

Accounting for Famine at the Extraordinary Chambers in the Courts of Cambodia:

The Crimes Against Humanity of Extermination, “Other Inhumane Acts” and Persecution

Randle C. DeFalco*

This submission summarizes the preliminary findings of a larger research project on the international criminal dimensions of the famine that occurred during the Democratic Kampuchea period in Cambodia. This submission focuses exclusively on three specific crimes against humanity from amongst the various possible crimes that may be committed in association with an instance of mass famine. Any questions or requests for supporting documentation may be directed to the author at: randle.defalco@gmail.com.

* 2009 Fulbright Research Fellow – Cambodia. *Juris Doctor*, Rutgers School of Law – Newark.

I. Introduction

The Extraordinary Chambers in the Courts of Cambodia (“ECCC”) was created to try “senior leaders” and others “most responsible” for international and domestic crimes committed during the period of Democratic Kampuchea (“DK”) in Cambodia from 1975-79.¹ Throughout this period Cambodia suffered one of the worst famines² of the twentieth century, resulting in the starvation³ of at least several hundred thousand people.⁴ If the ECCC is to fulfill its mandate, it is essential that the suffering associated with mass famine during the DK period be addressed.

Accounting for famine at the ECCC is complicated by the fact that there is no single international or domestic crime that alone encompasses the harms suffered by victims of extended famine. While this lack of a discrete, “famine crime” is regrettable, genocide, crimes against humanity and/or war crimes charges may all be predicated on causing famine in certain circumstances.

This submission, which is part of a larger, ongoing project on the international criminal dimensions of starvation in the context of the DK period, focuses exclusively on crimes against

¹ Law on the Establishment of the Extraordinary Chambers with inclusion of amendments, art. 1 new, Doc. NS/RKM/1004/006 (27 October 2004) (“The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea 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.”)[hereinafter “ECCC Law”].

² For the purposes of this submission, the term “famine” connotes an extreme and general scarcity of food covering a large geographic area.

³ For the purposes of this submission, the term “starvation” connotes death attributable to lack of food.

⁴ It is not contestable that widespread starvation occurred in Cambodia during the DK period, though estimates of the number of deaths attributable to starvation vary considerably. For an overview of some of the various aggregate death toll figures and breakdowns via type of death, *See e.g.* Patrick Heuveline, *‘Between One and Three Million’: Towards the Demographic Reconstruction of a Decade of Cambodian History (1980-79)*, 52 *POPULATION STUDIES* 49 (Mar. 1998); Damien de Walque, *Selective Mortality during the Khmer Rouge Period in Cambodia*, 31 *POPULATION & DEVELOPMENT REV.* 351 (June 2005); MICHAEL VICKERY, *CAMBODIA 1975-1982 188 et seq.* (2d ed. South End Press 1984); CRAIG ETCHESON, *AFTER THE KILLING FIELDS: LESSONS FROM THE CAMBODIAN GENOCIDE* 107-129 (Praeger Publishers 2005); BEN KIERNAN, *GENOCIDE AND RESISTANCE IN SOUTHEAST ASIA: DOCUMENTATION DENIAL AND JUSTICE IN CAMBODIA AND EAST TIMOR* 271-272 (Transaction Publishers 2008).

humanity, which appear to be best suited to address famine in Cambodia from 1975-79.⁵ Crimes against humanity are applicable to situations where criminal acts form part of a widespread or systematic attack against a civilian population.⁶ The specific crimes against humanity that are most likely to be implicated under the ECCC's jurisdiction in the context of starvation are: extermination, "other inhumane acts" and persecution.⁷

Extermination involves acts or omissions that contribute to mass killing and would be implicated if senior DK leaders implemented social policy causing mass starvation while intentionally, knowingly or recklessly disregarding the fact that mass death would naturally follow. "Other inhumane acts" are those that do not fall under a crime against humanity enumerated in ECCC Law, yet are of equal gravity. They could be used to account for the physical and mental traumas, both temporary and lasting that resulted from famine during DK. Persecution is the discriminatory denial of a fundamental right to members of a protected class. The same criminal acts may underlie both persecution and "other inhumane acts."⁸ However, the victims of persecution must also be specifically targeted "on political, racial, [or] religious grounds."⁹ Persecution would be implicated in situations where senior DK leaders intentionally

⁵ It is also possible that charges of genocide and/or war crimes charges could be brought in the context of famine at the ECCC; however it is the opinion of the author that such charges would be unlikely to succeed. For more information on war crimes and genocide, *see generally*, ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW, 81-94, 127-146 (2d ed. Oxford University Press 2008).

⁶ The showing that alleged crimes against humanity were committed as part of a "widespread or systematic attack against a civilian population" is a prerequisite to a conviction for any crime against humanity, both at the ECCC and under customary international law. ECCC Law, art. 5; *see also id.* CASSESE 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.") (emphasis in original). ECCC Law also requires that crimes against humanity be committed "on national, political, ethnic, racial or religious grounds." *Id.* ECCC Law. This submission does not discuss these general elements, instead focusing solely on the elements of specific crimes against humanity that may be implicated.

⁷ *Id.*

⁸ The requisite criminal act for persecution is the denial of a fundamental right to members of a protected social group, rising to a level gravity equal to other crimes against humanity.

⁹ ECCC Law, art. 5.

subjected a disfavoured political, racial or religious group to famine, resulting in serious physical and/or mental suffering amongst members of the group.

Combined, these three crimes against humanity can provide a full picture of famine-based suffering during DK and the culpability of those responsible. Extermination could be charged to account for the massive death toll attributable to starvation during DK. “Other inhumane acts” could be charged to account for the various forms of suffering other than death associated with famine endured by Cambodians during DK. Finally, persecution could be charged to account for the especially harsh famine endured by members of disfavoured political groups, such as so-called “new” people, who were given the least food and forced to do the most work. Each crime will be analyzed in turn.

I. Crimes Against Humanity Relevant to Starvation at the ECCC

As mentioned *supra*, all crimes against humanity charged at the ECCC must form part of a widespread or systematic attack against a civilian population. Once it has been established that such an attack took place, each discrete crime against humanity discussed below must be shown to form part of the attack for liability to be proper.

