

Prosecuting Starvation under the ECCC Law

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The main purpose of the Extraordinary Chambers in the Courts of Cambodia (ECCC) is to provide justice to the victims of the Khmer Rouge. In order to do so, it must prosecute those crimes that are the most important to the victims. As I wrote in issue 97 of *Searching for the Truth* (January 2008), in reading victim accounts a consistent theme seems to emerge. More than murder and torture, victims talk about the lack of food. For many, this feeling of hunger is their strongest memory of the Democratic Kampuchea era.

Although hundreds of thousands of people died of starvation during the Khmer Rouge period, prosecuting the Khmer Rouge leaders for those deaths would not be easy. The ECCC's jurisdiction is limited. It can only prosecute defendants for grave breaches of the Geneva Convention, genocide, crimes against humanity, and a few other crimes. In addition, it has jurisdiction only over senior leaders and those most responsible for the crimes of that era. Taking into account these challenges, this article will discuss how food deprivation might be prosecuted by the ECCC.

A number of governments in modern history have regulated the production and distribution of food as a means of political control. Even though government induced famines have caused millions of deaths, they have not elicited the same outrage as atrocities claiming only a fraction of the number of victims. One reason that governments have historically been able to withhold food with impunity is their ability to blame famines on intervening conditions such as bad weather or a poor harvest. It is extremely difficult to show that starvation is an intended criminal act and not merely the consequence of poor

planning or unforeseen consequences. For this reason, until today no international tribunal has prosecuted government leaders for starving their own population.

Prosecution of Starvation As a War Crime

There are long established rules for the treatment of a civilian population during times of war. Historically, withholding food as means of inducing surrender has been considered an acceptable tactic. Even after the development of commonly accepted rules of war, laying siege to a city and starving out a population was not considered unlawful. For example, in the post World War II trial of the Nazi High Command (*United States v. Von Leeb*), a US military court reluctantly condoned the Nazi siege of Leningrad that resulted in the deaths of more than one million Russians, saying, "We might wish the law were otherwise but we must administer it as we find it." The court found:

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

It was only in 1949 with the adoption of the Geneva Conventions that humanitarian law prohibited the unfettered right of armies to starve out a population in order to gain a military advantage. However, this prohibition is narrowly drawn. Article 23 of the Fourth Convention states that a military must permit the free passage of all consignments of essential foodstuffs to "children under fifteen, expectant mothers, and maternity cases." Moreover, the prohibition is conditional on the belligerent's satisfaction that there are "no serious reasons for fearing," among other things, that the enemy may gain a definite military advantage. Thus, not only is the scope of who is protected limited, but so too are the circumstances under which the prohibition will apply. Only in 1977 with the adoption of the additional protocols of the Geneva Conventions was "[s]tarvation of civilians as a method of warfare/combat" absolutely prohibited.

The law establishing the Extraordinary Chambers gives the ECCC competence to prosecute grave breaches of the 1949 Geneva Conventions, but not criminal violations of their subsequent protocols. To prosecute someone for a grave breach, a nexus must be shown between the criminal act and an international armed conflict. Prosecutors at the ECCC may attempt to argue that Cambodia was in a state of war with Vietnam during the entire duration of the DK regime (1975 - 1979). If this argument succeeds they would still be required to show that the starvation of Cambodian civilians was related to the war with Vietnam.

Even more problematic, the grave breaches of the Fourth Geneva Convention – those acts identified by the Convention as giving rise to individual criminal responsibility – do not include the failure to allow free passage of food. Because the ECCC law clearly limits the Court's jurisdiction to grave breaches, it is unlikely that the judges will allow prosecution of war crimes not explicitly identified as such by the Conventions. For that reason, starvation most likely cannot be prosecuted as a war crime at the ECCC.

Prosecution of Starvation As Genocide

One of the most controversial issues facing the prosecutors and judges at the ECCC is whether to charge the Khmer Rouge leaders with genocide. The ECCC law, which mirrors the Genocide Convention of 1948, defines genocide as “any acts committed with the intent to destroy, in whole or, in part, a national, ethnical, racial or religious group.” This includes acts “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.” Starvation could thus seemingly be prosecuted as a mode of committing genocide.

However, to charge genocide, the targeted population must be a national, ethnic, racial or religious group. By definition, political or social groups cannot be victims of genocide. Although up to one-fifth of Cambodian's population may have died during the

DK regime, most of the victims were ethnic Khmer. Although a strong argument can be made that the Khmer Rouge disproportionately targeted for harsh treatment groups such as the Cham Muslims and Vietnamese, because Khmer Cambodians similarly suffered from the lack of food, it would be extremely difficult to show that government policies resulting in starvation were aimed at eliminating these protected groups. It is therefore unlikely that the prosecutors will decide to charge starvation as the crime of genocide.

