the revolution by scapegoating wholly fabricated “enemies” of the revolution for sabotaging food crops and spreading dissent.

From these basic facts, one can observe an apparent evolution in the degree of knowledge amongst Party Center members concerning the fact that famine would result. If one focuses solely on the point in time when these individuals enacted famine-inducing policies, it appears plausible that some or all of these former leaders were ignorant of the deadly implications these policies portended for the civilian population. To focus solely on this moment in time however, fails to account for the fact that famines generally are dynamic phenomena that weaken and kill victims over extended periods of time and that the Khmer Rouge period famine itself lasted over
three full years, during which time it appears to have continually worsened and never been alleviated in any meaningful way. When viewed in this dynamic way, continuing ignorance of the existence of mass famine amongst members of the Party Center begins to strain credulity, as these leaders were openly obsessed with monitoring and controlling policies in the countryside and civilians were dying of starvation by the thousands. Finally, if senior Khmer Rouge leaders were truly ignorant of the extent of famine in certain areas, such ignorance was clearly the product of the wilful maintenance of this ignorance through the utilization of mass torture and murder.

When viewed from this perspective, it appears that at some point during the Khmer Rouge period, ever-mounting evidence and reports of mass famine and starvation rendered it impossible for members of the Party Center to maintain a state of willful ignorance. Thus, at some point, mere negligence or recklessness on the part of individual Party Center members vis-à-vis their role in causing famine must have evolved into actual knowledge that civilians were starving by the thousands, while every aspect of their lives was being dictated by the revolution. Establishing such knowledge would be crucial to any legal effort to provide justice for this famine, as the Party Center continued to enforce policies of forced labour, communal eating, bans on private consumption of food and state expropriation of rice throughout the Khmer Rouge period. As such, it appears that the Khmer Rouge leadership at some point after becoming aware that the civilians under its authority were starving by the thousands, chose to continue to export rice and to enforce policies banning private food cultivation, foraging, hunting, fishing or even the act of eating, apparently prioritizing the revolutionary goals over of the very survival of the civilian population.

When viewed this way, from a moral perspective, it is not difficult to blame the Khmer Rouge leadership for enforcing famine conditions on the civilian population while in power. However, from an international criminal justice perspective, such group moral responsibility does not necessarily entail individual penal sanctions. Instead, how these facts interact and fit within the required elements of established international crimes and associated modes of liability must be assessed prior to declaring that Khmer Rouge leaders could be held criminally responsible. The remainder of this thesis seeks to perform this assessment, by considering how the international criminal law concepts of genocide, war crimes and crimes
against humanity interact with the foregoing factual overview of the Khmer Rouge period. This analysis will demonstrate that generally speaking, periods of modern famine may implicate some or all of these three main categories of international crimes. Furthermore, in the context of the Khmer Rouge period famine, the facts suggest that certain former high-level Khmer Rouge officials could be held individually responsible for crimes against humanity predicated on their roles in enforcing famine conditions on the civilian population.
Chapter 3
Famine and International Criminal Justice in Cambodia

1 Introduction

International criminal law is a relatively new branch of public international law and draws heavily from international human rights law, humanitarian law and domestic criminal law. International crimes are also considered inherently more grave than domestic crimes, as the commission of an international crime offends the most basic shared principles of humanity and are typically of a scale much larger than their domestic counterparts. As a specialized branch of public international law, international criminal law consists of a complex mix of specialized statutes, customary law and interpretive jurisprudence developed at a handful of specialized courts and tribunals and most recently, the ICC, the first ostensibly permanent institution with general jurisdiction over international crimes.

One result of the fitful development and specialized nature of international criminal law has been the development of a marked disconnect between popular understandings of international criminal law concepts, such as genocide or crimes against humanity, and their legal definitions. One need only peruse global news headlines to find statements labelling alleged instances of wrongdoing as “genocide” or “crime against humanity”. An oft-repeated result of this instinctual desire to label all large-scale harms or rights violations is inaccurate labelling that could not withstand scrutiny in an actual court of law, setting the stage for disappointment should actual international criminal law accountability be pursued. Famine is one topic that has repeatedly suffered from this loose use of legal language, as certain famines have been improperly referred to as “crimes” in and of themselves, or been mislabelled as involving criminal allegations that could never be proven in a court of law. Chapter Three of this thesis seeks to facilitate movement towards more accurate and nuanced legal discussions of modern famines, by assessing how criminal justice for famine might be pursued, both generally and in the specific case of the Khmer Rouge famine in Cambodia. To do so, this Chapter analyzes provisions within the law of genocide, war crimes and crimes against humanity that provide potentially useful provisions for

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329 Humanitarian law is the body of law which regulates the conduct of warfare.
330 See Cassese, supra note 94 at 1-6.
responding to modern famine scenarios both generally and within the context of the Khmer Rouge period famine specifically.

In light of the massive loss of life associated with modern famines in Cambodia and beyond, there is an understandable desire to intuitively label such famines as “crimes” in a most basic sense that one group of individuals caused massive harm amongst another group. This is especially true when one considers the fact that the movement within famine studies towards greater emphasis on human agency as the key causal ingredient roughly coincided with the exponential growth of international criminal law during the latter half of the twentieth century. Shortly after Amartya Sen and others began debunking entrenched myths surrounding the root causes of famine, international criminal tribunals for the former Yugoslavia (the “ICTY”), Rwanda (the “ICTR”), Sierra Leone (the “SCSL) and eventually, Cambodia (the “ECCC”) were created, followed by the formation of the ICC. Given modern understandings of how famines are triggered and deepened and the recent revival of the prosecution of international crimes, one might presume that at least some of these institutions would have addressed the role of international criminal law in responding to famine head-on. Nevertheless, no modern international criminal adjudicatory body has done so thus far.

Perhaps nowhere is this gap in prosecutorial attention so glaring as at the ECCC, which has been specifically assigned the task of providing accountability for the crimes of the Khmer Rouge period, during which upwards of one million civilians died from living conditions, famine, disease and other causes aside from direct physical violence. This Chapter seeks to address this prosecutorial lacuna by outlining the elements of specific international crimes potentially implicated during periods of famine and thereafter considering these legal requirements within the factual context of the Khmer Rouge period famine outlined in the previous Chapter. In doing so, the three main categories of international offenses – genocide, war crimes and crimes against humanity – will each be explored in turn. Generally speaking, genocide can be implicated when

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331 The official names of these institutions are respectively: the International Criminal Tribunal for the former Yugoslavia; International Criminal Tribunal for Rwanda; Special Court for Sierra Leone; and, as mentioned above, the Extraordinary Chambers in the Courts of Cambodia. While each tribunal varies in terms of its jurisdiction and procedure, they are all similar in that each was granted jurisdiction over core international crimes.

332 See supra note 5 (discussing estimates of the death toll during the Khmer Rouge period and its causal breakdown).
famine forms part of an effort to destroy a national, ethnic, racial or religious group. War crimes meanwhile, become relevant when famine conditions are closely linked to an armed conflict. Finally, crimes against humanity are potentially applicable to situations where famine forms part of widespread or systematic abuse of a civilian population.

This analytical process demonstrates that crimes against humanity present a promising framework for pursuing justice for the Khmer Rouge period famine in Cambodia. In particular, three crimes against humanity—extermination, persecution and other inhumane acts—are identified as combining to form a useful framework for satisfactorily providing individual accountability for this famine.333 This framework is suitable because each of these three crimes against humanity could be used to account for one of the three main harms associated with famine under the Khmer Rouge: mass death, especially harsh famine conditions suffered by disfavoured political groups and generally inhumane living conditions. Furthermore, it is further argued that, based on available evidence, former leaders of the Khmer Rouge Party Center could not only be charged, but likely convicted, of these three crimes against humanity predicated specifically on enforcing famine conditions on the civilian population while in power. As such, it is ultimately concluded that the current lack of criminal accountability for this particular famine is not the product of insufficient law, but a lack of sufficient will.

2 Genocide

The definition of genocide is found in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”), which defines genocide as one or more of an enumerated list of “acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”334 Following the Rwandan genocide, the ICTR has interpreted the Genocide Convention as outlining three elements: (1) commission of one of the enumerated acts; (2) committed against a recognized protected class; “specifically targeted as such”; and (3) committed with the intent to destroy the protected group in whole or in part (dolus

333 This conclusion affirms a previous suggestion that these three crimes against humanity might provide a useful entry point for the ECCC specifically to account for famine. See DeFalco, “Accounting for Famine”, supra note 63. The present conclusion goes beyond the suggestion that these three crimes against humanity could provide a potentially useful framework and argues that convictions for these crimes would be feasible if pursued at a court with competent jurisdiction.
specialis). Acts of genocide can include, inter alia: killing members of the group, causing “serious bodily or mental harm” to members of the group; and “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.”

Recent jurisprudence has held that the portion of a protected group targeted for destruction must form a “substantial portion” of the overall group population. This requirement may be numerically or qualitatively satisfied however, “the part targeted must be significant enough to have an impact on the group as a whole.”

2.1 Genocidal Actus Reus

2.1.1 Intentional Killing

In order for killings to rise to the level of genocide under article 2(a) of the Genocide Convention, the ICTR Trial Chamber has held that “killing members of the [protected] group” must be interpreted as “murder,” according to the definition in the Rwandan penal code to predicate liability for genocide. Thus, for an instance of famine to amount to genocide under article 2(a), those responsible for the famine must have intentionally sought to kill members of a protected group. This interpretation means that for this particular actus reus requirement to be satisfied within a famine scenario, the perpetrator(s) must have acted with the specific intent to kill members of a protected group, while also having the special intent for these killings to form part of an effort to destroy the group in whole or in part.


336 Genocide Convention, supra note 334, art 2.


338 Prosecutor v Radislav Krstić, IT-98-33-T, Judgement (2 August 2001) at para 634 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <http://www.icty.org/> [Krstić, Trial Judgement]. (Holding that genocide requires “an intent to destroy only part of the group must nevertheless concern a substantial part thereof, either numerically or qualitatively.”).


340 Prosecutor v Jean-Paul Akayesu, ICTR-96-4-T, Judgement (2 September 1998) at para 500 (International Criminal Tribunal for Rwanda, Trial Chamber I), online: ICTR <http://www.unictr.org/> (Under the Rwandan Penal Code murder “is homicide committed with the intent to cause death.”) [Akayesu, Trial Judgement].
2.1.2 Causing Serious Bodily or Mental Harm

The ICTR Trial Chamber held in *Prosecutor v Akayesu* that “[c]ausing serious bodily or mental harm to members of the group does not necessarily mean that the harm [required] is permanent and irremediable” for genocide liability to attach.\(^{341}\) In the former Yugoslavia, the ICTY Trial Chamber further elaborated in *Prosecutor v Krstić*, stating:

> serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life. In subscribing to the above case-law, the Chamber holds that inhuman treatment, torture, rape, sexual abuse and deportation are among the acts which may cause serious bodily or mental injury.\(^{342}\)

Presumably, enforcement of famine conditions on a protected group would rise to the level of “serious bodily or mental harm” required by article 2(b) of the Genocide Convention, as the suffering associated with famine often causes the type of “grave and long-term disadvantage” to the ability of victims to live a normal and constructive life required under current ICL practice.\(^{343}\)

2.1.3 Inflicting Genocidal “Conditions of Life”

Starvation may also be implicated under article 2(c) of the Genocide Convention as a method of “inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.”\(^{344}\) The Preparatory Commission for the International Criminal Court (“ICC Preparatory Commission”) subdivided the requirements of article 2(c) into five distinct elements:

1. The perpetrator inflicted certain conditions of life upon one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, the national, ethnical, racial or religious group, as such.
4. The conditions of life were calculated to bring about the physical destruction of that group, in whole or in part.

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\(^{341}\) *Ibid* at para 502.

\(^{342}\) *Krstić*, Trial Judgement, *supra* note 338 at para 513. Krstić was convicted of genocide by the Trial Chamber (*ibid* at para 688). On Appeal, this conviction was downgraded to “aiding and abetting” genocide. *Krstić*, Appeal Judgement, *supra* note 337 at para 138. Nonetheless, the Appeals Chamber did not find any error in the Trial Chamber’s finding that genocide occurred in Srebrenica during the relevant time (*ibid* at paras 2-32).

\(^{343}\) *Krstić*, Trial Judgement, *supra* note 338 at para 513.

\(^{344}\) *Ibid*. 
The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.\(^{345}\)

According to the ICC Preparatory Commission, intentionally inducing starvation amongst a protected class of individuals appears to qualify as genocidal infliction of “conditions of life” that destroy a targeted group in whole or in part.\(^{346}\)

The ICTR has followed a similar tract in discussing what acts may satisfy article 2(c) of the Genocide Convention. In Akayesu, the ICTR Trial Chamber held that article 2(c) includes “methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.”\(^{347}\) In Prosecutor v Kayishema & Ruzindana, the Trial Chamber similarly stated that the Genocide Convention “allows for the punishment of the perpetrator for the infliction of substandard conditions of life which, if left to run their course, could bring about the physical destruction of the group … [including, \textit{inter alia},] the starving of a group of people.”\(^{348}\)

### 2.2 Genocidal Mens Rea: Dolus Specialis

While subsections (b) and (c) of article 2 of the Genocide Convention establishes that the \textit{actus reus} of genocide could encompass the targeted creation of famine conditions amongst a national, ethnical, racial or religious group, the success or failure of any genocide prosecution predicated on famine would likely hinge on whether the crime’s stringent \textit{mens rea} could be established. A perpetrator of genocide must commit one of the acts enumerated under article 2 of the Genocide Convention while possessing the specific intent to destroy a protected group in whole or in part.\(^{349}\) This special \textit{mens rea} of \textit{dolus specialis} requires that the victims be targeted specifically \textit{because} of their status as a member of a protected class, as “the victim of the crime of genocide

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\(^{346}\) \textit{Ibid} at 7, note 4 (The Preparatory Commission includes “… deprivation of resources indispensable for survival, such as food or medical services” as an example of a genocidal infliction of conditions of life calculated to cause physical destruction of part or all of a group.).

\(^{347}\) See Akayesu, Trial Judgement, \textit{supra} note 340 at para 505.


\(^{349}\) See e.g. Krstić, Trial Judgement, \textit{supra} note 338 at para 542 (Stating that “the \textit{mens rea} of [genocide] is described as the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”).
not only the individual, but also the group to which he or she belongs. Hence, for genocide to apply to a famine scenario, there must be evidence demonstrating that not only were those individuals responsible for causing the famine aware of the suffering and death that resulted from their actions, but also that such individuals specifically caused the famine with the goal of destroying at least a significant portion of a group of people protected by the Genocide Convention.