1. Extermination

The crime against humanity of extermination involves killing on a massive scale.¹⁰ There is no need that the victims of extermination share “any common national, ethnical, racial or

¹⁰ See *Prosecutor v. Lukic & Lukic*, Case No. IT-98-32/1-T, Judgment, para. 937 (20 July 2009), citing *Prosecutor v. Seromba*, Case No. ICTR-2001-66-A, Judgment, para. 189 (12 Mar. 2008); *Prosecutor v. Stakic*, Case No. IT-97-24-A, Judgment, para. 259 (22 Mar. 2006); *Prosecutor v. Ntakirutimana & Ntakirutimana*, Case Nos. ICTR-96-10-A & ICTR-96-17-A, Judgment, para. 516 (13 Dec. 2004); *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Judgment, para. 2191 (18 December 2008); *Prosecutor v. Martić*, Case No. IT-95-11-T, Judgment, para. 62 (12 June 2007).

religious characteristics” beyond comprising a civilian population.¹¹ The *actus reus* (“physical act”) of extermination is the “act of killing on a large scale” and includes “. . . subjecting a number of people to conditions of living that would inevitably lead to death.”¹² A recent Judgment of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) held 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.”¹³ Moreover, extermination charges are appropriately brought against individuals who “exercise[d] 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.”¹⁴

The *mens rea* (“guilty mind”) required for extermination is 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 deaths.”¹⁵ There has been some disagreement between reviewing courts as to

¹¹ See *Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgment, para. 500 (2 Aug. 2001). This is important because many of the Khmer Rouge’s criminal policies were aimed at repressing political enemies however, both these perceived enemies and preferred rural peasants suffered from lack of food. While generally speaking the conditions of the rural peasants were slightly better than those of the evacuated “new” people, both groups appear to have suffered severe undernutrition during DK.

¹² See *Ntakirutimana & Ntakirutimana*, AC, Judgment, para. 522; *accord Stakic*, AC, Judgment, para. 259.

¹³ *Seromba*, AC Judgement, para. 189 *citing Brdanin*, TC Judgement, para. 389; *see also Bagosora*, TC Judgement, para. 2191.

¹⁴ *Prosecutor v. Vasiljevic*, Case No. IT-98-32-T, para. 222 (29 No. 2002) (“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. Those, such as executioners, who were not in such position but who had participated in the killing of one or a number of individuals were generally charged with murder or related offences whilst the charge of “extermination” seems to have been limited to individuals who, by reason of either their position or authority, could decide upon the fate or had control over a large number of individuals.”) *citing* IMT Judgment, in respect of Goering par 83; Ribbentrop para. 87-88; Kaltenbrunner, par a. 91; Frank, para. 95; Julius Streicher, para. 99; *United States v. Ohlendorf et al.* (“*Einsatzgruppen* case”), IV Trials of War Criminals before the Nuremberg Military Tribunal under Control Council Law No 10; *accord Prosecutor v. Brdanin*, Case No. IT-99-36-T, para. 390 (1 Sept. 2004).

¹⁵ *Stakic*, AC Judgment, para. 259; *citing Ntakirutimana & Ntakirutimana*, AC Judgment, para. 522. For an example of the application *mens rea* and *actus reus* requirements for extermination, *see Vasiljevic*, TC Judgment, paras. 230-233 (In the case the accused participated in the killing of seven Muslim men in an incident at the Drina

whether this *mens rea* standard includes gross or criminal negligence.¹⁶ Recent jurisprudence on the issue suggests that *dolus eventualis* (“recklessness”) is the minimum *mens rea* standard that must be proved by the prosecution.¹⁷

a. Extermination Need Not Be Committed Violently

The typical *actus reus* of extermination involves an episode of violent mass killing.¹⁸ However, extermination can also be committed indirectly, by bringing about living conditions that cause mass death amongst a civilian population, such as the denial of necessary foodstuffs.¹⁹ For example, the Rome Statute of the International Criminal Court (“Rome Statute”) explicitly states that extermination “includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.”²⁰ Similarly, one of the examples of acts amounting to the crime of extermination given by the Trial Chamber of the International Criminal Tribunal for Rwanda (“ICTR”) is

River. The Chamber acquitted the accused of extermination charges because he was unaware that his acts of murder were part of a larger scheme of extermination and thus, his intent to kill nine Muslim men (two escaped) did not reach the massiveness threshold necessary to be an independent act of extermination).

¹⁶ For an overview of the legal debate on the issue, see *Brdanin*, TC Judgment, paras. 392-395.

¹⁷ *Id.* para. 395; *aff’d Prosecutor v. Brdanin*, AC Judgment, Case No. IT-99-36-A, para. 476 (3 Apr. 2007) (“The Trial Chamber correctly stated the *mens rea* required for extermination when recalling the law on the crime of extermination.”); see also *Lukic & Lukic*, TC Judgment, 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.*”)(emphasis added). For the purposes of analysis in this submission, it will be assumed that recklessness is the minimum *mens rea* threshold for the crime of extermination. Under international criminal law recklessness is referred to as “*dolus eventualis*” and is the conscious disregard of the natural and foreseeable consequences of one’s actions.

¹⁸ See e.g. *Lukic & Lukic*, TC Judgment, paras. 940-955 (The accused Milan Lukic was found guilty of extermination, Judge Van den Wyngaert dissenting, for playing a central role in two incidents where Muslim civilians were forcibly herded into a house already primed with accelerant and subsequently lit on fire, killing approximately 59 and 60 persons respectively.).

¹⁹ See e.g. *id.* citing *Seromba*, AC Judgment, para. 189 (subsequent citations omitted).

²⁰ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, adopted 17 July 1998, entered into force 1 July 2002, art. 7(2)(b)(emphasis added)(underscoring in original)[hereinafter “Rome Statute”].