Prosecution of Starvation As the Crime Against Humanity of Extermination

Crimes against humanity are considered to be of similar gravity to the crime of genocide. In particular, the crime against humanity of extermination is similar not only in gravity but also in substance to genocide in that both criminalize large scale killing. The ECCC law defines crimes against humanity as “any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds.”

Thus, to prosecute crimes against humanity, prosecutors must first demonstrate that there was a widespread or systematic attack against a civilian population on national, political, ethnical, racial or religious grounds. International jurisprudence has been quite liberal in determining what constitutes an attack. For example, the attack need not reach the level of an armed conflict. Likewise, the courts have been fairly liberal in defining what constitutes discriminatory intent for the attack. It would therefore not be difficult to show that there was an attack against the Cambodian people at the time starvation was occurring.

Once the contextual elements of a crime against humanity are established, the criminal act itself must be proved. In the case of the crime of extermination, it must be shown that there has been intentional mass killing. The International Criminal Tribunal for Rwanda (ICTR), which has a very similar definition of crimes against humanity as the ECCC, has found that extermination can take place through “the creation of conditions of

life that leading to the mass killing of others,” such as “withholding the necessities of life.” Presumably this could include food deprivation. Moreover, the International Criminal Court’s Rome Statute explicitly states that extermination includes the “the deprivation of access to food ... calculated to bring about the destruction of part of a population.” If a similar definition of extermination is accepted by the ECCC, the prosecution would need to prove that the deprivation of food was a manufactured rather than a natural occurrence. In other words, the starvation must have been preventable. Moreover, it must be shown to have been perpetrated as part of the overarching attack against the civilian population. In addition to intending the deprivation of food, the accused must have known that this crime was committed as part of the greater attack.

One of the principle policies of the DK regime was the abolishment of private property. This meant that everything grown in a cooperative (co-op) belonged to the central government (the Center) and food distribution was controlled by the co-op chief. Each co-op also had to give a portion of their harvest to the Center as a tax. This tax was viewed by the Center as essential, for it was the primary means of generating revenue. The result was that co-op chiefs, acting either out of fear or an eagerness to please the Center, often prioritized meeting the tax quota over feeding the population. Survivors report seeing piles of rice taken away in trucks even while the people in the co-ops were starving. Another policy contributing to starvation was the prohibition on foraging for food without permission. If people were caught more than once they would usually be arrested, and sometimes executed.

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

resulting in starvation or provide evidence of the similarity of such practices in different areas of the country to show that they must have originated in the Center.

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

Due to the evidentiary difficulties of linking the senior Khmer Rouge leaders with the decisions resulting in food deprivation, the prosecutors could also argue that the leaders participated in a criminal plan of which starvation was a foreseeable result. Specifically, prosecutors could attempt to prove that senior Khmer Rouge leaders conspired to deport, imprison and enslave the Cambodian people, it was foreseeable that these acts would lead to massive starvation, and the leaders willingly took the risk that this would occur.

After the Khmer Rouge seized Phnom Penh on 17 April 1975, everyone was forced to leave regardless of his or her physical condition. The old, young and sick were evacuated along with everyone else and told to go to the countryside. People were not given any provisions for journeys that lasted up to three weeks. Consequently many starved to death trying to make it back to their familial village. The evidence suggests that senior leaders of the Khmer Rouge had a long standing plan to evacuate the capital as well as other cities. This plan was implemented despite the very real risk that many of the evacuees would starve to death as a consequence.

According to most reports, the subsequent forced movement of people to the Northwest was even more arduous than the evacuation of Phnom Penh. Beginning in mid

1975, 800,000 people, mostly former Phnom Penh residents, were forcibly relocated from the Southwest and West to the Northwest without adequate provisions. From the outset, people died of starvation due to the lack of available food. The Khmer Rouge leadership must have been aware that this population transfer – which nearly doubled the Northwest’s population – could be devastating. Indeed, there is evidence that the Northwest leadership warned the Center that moving such a large amount of people to the Northwest would cause widespread starvation. Despite this information, the Khmer Rouge leadership decided that the transfer was necessary to achieve the Center’s agricultural production goals. The Khmer Rouge wanted Cambodia to be a model for all communist revolutions. As such, they set unrealistic production and export requirements. In order to achieve these goals the Center focused on increasing production in the Northwest, which was to shoulder much of the rice producing burden of the country. In 1975, the Center thought that the Northwest was under populated and needed 500,000 additional workers in order to maximize efficiency and achieve its production targets. However there was no way to feed the additional people.

The starvation caused by the evacuation of Phnom Penh, the forced movement of persons to the Northwest, and the Center’s unrealistic production goals was not only foreseeable, but almost a certainty. Moreover, there is evidence in speeches, reports and committee meetings minutes that the senior leaders knew that starvation was occurring. Not only did they not take action to alleviate the food shortage, they continued enforcing policies that exacerbated the situation. Thus, despite the many challenges involved, the ECCC could and should prosecute the senior Khmer Rouge leaders for the crime against humanity of extermination for the starvation caused by their economic and social policies.