2.3 Intersections between Famine and Genocide to Date

Despite the fact that in most famine scenarios, it would be quite difficult to prove that any accused was aware that they were causing famine and starvation, let alone that such accused acted with the mens rea of dolus specialis, some jurisprudence does exist suggesting that certain famines can be conceptualized as instances of genocide. In a letter written sometime around 1953 but only recently published, Rafael Lemkin, who coined the term “genocide” and was largely responsible for the adoption of the Genocide Convention itself, discussed the “Soviet Genocide in Ukraine.” Lemkin argued that the Soviet government used the “weapon” of starvation against Ukrainian farmers, resulting in 5,000,000 famine deaths between 1932 and 1933. According to Lemkin’s view, the Ukrainian peasantry was “sacrificed” by the Soviet Kremlin by enforcing famine conditions through forced collectivization and state grain expropriation and enforcement of these conditions was one aspect of a four-pronged genocidal plan aimed at the “systematic destruction of the Ukrainian nation, in its progressive absorption within the new Soviet nation.” Other commentators have also argued that this famine was a product of genocide or other international crimes.

The 1961 prosecution of Adolf Eichmann in Israel provides further support for this formulation of genocide via starvation. The District Court of Jerusalem convicted Eichmann of multiple

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350 Prosecutor v Ignace Bagilishema, ICTR-95-1A-T, Judgement (7 June 2001) at para 61 (International Criminal Tribunal for Rwanda, Trial Chamber I), online: ICTR: <http://www.unictr.org/> [Bagilishema, Trial Judgement], citing Akayesu, Trial Judgement, supra note 340 at paras 521-522; accord Cassese, supra note 94 at 137 (“Genocide is a typical crime based on the ‘depersonalization of the victim’; that is a crime where the victim is not targeted on account of his or her individual qualities or characteristics, but only because he or she is a member of a group.”).


352 Ibid at 128.

353 Ibid.

354 Ibid at 129.

355 See discussion above at 14-16.
counts of “crimes against the Jewish People” (a domestic formulation of genocide) predicated on his role in formulating and carrying out the Nazi Party’s “Final Solution” plan to exterminate all Jews in Europe, launched in the summer of 1941.\(^{356}\) The Court held that victims of the second count of crimes against the Jewish People were Jews who were “put to hard labour, with the intention of killing them, too, in time, in some way; but who were saved because of the advance of the Soviet army.”\(^{357}\) Similarly, the third count of crimes against the Jewish people was predicated on “causing serious bodily or mental harm to Jews” after the summer of 1941 pursuant to the Final Solution,

by means of enslavement, starvation, deportation and persecution, confinement to ghettos, to transit camps and to concentration camps - all this under conditions intended to humiliate the Jews, to deny their rights as human beings, to suppress and torment them by inhuman suffering and torture … with the [ultimate] intention of exterminating the Jewish People.\(^ {358}\)

Thus, according to Eichmann, holocaust survivors who had suffered at the hands of the Nazis, yet ultimately survived, were also victims of “crimes against the Jewish people,” along with the millions who were killed in pursuit of the Final Solution plan.

Eichmann also provides an example of the critical importance of mens rea proofs in any genocide prosecution and how such proofs could interact with famine issues. In Eichmann, the District Court held that the forced deportation of Jews prior to the implementation of the Final Solution plan to destroy the Jewish people in Europe did not amount to a crime against the Jewish people, due to insufficient proof Eichmann possessed the necessary mens rea at the time.\(^ {359}\) This finding was despite the fact that the Court also found that the deportations were “organized by the Accused in complete disregard for the health and lives of the deported Jews” and also that “many Jews died as a result of the expulsions.”\(^ {360}\) Although Eichmann himself was found to have both “foresaw” and “wished” the “murderous consequences of these deportations”, the Court found insufficient evidence to conclude that Eichmann possessed the “intentional aim

\(^{356}\) Israel v Eichmann, 40/61 CrimC (Jer) [1961], paras 195-199, online: Web Genocide Documentation Centre of the University of the West of England <http://www.ess.uwe.ac.uk/genocide/Eichmann_Index.htm> [Eichmann Judgement].

\(^{357}\) Ibid at para 196.

\(^{358}\) Ibid at para 199 (emphasis added).

\(^{359}\) Ibid at para 186.

\(^{360}\) Ibid.
to exterminate” and therefore, “deal[t] with these inhuman acts as being crimes against humanity” rather than crimes against the Jewish People.\(^{361}\)

Despite these two early examples, international jurisprudence on this issue remains limited essentially to \textit{Eichmann} and scholarship, due to two primary reasons. First, the crime of genocide was drafted in response to the extermination of Jews by Nazi Germany and thus, did not exist until its codification in the Genocide Convention. As a result, the International Military Tribunal and other courts and tribunals created in the immediate aftermath of World War II did not produce any jurisprudence relevant to genocide, limiting consideration of the issue to \textit{Eichmann}.

Meanwhile, subsequent tribunals, such as the ICTR and ICTY, which have both dealt extensively with genocide allegations, have focused mainly on the perpetration of direct violence as methods of committing genocide. As such, these courts, while generally acknowledging that genocide could be committed by means other than traditional means of mass executions and targeted violence, have dealt with issues of famine and starvation under the rubrics of war crimes and/or crimes against humanity.\(^{362}\)

At the ICC, meanwhile, it appears the issues of potential intersections between famine conditions and genocide may come to the fore within the context of cases arising out of the Darfur region of the Sudan. Most notably, recently, following a successful appeal by the prosecution, ICC Pre-Trial Chamber I added genocide charges to the arrest warrant for sitting Sudanese President Omar Al-Bashir.\(^{363}\) In that case, \textit{Prosecutor v Omar Hassan Ahmad Al Bashir}, the prosecution had alleged that genocidal acts were committed against members of the Fur, Masalit and Zaghawa ethnic groups in the Darfur region, including “causing serious bodily or mental harm and … deliberately inflicting conditions of life calculated to bring about physical destruction” of the ethnic groups as part of the Sudanese government’s anti-insurgency campaign.\(^{364}\) Indeed, specific reference is made in the second arrest warrant for Al-Bashir to acts of poisoning drinking water supplies, forcible transfer and encouraging members of other ethnic groups to

\(^{361}\) \textit{Ibid.}\n
\(^{362}\) Furthermore, while both the ICTY and ICTR have held that genocide was committed in the former Yugoslavia and Rwanda respectively, neither of these genocides involved the infliction of famine conditions in any significant way, making them ill-suited test cases for the modern application of genocide to famine.

\(^{363}\) \textit{Bashir}, Arrest Warrant II, \textit{supra} note 76; \textit{cf Bashir}, Arrest Warrant I, \textit{supra} note 76.

\(^{364}\) \textit{Bashir}, Arrest Warrant II, \textit{ibid} at 7.
settle the land of forcibly evicted victims.\(^{365}\) The ICC Office of the Prosecutor (“OTP”), in its original application to the Pre-Trial Chamber concerning the situation in Darfur, repeatedly referenced various acts causing starvation in Darfur as part of an alleged genocidal criminal plan.\(^{366}\) In particular, the OTP alleged that in the Darfur region approximately “83,000 [victims] died as a consequence of injury, starvation, lack of water, or conditions in [refugee] camps” between September of 2003 and January of 2005.\(^{367}\) On 13 December 2012, ICC Prosecutor Fatou Bensouda also reportedly stated that further charges may be pursued in relation to the situation in Darfur, including those predicated on “the blocking of distribution of humanitarian aid.”\(^{368}\) Should Al-Bashir or other individuals implicated in the alleged genocide in Darfur ever be tried at the ICC, the Court could take a major step forward towards the treatment of modern famines as proper subjects of international criminal justice.

Despite this limited jurisprudence and the fact that the Darfur cases at the ICC remain in their preliminary stages, there is ample support already for the basic proposition that enforcing famine conditions on a national, racial, ethnic or religious group, with the intent to destroy the group in whole or in part could qualify as an act of genocide. The *Eichmann* Judgment provides some precedent, if only in the form of a single domestic conviction, while such an approach is also indirectly supported in language used at the ad hoc Tribunals concerning the potential ways of establishing genocidal *actus reus*.\(^{369}\) Finally, as cases based on the situation in Darfur make their way through the ICC, it is likely that further jurisprudence will be developed discussing the circumstances under which a famine can be legally labelled as being the product of a genocidal course of conduct.

\(^{365}\) Ibid.

\(^{366}\) *Situation in Darfur, The Sudan*, ICC-02/05, Public Redacted Version of the Prosecutor’s Application under Article 58 (14 July 2008) at paras 30, 111, 172-173, 177, 202, 388 (International Criminal Court, Pre-Trial Chamber I), online: ICC <http://www.icc-cpi.int/> (repeatedly referencing the causation of death by starvation as a main aspect of the alleged genocide in Darfur).

\(^{367}\) Ibid at para 111 (emphasis added).

\(^{368}\) See e.g. “ICC Prosecutor: Sudan may face more Darfur charges” *The Guardian* (13 December 2012), online: The Guardian <http://www.guardian.co.uk>.

\(^{369}\) See e.g. Akayesu, Trial Judgement, *supra* note 340 at para 506 (Referencing the *Eichmann* Judgement and holding that “the means of deliberate inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or part [for purposes of the Genocide Convention], include, inter alia, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement.”).
2.4 Genocide and the Khmer Rouge Famine

Although this possibility of pursuing genocide charges predicated on famine clearly exists, it nonetheless appears that the crime of genocide is ill-suited to address the Khmer Rouge period famine specifically. The facts of the Khmer Rouge famine outlined above in Chapter Two do not indicate that Khmer Rouge leaders set out with the goal of killing Cambodians by starving them or targeted the members of any discernible national, ethnical, racial or religious group to be destroyed by inflicting unlivable conditions of life, including famine conditions, on them. Instead, it appears that these leaders pursued extreme social, agricultural and security policies that combined to result in catastrophic famine with the goal of radically altering Cambodian society. Moreover, the famine overwhelmingly killed Cambodian civilians and general civilian status is not protected under the Genocide Convention. These basic facts appear to preclude any way of proving that former Khmer Rouge leaders possessed the requisite genocidal *dolus specialis* when choosing to enact or maintain famine-inducing policies. Aside from these practical evidentiary issues, genocide charges would also fail to reflect how the Khmer Rouge period famine was brought about and the associated actual culpability of the regime’s leaders. This is because the evidence suggests that these leaders simply chose to continue to cause suffering and mass death amongst their own people because of a desire to maintain their own power at any cost and unshakeable faith in extreme ideological beliefs. This indifference to human life, although arguably as morally reprehensible as actively working to destroy a group of people, is qualitatively different from the culpability embedded in the concept of genocidal *dolus specialis* and should be reflected accurately in any pursuit of criminal accountability.

3 War Crimes

The term “war crimes” refers to serious violations of international humanitarian law, which entail individual criminal responsibility. War crimes were charged extensively in post-World War II prosecutions and are predicated on humanitarian law requirements dating back to the

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370 See generally, Cassese, *supra* note 94 at 81.
371 See e.g. *Charter of the Nuremberg International Military Tribunal* (8 August 1945), art 6(b) [*IMT Charter*] (The war crimes under the jurisdiction of the Nuremberg Tribunal “include[d], but [were] not [...] limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.”).
Hague Conventions of 1899\(^\text{372}\) and 1907\(^\text{373}\) and expanded upon in the four Geneva Conventions of 1949,\(^\text{374}\) and their two additional protocols of 1977.\(^\text{375}\) The current body of war crimes are largely drawn from actions constituting so-called “grave breaches” of the Geneva Conventions, although other flagrant violations of customary humanitarian law also rise to the level of war crimes.

3.1 The Armed Conflict “Nexus” Requirement

Once it is established that an armed conflict existed at the relevant time, the prosecution must demonstrate in each case that every charged war crime shared some link or “nexus” with the predicate armed conflict at issue.\(^\text{376}\) The ICTY Trial Chamber has stated that what is required is an “obvious link” between an alleged criminal act and the predicate armed conflict in order for it to qualify as a war crime.\(^\text{377}\) This requirement however, does not mean that war crimes can only be committed within areas where armed hostilities physically take place, as it is sufficient that alleged war crimes be “closely related to the hostilities occurring in other parts of the territories controlled by the parties at the conflict.”\(^\text{378}\)

\(^{372}\) Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (29 July 1899), online: University of Bradford <http://www.brad.ac.uk> [1899 Hague Convention].

\(^{373}\) Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (18 October 1907), online: International Committee of the Red Cross <http://www.icrc.org/eng/> [1907 Hague Convention].


\(^{376}\) See generally Cassese, supra note 94 at 82-86.

\(^{377}\) E.g. Prosecutor v Zejnil Delalić (Celebići Camp), IT-96-21-T, Judgement (16 November 1998) at para 193 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <http://www.icty.org/> (Observing that “[i]t is axiomatic that not every serious crime committed during the armed conflict in Bosnia and Herzegovina can be regarded as a violation of international humanitarian law. There must be an obvious link between the criminal act and the armed conflict.”).

\(^{378}\) Prosecutor v Tihomir Blaškić (“Lašva Valley”), IT-95-14-T, Judgement (3 March 2000) para 69 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <http://www.icty.org/> [Blaškić, Trial Judgement]; accord Prosecutor v Dario Kordić & Mario Čerkez, IT-95-14/2-T, Judgement (26 February 2001) at
3.2 International versus Non-International Armed Conflicts

Until relatively recently, the predicate armed conflict for war crimes applicability was strictly required to be international in character, thereby excluding the types of civil wars and insurgencies that now form the vast majority armed conflicts.\textsuperscript{379} This antiquated focus on classical warfare now between two distinct nation-states has significant repercussions for the potential coverage of war crimes over modern famine scenarios, as famine is often the by-product of localized, sectarian armed conflict or armed insurgencies.\textsuperscript{380} In 1995, the ICTY Appeals Chamber in the Tribunal’s first case, \textit{Prosecutor v Duško Tadić}, signalled a move towards relaxing this strict requirement by holding that serious violations of fundamental provisions of international humanitarian law may be regarded as true war crimes regardless of whether the underlying conflict is international in character.\textsuperscript{381} The Chamber held that for a violation of humanitarian law to rise to the level of war crime, three conditions must be met: (1) the acts by the accused amount to a “serious infringement” of a humanitarian law provision protecting important values, the breach of which necessarily involves grave consequences for the victim; (2) the rule being violated must be part of customary international law or provided for in an applicable treaty; and (3) applicable law must provide for individual criminal responsibility for violations of the rule in question.\textsuperscript{382} Although Tadić marked an emerging international criminal law trend towards relaxation of the strict requirement of an international armed conflict,

\textsuperscript{379} See e.g. Cassese, \textit{supra} note 94 at 81 (“Traditionally, war crimes were held to embrace only violations of international rules regulating war proper; that is international armed conflicts and not civil wars.”).