“[i]mprisoning a large number of people and withholding the necessities of life which results in mass death.”²¹

b. The Massiveness Threshold

“Mass” death is the key element of extermination setting it apart from the crime against humanity of murder.²² There is no numerical threshold of victims that automatically establishes the necessary element of massiveness.²³ Instead, the determination in each case involves a careful analysis of the relevant factors, including: “the time and place of the killings, the selection of the victims, and the manner in which they were targeted.”²⁴ Individual victims

²¹ *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Judgment, para. 146 (21 May 1999). The accused were not convicted of extermination because the Trial Chamber found that “the circumstances in th[e] case” did not “give rise to the commission of more than one offence . . . allow[ing] for a finding of either genocide or extermination and/or murder. Therefore because the crime of genocide is established against the accused persons, then they cannot simultaneously be convicted for murder and/or extermination.” *Id.* para. 649. Thus, the Appeals Chamber did not discuss extermination in its Judgment. *See also Brdanin*, TC Judgment, 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.”)(internal citations omitted).

²² *See e.g. Lukic & Lukic*, TC Judgment, para. 938 (Noting that “[t]he crime of extermination differs from murder in that it requires an element of mass destruction.”) *citing Stakic*, AC Judgment, paras. 259, 260 (“The *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 *actus reus* of the crime.”); *Ntakirutimana & Ntakirutimana*, AC Judgment, para. 522; *Bagosora*, TC Judgment, para. 2191 (“The *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*, TC Judgment, para. 395 (The Trial Chamber states that “[t]he Prosecution is thus required 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 Brdanin*, AC Judgment, para. 476.

²³ *See e.g. Lukic & Lukic*, TC, Judgment, para. 938 *citing Stakic*, AC Judgment, para. 260; *Ntakirutimana & Ntakirutimana*, AC Judgment, para. 516; *Krstic* AC Judgment, para. 501; *Blagojevic & Jokic*, Case No. IT-02-60-T, Judgment, para. 573 (17 Jan. 2005); *Brdanin*, AC Judgment, paras 471-472; *see also* International Law Commission, 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind with commentaries, p. 48, n. 8, available online: http://untreaty.un.org/ilc/texts/instruments/English/draft%20articles/7_4_1996.pdf (Noting that extermination “applies in situations in which some members of a group are killed while others are spared.”)[hereinafter “1996 Draft Code”]. At the ICTY single killing events with 59 and 66 persons respectively have been instances of the crime against humanity of extermination. *Lukic & Lukic*, TC Judgment, paras. 941, 945 (Majority decision, Judge Van den Wyngaert dissenting); *Prosecutor v. Krajisnik*, Case No. IT-00-39-T, Judgment, paras 699, 720 (27 Sept. 2006).

²⁴ *Krajisnik*, TC Judgment, para. 716; *accord Martić*, TC Judgment, para. 63; *Lukic & Lukic*, TC Judgment, para. 938. For example, extermination convictions have resulted from incidents involving the killing of approximately 66 and 59 persons respectively at the ICTY. *Krajisnik* Trial Judgment, paras. 699, 720; *Lukic & Lukic*, TC Judgment, paras. 941, 945 (Majority decision, Judge Van den Wyngaert dissenting).

however, need not be named or described,²⁵ as the accused need not have specific victims in mind during the commission of the crime.²⁶ Additionally, the accumulated deaths from geographically and/or temporally separated killing events may be aggregated to reach the required massiveness threshold so long as each event falls within the overall extermination episode charged.²⁷

c. Extermination by Enforced Starvation at the ECCC

There would likely be a strong basis for extermination charges at the ECCC predicated on starvation. The KR leadership conceived of and implemented a national system of forced labour and cooperative living that permeated every aspect of Cambodian life from 1975-79.²⁸ KR

²⁵ *E.g. Ntakirutimana & Ntakirutimana*, AC Judgment, para. 521 (“It is not an element of the crime of extermination that a precise identification of ‘certain named or described persons’ be established.”).

²⁶ *See Kayishema & Ruzindana*, TC, Judgment, para. 145; *see also* M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW* 291 (Martinus Nijhoff Publishers 1992) *cited in id.* 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.”).

²⁷ *See Lukic & Lukic*, TC, Judgment, para. 938; *citing Brdanin* TC Judgment, para. 391; *aff’d, Brdanin* AC Judgment, paras 471-472; *see also Ntakirutimana & Ntakirutimana*, AC Judgment, para. 521. Recently, the ICTY Trial Chamber has considered the total population and density thereof within a given area in considering whether accumulated, related murders reach the “significant portion” threshold required for an extermination conviction. *Lukic & Lukic*, TC Judgment, para. 938 (“factor in the majority’s view, Judge Van den Wyngaert dissenting, is the population density of the particular area. In other words, while there may be a higher threshold for a finding of extermination in a densely-populated area, it would not be inappropriate to find extermination in a less densely-populated area on the basis of a lower threshold, that is, fewer victims.”); *but see id.* Partially Dissenting Opinion of Judge Van Den Wyngaert, paras 1114-1128.

²⁸ *See e.g. KHAMBOLY DY, A HISTORY OF DEMOCRATIC KAMPUCHEA (1975-1979) 29-30* (Documentation Center of Cambodia 2007)(“The [Communist Party of Kampuchea’s] leaders established cooperatives as part of their move to abolish private ownership and capitalism, and to strengthen the status of the workers and peasants. To the Khmer Rouge, a cooperative meant that people were supposed to live together, work together, eat together, and share each other’s leisure activities.”); *see also* “Document about the 4 years planning of Kampuchea Democracy regime” Documentation Center of Cambodia, Doc. No. D00480, translation available in DAVID P. CHANDLER, BEN KIERNAN & CHANTHOU BOUA, *POL POT PLANS THE FUTURE: CONFIDENTIAL LEADERSHIP DOCUMENTS FROM DEMOCRATIC KAMPUCHEA 1976-1977*, 45-119 (Monograph Series 33, Yale University Southeast Asian Studies) (1988) This document is what is commonly referred to as the “4 Year Plan” of 1977-1980. The plan was hastily put together and never implemented but provides important insights into KR ideology and policy. After national defence, collectivization and attaining the goal of three tons per hectare rice production were the next highest priorities.