\textsuperscript{380} For example, recent famines in the Darfur region of the Sudan and Somalia are closely related to sectarian violence without clear international components.

\textsuperscript{381} \textit{Prosecutor v Duško Tadić}, IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) at paras 96-137 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), online: ICTY <http://www.icty.org/> [\textit{Tadić}, Decision on Interlocutory Appeal] (Providing an overview of the evolution of customary international law in relation to internal armed conflicts and concluding that “customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife” at para 134.).

\textsuperscript{382} \textit{Ibid} at para 94.
the scope and applicability of war crimes remain narrower during non-international armed conflicts. \(^{383}\)

Generally, an armed conflict exists “whenever there is a resort to armed forces between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”\(^{384}\) For the conflict to be deemed international in character, it must either involve the breakout of hostilities between two States\(^ {385}\) or, as held by the ICTY Trial Chamber in *Prosecutor v Kordić & Čerkez*, an internal conflict may become international if: “(i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal conflict act on behalf of that State.”\(^ {386}\) In situations where it is unclear whether certain belligerent forces are affiliated with a foreign State or not, the ICTY has utilized a test of “overall control” to determine the relevant chain of command.\(^ {387}\)

### 3.3 Victim Identity and Protected Classes

The identity of the victims of war crimes also affects what crimes may be implicated in any given scenario. For crimes that originated as so-called “grave breaches” of the Geneva Conventions, the victims must fall into one of the classes of individuals protected by the Conventions themselves, including: civilians under an occupying power, health workers and aid workers and soldiers rendered *hors de combat*, such as wounded, sick and shipwrecked soldiers and prisoners of war.\(^ {388}\) Importantly, under the Geneva Conventions, civilians are not protected from abuses committed by their own government according to the fourth Geneva Convention, which defines protected persons as “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the


\(^{385}\) E.g. *Prosecutor v Duško Tadić*, IT-94-1-A, Judgement 15 July 1999) at para 84 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), online: ICTY <http://www.icty.org/> [*Tadić*, Appeal Judgement] (“It is indisputable that an armed conflict is international if it takes place between two or more States.”).


\(^{387}\) E.g. *Tadić*, Appeal Judgement, *supra* note 385 at para 120 (“Normally a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group. Consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State.”).

\(^{388}\) See *Geneva I; Geneva II; Geneva III; Geneva IV*, all documents *supra* note 374.
conflict or Occupying Power of which they are not nationals." This limitation does not apply however, to a limited set of war crimes consisting of violations of Common Article 3 shared by all four Geneva Conventions and applicable to all armed conflicts, including those non-international in character. For Common Article 3 to apply, the victims must simply be non-combatants (*hors de combat*). Finally war crimes that have developed within general customary international law outside of the Geneva Conventions have individual requirements concerning victim status for some crimes, although typically reference is made to civilian victims more generally in the language of such crimes.

### 3.4 Intersections between War Crimes and Famine to Date

War crimes have evolved into a long list of offences drawn from a mix of customary and codified international criminal law. While it is not a codification of custom, the ICC’s Rome Statute provides an illustrative set of modern war crimes in Article 8, including numerous crimes that could be implicated during periods of famine and starvation. Which crime(s) might be relevant to any particular scenarios would depend largely on both whether the relevant famine took place during a period of international versus domestic armed conflict and the identity of the victims. For example, it is a war crime under Article 8(2)(a) of the Rome Statute to subject members of a class of persons protected by one of the four Geneva Conventions to “inhuman treatment”, to “[w]ilfully cause great suffering, or serious injury to body or health” of such individuals or to extensively destroy or appropriate their property. Presumably, enforcing famine conditions on a protected civilian population could rise to the level of inhuman treatment, great suffering or serious injury. Moreover, wartime famines are often caused by military destruction of agricultural property or expropriation of foodstuffs and these actions could be prosecuted under the war crime of destroying or appropriating protected property.

In addition to these Geneva Convention-based crimes, the Rome Statute also provides for jurisdiction over war crimes drawn from customary law during periods of international armed

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390 See *Geneva I; Geneva II; Geneva III; Geneva IV*, all documents *supra* note 374 at art 3 (Uniformly prohibiting “violence to life and person, in particular murder of all kinds” against persons placed *hors de combat*.).
conflict, including “directing attacks against civilian objects”, destroying or seizing enemy property, pillaging, committing “outrages upon personal dignity” and most notably “[i]ntentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions.” 392 Meanwhile, the list of war crimes potentially relevant to famine and starvation that can be committed during periods of non-international armed conflict are much more cursory, including violations of Common Article 3 of the Geneva Conventions and limited customary law crimes. Article 8(2)(c)(i)-(ii) of the Rome Statute contains the war crime of “violence to life and person” which encompasses “cruel treatment” and also the crime of “outrages upon person dignity.” 393 Meanwhile, Article 8(2)(e) subsections (v) and (xii) render pillage and destruction of property outside the “necessities of the conflict” respectively war crimes during periods of non-international armed conflict. 394

When considered as a whole, certain principles relevant to famine scenarios can be drawn out from amongst these war crimes. First, famine conditions could indirectly be treated as forming key aspects of war crimes in specialized situations, as the harms associated with periods of famine clearly can rise to the level of inhuman, cruel or degrading treatment or an outrage against personal dignity, making the creation of famine conditions a potential actus reus mechanism for numerous war crimes.

Second, the criminalization of “intentionally using starvation of civilians as a method of warfare” under Rome Statute Article 8(2)(b)(xxv) stands out as an uncharacteristically direct mechanism under international criminal law of addressing famine attendant to periods of armed conflict. This crime is drawn directly Article 54(1) of Protocol I Additional to the Geneva Conventions, which also prohibits starvation of civilians as a method of warfare and goes on to state:

It is prohibited to [inter alia] remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them their sustenance value

392 Ibid, art 8(2)(b)(ii)-(iii), (vi), (xxi), (xxv).
393 Ibid, art (2)(c)(i)-(ii).
to the civilian population … whatever the motive, whether in order to starve out civilians, cause them to move away or any other motive.\footnote{395}{\textit{Geneva I}, supra note 374, art 54(1).}

The language of Article 8(2)(b)(xxv) also specifically provides for the criminalization of acts which impede relief supplies as provided for under the Geneva Conventions. Specific references to civilian food rights are found in articles 23, 55, 59, 60 and 89 of the fourth Geneva Convention.\footnote{396}{\textit{Geneva IV}, supra note 374, arts 23, 55, 59, 60, 89.} Article 55 of the Convention specifically references food rights of civilians in occupied territory, stating that “[t]o the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population.”\footnote{397}{\textit{Ibid}, art 55.} Article 55 thus places an affirmative duty on an occupying military authority to import necessary foodstuffs when civilian needs are not adequately met and forbids the requisition of food from civilian populations, especially if such requisition would lead to civilian shortages of food. Additionally, Article 23 requires the “free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases,”\footnote{398}{\textit{Ibid}, art. 23.} although subject to limitation if there are “serious reasons for fearing” such foodstuffs will be “diverted from their destination” or “a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.”\footnote{399}{\textit{Ibid}, art 23, subsections (a), (c).} Article 59 requires the power occupying an inadequately supplied area to agree to relief schemes,\footnote{400}{\textit{Ibid}, art 59.} although Article 60 states that accepting such “[r]elief consignments shall in no way relieve the Occupying Power of any of its responsibilities under Articles 55 … and 59.”\footnote{401}{\textit{Ibid}, art 60.} Reference to these provisions demonstrates that the drafters of the Rome Statute clearly sought to criminalize both positive acts intended to cause starvation of civilians and passive acts, such as refusing to permit or cooperate with outside humanitarian food relief efforts.
Charges based on Article 8(2)(b)(xxv), however, have yet to be pursued at the ICC, although it appears that the pursuit of war crimes charges for intentionally starving civilians were at least contemplated at the ICTY. The experience of the ICTY is illustrative of how narrow the war crime of intentionally using starvation of civilians as a method of warfare is. First, the crime solely applies to international armed conflicts, excluding more prevalent internal. Second, the crime includes a rather stringent mens rea of intent, which appears to limit the crime’s scope to only apply to instances where famine is induced as part of a specific strategy to starve civilians.

As such, other than in highly specialized circumstances, despite the rare inclusion of the word “starvation” within international criminal law, Article 8(2)(b)(xxv) of the Rome Statute appears to provide only narrow coverage over instances of famine and starvation attendant to armed conflicts.

For example, in the former Yugoslavia, a commission of legal experts appointed by the UN Security Council considered whether this crime was committed during the siege of Sarajevo but concluded, based on the “tendency of both sides [to the conflict] to control food, water and electricity for publicity purposes, the intermingling of military forces and the civilian population and the fact that no one appears to have died during the siege from starvation, dehydration or freezing” that the crime was inapplicable.\textsuperscript{402} Similarly, no attempts were made to prosecute the war crime of intentional starvation of civilians predicated on conditions in other affected areas where severe food shortages occurred during the Balkan conflict, such as in Srebrenica from 1992-1993, where famine conditions did reach the point of actual instances of civilian starvation.\textsuperscript{403} Quite understandably, the prosecution at the ICTY appears to have focused its


\textsuperscript{403} For example, humanitarian conditions in and around Srebrenica deteriorated from 1992-1993 amidst conflict between Bosnian Serb and Bosnian Muslim forces. Serb forces destroyed the town’s water supply and in March of 1993, General Philippe Morillon of France -- the Commander of the UN Protection Force (“UNPROFOR”) reported that “siege” conditions prevailed in Srebrenica. See Prosecutor v Zdravko Tolomir, IT-05-88/2-PT, Decision on Prosecution Motion for Juridical Notice of Adjudicated Facts Pursuant to Rule 94(B) (17 December 2009) at paras 22-23 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II) online: ICTY: <http://icty.org/>. Genocide charges related to Srebrenica however, have been predicated on the mass execution of Muslim men and boys from the area in 1995. Indeed, the famine conditions in Srebrenica were dire enough that the ICTY Trial Chamber dropped charges of plunder as a war crime against accused Naser Oric for having participated in the alleged theft of several hundred cattle specifically because “any criminal responsibility” on the part of Oric was “offset by the real and present necessity to acquire food for the survival of the population of Srebrenica.” International Criminal Tribunal for the former Yugoslavia, Press Release, CVO/MOW/974e “Oral Decision Rendered Pursuant to Rule 98bis in the Oric Case” (8 June 2005) online: ICTY <http://www.icty.org/>.
resources concerning Srebrenica on crimes related to the notorious 1995 genocidal massacre of thousands of Muslim men and boys.

In light of the narrow language of using starvation of civilians as a method of warfare, the more general language of other war crimes may actually provide more useful approaches to prosecuting certain other famine-inducing acts under the aegis of war crimes. For example, the UN commission of experts for the former Yugoslavia did conclude that inhumane acts were likely being committed against certain non-Serb detainees based on findings of “patterns of abuse” including evidence that:

prisoners [were] nearly starved to death and, at best, are given one meal a day consisting of meagre portions of thin soup and bread. In instances where food is delivered to a camp by the ICRC [International Committee of the Red Cross], the food is not distributed to prisoners as intended [but] is retained for the Bosnian-Serb fighting forces or … the camp guards.\footnote{ICTY UN Experts Report, \textit{supra} note 402 at para 230(p).}

These and other acts of starving and otherwise mistreating detainees were prosecuted extensively at the ICTY as both crimes against humanity and war crimes. For example, Milorad Krnojelac was found liable under the doctrine of superior responsibility for the war crime of cruel treatment as a breach of Common Article 3 of the Geneva Conventions for the living conditions enforced on non-Serb detainees at the Kazneno-Pravni Dom (“KP Dom”) prison where he served as warden.\footnote{\textit{Prosecutor v Milorad Krnojelac (Foća),} IT-97-25-T, Judgement (15 March 2002) at para 499 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <http://www.icty.org/> [\textit{Krnojelac,} Trial Judgement].} A major aspect of the living conditions that contributed to their rising to the level of cruel treatment as a war crime was the provision of “starvation rations” to non-Serb prisoners.\footnote{\textit{Ibid} at paras 439-443.}

In \textit{Prosecutor v Milorad Krnojelac}, the Trial Chamber noted that “[p]erhaps the most marked contrast between the treatment of Serbs and non-Serbs was with regard to food, both in quantity and in quality.”\footnote{\textit{Ibid} at para 442.}

Additional war crimes provisions may also criminalize certain famine-inducing behaviour in certain circumstances. Two especially relevant of these war crimes are those of pillage and destruction or seizure of the property of an adversary not imperatively demanded by the
necessities of the conflict under customary law and codified in Rome Statute Articles 8(2)(e)(v) and (xii). These two property crimes can be committed during any armed conflict and, being grounded in customary law and not the Geneva Conventions, need not be directed only against civilians in occupied territory. The strength of these crimes and other similar war crimes provisions protecting property during armed conflicts, is that they criminalize acts of property theft and destruction, which are often key factors contributing to famine during a period of armed conflict. The weakness of the crimes is that if used to prosecute individuals for stealing or destroying foodstuffs or food-production equipment, such prosecutions would be for those specific acts themselves and would not therefore, reflect any direct culpability for resulting famine conditions. Nonetheless, protecting civilian property rights during periods of armed conflict is an important famine deterring activity. Moving forward, should the cases of Al Bashir, Prosecutor v Ahmad Harun or Prosecutor v Ali Kushayb go to trial at the ICC, issues of famine resulting from acts of pillage and destruction in the Darfur region will likely be discussed and considered at trial, as such acts appear to have formed part of a plan to destroy civilian food and water sources within targeted areas. Moving forward, these and other specialized war crimes may provide a beachhead for the discussion of famine issues within international criminal law.

Intuitively, war crimes present a promising entry point for addressing famine through international criminal law, as famine is often the companion of armed violence and warfare and humanitarian law concerns itself with civilian food rights in the provisions discussed above. The coverage of war crimes over common modern famine scenarios, however, is circumscribed by the fact that only infringement of fundamental humanitarian law provisions qualify as war crimes, the limited applicability of war crimes to instances of non-international armed conflicts and the requirement that victims of war crimes fall within a protected class. Despite these limitations, war crimes do continue to have relevance to very specific famine scenarios, particularly those involving sieges, expropriation of civilian foodstuffs by military forces, the destruction of civilian food production capacities or severe violations of civilian food rights in occupied territory.

3.5 War Crimes and the Khmer Rouge Famine

The specialized nature of war crimes also renders them an ill-suited entry point for an attempt to provide justice for the Khmer Rouge period famine for two main reasons. First, as a general matter, the main victims of the Khmer Rouge famine were Cambodian civilians, who were not protected persons under the rules of the Geneva Conventions. Second, the famine was mostly unrelated to the armed conflict with Vietnam at the time.

The Khmer Rouge’s CPK government was not a foreign occupying power in Cambodia while it held power, but was the official government of the country, meaning that Cambodian victims of famine were not civilians under a foreign occupying power. War crimes are not designed to protect citizens from abuses by their home government, especially when largely unrelated to any armed conflict that may be ongoing at the time.

Additionally, it does not appear that the Khmer Rouge period famine shared a significant nexus with the intermittent armed conflict between Cambodia and Vietnam at the time, as famine conditions were caused by the Khmer Rouge government itself in its domestic policy and the fighting was not a major cause which contributed to lessened crop yields. In fact, some of the worst areas for famine conditions at the time were in Cambodia’s Northwest Zone and other locations very far away from the border conflict with Vietnam, showing that it was not the conflict that was causing food shortages for civilians.

Thus, war crimes are simply not designed to address the types of harms associated with the Khmer Rouge period famine. Instead, as demonstrated below, it is crimes against humanity, which have evolved to criminalize severe abuses of civilians, regardless of the source of such abuse and the existence of any armed conflict, that are better suited to this task, as demonstrated below.

4 Crimes against Humanity

The term “crimes against humanity” refers to a group of offenses that are elevated to the level of international crimes when committed as part of a widespread or systematic attack against a civilian population. The term was first used in reference to possible criminal sanctions on 28 May 1915, when the French, British and Russian Governments issued a declaration condemning
the mass killing of Armenians in the Turkish Ottoman Empire, calling the killings “new crimes of Turkey against humanity and civilization” and denouncing the acts of “all members of the Ottoman Empire ... who are implicated in such massacres.”

This declaration did not result in any prosecutions, but sowed the seeds for a new category of international crimes that were eventually prosecuted extensively following World War II. Adolf Eichmann was also found guilty of numerous crimes against humanity by the District Court of Israel and crimes against humanity have been charged extensively in international criminal law prosecutions and form a vital component of the Rome Statute of the ICC.

As a body of law criminalizing the widespread or systematic abuse of civilians, the doctrine of crimes against humanity presents a conceptual framework that appears highly conducive to effectively scrutinizing and accounting for modern famine scenarios. Indeed, some of the earliest prosecutions of crimes against humanity, for example, those of Eichmann in Israel and Hans Frank in Nuremberg at the IMT, resulted in convictions based at least partially on enforcing starvation conditions on civilians.

These early applications however, failed to clearly elucidate precisely how the enforcement of famine conditions on a civilian population interacted with the elements of specific crimes against humanity as for example, the IMT simply found Frank guilty of various crimes against humanity based on his contribution to a variety of methods of abuse and killing utilized by the Nazi Party against civilian Jews and Poles without connecting specific harms to specific crimes against humanity.

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411 Eichmann Judgement, supra note 356 at para 244.
412 Rome Statute, supra note 391, art 7.
413 Eichmann Judgement, supra note 356; IMT Judgement, supra note 70 at 115-117 (487-499 in original document) (convicting accused Hans Frank of war crimes and crimes against humanity predicated on the treatment of civilians in occupied Poland).
The issue of famine and starvation as subjects of crimes against humanity has since largely languished, as more recent prosecutions at the ICTY and ICTR for example, have involved factual scenarios mostly involving classical international crimes of direct violence, rather than involving large-scale and severe civilian famines involving mass death. The Khmer Rouge period, in contrast to the situations in the former Yugoslavia and Rwanda, presents an instance of a particularly virulent and directly caused famine affecting virtually the entire civilian population of Cambodia, rendering this famine an ideal entry point for applying crimes against humanity to the subject of famine.

The remainder of this chapter provides an overview of the prerequisite chapeau elements universal to all crimes against humanity and examines how these requirements, along with the elements of three specific crimes against humanity (extermination, persecution and other inhumane acts) interact with the factual background of the Khmer Rouge period. This analysis demonstrates that not only should the Khmer Rouge period famine be considered to have involved the commission of crimes against humanity against the Cambodian civilian population by the Khmer Rouge regime generally, but also that individual former Khmer Rouge leaders could likely be convicted of the specific crimes against humanity of extermination, persecution and/or other inhumane acts for their roles in actively enforcing famine conditions while in power.

4.1 Chapeau Elements: The Widespread or Systematic Attack

Historically, in order to differentiate crimes against humanity from ordinary domestic crimes, crimes against humanity were linked with war crimes and it was necessary to demonstrate a nexus between any alleged crime against humanity and an armed conflict. At the IMT and the International Military Tribunal for the Far East (“IMTFE”) in Tokyo, crimes against humanity could only be “committed in connection with either war crimes or an aggressive war.” The various special domestic courts established under Control Council Law 10 in each of the allied-control sections of Germany dropped this requirement, apparently removing the requirement that

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414 See IMT Judgement, supra note 70 at 117 (498 in original document).
415 Stuart Ford, “Crimes Against Humanity at the Extraordinary Chambers in the Courts of Cambodia: Is a Connection with Armed Conflict Required?” (2007) 35 UCLA Pac Basin LJ 125, 144; see also IMT Charter, supra note 371, art 5(c); IMTFE Charter, supra note 410, art 5(c).
crimes against humanity be committed in connection with war crimes or crimes against peace.\textsuperscript{416} Since these early prosecutions, the requirement that crimes against humanity form part of an attack against a civilian population has replaced the abandoned requirement of some connection with an armed conflict or the crime of aggression.\textsuperscript{417} This requirement of a widespread or systematic attack against civilians is typically referred to as a contextual or “chapeau” element, as it is common to all crimes against humanity.\textsuperscript{418}

4.1.1 The Attack

The chapeau requirement that crimes against humanity be committed as part of a “widespread or systematic attack against a civilian population” and can be subdivided into five distinct elements: (1) an attack; that is (2) either widespread or systematic; and (3) directed against a civilian population; (4) the actus reus of the accused must form part of the attack; and (5) the accused must be aware of his participation therein (mens rea).\textsuperscript{419}

The Rome Statute is the only codified international legal instrument that defines “attack”, describing it as a “course of conduct involving the multiple commission of [enumerated crimes against humanity] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”\textsuperscript{420} This definition adds an additional “policy”

\textsuperscript{416} Ford, supra note 415 at 147-148.
\textsuperscript{417} See generally e.g. Tadić, Decision on Interlocutory Appeal, supra note 381 at paras 96-137.
\textsuperscript{418} Ibid at 99, 109 (“At present, [international criminal law] always requires for [crimes against humanity] a general context of criminal conduct, consisting of a widespread or systematic practice of unlawful attacks against the population.”); see also Statute of the International Criminal Tribunal for the former Yugoslavia (adopted 25 May 1993), art 5, online: ICTY <http://www.icty.org/> (updated 7 July 2009) [ICTY Statute] (“The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population”) (emphasis added); Statute of the International Criminal Tribunal for Rwanda (adopted 8 November 1994), art 3, online: ICTR <http://www.unictr.org/> (updated 31 January 2010) [ICTR Statute] (“The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.”) (emphasis added); Rome Statute, supra note 391, art 7(1) (“For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”) (emphasis added); Statute of the Special Court for Sierra Leone (14 August 2000), art 2, online: SCSL <http://www.sc-sl.org> [SCSL Statute] (“The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population.”).
\textsuperscript{419} See e.g. Tadić, Appeal Judgement, supra note 385 at para 248; Kunarac, Appeal Judgement, supra note 384 at para 85; Vasiljević, Trial Judgement, supra note 95 at para 28 (Distilling the customary chapeau elements of crimes against humanity into five distinct requirements, albeit in a different order.).
\textsuperscript{420} Rome Statute, supra note 391, art 7(2)(a); see also Akayesu, Trial Judgement, supra note 340 at para 581 (“An attack may also be non violent in nature, like imposing a system of apartheid … or exerting pressure on the
requirement, unique to the ICC, but otherwise reflects the expansive view of the term “attack” under customary law. The ICTY Appeals Chamber has defined “attack” as “a course of conduct involving the commission of acts of violence.” The attack however, is “not limited to the use of armed force [but] encompasses any mistreatment of the civilian population.” Furthermore, the prosecution may prove the existence of the attack by offering evidence that other, unindicted crimes were committed as part of the overall attack.

Under this expansive definition, it is clear that enacting harsh policies that lead directly to starvation can form part of the requisite attack necessary for crimes against humanity liability. For example, the ICTR has repeatedly affirmed that one example of an “attack” is “exerting population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner.”

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421 See e.g. Cassese, supra note 94 at 125 (Observing that “[i]t would seem that the [Rome] Statute requires that the offender, in committing a crime against humanity, pursue or promote [a State organizational policy to commit the alleged attack]” and concluding that “[c]learly, this requirement [of a State or organizational policy] goes beyond what is required under international customary law.”); see also Kunarac, Appeal Judgement, supra note 384 at para 98 (Holding that “neither the attack nor the acts of the accused needs to be supported by any form of ‘policy’ or ‘plan.’ There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes.”) (internal citations omitted). For an exhaustive overview of customary international law sources supporting the position that there is no policy requirement for crimes against humanity, see ibid at para 98, note 114.

422 See generally Cassese, supra note 94 at 124-126 (Outlining the elements of article 7 of the Rome Statute and noting that some aspects of the article are both narrower and broader than customary international law.).

423 Prosecutor v Dragoljub Kunarac, IT-96-23-T & IT-96-23/1-T, Judgement (22 February 2001) at para 415 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <http://www.icty.org/> [Kunarac, Trial Judgement]; aff’d Kunarac, Appeal Judgement, supra note 384 at para 89 (“The Appeals Chamber is satisfied that the Trial Chamber correctly defined and interpreted the concept of ‘attack’ and that it properly identified the elements and factors relevant to the attack.”).

424 Kunarac, Appeal Judgement, supra note 423 at para 86. For example, in Kunarac, the requisite “attack” chapeau requirement of crimes against humanity was held to be satisfied. The Trial Chamber found that during the relevant period there was “an extensive attack by the Serb forces targeting the Muslim civilian population” in the municipalities of Foča, Gacko and Kalinovik. Kunarac, Trial Judgement, supra note 423 at para 570. The Trial Chamber found that the attack consisted of the creation of an “atmosphere of intimidation” imposed on the local Muslim population, marked by, inter alia, ostracism, violent outbursts (including numerous beatings and killings), house-burning, gender segregation, arbitrary detainment with insufficient food in “intolerably unhygienic conditions” and the systematic rape and sexual assault of women and young girls (ibid at paras 570-578). The findings of the Trial Chamber in Kunarac illustrate the fact that various forms of mistreatment, both violent (e.g. beatings and killings) and non-violent (e.g. gender segregation and insufficient provision of food) can form part of the requisite attack.

425 E.g. Prosecutor v Milan Lukić, IT-98-32/1-T, Judgement (20 July 2009) at para 890 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber III), online: ICTY <http://www.icty.org/> [Lukić, Trial Judgement] (“The Trial Chamber recalls its finding that evidence of specific non-indicted crimes will be taken into account when determining whether the Prosecution has satisfied the general requirements of Article 5 of the Statute.”).
pressure on the population to act in a particular manner … if orchestrated on a massive scale or a systematic manner.”

Furthermore, there is ample support in existing case law for the proposition that general mistreatment may qualify as the requisite “attack” as long as such mistreatment is either widespread or systematic.\footnote{See e.g. 

\subsection*{4.1.2 Widespread or Systematic}

The key feature of all crimes against humanity differentiating them from domestic crimes is their massive scale or highly organized nature.\footnote{See Cassese, \textit{supra note 94} at 99 (“Let us now return to the large-scale or massive nature of crimes against humanity. That this feature is a necessary ingredient may be inferred from the first provisions setting out a list of such offences. They clearly, if implicitly, required that the offence, to constitute an attack on humanity, be of extreme gravity and not be a sporadic event but part of a pattern of misconduct.”); see also \textit{Akayesu}, Trial Judgement, \textit{supra note 340} at para 579 (“The Chamber considers that it is a prerequisite that the act must be committed as part of a wide spread or systematic attack and not just a random act of violence.”).}  

In order to reach this threshold, an alleged crime against humanity must form part of an attack that is either “widespread” or “systematic,” rather than being a mere isolated instance of criminal behaviour.\footnote{See e.g. \textit{Rome Statute}, supra note 391, art 7 (“For the purpose of this Statute ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population.”); accord, \textit{Akayesu}, Trial Judgement, \textit{supra note 340} at para 579.}  

The ICTR Trial Chamber has commented that “[a] widespread attack is an attack on a large scale directed against a multiplicity of victims, whereas a systematic attack is one carried out pursuant to a preconceived policy or plan.”\footnote{Bagilishema, Trial Judgement, \textit{supra note 350} at para 77 (internal citation omitted).} It is well-settled law that these requirements are alternative and not cumulative.\footnote{See e.g. \textit{Tadić}, Appeal Judgement, \textit{supra note 385} at para 203 (“The Chamber notes that customary international law requires that the attack be of either a widespread or systematic nature and need not be both.”) (underscore in original).}
Within crimes against humanity jurisprudence, the term “widespread” refers to the scale and number of victims of an alleged attack on a civilian population. The ICTR Trial Chamber has defined “widespread” as “massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.” Accordingly, if it is clear that crimes were committed on a vast scale against a civilian population, the prosecution need not introduce any evidence that the alleged crimes were organized in any way, but may rely on the gravity and frequency of the crimes alone.

The alternative requirement of a “systematic” attack refers to whether the attack forms part of an organized effort to abuse civilians. The commentary to the International Law Commission’s 1996 Draft Code of Crimes against the Peace and Security of Mankind (“1996 ILC Draft Code”) defines “systematic” as “pursuant to a preconceived plan or policy … [t]he implementation of which could result in the repeated or continuous commission of inhuman acts.” The ICTY Trial Chamber provided a more detailed definition in its judgment in Prosecutor v Tihomir Blaškić, distilling four factors to consider in assessing the systemic nature of an alleged attack:

- [1] the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy persecute or weaken a community
- [2] the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another
- [3] the preparation and use of significant public or private resources, whether military or other
- [4] the implication of high level political and/or military authorities in the definition and establishment of the methodical plan.