policy banned any individual efforts to gather food or cultivate crops.²⁹ Even eating alone was forbidden and violators of the ban risked death.³⁰ These harsh rules made Cambodians wholly reliant on their daily communal rations provided by the DK government. These rations were woefully insufficient, in terms of both calories and basic nutrition, typically consisting of around two ladles of watery rice gruel per day.³¹ These pathetic rations were made even more inadequate by the long hours of labour Cambodians were forced to perform every day.³² Moreover, the total lack of medical provisions, infrastructure or qualified personnel further amplified the number of famine-related deaths across the country.³³ It may be argued that these

²⁹ For useful explanation of KR social policy and underlying concerns that illustrates the rigidity and absolutism of the “building of socialism,” see *Revolutionary Flag (“Tung Padevat”)* “Excerpted Report on the Leading Views of the Comrade Representing the Party Organization at a Zone Assembly,” (June 1976), Documentation Center of Cambodia, Doc. No. D21415, English translation available in *id.* CHANDLER ET AL. at 13-30.

³⁰ Communal eating was part of the general plan to build socialism in all fields and was strictly enforced. *See id.*

³¹ Official KR policy was to provide a ration of 312 kilograms of rice per person, per year (or 0.85kg/day). *See id.* at 27. However, there is no evidence that a significant portion of Cambodian civilians received this amount for an extended period of time. The KR leadership was obsessed with increasing national rice output to three tons per hectare of rice paddy, however, this goal was also during DK but evidence suggests that large amounts of rice were being exported, most likely to China throughout the DK period. *See id.*; see also Nayan Chanda, *Cambodia Goes to Market*, Far Eastern Economic Review, 75 (20 May 1977), also available at Documentation Center of Cambodia, Doc. No. D16186. The article quotes a “source with intimate knowledge of Cambodian business deals” in Hong Kong as stating that over a six month period the DK government purchased three million “jute sacks . . . apparently for rice exports.” Indeed, in a public address made in Malaysia in March of 1977 Ieng Sary stated that the DK government planned to export 100,000 tons of rice for the year. *See id.*; see also George McArthur, *Cambodia Resumes Foreign Trading*, Los Angeles Times (19 May 1977). This planned export of rice was despite the fact that in 1977 Southeast Asia experience drought as the monsoon rains did not arrive until August. *See* Karl D. Jackson, *Cambodia 1977: Gone to Pot*, 18:1 ASIAN SURVEY 76, 88 (University of California Press)(Jan. 1978).

³² DY, *supra* note 28, at 38 (“Nearly everyone worked more than 12 hours a day, 7 days a week without rest or adequate food. They sometimes worked from sunrise until midnight if the moon was bright enough.”).

³³ The DK Ministry of Health recruited nurses and doctors based on their revolutionary background, rather than medical skills. Most often these medical workers were only given traditional medicines consisting of various dried plant parts mixed with water and shaped into pills which were often referred to as “Rabbit Droppings” because of their similarity in appearance to rabbit dung. *See* Sokhym Em, “Rabbit Dropping” Medicine, 30 Searching for the Truth: Magazine of the Documentation Center of Cambodia 22 (June 2002)(“‘Rabbit dropping’ medicine consisted of plant roots, tree bark, the sap of the tropical thnung tree, and other ‘natural’ compounds. It was produced by female medical staff (many of whom were illiterate or semiliterate) during the [DK] regime. Made without proper scientific testing, it was rarely known to help patients, and often made them worse or killed them.”); *see also* Sokhym Em, *Female Patients*, 33 Searching for the Truth: Magazine of the Documentation Center of Cambodia 25, 26 (Sept. 2002)(“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 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. In addition, most of Angkar’s medical staff were very young—from 14 to 15 years of age—with at most three months of technical training.”); Sokhym Em, *Revolutionary Female*

conditions, set in place by the KR leadership who exercised absolute authority over Cambodia, naturally and foreseeably led to mass starvation.³⁴

The *actus reus* of extermination via starvation at the ECCC would consist of formulating and implementing this system of radical social change and thereby “subjecting” Cambodian civilians³⁵ to “conditions of living that would inevitably lead to death”³⁶ by starvation. Although implementing and enforcing this plan involved acts of brutal violence and killing, the plan itself does not have to have necessarily involved acts of violence as discussed *supra* at 5.

Furthermore, either a general extermination campaign covering all of Cambodia or smaller extermination episodes in specific regions or zones could be charged. Regardless of how the charges were framed, the alleged extermination episode would easily surpass the massiveness threshold, as even the most conservative estimates place the number of starvation-related deaths in Cambodia from 1975-79 in the hundreds of thousands.³⁷

Medical Staff in Tram Kak District, 34 Searching for the Truth: Magazine of the Documentation Center of Cambodia 24 (Oct. 2002).

³⁴ That widespread starvation was occurring in Cambodia during the DK period was not common knowledge amongst the KR leadership strains plausibility. Despite the fact that Cambodia’s borders were closed and the KR did not allow press access there was a consistent stream of major foreign news articles reporting that starvation was occurring on a massive scale in Cambodia during DK. If reporters were able to accurately deduce the situation on the ground in Cambodia by drawing logical inferences from limited sources of information, one would assume that the KR leaders, who maintained an iron grip of absolute control over minute aspects of daily life in Cambodia, would also be aware of the situation. *See e.g.* David A. Andelman, *Refugees Depict Grim Cambodia Beset by Hunger*, New York Times (2 May 1977), also available at Documentation Center of Cambodia, Doc. Nos. D16594 & D16595; Lewis M. Simmons, *Disease, Hunger Ravage Cambodia As Birthrate Falls*, Washington Post (22 July 1977), also available at Documentation Center of Cambodia, Doc. No. D16255; Barry Kramer, *Cambodian Refugees Tell a Story of Hunger, Repression and Death*, Wall Street Journal (22 Nov. 1978), also available at Documentation Center of Cambodia, Doc. Nos. D16502 & D16503.