The Chamber in Blaškić also held that the plan itself need not be declared expressly but “may be surmised from the occurrence of a series of events.” The ICTY Appeals Chamber elaborated

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432 Akayesu, Trial Judgement, supra note 340 at para 580 (emphasis added); see also International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind with commentaries, art 18, comment 4, in UN Yearbook of the International Law Commission, vol II, part 2 (1996) at 47 [1996 ILC Draft Code] (Noting that the “[widespread] alternative requires that the inhumane acts be committed ‘on a large scale’ meaning that the acts are directed against a multiplicity of victims.”).

433 Ibid (art 18, comment 3).

434 Blaškić, Trial Judgement, supra note 378 at para 203 (internal citations omitted).

435 Ibid at para 204. The Chamber goes on to enumerate a non-exhaustive list of specific factors probative of whether a general plan existed including:

- the general historical circumstances and the overall political background against which the criminal acts are set; the establishment and implementation of autonomous political structures at
on how a systematic attack can be inferred in *Prosecutor v Dragoljub Kunarac and others*, finding that the “[p]atterns of crimes” necessary to satisfy the systematic requirement can be inferred based on an analysis of the “improbability of their random occurrence.” As a result, even a single criminal act may constitute a crime against humanity when committed pursuant to a larger, organized assault on a civilian population. Famines, which by their very nature are widespread and affect numerous victims, would seemingly always qualify as “widespread” and if famine conditions resulted pursuant to an organized plan or set of policies, it is also likely that this scenario would also satisfy the alternative “systematic” requirement. The Khmer Rouge period famine meanwhile, was clearly widespread, as it killed Cambodian civilians throughout large swaths of the country. Moreover, the main policies causing this famine were part of official national policy and as such, systematically enforced starvation conditions throughout the country.

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436 *Kunarac*, Trial Judgement, *supra* note 423 at para 429; aff’d *Kunarac*, Appeal Judgement, *supra* note 384 at para 94. In practice, there is often significant evidentiary overlap in analyzing whether an attack is widespread and/or systematic. For example, in *Kunarac*, the Appeals Chamber considered “[t]he consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes,” in determining “whether the attack satisfies either or both requirements of a ‘widespread’ or ‘systematic’ attack vis-à-vis [the specific] civilian population.” *Ibid* at para 95. This is to be expected and in most cases both requirements are satisfied or fail, based on the same evidence.

437 See e.g. *Kunarac*, Trial Judgement, *supra* note 423 at para 431 (“A single act could therefore be regarded as a crime against humanity if it takes place in the relevant context.”), citing *Prosecutor v Žoran Kupreškić*, IT-95-16-T, Judgement (14 January 2000) para 550 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <http://www.icty.org/> [Kupreškić, Trial Judgement]; *Prosecutor v Duško Tadić aka “Dule”, IT-94-1-T, Opinion and Judgement (7 May 1997) at para 649 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <http://www.icty.org/> [Tadić, Trial Judgement]; aff’d *Kunarac*, Appeal Judgement, *supra* note 384 at para 96 (“[T]he acts of the accused need only be a part of this attack and, all other conditions being met, a single or relatively limited number of acts on his or her part would qualify as a crime against humanity, unless those acts may be said to be isolated or random.”).
4.1.3 Against a Civilian Population

Crimes against humanity are limited to instances where a civilian – as opposed to military – population is the target of widespread or systematic abuses. According to current jurisprudence, “the use of the word ‘population’ does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack.” Instead, the prosecution must demonstrate that “enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian ‘population’, rather than against a limited and randomly selected number of individuals.” Furthermore, the expression “directed against” has been interpreted by the ICTY Appeals Chamber as specifying that the civilian population must be “the primary rather than incidental target of the attack.” To determine whether the civilian population was the subject of the attack the same Chamber has directed Trial Chambers to:

consider, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.

Accordingly, the civilian population in question may vary based on the size and scope of the alleged attack. Additionally, the attack itself need not be directed against the entire civilian population in a given area, but may target a specific group from amongst the larger the civilian community. Indeed, a population retains its civilian character even if it contains some non-civilian members as long as the attack itself primarily targets civilians. Again, this element would be clearly satisfied in the context of the Khmer Rouge period, as the entire civilian

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439 Ibid.
440 Ibid at para 91.
441 Ibid.
442 For example, in the case of *Prosecutor v. Milan Lukić*, the ICTY Trial Chamber found that there existed a widespread or systematic attack against the Muslim civilian population of Višegrad. Lukić, Trial Judgement, *supra* note 425 at paras 889-895.
443 See e.g. *ibid* at para 891 (Finding that the requisite “attacks were directed in a discriminatory manner against the civilian population; the victims were civilians from Višegrad, many were elderly and women and children, and all were Muslims.”).
444 See e.g. Blaškić, Trial Judgement, *supra* note 378 at para 214 (Holding that “it can be concluded that the presence of soldiers within an intentionally targeted civilian population does not alter the civilian nature of that population.”); see also Tadić, Trial Judgement, *supra* note 437 at para 639; Akayesu, Trial Judgement, *supra* note 340 at para 582; Kayishema & Ruzindana, Trial Judgement, *supra* note 348 at para 128.
population was subjected to severe famine conditions, while members of the regime received ample food in most cases.

4.1.4  **Chapeau Actus Reus**

Simply committing a crime during an unrelated widespread or systematic attack against a civilian population is insufficient to turn a simple domestic crime into a crime against humanity. The criminal acts of the specific accused must form part of the overall attack against a civilian population. The contribution of the accused, however, need not be a *sine qua non* for the overall attack, as the commission of crimes against humanity often involve numerous perpetrators spread widely across time and space. In fact, liability is still possible in instances where the accused commits a single unlawful act before or after the overall attack, provided the act is not found to be “isolated” from the attack. The ICTY Appeals Chamber has defined an “isolated act” as one “so far removed from that attack that, having considered the context and circumstances in which it was committed, it cannot reasonably be said to have been part of the attack.” The Khmer Rouge famine resulted from the very core policy of pursuing extreme socialism, backed up by the threat of extreme violence. Thus, while the famine may have not been planned by the Khmer Rouge leadership, it was clearly not isolated from the larger attack on the civilian population that these leaders ordered, via their extremist policies, but was instead intimately related thereto.

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445 See e.g. *Tadić*, Appeal Judgement, *supra* note 384 at para 248 (“The Appeals Chamber agrees that it may be inferred from the words “directed against any civilian population” in Article 5 of the Statute that the acts of the accused must comprise part of a pattern of widespread or systematic crimes directed against a civilian population.”) citing *Prosecutor v Mile Mrkšić* (“*Vukovar Hospital*”), IT-95-13-R61-T, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence (3 April 1996) at para 30 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <http://www.icty.org/>; accord *Kunarac*, Appeal Judgement, *supra* note 384 at para 96 (Observing that “the acts of the accused need only be a part of this attack” in order to satisfy the chapeau element of crimes against humanity.).

446 See e.g. *Kunarac*, Appeal Judgement, *supra* note 384 at para 96 (Noting that “all other conditions being met, a single or relatively limited number of acts on his or her part would qualify as a crime against humanity, unless those acts may be said to be isolated or random.”); see also *Tadić*, Appeal Judgement, *supra* note 384 at para 271 (Holding that “to convict an accused of crimes against humanity, it must be proved that the crimes were related to the attack on a civilian population.”)(emphasis in original).

447 *Ibid* at para 100.

4.1.5  

**Chapeau Mens Rea**

Crimes against humanity can only be committed by a perpetrator who is aware of the larger criminal context of his actions. The accused must “know that his acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and [must also] know that his acts fit into such a pattern.” As for knowledge of the specifics of the attack and the nature of his participation therein, it is “sufficient that [the accused] merely understood the overall context in which his acts took place” and with such understanding, “took the risk that his acts were part of the attack.” As is the norm under international criminal law, the accused’s subjective motivation for participating in the commission of a crime against humanity is irrelevant. Additionally, it is inconsequential whether the accused’s acts targeted a specific individual, rather than the civilian population in general, as “it is the attack, not the acts of the accused, which must be directed against the civilian population.”

This final element also appears relatively easy to establish in the context of the Khmer Rouge period famine, as the regime’s leaders were the driving force behind the main policies that formed both a widespread and systematic attack on Cambodia’s civilian population that consisted of both the imposition of famine conditions and the perpetration of mass violence. Moreover, over time, these leaders appear to have become aware of the basic facts that civilians were being executed and dying by the thousands of starvation, disease, overwork and other problems flowing from the horrific living conditions they were forcibly subjected to. These leaders nonetheless, chose to continue and even deepen the policies that were causing such massive harms, demonstrating their awareness of, yet indifference to, the suffering of the civilian population at the time. Thus, it appears that the chapeau requirement for crimes against humanity could be satisfied by demonstrating that the Khmer Rouge period famine formed an integral part of a larger widespread and systematic attack against Cambodia’s civilian population, perpetrated by government forces at the behest of the Khmer Rouge leadership.

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450 *Lukić*, Trial Judgement, supra note 425 at para 877.

451 For a thorough discussion of why the subjective motivation of an individual accused with crimes against humanity is irrelevant, see *Tadić*, Appeal Judgement, supra note 385 at paras 247-272; accord *Lukić*, Trial Judgement, supra note 425 at para 877 (“The accused’s motives for participating in the attack are irrelevant as well as whether the accused intended his acts to be directed against the targeted population or merely against his victim.”), citing *Kunarac*, Appeal Judgement, supra note 384 at paras 103, 105.

Establishing that an accused’s alleged criminal actions formed part of the requisite widespread or systematic attack on a civilian population is only the first step towards a conviction for crimes against humanity, as the prosecution must further prove the elements of each specific charged crime against humanity beyond a reasonable doubt. In the case of the Khmer Rouge famine, while it is clear that the general living conditions enforced on the civilian population involved a nationwide and highly organized series of abuses undoubtedly rising to the requisite level to satisfy the chapeau requirements of crimes against humanity, the next critical step toward criminal accountability for famine would be to identify specific crimes against humanity that could both be sufficiently proved and which properly reflect the main harms associated with the famine. In the specific circumstance of the Khmer Rouge period famine, three specific crimes against humanity stand out as potential candidates: extermination, persecution and other inhumane acts.

4.2 Specific Crimes against Humanity

4.2.1 Extermination

The crime against humanity of extermination is a crime of mass killing, by any means, including “subjecting a number of people to conditions of living that would inevitably lead to death.” Both the ICTR and ICTY have stated that the actus reus of extermination covers “any act, omission, or combination thereof which contributes directly or indirectly to the killing of a large number of individuals.” One example of the actus reus of extermination provided by the Trial Chamber of the ICTR is “[i]mprisoning a large number of people and withholding the


necessities of life which results in mass death”.\textsuperscript{456} Similarly, the Rome Statute explicitly includes the “deprivation of access to food and medicine” as acts that may satisfy the \textit{actus reus} of extermination.\textsuperscript{457} Moreover, extermination charges are well-suited to address the culpability of leaders of repressive regimes, as they are appropriately brought against individuals who “did in fact exercise authority or power over many other individuals or did otherwise have the capacity to be instrumental in the killing of a large number of individuals.”\textsuperscript{458}

\subsection*{4.2.1.1 The Massiveness Threshold}

The crime against humanity of extermination is–along with genocide–perhaps the most heinous crime in existence,\textsuperscript{459} as its commission necessarily involves mass death. The critical element of massiveness sets extermination apart from simple murder as a crime against humanity.\textsuperscript{460} There is no numerical threshold of victims that automatically establishes massiveness as a matter of

\begin{itemize}
\item \textsuperscript{456} Kayishema \& Razindana, Trial Judgement, \textit{supra} note 348 at para 146 (The accused were not convicted of extermination because the Trial Chamber found that under the specific circumstances, the conviction of the accused for genocide subsumed the charges of murder and extermination as crimes against humanity.); see also Brdanin, Trial Judgement, \textit{supra} note 455 at para 389 (“An act amounting to extermination may include the killing of a victim as such as well as conduct which creates conditions provoking the victim’s death and ultimately mass killings, such as the deprivation of food and medicine, calculated to cause the destruction of part of the population.”).
\item \textsuperscript{457} Rome Statute, \textit{supra} note 391, art 7(2)(b).
\item \textsuperscript{458} Vasiljević, Trial Judgement, \textit{supra} note 95 at para 222 (“It is worth noting that in none of the reviewed [post-World War II] cases were minor figures charged with ‘extermination’ as a crime against humanity. Those who were charged with that criminal offence did in fact exercise authority or power over many other individuals or did otherwise have the capacity to be instrumental in the killing of a large number of individuals.”); accord Brdanin, Trial Judgement, \textit{supra} note 455 at para 390.
\item \textsuperscript{459} Although there is no formal hierarchy of international crimes, which are all considered especially grave in nature, extermination is often described as “similar to genocide” and of equal gravity thereto. See e.g. Krstić, Trial Judgement, \textit{supra} note 338 at para 497.
\item \textsuperscript{460} See e.g. Lukić, Trial Judgement, \textit{supra} note 425 at para 938 (“The crime of extermination differs from murder in that it requires an element of mass destruction.”), citing Stakić, Appeal Judgement, \textit{supra} note 453 at paras 259, 260 (“The \textit{mens rea} of extermination clearly requires the intention to kill on a large scale or to systematically subject a large number of people to conditions of living that would lead to their deaths. This intent is a clear reflection of the \textit{actus reus} of the crime.”); Ntakirutimana, Appeal Judgement, \textit{supra} note 453 at para 522; Bagosora, Trial Judgement, \textit{supra} note 427 at para 2191 (“The \textit{mens rea} of extermination requires that the accused intended to kill persons on a massive scale or to subject a large number of people to conditions of living that would lead to their deaths in a widespread or systematic manner.”); Brdanin, Trial Judgement, \textit{supra} note 455 at para 395 (“The Prosecution is … required [in order to obtain an extermination conviction] to prove beyond reasonable doubt that that accused had the intention to kill persons on a massive scale or create the conditions of life that led to the deaths of a large number of people.”); aff’d Prosecutor \textit{v} Radoslav Brdanin, IT-99-36-A, Judgement (3 April 2007) at para 476 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), online: ICTY <http://www.icty.org/> [Brdanin, Appeal Judgement].
\end{itemize}
law. Instead, each case requires a careful analysis of relevant factors, including: “the time and place of the killings, the selection of the victims, and the manner in which they were targeted”. Individual victims however, need not be named or described, or share “any common national, ethnical, racial or religious characteristics” beyond comprising a civilian population. The accused also need not have specific victims in mind during the commission of the crime. Moreover, deaths from geographically and/or temporally separated sites may be aggregated to reach the required massiveness threshold so long as each event falls within the overall extermination episode charged.

4.2.1.2 Mens Rea: Knowledge of Mass Death

The mens rea of extermination requires that “the accused intended, by his acts or omissions, either killing on a large scale, or the subjection of a widespread number of people, or the systematic subjection of a number of people, to conditions of living that would lead to their

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462 Krajišnik, Trial Judgement, supra note 461; accord, Martić, Trial Judgement, supra note 453 at para 63; Lukić, Trial Judgement, supra note 425 at para 938. For example, extermination convictions have resulted from incidents involving the killing of 66 and 59 persons in cases at the ICTY. Krajišnik, ibid at paras 699, 720; Lukić, Trial Judgement, supra note 425 at paras 941, 945 (majority decision, Judge Van den Wyngaert dissenting).

463 E.g. Ntakirutimana, Appeal Judgement, supra note 453 at para 521 (“It is not an element of the crime of extermination that a precise identification of ‘certain named or described persons’ be established.”).

464 See Krstić, Trial Judgement, supra note 338 at para 500.

465 Kayishema & Ruzindana, Trial Judgement, supra note 348 at para 145; see also M Cherif Bassiouni, Crimes Against Humanity in International Law (Hague-London-Boston: Martinus Nijhoff, 1992) at 291, cited in Kayishema & Ruzindana, Trial Judgement, supra note 348 at para 143 (“Extermination implies intentional and unintentional killing. The reason for the latter is that mass killing of a group of people involves planning and implementation by a number of persons who, though knowing and wanting the intended result, may not necessarily know their victims. Furthermore, such persons may not perform the actus reus that produced the deaths, nor have specific intent toward a particular victim.”); see also 1996 ILC Draft Code, supra note 432 at 48, note 8 (noting that the crime against humanity of extermination “applies in situations in which some members of a group are killed while others are spared”).

466 See Lukić, Trial Judgement, supra note 425 at para 938, citing Brđanin, Trial Judgement, supra note 455 at para 391; aff’d Brđanin, Appeal Judgement, supra note 460 at paras 471-472; see also Ntakirutimana, Appeal Judgement, supra note 453 at para 521.
There has been some disagreement between reviewing courts as to whether this standard includes gross criminal negligence. The ICTR Trial Chamber included gross negligence in its summary of the requisite mens rea for extermination in its Kayishema & Ruzindana Judgment, however, recent ICTY jurisprudence suggests that dolus eventualis (recklessness) is the threshold mens rea for extermination as is the standard for crimes against humanity generally.

### 4.2.1.3 Extermination and Famine Mortality

As a crime of indiscriminate causation of mass death, the crime against humanity of extermination is perhaps the most likely international crime to apply to typical modern famine scenarios. This is because there is significant conceptual overlap between modern understandings of how famines kill and how causation issues are treated within extermination jurisprudence. The judgement of the IMT convicting Hans Frank of, inter alia, extermination as a crime against humanity is illustrative of how this crime can properly reflect the culpability of individuals who cause mass death by placing a group of victims in circumstances leading to mass death. In convicting Frank, who held the positions of Chief Civil Administration Officer and later, Governor General, of occupied Poland during World War II, the IMT noted that according the policy of the German Nazi Party, Frank had stated “‘Poland shall be treated like a colony, the Poles will become the slaves of the Greater German World Empire.’” The Tribunal further found that “[t]he evidence establishes that this occupation policy was based on the complete destruction of Poland as a national entity, and a ruthless exploitation of its human and economic resources for the German war effort. All opposition was crushed with the utmost harshness.” As for the results of this ruthless exploitation of Polish resources, the Tribunal noted that the

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468 For an overview of the legal debate on the issue, see *Brdanin,* Trial Judgement, *supra* note 455 at paras 392-395.

469 Kayishema & Ruzindana, Trial Judgement, *supra* note 348 at para 144.

470 *Ibid* at para 395; aff’d *Brdanin,* Appeal Judgement, *supra* note 460 at para 476; see also *Lukić,* Trial Judgement, *supra* note 425 at para 939 (“The mens rea of extermination is that the accused committed the act or omission with the intent to kill persons on a large scale or in knowledge that the deaths of a large number of people were a probable consequence of the act or omission.”).

471 See e.g. Cassese, *supra* note 94 at 114-115.

472 IMT Judgement, *supra* note 70 at 115 (497 in original).

473 *Ibid* at 115-116 (497 in original).
arduous working conditions and German expropriation of foodstuffs resulted in mass death through disease and starvation, finding that:

The economic demands made on the General Government were far in excess of the needs of the army of occupation, and were out of all proportion to the resources of the country. The food raised in Poland was shipped to Germany on such a wide scale that the rations of the population of the occupied territories were reduced to the starvation level, and epidemics were widespread. Some steps were taken to provide for the feeding of the agricultural workers who were used to raise the crops, but the requirements of the rest of the population were disregarded. It is undoubtedly true, as argued by counsel for the defence, that some suffering in the General Government was inevitable as a result of the ravages of war and the economic confusion resulting therefrom. But the suffering was increased by a planned policy of economic exploitation.474

This use of the civilian population of Poland as a source of indentured labour by Nazi Germany is fundamentally similar to how the Khmer Rouge viewed and used the civilian population of Cambodia in the service of the perceived needs of the revolution. In both situations, the civilians were only permitted to access enough basic necessities, including food, insofar as it benefitted the relevant authority. In both Poland and Cambodia, this economic and social exploitation of the civilian population resulted in terrible living conditions marked by famine, disease and starvation and resulting in mass death. Ultimately, the Tribunal found that Frank was “a willing and knowing participant in the use of terrorism in Poland; in the economic exploitation of Poland in a way which led to the death by starvation of a large number of people; in the deportation to Germany as slave labourers of over a million Poles; and in a programme involving the murder of at least three million Jews.” As a result of this participation, the Tribunal found Frank guilty of count four (crimes against humanity)475, including “murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations.”476

The IMT Judgement against Frank provides thus, demonstrates how the crime against humanity of extermination can be successfully prosecuted against individuals who participate in enforcing famine conditions on a civilian population. The conviction of Frank also demonstrates how, as a crime of large-scale, yet impersonal killing whereby there is no requirement of a direct link between the accused and any specific individual victim, extermination accurately reflects how

474 Ibid at 116 (498 in original).
475 Ibid at 117 (498 in original).
476 Ibid at 14 (413 in original).
famines can ravage a civilian population indiscriminately. This signalling would help to demonstrate how famine victims are typically overrepresented within poor or otherwise marginalized groups and suffer and die largely anonymously and far removed from the decision-makers whose acts set in motion the events leading to their ultimate starvation and death. In the context of the Khmer Rouge famine, extermination is therefore a particularly useful international crime, as it could reflect how the decisions of Khmer Rouge elites in Phnom Penh directly resulted in indiscriminate mass death throughout the Cambodian countryside.

4.2.2 Persecution

Persecution is defined in the Rome Statute as the “intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.” The ICTY has adopted a similar definition:

the crime of persecution consists of an act or omission which discriminates in fact and which: denies or infringes upon a fundamental right laid down in international customary or treaty law (the actus reus); and was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the mens rea).

4.2.2.1 Actus Reus: Severe Infringement of a Fundamental Human Right

The actus reus of persecution requires acts or omissions that severely infringe a “fundamental right” guaranteed by international law and “only gross or blatant denials of fundamental rights” qualify as persecution. The suffering occasioned through the infringement of the

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477 Rome Statute, supra note 391, art 7(1)(g).
479 See e.g. Vasiljević, Trial Judgement, supra note 95 at para 43.
480 Ibid. The requirement that the right be “fundamental” replaced the former requirement under the Nuremberg Charter that persecution be committed in association with other crimes against humanity. See e.g. Prosecutor v Tihomir Blaškić (“Lašva Valley”), IT-95-14-A, Judgement (29 July 2004) at para 135 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), online: ICTY <http://www.icty.org/> [Blaškić, Appeal Judgement]. It is unclear however, whether the actus reus of persecution must independently constitute a criminal act. See Separate Opinion of Judge Shahabuddeen, in Krnojelac, Appeal Judgement, supra note 478 at paras 5-7, cf Prosecutor v Miroslav Kvočka (“Omarkska, Keraterm & Trnopolje Camps”), IT-98-30/1-T, Judgement (2 November 2001) at para 186 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <http://www.icty.org/> [Kvočka, Trial Judgement] (Stating that “jurisprudence from World War II trials found acts or omissions such as denying bank accounts, educational or employment opportunities, or choice of spouse to Jews on the basis of their religion, constitute persecution. Thus, acts that are not inherently criminal may nonetheless become criminal and persecutorial if committed with discriminatory intent.”).
predicate fundamental right must be of “similar gravity” to other crimes against humanity.\textsuperscript{481} Additionally, specific persecutory acts must be alleged rather than general mistreatment of a targeted group,\textsuperscript{482} although various discriminatory acts not individually rising to the requisite gravity may cumulatively qualify as persecution.\textsuperscript{483}

International human rights law is made up of various international treaties, conventions and soft law norms that grant rights to human beings by “restricting the authority yielded by states of such individuals.”\textsuperscript{484} Although human rights are conceived as basic rights held by all humanity based solely on being human, not all rights are considered “fundamental” and as such, violations of human rights do not necessarily rise to the level of an international crime. This general fact is especially true within the context of economic and social rights, such as the right to adequate food, which encompasses both fundamental core rights, as well as penumbral aspirational targets assigned to individual states and the global community at large. The genesis of the modern right to adequate food is found in article 25(1) of the Universal Declaration of Human Rights of 1948 (“Universal Declaration”), which acknowledged a universal “right to a standard of living adequate for the health and well-being of himself and of his family, including food”.\textsuperscript{485} This nascent right to adequate food was solidified and elaborated on in Article 11 of the International Covenant for Economic, Social and Cultural Rights (“ICESCR”) in 1966.\textsuperscript{486} Article 11 of the ICESCR divides the general human right to adequate food into two rights: (1) the largely aspirational right to an “adequate standard of living” including “adequate food” and the “continuous improvement” of living conditions; and (2) “the fundamental right of everyone to be

\textsuperscript{481} See \textit{Lukić}, Trial Judgement, \textit{supra} note 425 at para 993; see also \textit{Kordić}, Appeal Judgement, \textit{supra} note 427, para 102, citing \textit{Blaškić}, Appeal Judgement, \textit{supra} note 480 at para 135; \textit{Krojelac}, Appeal Judgement, \textit{supra} note 478 at paras 199, 221.
\textsuperscript{482} See e.g. \textit{ibid} at para 246, citing \textit{Kupreškić}, Trial Judgement, \textit{supra} note 437 at para 626; \textit{Krojelac}, Trial Judgement, \textit{supra} note 405 at para 433.
\textsuperscript{484} Cassese, \textit{supra} note 94 at 6.
\textsuperscript{485} \textit{Universal Declaration of Human Rights}, UNGAOR, UN Doc A/810 (12 December 1948), art 25(1).
\textsuperscript{486} \textit{International Covenant on Economic, Social and Cultural Rights}, 993 UNTS 3 (16 December 1966), art 11.
The core values of the right to adequate food, recognized in the ICESCR and Universal Declaration are also considered “fundamental” in nature. Thus, the core requirements of the right to adequate food cannot be dismissed as mere “economic” rights, but must be viewed as a critical ingredient necessary to protect the most basic human right of all: the right to life.

General support for the right to adequate food can also be found in numerous other human rights documents, including the International Covenant for Civil and Political Rights, Universal Declaration on the Eradication of Hunger and Malnutrition, Conventional on the Elimination of Discrimination Against Women and Convention on the Rights of the Child.

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487 Ibid.

489 For example, Federal Courts in the United States reviewing asylum requests of foreign nationals have found that individuals who would lack access to adequate food upon return to their homeland face “extreme hardship.” See e.g. Santana-Figueroa v Immigration and Naturalization Service, 644 F.2d 1354 at 1356-1357 (9th Cir 1981) (Stating that “[d]eprivation of the means to live is far more than an ‘economic’ loss. … For an aged person with no means of support but his own labor, the consequences may include untreated illness, malnutrition, or starvation. These bleak prospects cannot rationally be said to fall short of extreme hardship in all cases simply because they are traceable to ‘economic’ causes.”); see also Soric v Flagg, 303 F.2d 289 at 290 (7th Cir 1962) (“economic sanctions so severe as to deprive a person of all means of earning a livelihood may amount to physical persecution”).

490 See General Comment 12, supra note 488.
491 International Covenant for Civil and Political Rights, UN Doc A/6316, 999 UNTS 171, art 1(2) (entered into force 23 March 1976) (“All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.”).
492 Universal Declaration on the Eradication of Hunger and Malnutrition, General Assembly resolution 3180 (XXVIII) (17 December 1973); endorsed by General Assembly resolution 3348 (XXIX) (17 December 1974), art 1 (“Every man, woman and child has the inalienable right to be free from hunger and malnutrition in order to develop fully and maintain their physical and mental faculties.”).
494 Convention on the Rights of the Child, UNGAOR 44/25 of 20 November 1989, art 24(2)(c), (entered into force, 2 September 1990) (Obligating State parties to “take appropriated measures” to inter alia “combat disease and malnutrition, including within the framework of primary health care through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water”).
Commentators and the UN have asserted that these instruments and concordant state practice are sufficient to establish the human right to adequate food as customary international law.\footnote{See Niada, \emph{supra} note 488 at 173-76 (discussing the arguments for and against recognizing the right to adequate food as customary law and concluding that “there is a strong case for identifying a ‘modern’ international customary norm on the right to food, comprehensive and constantly updating” at 176.); see also Special Rapporteur on the Right to Food, \emph{Report of the Special Rapporteur on the right to food}, UN Doc A/63/278 (21 October 2008), para 10 (asserting that the right to adequate food is customary international law).}

As with most human rights, the right to adequate food refers to a broad spectrum of rights, ranging from well-established basic prohibitions on state action to aspirational soft-law norms calling for affirmative state action to improve food security both domestically and abroad.\footnote{See generally, Niada, \emph{supra} note 488; see also DeFalco, “Right to Food in Gaza”, \emph{supra} note 488.} There are three main responsibilities placed on states, those to: \emph{respect}, \emph{ensure} and \emph{fulfil}.\footnote{Ibid at 151-152.}

When it comes to state implementation of the right to adequate food and according to one commentator: “States have a duty to immediately realize the right to be free from hunger” but “[r]esponding to minimum needs, however, is only the baseline action necessary to comply with the right to food [because] States have an explicit duty to progressively implement the comprehensive right to food.”\footnote{Lukić, \emph{Trial Judgement}, \emph{supra} note 425 at para 994, citing Stakić, \emph{Appeal Judgement}, \emph{supra} note 453 at para 328.} Thus, while it can be generally concluded that there is a right to adequate food and a fundamental right to be free from hunger, it remains unclear where the demarcation line between “fundamental” and other types of food rights precisely sits. Nonetheless, it appears clear that if a group is intentionally subjected to famine conditions as part of a targeted campaign against them, such acts would amount to a severe infringement of a fundamental human right.