³⁵ ECCC Law requires that all crimes against humanity be committed “on national, political, ethnical, racial or religious grounds.” ECCC Law art. 5. Thus, to satisfy the *chapeau* requirements, the Co-Prosecutors would have to allege that the various criminal acts which led to starvation were committed pursuant to an overall discriminatory attack. This could likely be satisfied by alleging that the attack was perpetrated against the “political opponents” of the KR, which consisted of everyone who was not a fervent revolutionary or who had ties to the former government or urban life.

³⁶ *See Ntakirutimana & Ntakirutimana*, AC Judgment, para. 522; *accord Stakic*, AC Judgment, para. 259.

³⁷ For a statistical review of the death toll and breakdown thereof during DK, *see* Heuveline; de Walque, *supra* note 4.

The difficult aspect of obtaining a successful conviction for extermination at the ECCC predicated on starvation would be establishing the *mens rea* of *dolus eventualis* for each of the accused. Preliminary research suggests that there may be no single document or communiqué that clearly establishes that members of the KR leadership were aware of the starvation that surrounded them. Thus, the accused may claim that they had been at most, negligent in their formulation of social policy. To overcome this hurdle the Co-Prosecutors would have to demonstrate clearly that any lack of knowledge of starvation was due solely to willful ignorance on the part of the accused, rather than a true lack of information. A cursory examination of available primary and secondary contemporaneous documentation suggests that this task is possible.³⁸ A carefully crafted and well-researched case may prove that the DK leaders were aware that massive food shortages were occurring throughout Cambodia and that they willfully ignored this fact, along with the evidence of mass starvation surrounding them. If the requisite recklessness or knowledge is established, it appears a conviction for extermination via starvation may be possible at the ECCC.

³⁸ Even during the DK period there was a steady stream of reports from major news outlets regarding the massive famine that was occurring in Cambodia. *See e.g.* Andelman, *Refugees Depict Grim Cambodia Beset by Hunger*; Simmons, *Disease, Hunger Ravage Cambodia As Birthrate Falls*; Kramer, *Cambodian Refugees Tell a Story of Hunger, Repression and Death*, *supra* note 34. Additionally, the DK leadership received daily reports from every zone regarding all matters, especially agricultural production, which was a national obsession of the KR. *See* “Decision of Central Committee on a Variety of Questions,” Documentation Center of Cambodia, Doc. No. D00693, English translation available in, CHANDLER ET AL. *supra* note at 3 (Stating that there shall be a “System of Weekly Reporting to 870 [the Party “Center”].”). This reporting is “[i]n order to adhere closely to plan and to resolve problems in a timely fashion, in the direction decided upon of three tons per hectare.”); *see also* “Report of Activities of the Party Center According to the General Political Tasks of 1976,” in CHANDLER ET AL. *id.* This report was most likely presented by Pol Pot to other senior KR members and alludes to shortages of rice in the discussion of “Key Task Number 2” which is the goal of three tons per hectare national rice production average. Worthy of note is the fact that the party “estimate[s] that [it] ha[s] accomplished ninety percent of the Plan” and that the party “estimate[s] a surplus for export [of milled rice] between 100,000 and 150,000 tons.” The report is typical of those during the DK period, as it admits that production targets are not always met, but fails to even begin to address the true size of the shortfalls, or the fact that rampant starvation was occurring.

B. “Other Inhumane Acts”

Article 5 of the ECCC Law includes a residual provision conferring jurisdiction over the crime against humanity of “other inhumane acts.”³⁹ The non-specificity of the crime against humanity of “other inhumane acts” is intentional, designed to account for the astonishing ingenuity of human beings when developing new methods to abuse one another.⁴⁰ The ICTY and ICTR have held that for an act to be serious enough to be considered “inhumane” it must be of “similar gravity” to other, enumerated crimes against humanity.⁴¹ Additionally, specific inhumane acts must be proven, rather than merely showing general mistreatment of a civilian population.⁴² The perpetrator of an “other inhumane act” must possess a *mens rea* of at least recklessness (*dolus eventualis*) when committing the specific inhumane acts alleged.⁴³

a. The Legal Definition of “Similar Gravity”

The key element of “other inhumane acts” is that such acts must be of similar gravity to other crimes against humanity.⁴⁴ Acts of requisite gravity have been described qualitatively by

³⁹ *E.g.* Nuremberg Charter, art. 6; ECCC Law, Art. 5. It is worthy of note that the specific, enumerated crimes against humanity are simply examples of acts that are *per se* “inhumane.”

⁴⁰ *See e.g. Kupreskic et al.*, TC Judgment, 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.”).

⁴¹ *E.g. Lukic & Lukic*, TC Judgment, para. 960 (“The act or omission [forming the actus reus of ‘other inhumane acts’] must have been of a seriousness similar to that of [other crimes against humanity].”)

⁴² *Kayishema & Ruzindana*, TC Judgment, 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 of “other inhumane acts.”).

⁴³ *E.g. Krnojelac*, TC Judgment, 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 and Ruzindana*, TC Judgment, par 153; *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Judgment, para. 56 (25 June 1999).

⁴⁴ *E.g. Lukic & Lukic*, TC Judgment, para. 960 (“The act or omission [forming the actus reus of ‘other inhumane acts’] must have been of a seriousness similar to that of [other crimes against humanity].”); *Kayishema &*

the ICTY, ICTR and International Law Commission as those that injure the victim in terms of “physical or mental integrity, health or human dignity.”⁴⁵ Similarly, the Rome Statute provides for prosecution of the crime against humanity of “. . . acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”⁴⁶

b. Case Law Examples of “Other Inhumane Acts”

Accused have been found guilty of “other inhumane acts” for various acts of cruelty and abuse committed against civilians. Examples include: attempted murder,⁴⁷ forcible transfer,⁴⁸ “confinement . . . on exposed ground without water, food or sanitary facilities” for over five days,⁴⁹ mistreatment of detainees including causing injury,⁵⁰ “beatings, torture, sexual violence, humiliation, harassment, psychological abuses, and confinement in inhumane conditions,”⁵¹ the “use of persons as human shields,”⁵² forced marriage,⁵³ physical and sexual violence perpetrated

Ruzindana, TC Judgment, para. 149 (“Since the Nuremberg Charter, the category ‘other inhumane acts’ has been maintained as a useful category for acts not specifically stated but which are of comparable gravity.”).

⁴⁵ See also *Lukic & Lukic*, TC Judgment, para. 960 (“act or omission must have caused serious mental or physical suffering or injury or constituted a serious attack on human dignity.”) citing *Kordic & Cerkez*, AC Judgment, para. 117; *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Judgment, para. 165 (25 February 2004); *Prosecutor v. Milosevic*, Case No. IT-98-29/1-T, Judgment, para. 934 (12 December 2007); *Martic*, TC Judgment, para. 83; *Blagojevic & Jokic*, TC Judgment, para. 626; *Prosecutor v. Galic*, Case No. IT-98-29-T, Judgment, para. 152 (5 Dec. 2003); *Vasiljevic*, TC Judgment, para. 234; see also 1996 Draft Code, supra note 24 art. 18.

⁴⁶ Rome Statute, art. 7(1)(k).

⁴⁷ *Lukic & Lukic*, TC Judgment, paras. 964-966; *Vasiljevic*, TC paras. 238-240. In these cases the accused lined up seven Muslim civilians at the edge of the Drina River and shot at them, intending to kill them all. Two of the seven victims survived by falling into the river and pretending to be dead. The reviewing Chambers found that the crime against humanity of other inhumane acts was applicable in regards to only the two survivors, as they suffered physical and mental harm of a level comparable to victims of other crimes against humanity.

⁴⁸ See e.g. *Milutinovic et al.*, TC, Judgment, para. 170 *et seq.*; *Blagojevic & Jokic*, TC Judgment, para. 810.

⁴⁹ *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Judgment, paras 490-494 (7 June 2001)(Stating that confining the refugees without food, water or sanitary facilities both caused both “serious or mental suffering” and a “serious attack on human dignity” and holding that “the confinement that the maltreatment of refugees at the Stadium during the period 13 April 1994 up until the day of the attack, on 18 April 1994, amounts to ‘inhumane acts.’”).

⁵⁰ *Kordic & Cerkez*, TC Judgment, paras. 256, 266-272.

⁵¹ *Kvocka et al.*, TC, Judgment, para. 209.

⁵² *Id.*; see also *Prosecutor v. Jelusic*, Case No. IT-95-10-T, Judgment, para. 138 (Finding the Accused guilty of three counts of the crime against humanity of “other inhumane acts” for “causing bodily harm” to Muslim detainees.).

⁵³ *Prosecutor v. Brima et al.*, Case No. SCSL-2004-16-A, Judgment, paras. 197-203 (22 Feb. 2008).

against dead bodies,⁵⁴ injuries sustained during forced labour⁵⁵ and general physical assaults causing injury.⁵⁶ Additionally, the ICTY Trial Chamber has noted that “enforced prostitution” and “enforced disappearance of persons” presumptively rise to the level of “other inhumane acts.”⁵⁷

c. Causing Mass Famine as an Inhumane Act at the ECCC

The crime against humanity of “other inhumane acts” could be used to account for the culpability of KR leaders who designed and implemented the social policies of the regime that led to nationwide famine. Much of the analysis regarding the *actus reus* and *mens rea* of “other inhumane acts” would overlap with that of extermination, discussed *supra*. The difference between the two charges would turn largely on the alleged harms and the class of victims. “Other inhumane acts” charges could be predicated on a variety of harms associated with famine and undernutrition during DK that all presumably rise to the level of similar gravity to other crimes against humanity. Victims of chronic undernutrition may suffer a wide variety of painful symptoms and enduring health issues,⁵⁸ especially children born during to undernourished

⁵⁴ *Prosecutor v. Nyitegeka*, Case No. ICTR-96-14-T, paras 462-465 (16 May 2003); *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Judgment, paras 934-936 (1 Dec. 2003)(For example the Chamber found in paragraph 936 that “[c]utting a [Tutsi] woman’s breast off and licking it, and piercing a woman’s sexual organs with a spear are nefarious acts of a comparable gravity to the other acts listed as crimes against humanity, which would clearly cause great mental suffering to any members of the Tutsi community who observed them.”). It is noteworthy that in this case, the Chamber held that the victims of the inhumane acts committed by the accused were not the deceased whose bodies were brutalized, but other living Tutsis would the acts were designed to instil fear into.

⁵⁵ *Prosecutor v. Naletilic & Martinovic*, Case No. IT-98-34-T, Judgment, para. 271 (31 Mar. 2003).

⁵⁶ *E.g. Tadic*, TC Judgment, paras. 719, 730 (Beatings of six Muslim prisoners by the Accused resulted in conviction for the crime against humanity of other inhumane acts).

⁵⁷ *Kupreskic et al.*, TC, Judgment, para. 566.

⁵⁸ For an overview of the immediate and long term harms associated with severe or chronic undernutrition, see The Merck Manual for Patients and Caregivers, Robert S. Porter MD, Justin L. Kaplan MD, Barbara P. Homeler MD, eds. (online edition), Disorders of Nutrition and Metabolism: Undernutrition (last full review/revision August 2007 by David R. Thomas, MD), <http://www.merck.com/mmhe/sec12/ch153/ch153a.html#sec12-ch153-ch153a-64> [hereinafter “Merck Manual for Patients”]; for a more thorough analysis, see The Merck Manual for Healthcare Professionals, Robert S. Porter MD and Justin L. Kaplan MD (eds. online edition), Nutritional Disorders: Undernutrition, (last full review/revision by John E. Morley, MB, BCh, June 2007), <http://www.merck.com/mmpe/sec01/ch002/ch002a.html> [hereinafter “Merck Manual for Professionals”].

mothers.⁵⁹ Additionally, famine victims often suffer severe emotional trauma from their experiences.⁶⁰ Finally, it may be argued that forcibly subjecting victims to famine constitutes an attack on human dignity. Thus, the victims of the crime of “other inhumane acts” in the context of starvation at the ECCC are not only those who died of starvation during DK (who were also victims of extermination), but also survivors, both of whom endured extreme suffering due to chronic undernutrition throughout the DK period.