\subsection*{4.2.2.2 Mens Rea: Dolus Specialis}

The key to most persecution convictions is establishing that the accused required \emph{mens rea} of \emph{dolus specialis} or the “intent to commit the underlying act and to discriminate on political, racial or religious grounds”.\footnote{See generally Niada, \emph{supra} note 488.} The requirement of special discriminatory intent is indeed, the element that sets persecution apart from other crimes against humanity.\footnote{See e.g. Badar, \emph{supra} note 410 at 137 (Noting that it is the requirement of “discriminatory intent which sets the crime of persecution apart from other crimes against humanity").} For this stringent requirement
to be satisfied, the perpetrator of persecution must violate the fundamental rights of members of an intentionally targeted political, racial or religious group.\textsuperscript{501}

Unlike the crime of genocide, political groups form a protected class for purposes of persecution, although it is often difficult to define the vital aspects a political group. The ICTR Trial Chamber has commented that “[p]olitical grounds include party political beliefs and political ideology.”\textsuperscript{502} The practical difficulties inherent in such ambiguity however, are largely avoided through the adoption of a subjective approach to defining political groups, meaning that if the perpetrators targeted a group of victims based on their perceived group political identity, this suffices for purposes of persecution applicability.\textsuperscript{503} Thus, it follows that liability is proper, even if an alleged perpetrator of persecution acted with the intent to discriminate based on a false assumption regarding the identity of the victim.\textsuperscript{504}

4.2.2.3 Persecution and Famine

In the context of famine, persecution could serve as a useful mechanism to reflect the culpability of those who forcibly subject disfavoured political or other protected groups to famine conditions. Furthermore, the inclusion of political groups, renders persecution potentially applicable to more modern famine scenarios than genocide, representing a critically important distinction in many cases. This distinction is important because famines are often manipulated by

\textsuperscript{501} See e.g. Tadić, Trial Judgement, supra note 437 at para 697 (Stating that for persecution liability to attach, “it is evident that what is necessary is some form of discrimination that is intended to be and results in an infringement of an individual’s fundamental rights”).

\textsuperscript{502} See e.g. Kayishema & Ruzindana, Trial Judgement, supra note 348 at para 130.

\textsuperscript{503} For example, the ICTY Trial Chamber found that persecutory acts committed by Serb paramilitary groups against local Muslim populations were committed on both religious and political grounds. Krnojelac, Trial Judgement, supra note 405 at para 22, note 56 (“The Trial Chamber understands that the term ‘non-Serb’ connotes both religious and political distinctions.”); accord, Prosecutor v Ferdinand Nahimana, ICTR-99-52-T, Judgement and Sentence (3 December 2003) at para 1072 (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR <http://www.unictr.org/> (Finding the accused guilty of persecution for broadcasting hate-speech targeting both “the Tutsi ethnic group and the so-called ‘moderate’ Hutu political opponents who supported the Tutsi ethnic group”. The Trial Chamber found that these attacks “essentially merged political and ethnic identity, defining their political target on the basis of ethnicity and political positions relating to ethnicity”); cf Nahimana, Appeal Judgement, supra note 427 at paras 986-988 (Finding that “hate speech alone can amount to a violation of the rights to life, freedom and physical integrity of the human being. Thus other persons need to intervene before such violations can occur; a speech cannot, in itself, directly kill members of a group, imprison or physically injure them.” The Chamber further found however, that “all [relevant hate] speeches took place in the context of a massive campaign of persecution directed at the Tutsi population of Rwanda, this campaign being also characterized by acts of violence” and thus such hate speech rose to the level of the crime against humanity of persecution.).

\textsuperscript{504} Krnojelac, Appeal Judgement, supra note 478 at para 187 (finding that “a Serb mistaken for a Muslim may still be the victim of the crime of persecution”).
powerful groups to occasion the brunt of suffering on less powerful groups. As such, persecution provides a potentially useful legal acknowledgment of this dynamic and could signal instances where famine conditions, even if not completely caused by the perpetrator group, are manipulated to much more severely affect one group. Prosecutions of persecution charges attendant to famine scenarios could also serve the purpose of further clarifying and advancing human rights related to food access. This is true even in the event that reviewing adjudicators decline to enter a conviction for persecution predicated exclusively on the denial of the human right to be free from hunger, as famine conditions also very directly compromise other less controversial rights, such as the basic human rights to life and bodily integrity.

The judgement against Hans Frank at the IMT proves demonstrative again, within the context of the interaction between the enforcement of famine conditions criminal culpability. Along with finding Frank guilty of other crimes against humanity for his role in brutalizing the civilian population of Poland generally, Frank was also convicted for his role in the persecution and extermination of European Jews. The Tribunal specifically found that Frank participated in the Final Solution plan of the German Nazi party, pursuant to which Jews “were forced into ghettos, subjected to discriminatory laws, deprived of the food necessary to avoid starvation, and finally systematically and brutally exterminated.” This targeted persecution of Jews by the German Nazis is in many respects similar to the manner in which the Khmer Rouge leadership expressed disdain for new people, as new people were also singled out amongst the civilian population and branded as less deserving of access to basic necessities such as food, water, shelter, healthcare and rest. Just as Jews in German-controlled portions of Europe were segregated and subjected to especially harsh conditions marked by lack of food and basic sanitation and the ever-present threat of extreme violence, Cambodians labelled as new people by the Khmer Rouge were subject to repeated forced relocation, especially harsh living and working conditions and often provided with food rations that paled in comparison to even the meagre rations provided to other civilian workers. The Frank judgement thus demonstrates how convictions for the crime against humanity of persecution can reflect such targeted enforcement of famine and starvation conditions on political or other discriminatory grounds, even amidst such horrific general suffering. Pursuit of persecution convictions for such acts could also serve

505 IMT Judgement, supra note 70 at 117 (498 in original).
506 Ibid at 116 (498 in original).
to solidify the underlying social, economic and basic human rights that are violated when a group starved as part of persecutory policies.

4.2.3 Other Inhumane Acts

The crime against humanity of other inhumane acts, is designed as a catch-all residual crime that can be used to prosecute acts that, while not satisfying all of the elements of a specific other crime against humanity, nevertheless rise to the same level of seriousness. To maintain this flexibility, the actus reus of other inhumane acts has been left intentionally amorphous to prevent creative evasion of the law by perpetrators.\(^\text{507}\) An alleged inhumane act must be of “similar gravity” to that of other crimes against humanity in order to rise to the requisite level of seriousness.\(^\text{508}\) Moreover, specific inhumane acts must be demonstrated at trial, rather than generally demonstrating mistreatment of a civilian population.\(^\text{509}\) The perpetrator of an inhumane act must possess a mens rea of at least advertent recklessness (dolus eventualis) according to prevailing jurisprudence at the ad hoc Tribunals, although the Rome Statute requires that the perpetrator “intentionally” cause the suffering of the victims.\(^\text{510}\)

\(^{507}\) See e.g. Judgement, Kupreškić, Trial Judgement, supra note 437 at para 563 (“The phrase [other inhumane acts] was deliberately designed as a residual category, as it was felt to be undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition.”).

\(^{508}\) E.g. Lukić, Trial Judgement, supra note 425 at para 960 (“The act or omission [forming the actus reus of [inhumane acts] must have been of a seriousness similar to that of [other crimes against humanity].”); Kayishema & Ruzindana, Trial Judgement, supra note 348 at para 149 (“Since the Nuremberg Charter, the category [of other inhumane acts] has been maintained as a useful category for acts not specifically stated but which are of comparable gravity.”).

\(^{509}\) Ibid at paras 580-589 (Observing that “[a]s far as counts for other inhumane acts are concerned the accused could be found guilty of crimes against humanity based on other inhumane acts” but ultimately finding that “the fundamental rights of both the accused, namely to be informed of the charges against him and to be in a position to prepare his defence in due time with complete knowledge of the matter, has been disregarded in relation to all the counts of crimes against humanity for other inhumane acts” thereby requiring their acquittal for inhumane acts.).

\(^{510}\) E.g. Krnojelac, Trial Judgement, supra note 405 at para 132 (“The required mens rea is met where the principal offender at the time of the act or omission, had the intention to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim, or where he knew that his act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity and was reckless as to whether such suffering or attack would result from his act or omission.”), citing Kayishema & Ruzindana, Trial Judgement, supra note 348 at para 153; Prosecutor v Zlatko Aleksovski, IT-95-14/1-T, Judgement (25 June 1999) at para 56 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <http://www.icty.org/>; cf Rome Statute, supra note 391, art 7(1)(k).
4.2.3.1 Acts of “Similar Gravity”

In order to rise to a level of similar gravity to other crimes against humanity, alleged inhumane acts must cause injury to the “physical or mental integrity, health or human dignity” of affected victims.\(^{511}\) Within international practice, accused have been found guilty of inhumane acts as a crime against humanity for various acts of cruelty and abuse. Examples include: attempted murder;\(^{512}\) forcible transfer;\(^{513}\) “confinement … on exposed ground without water, food or sanitary facilities” for five days;\(^{514}\) mistreatment and injuring of detainees;\(^{515}\) “beatings, torture, sexual violence, humiliation, harassment, psychological abuses, and confinement in inhumane conditions”;\(^{516}\) the “use of persons as human shields”;\(^{517}\) forced marriage;\(^{518}\) physical and sexual violence to dead bodies;\(^{519}\) injuries sustained during forced labour;\(^{520}\) and general physical

\(^{511}\) See Lukić, Trial Judgement, *supra* note 425 at para 960 (The “act or omission must have caused serious mental or physical suffering or injury or constituted a serious attack on human dignity.”), citing Kordić, Appeal Judgement, *supra* note 427, para 117; Prosecutor v Mitar Vasiljević, IT-98-32-A, Judgement (25 February 2004) at para 165 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), online: ICTY <http://www.unictr.org/>; Prosecutor v Dragomir Milošević, IT-98-29/1-T, Judgement (12 December 2007) at para 934 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber III), online: ICTY <http://www.unictr.org/>; Martić, Trial Judgement, *supra* note 453 at para 83; Blagojević, Trial Judgement, *supra* note 461 at para 626; Prosecutor v Stanislav Galić, IT-98-29-T, Judgement (5 December 2003) at para 152 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <http://www.unictr.org/>; Vasiljević, Trial Judgement, *supra* note 95 at para 234; see also *Rome Statute, supra* note 391, art 7(1)(k) (Defining the crime as that of “[o]ther inhumane acts of a similar character [to other crimes against humanity,] intentionally causing great suffering, or serious injury to body or to mental or physical health.”).

\(^{512}\) Lukić, Trial Judgement, *supra* note 425 at para 964-966; Vasiljević, Trial Judgement, *supra* note 95 at para 238-240 (Both cases concerned an incident during which seven Muslim civilians were lined up at the edge of the Drina River and shot at them, intending to kill them all. Two of the seven victims were only injured and survived by falling into the river and pretending to be dead. The Chamber found the accused guilty of inhumane acts regarding only the two survivors, who suffered physical and mental harm of a level comparable to victims of other crimes against humanity.).

\(^{513}\) See e.g. Blagojević, Trial Judgement, *supra* note 461 at para 810.

\(^{514}\) Bagilishema, Trial Judgement, *supra* note 350 at paras 490-494 (“The confinement of a large number of people on exposed ground without water, food or sanitary facilities will amount to an inhumane act if the act is deliberate and its consequences are serious mental or physical suffering or a serious attack on human dignity.”) Lukić, Trial Judgement, *supra* note 425 at para 964-966; Vasiljević, Trial Judgement, *supra* note 95 at para 238-240 (Both cases concerned an incident during which seven Muslim civilians were lined up at the edge of the Drina River and shot at them, intending to kill them all. Two of the seven victims were only injured and survived by falling into the river and pretending to be dead. The Chamber found the accused guilty of inhumane acts regarding only the two survivors, who suffered physical and mental harm of a level comparable to victims of other crimes against humanity.).

\(^{515}\) See e.g. Blagojević, Trial Judgement, *supra* note 461 at para 810.

\(^{516}\) See also Jelisić, Trial Judgement, *supra* note 337 at para 138 (Finding the accused guilty of three counts of the crime against humanity of Inhumane acts for “causing bodily harm” to Muslim detainees.).

\(^{517}\) Prosecutor v Alex Tamba Brima (AFRC Case), SCSL-2004-16-A, Judgement (22 February 2008) at paras 197-203 (Special Court for Sierra Leone, Appeals Chamber), online: SCSL <http://www.sc-sl.org/>.

\(^{518}\) Prosecutor v Eliézer Nyitengeka, ICTR-96-14-T, Judgement and Sentence (16 May 2003) paras 462-465 (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR <http://www.unictr.org/>; see also Prosecutor v Juvenal Kajelijeli, ICTR-98-44A-T, Judgement and Sentence (1 December 2003) at paras 934-936 (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR <http://www.unictr.org/> (The
assaults causing injury.\textsuperscript{521} Additionally, “enforced prostitution” and “enforced disappearance of persons” also presumptively rise to the level of inhumane acts according to recent ICTY jurisprudence.\textsuperscript{522}

\textbf{4.2.3.2 Other Inhumane Acts and Famine}

The conditions of life associated with periods of famine involve a degree of suffering clearly comparable to that of both other enumerated crimes against humanity and previous convictions for other inhumane acts at the international level. Starving famine victims suffer severe, prolonged physical pain as their bodies break down and weaken. The longer term health implications for victims are similarly serious, as the physical stress of enduring periods of starvation is associated with lifelong and intergenerational negative health implications.\textsuperscript{523} Moreover, famine conditions can involve severe mental traumas and often involve breakdowns in most basic societal norms and mores, leading to wider negative implications for affected societies. For example, survivors of the Khmer Rouge period famine often suffered physically from lack of food while also being forced to watch loved ones weaken, suffer and die from starvation. Moreover, basic societal taboos, such as the prohibition on cannibalism were transgressed in Cambodia out of sheer desperation, leading to wider shared communal traumas. As such, inhumane acts presents a potentially useful legal mechanism for responding to famine, as it could be used to properly label the various types of individual and shared suffering and breakdowns associated with famine conditions as “inhumane”. Importantly, this crime could also be used to recognize the suffering of victims of famine who ultimately survive, as the suffering of survivors is oft-ignored in discussions of famine in Cambodia and elsewhere.