While the Co-Prosecutors cannot simply allege general mistreatment of the civilian population, specific KR policies can be fairly characterized as “inhumane” in the truest sense of the word. Furthermore, a short perusal of survivor statements makes it clear that virtually every Cambodian civilian endured inhumane conditions during DK and surely thousands, if not millions of survivors could testify as to the inhumanity of the perpetual hunger and deprivation that was forced on them during DK.⁶¹ The key for a successful prosecution would not be

⁵⁹ See e.g. Cesar G. Victora, Linda Adair, Caroline Fall, Pedro C. Hallal, Reynaldo Martorell, Linda Richter and Harshpal Singh Sachdev, *Maternal and Child Undernutrition: Consequences for Adult Health and Human Capital*, 371(9609) LANCET 340 (26 Jan. 2008) (“Specific forms of mental illness are thought to be affected by adverse intrauterine experience, including maternal undernutrition.”); Laura Bennet & Alistair J. Gunn, *The Fetal Origins of Adult Mental Illness*, in EARLY LIFE ORIGINS OF HEALTH AND DISEASE 204-217 (E. Marelyn Wintour & Julie A. Owens eds., Springer US, 2006); Tessa Roseboom, Susan de Rooij & Rebecca Painter, *The Dutch Famine and its Long-Term Consequences for Adult Health*, 82 EARLY HUMAN DEVELOPMENT 485, 488 (2006); see also *id.*

⁶⁰ See Merck Manual for Professionals, *supra* note 58. There are thousands, if not over a million potential witnesses in Cambodia who could testify to the inhumane nature of enduring the famine that occurred during DK. See e.g. “Interview with Yim Sa-Ut, Female, 59yrs, Farmer, Living in Koh Khnol Village, Prek Rorka Sub district, Kandal Stung District, Kandal Province,” Documentation Center of Cambodia, Doc. No. VOT0020; “Interview with Hen Sovannari, Female, 39yrs, Farmer, Living in Boeng Khyang Village, Prek Rorka Sub district, Kandal Stung District, Kandal Province,” Doc. No. VOT0022 (“Sovannari has seven siblings, but five died because of starvation in the Khmer Rouge regime.”); “Interviewed with Ing Yan, Female, 76yrs, Farmer, Living in Yeay La Village, Tram Kakk Sub district, Tram Kakk District, Takeo Province,” Documentation Center of Cambodia, Doc. No. 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 brainwashed. She was close to death. She has been suffocating recently. 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.”).

⁶¹ See e.g. “Interview with Yim Sa-Ut, Female, 59yrs, Farmer, Living in Koh Khnol Village, Prek Rorka Sub district, Kandal Stung District, Kandal Province,” Documentation Center of Cambodia, Doc. No. VOT0020; “Interview with Hen Sovannari, Female, 39yrs, Farmer, Living in Boeng Khyang Village, Prek Rorka Sub district, Kandal Stung District, Kandal Province,” Doc. No. VOT0022 (“Sovannari has seven siblings, but five died because

establishing that living conditions, especially the inadequate provision of food, were inhumane, but establishing the necessary *dolus eventualis mens rea* for each individual accused.

C. Persecution

The ECCC Law includes the crime against humanity of “persecutions on political, racial, [or] religious grounds.”⁶² Persecution under the Rome Statute is the “intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”⁶³ 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*).”⁶⁴

a. Severe Infringement of a Fundamental Right

The *actus reus* of persecution will likely be found to follow international precedent and require acts or omissions that severely infringe a “fundamental right laid down in international customary or treaty law.”⁶⁵ “Only gross or blatant denials of fundamental rights” qualify as

of starvation in the Khmer Rouge regime.”); “Interviewed with Ing Yan, Female, 76yrs, Farmer, Living in Yeay La Village, Tram Kakk Sub district, Tram Kakk District, Takeo Province,” Documentation Center of Cambodia, Doc. No. 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 brainwashed. She was close to death. She has been suffocating recently. 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.”). These interviews are randomly selected samples of the experiences of three DK survivors. It is unquestionable that thousands upon thousands of witnesses could testify to the inhumanity of living conditions, including food rations, during DK.

⁶² ECCC Law, art. 5; see also, Fausto Pocar, *Persecution as a Crime Under International Criminal Law*, 2 J. Nat’l Security L. & Pol’y 355, 358 (2008) (“Persecution is now defined as follows. The actus reus of the crime consists of an underlying act which discriminates in fact and must deny a fundamental human right laid down in international law. The mens rea of persecution is discrimination on one of the listed grounds (at the ICTY, these are political, racial and religious grounds).”

⁶³ Rome Statute, art. 7(1)(g).

⁶⁴ *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgment, para. 185 (17 Sept. 2003) quoting *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment, para. 431 (15 March 2002).

⁶⁵ See e.g. *Vasiljevic*, TC, Judgment, para. 244.

persecution,⁶⁶ meaning that the acts must be of “similar gravity” to other crimes against humanity.⁶⁷ Thus, the *actus reus* of persecution is comparable to that of “other inhumane acts” discussed *supra*. Additionally, as is the case with “other inhumane acts,” specific persecutory acts must be alleged rather than general mistreatment.⁶⁸ Moreover, various discriminatory acts not individually rising to the requisite gravity may cumulatively qualify as persecution.⁶⁹

b. Persecutory *Dolus Specialis* and Protected Classes

The key to any persecution conviction is establishing that the accused had the specific “intent to commit the underlying act and to discriminate on political, racial or religious grounds.”⁷⁰ This *mens rea* of special intent (“*dolus specialis*”) is the distinguishing feature of persecution from

⁶⁶ *Id.* 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 Pocar, *supra* note 62 at 359 (“Although the ICTY Statute was modeled on the Nuremberg Charter, the restriction mentioned before – that persecution be committed in association with another crime reached by the Statute – has been explicitly rejected by the ICTY. The Tribunal instead that the crime of persecution, thanks to its development in the fifty years between Nuremberg and the first ICTY cases, consists of the intentional, gross, or blatant denial, on discriminatory grounds, of a fundamental right, as long as the persecutory acts reach the same level of gravity as other crimes against humanity.”) citing *Blaskic*, AC Judgment, para. 135. It is unclear however, whether the *actus reus* of persecution must independently constitute a criminal act. See *Krnjelac*, AC Judgment, Separate Opinion of Judge Shahabuddeen, paras. 5-7. Historical precedents suggest not. See *id.* para. 6, (Stating that the underlying act in the crime of persecution “by itself it does not have to be a crime specified anywhere in international criminal law: it may be a non-crime.”)(internal citations omitted); see also, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Judgment, para. 186 (2 November 2001)(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.”).