\textsuperscript{520} Prosecutor v Mladen Naletilić (“Tuta & Štela”), IT-98-34-T, Judgement (31 March 2003) at para 271 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <http://www.icty.org/>.
\textsuperscript{521} E.g. Tadić, Trial Judgement, supra note 437 at para 697 (beatings of six prisoners).
\textsuperscript{522} Kupreškić, Trial Judgement, supra note 437 at para 566.
\textsuperscript{523} As discussed above at 5-7.
4.3 Crimes against Humanity and the Khmer Rouge Famine

The most suitable category of international criminal law to account for the culpability of former Khmer Rouge leaders who enforced famine conditions on the civilian population is crimes against humanity, which were purposefully designed to protect civilians from widespread and systematic abuse, regardless of the identity or motivation of those responsible. Indeed, the interpretive flexibility of the term “humanity” allows the phrase “crimes against humanity” to refer to the _inhumane_ results of the crimes, while also serving as a reminder that violations of international criminal law offend _all of humanity_. This dual meaning is also usefully reflective of the facts that famine living conditions are inhumane, entailing suffering on a massive and incalculable scale and that the continued existence of famine in an era where it is a wholly eradicable product of human agency should offend all of humanity.

Specifically, the main harms attendant to the Khmer Rouge period famine could be viewed as products of the crimes against humanity of extermination, persecution and other inhumane acts. This is because each of these three crimes accurately captures and lays blame for, a key harm wrought by famine in Cambodia under the Khmer Rouge. Extermination is a crime of causing mass death and could be utilized to attach criminal responsibility to Khmer Rouge leaders for the hundreds of thousands of excess deaths attributable to the famine conditions they enforced on the civilian population. Persecution is a crime of targeted discrimination rising to the level of the denial of a fundamental human right to members of a targeted class and could be utilized to acknowledge the fact that the Khmer Rouge leadership viewed “new” people as political enemies of the revolution and purposefully exposed them to especially harsh living conditions entailing violations of not only the core human right to adequate food, but also compromising more basic rights of physical and mental integrity.

As such, the crime against humanity of persecution could be utilized to acknowledge the especially harsh suffering of new people from famine and especially deplorable living conditions during the Khmer Rouge period. Finally, other inhumane acts are those rising to a level of gravity comparable to other crimes against humanity, yet not falling under the auspices of an established crime and could be utilized to account for the general suffering of all civilian victims of famine during the Khmer Rouge period, regardless of whether they ultimately survived or
were subjected to targeted discrimination for reasons other than not being Khmer Rouge party members generally. Moreover, as with the crimes against humanity of extermination and persecution, the IMT judgement of Hans Frank again provides a clear precedent for the conviction of individuals who enforce famine conditions on a civilian population on charges of other inhumane acts, as this crime was amongst the numerous crimes against humanity Frank was convicted of for mistreating and starving the civilian population of Poland in service of the German war effort.  

Prosecution of this crime would acknowledge the full scope and gravity of the harms that flowed from famine conditions in Cambodia and how famine conditions lead to the gradual breakdown of both individuals and societies over time.

524 See IMT Judgement, supra note 70 at 115-117 (497-498 in original).
Chapter 4
Conclusion

The Khmer Rouge period in Cambodia was a time of rampant human rights violations and extreme violence that resulted in the death of between 1.7 and 2.2 million victims, or roughly one quarter of the country’s population, during a period spanning slightly more than three years. Approximately half of these victims died from non-violence causes directly relatable to famine, disease and generally terrible living conditions. For each of these hundreds of thousands of Cambodians who ultimately succumbed to overwork and lack of food, sanitation and medical care, approximately three others managed to endure and survive. These survivors however, did not escape without suffering extreme physical and mental traumas. Indeed, survivors such as Sung Phareth and many others like her, continue to suffer the legacy of the Khmer Rouge period famine to this day. Many of these survivors consider this famine to have not been just a humanitarian disaster, but a crime committed against them by members of the Khmer Rouge regime and desire justice, in the form of criminal prosecutions.

The intuitions of survivors like Sung Phareth are well-founded, as it appears that former Khmer Rouge leaders could potentially be convicted of crimes against humanity predicated specifically on their contributions to the enforcement of famine conditions throughout Cambodia while in power. Indeed, when one considers the pre-1975 judgments in international criminal law cases such as Eichmann and the IMT Judgement against Hans Frank, combined with the wealth of modern crimes against humanity and modes of liability jurisprudence, pursuit of international criminal law accountability for starvation and famine does not appear especially farfetched. In both of those cases, accused were convicted of international crimes predicated on their participation in repressive all-powerful authority structures that actively denied civilian populations access to minimally sufficient nourishment, while simultaneously exposing victims to a variety of other sources of abuse and physical stresses. When viewed in this more general context, the close analogies between those cases and the situation in Cambodia under the Khmer Rouge from 1975-1979 become apparent, as in the Cambodian context, the Khmer Rouge controlled all aspects of daily civilian life and in doing so, exposed Cambodian civilians to similar abuses to those suffered by Jews, and especially Poles during World War II in German-occupied Europe.
In the most common famine scenarios, it is crimes against humanity that would provide the most suitable entry point for international criminal justice, as crimes against humanity are designed to repress a bus of civilians, who most often bear the brunt of famine suffering and death. This generality rings true in the Khmer Rouge context as well, as the facts of the Khmer Rouge period famine, developed in Chapter Two of this thesis, mesh well with the specific requirements of extermination, persecution and other inhumane acts, as laid out in Chapter Three. For example, at the ECCC, the prosecution has proceeded thus far upon the overarching premise that certain key Khmer Rouge leaders combined to form a joint criminal enterprise (“JCE”) aimed at achieving a radical socialist overhaul of Cambodian society through the utilization of violence, enforced communal living and forced labour, amongst other means after taking power in 1975.525

Famine-creating and enforcing socioeconomic, agricultural and security policies enacted and enforced by these key Khmer Rouge leaders fits neatly within both the goals and means of the JCE alleged by the prosecution. Moreover, members of the Party Center could be substituted for senior leaders, identifying a discrete group of individuals who could potentially be held criminally responsible via the mode of liability of JCE for various crimes, including those related to famine and starvation.526

Concerning the specific elements of the crimes themselves, it appears that sufficient evidence could be marshalled to convict at least some former Khmer Rouge Party Center members. The acts of the Party Center combined to cause and enforce famine conditions resulting in mass death, extreme physical and mental suffering and targeted discrimination of political enemies

525 See Watkins & DeFalco, supra note 94 at 237-238, 267-272 (outlining how the prosecution could potentially frame various charges, including those predicated on famine, via JCE liability).
526 JCE is a well-established mode of liability under customary international law. While JCE is the subject of much criticism and has not been fully accepted by the ECCC, it appears likely that the Court will at least utilized a somewhat limited version of the JCE doctrine, while excluding so-called “extended” JCE which provides for responsibility predicated on the mens rea of dolus eventualis. JCE can be used to hold all individuals liable for committing a crime who agree to pursue a common criminal enterprise with others and thereafter commit a “significant act” in furtherance of such enterprise. Although thus far the ECCC has rejected the application of so-called “extended” JCE (or JCE III), the Court has held that the two other permutations of JCE are available to the prosecution. While extended JCE could be useful in pursuing charges predicated on famine, it is likely that traditional JCE (JCE I) would be sufficient. A fulsome discussion of modes of liability, including JCE is outside the scope of this thesis. For more information on JCE and its applicability during the Khmer Rouge period, see Katrina Gustafson, “ECCC Tackles JCE: An Appraisal of Recent Decisions” (2010) 8 JICJ 1323; see also Watkins & DeFalco, supra note 94.
known as “new” people. In regards to mass death, members of the Party Center recklessly pushed forward with policies that directly resulted in hundreds of thousands of deaths via starvation and famine-related diseases. This appears to satisfy the requirements of extermination and this conclusion is buttressed by the fact that it could also likely be proven in a court of law that at some point, likely around the end of 1976, these leaders became aware that the civilian population was being brutalized and killed by the thousands as a direct result of their policies, shifting the mens rea to that of knowledge, rather than mere recklessness.

In regards to general suffering, the Khmer Rouge leadership enacted a series of policies that explicitly called for the infliction of inhumane living conditions on the civilian population, including a forced labour, generally horrible living conditions and the denial of adequate food or basic medical care. These specific policies also interacted to generally cause and deepen famine and resulted in virtually all civilians suffering physical and/or mental harms clearly of a level comparable to other crimes against humanity. For certain policies, such as forced labour, inhumane living conditions were intrinsic to official policy satisfying any applicable mens rea. Meanwhile, other policies, such as forced communal eating and the ban on private consumption of food may have originally amounted to the reckless infliction of suffering. One could powerfully argue that Party Center members acted with the mens rea of dolus eventualis when enacting these policies, as it was apparent that they would cause food shortages and famine. Again, it is also likely that it could be proven that individual leaders became aware that such indirect famine-inducing policies alone and in concert, were enforcing inhumane living conditions on the civilian population at the time, raising their mens rea to that of knowledge whenever this crucial threshold was passed.

Finally, in regards to persecution, this crime could be utilized to account for specific policies aimed at “new” people that intentionally and discriminatorily exposed new people to especially bad living conditions and attendant famine, rising to the level of the targeted denial of fundamental human rights to life, bodily integrity and freedom from hunger. The Party Center produced many propaganda and internal secret documents deriding new people as a source of enemies of the revolution and in such documents, often explicitly stated that new people could be abused and killed without regard because of their association with perceived political enemies of the revolution. This targeted discrimination appears to satisfy the stringent dolus specialis
required for a persecution conviction, as it singles out a specific political group for targeted mistreatment. Issues of famine are implicated because new people were used as a portable and disposable human labour force that could be used by the revolution wherever deemed necessary and to do the most arduous and difficult jobs. In this way, new people were subjected to even worse overwork, denial of adequate food and general living conditions than the more general civilian population. This combination of discrimination and denial of access to basic necessities of life appears to satisfy the requirements for persecution.

In sum, this thesis has argued that as a general matter, periods of extreme famine are deserving of international criminal justice, as famines of this gravity are wholly products of human agency, at least in the modern context. For victims, it is largely immaterial whether they are brutalized through violence or being starved as the end result in either scenario is physical and mental trauma and ultimately, death. The main difference between physical violence and the enforcement of famine conditions is that the chain of causation in the former is typically much shorter and less multifaceted than in the latter, rendering critical proofs of causation and knowledge more difficult in famine scenarios than in prototypical international criminal prosecutions predicated on direct violence and abuse. Difficulty, however, should not be confused with impossibility and, as demonstrated in this thesis in the context of the Khmer Rouge period famine, in at least some scenarios it appears likely that certain key individuals could be successfully prosecuted for international crimes, particularly crimes against humanity, predicated on enforcing famine conditions on a victim group. Put more simply, it has been a lack of willpower and creative thinking, and not a lack of sufficient law that has prevented the prosecution of international crimes predicated on famine in modern international criminal law practice.

In the Khmer Rouge context, it appears that the crimes against humanity of extermination, persecution and other inhumane acts are best-suited to capture the harms occasioned by famine and the associated of the Khmer Rouge leaders who enforced famine conditions on Cambodia’s civilian population. As such, the intuition of survivors such as Sung Phareth which label the famine as a crime of the Khmer Rouge withholding food from them (i.e. bong-ot) appears substantially correct from a legal standpoint. Although, unfortunately, it is unlikely that Phareth or other survivors will ever see justice for the Khmer Rouge period famine delivered by a court
of law, this dark period of Cambodian history should be remembered as a crime and not simply a humanitarian disaster occasioned through the mere negligence of the Khmer Rouge leadership. Labelling this famine as anything less than an international crime would only serve to inaccurately downplay the culpability of the Khmer Rouge leaders and further the injustice Cambodians have endured over the turbulent decades since the fall of the Khmer Rouge regime in 1979.
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Glossary of Terms, Names and Acronyms

Angkar – Khmer language for “organization”, this term was used to generally denote the Khmer Rouge leadership.

CPK – Communist Party of Cambodia, the official name of what is popularly known as the “Khmer Rouge”.

DC-Cam – The Documentation Center of Cambodia, a leading research institution dedicated to the pursuit of justice and memory for the crimes of the Khmer Rouge period in Cambodia.

DK – Democratic Kampuchea, the official name of the country while the Khmer Rouge held power.

ECCC – the Extraordinary Chambers in the Courts of Cambodia, an ongoing hybrid Cambodian-UN tribunal created to prosecute “senior leaders” and “others most responsible” for international and domestic crimes committed in Cambodia during the Khmer Rouge period from 1975-1979.

Four-Year Plan – a detailed draft plan made by the Khmer Rouge government in 1976 but never formally implemented, this document provides a key example of the fantastical rice production estimations of the Khmer Rouge.

ICC – International Criminal Court.

Ieng Sary – Khmer Rouge Deputy Prime Minister in Charge of Foreign Affairs, widely considered the third most powerful member of the Khmer Rouge government after Pol Pot and Nuon Chea. Ieng Sary was one of four original accused in Case 002 at the ECCC until he died in early 2013.

Ieng Thirith – Ieng Sary’s wife and an influential Minister in the Khmer Rouge government. Ieng Thirith was one of the four original accused in Case 002 at the ECCC but has been dismissed from the case after being found unfit to continue standing trial due to the onset of dementia.

ICTR – International Criminal Tribunal for Rwanda

ICTY – International Criminal Tribunal for the former Yugoslavia

Khieu Samphan – the Prime Minister during the Khmer Rouge period and along with Nuon Chea, one of the two remaining accused in ECCC Case 002.

Khmer Rouge – the popular name of the Communist Party of Cambodia, which held power in Cambodia from 1975-1979.

Nuon Chea – Khmer Rouge Deputy Secretary and widely considered the second most powerful member of the Khmer Rouge after Pol Pot. Nuon Chea is one of the two remaining accused in Case 002 at the ECCC along with Khieu Samphan.
Party Center – shorthand for the central leadership apparatus of the Khmer Rouge regime, including the party’s Standing and Central committees.

Pol Pot – the Secretary (overall leader) of the Khmer Rouge movement, he died in 1998 in Northwest Cambodia.

SCSL – Special Court for Sierra Leone.

Super Great Leap Forward – the phrase used in Khmer Rouge propaganda to describe the government’s planned radical overhaul of Cambodia’s economy and society.

*Tung Padevat* (“Revolutionary Flag”) – the official publication of the Khmer Rouge, this magazine was used to disseminate party policy throughout the countryside at mandatory party study sessions.