⁶⁷ See *Lukic & Lukic*, TC Judgment, para. 993; see also *Prosecutor v. Kordic & Cerkez*, Case No. IT-95-14/2-A Judgment, para. 102 (17 Dec. 2004) citing *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Judgment, para. 135 (29 July 2004); *Krnjelac*, AC Judgment, paras 199, 221.

⁶⁸ See e.g. *id.* para. 246 citing *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-T, Judgment, para. 626 (14 Jan. 2000); *Krnjelac*, Judgment para. 433

⁶⁹ *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Judgment, para. 321 (28 February 2005); *Prosecutor v. Milutinovic et al.*, Case No. IT-05-87-T, Judgment, para. 179 (26 Feb. 2009); *Kupreskic et al.*, TC Judgment, para. 615(e); *Krnjelac*, TC Judgment, para. 434; see also *Naletilic & Martinovic*, Case No. IT-98-34-A, Judgment, para. 574 (3 May 2006).

⁷⁰ *Lukic & Lukic*, TC Judgment, para. 994 citing *Stakic*, AC Judgment, para. 328.

amongst crimes against humanity. Thus, a perpetrator of persecution must intentionally target members of a political, racial or religious group for harsher treatment.⁷¹

One of the protected classes in the ECCC Law definition of persecution is “political” groups.⁷² The ICTR Trial Chamber has commented that “[p]olitical grounds include party political beliefs and political ideology.”⁷³ Political identity can be subjectively defined by the perpetrators of persecution and may have ethnic or other dimensions.⁷⁴ Additionally, an accused may still be held liable for persecution if he acted with the intent to discriminate based on a false assumption regarding the identity of the victim.⁷⁵

c. Possible Famine-Related Persecution Charges at the ECCC

The nature of persecution charges predicated on the denial of adequate food at the ECCC would hinge on how the persecuted group is identified. One possible method of framing persecution charges would be to allege that the persecuted class during DK consisted of perceived political enemies, who were labelled “new” or “17 April” people, and included everyone who was forcibly evacuated from Cambodians urban areas to the countryside, along

⁷¹ See e.g. *Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgment, para. 697 (7 May 1997)(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. Additionally, this discrimination must be on specific grounds, namely race, religion or politics.”).

⁷² ECCC Law, art. 5.

⁷³ See e.g. *Kayishema & Ruzindana*, TC Judgment, para. 130.

⁷⁴ 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. *Prosecutor v. Krnojelac*, TC Judgment, para. 22, fn. 56 (“The Trial Chamber understands that the term ‘non-Serb’ connotes both religious and political distinctions.”). Similarly, in the ICTR case of *Prosecutor v. Nahimana et al.*, the accused were found 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.” *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, Judgment, para. 1072 (3 Dec. 2003)(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.”).

⁷⁵ *Krnojelac*, AC Judgment, para. 187 (Stating that “the Appeals Chamber considers that a Serb mistaken for a Muslim may still be the victim of the crime of persecution.” The Chamber goes on to conclude that it “considers that the act committed against him institutes discrimination in fact, vis-à-vis the other Serbs who were not subject to such acts, effected with the will to discriminate against a group on grounds of ethnicity.”). Similarly, at the ICTR, persecution convictions have resulted from acts committed against perceived “moderate Hutus” which was perpetrator-defined.

with other Cambodians deemed to have an “impure” revolutionary background.⁷⁶ After defining the protected victim class, the Co-Prosecutors would need to establish that members of this class of “new” people were targeted for harsher treatment, including reduced rations, resulting in greater famine amongst the group. This showing of disparate treatment could be combined with various pieces of KR propaganda and slogans that referred to “new” people in derogatory terms to demonstrate the requisite discriminatory intent.⁷⁷ The key to a successful prosecution would once again likely hinge on *mens rea* issues, as the accused may claim that all suffering due to famine was merely consequence of a general plan that did not target any group for discrimination.

II. Conclusion

The suffering of Cambodians from lack of food during the DK cannot be captured by one crime alone. A mere recitation of the number of people who were exterminated via starvation fails to capture the full suffering that occurred due to the draconian social policies of the KR. However, when the crimes against humanity of extermination, “other inhumane acts” and persecution are combined, a more accurate accounting can be made. Suffering from chronic lack of food was an experience that was virtually universal for all Cambodians during DK. In order to provide full accountability and develop an accurate historical record of the experiences of Cambodians under the KR from 1975-79, the ECCC should address this suffering.

⁷⁶ See DY *supra* note BLANK at 30-31 (The new people, or 17 April people, were those evacuated from the cities and towns in April 1975. However, many of them were from the countryside and had gone to the cities to escape the war. They were considered unreliable and were viewed by [the KR leaders] with hatred and suspicion. They were classified as ‘parasites’ and had no rights as the Khmer Rouge slogans asserted: ‘17 April people are parasitic plants. They are the losers of the war and prisoners of war.’”). Members of the preferred civilian social class created by the KR were referred to as “old” or “base” people.

⁷⁷ For a selection of translated KR slogans, see HENRI LOCARD, POL POT’S LITTLE RED BOOK: THE SAYINGS OF ANGKAR (Silkworm Books 2005).