

FOOD DEPRIVATIONS AS CRIMES
AGAINST HUMANITY

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I. INTRODUCTION	253
II. THE RIGHT TO FOOD UNDER THE UDHR AND ICESCR	259
III. CRIMES AGAINST HUMANITY	263
A. Actus Reus: <i>Actions and Omissions</i>	265
B. Mens Rea: <i>Purpose, Knowledge, or Recklessness?</i>	266
C. <i>Widespread or Systematic</i>	270
IV. LINKING BREACHES OF THE ICESCR TO CAH.....	271
A. <i>Persecution</i>	273
1. <i>Persecution in Somalia</i>	275
2. <i>Persecution in Palestine</i>	277
B. <i>Extermination</i>	280
C. <i>Other Inhumane Acts</i>	281
V. ESR VIOLATIONS AS CAH IN LIGHT OF EMERGING NORMS	285
VI. CONCLUSION	288

“‘[T]o starve’ is transitive: it is something people do to each other.”¹

I. INTRODUCTION

Every day, 25,000 people die from hunger or hunger-related causes.² That equals 9,125,000 people each year, 17 each minute, and perhaps another 700 by the time you finish read-

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1. ALEX DE WAAL, *FAMINE THAT KILLS: DARFUR, SUDAN*, at xii (2005).

2. John Holmes, *Losing 25,000 to Hunger Every Day*, 45 UN CHRON., no. 2/3, 2008, at 14, 15; *Millennium Development Goals: Eradicate Extreme Poverty and Hunger*, UNICEF, <http://www.unicef.org/mdg/poverty.html> (last visited Aug. 26, 2013) (calculating that someone starves to death every 3.6 seconds, which would equal 24,000 starvation deaths per year).

ing this Note. Moreover, 870 million people—or one out of seven worldwide—suffer from malnutrition.³ The massive scale of starvation and hunger is hard to fathom, particularly in light of the international community's capacity to feed the global population⁴ and the relatively low cost of ensuring that everyone has access to food.⁵

This pervasive starvation constitutes a serious human rights violation. The Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) both enshrine the right to food, thereby committing signatories to ensure that this right is realized for all within their borders. Acute malnutrition, starvation that results from chronic hunger, and famine⁶ constitute clear

3. Press Release, Secretary-General, Nearly 870 Million Hungry People Worldwide 'Unacceptable' in World of Plenty, Says Secretary-General in Message for World Food Day, U.N. Press Release SG/SM/14587 (Oct. 16, 2012), *available at* <http://www.un.org/News/Press/docs/2012/sgsm14587.doc.htm>.

4. Jonathan A. Foley, *Can We Feed the World and Sustain the Planet?*, SCI. AM., Nov. 2011, at 60, 62; TEDGlobal 2011, *Josette Sheeran: Ending Hunger Now*, TED (July 2011), http://www.ted.com/talks/josette_sheeran_ending_hunger_now.html (explaining “we know how to fix hunger; 100 years ago we didn't. We actually have the technologies and systems . . . this [hunger] is out of place at our time in history.”).

5. According to the United Nations, it would cost \$30 billion per year to end hunger. *The Price of Hunger*, L.A. TIMES, (June 23, 2008), <http://articles.latimes.com/2008/jun/23/opinion/ed-food23>. Ironically, Action Aid reports that “hunger is costing the world's poorest nations £290bn a year—more than 10 times the estimated amount needed to meet the goal of halving global hunger by 2015.” Gethin Chamberlain, *Hunger in India: 'The Real Cause Is Lack of Political Will'*, GUARDIAN (Sept. 14, 2010, 7:39 AM), <http://www.guardian.co.uk/environment/2010/sep/14/hunger-india-actionaid>. When held up against the mid-2011 estimate of \$3.7–\$4.4 trillion spending on the war in Iraq by the United States alone, it is clear we have the financial capacity to prevent all starvations. See Daniel Trotta, *Cost of War at Least \$3.7 Trillion and Counting*, REUTERS (June 29, 2011), <http://www.reuters.com/article/2011/06/29/us-usa-war-idUSTRE75S25320110629> (quantifying the total cost of the wars in Iraq, Pakistan, and Afghanistan).

6. Famines are more condensed in time and space than starvation that results from chronic malnutrition, but account for a minority of total starvation deaths. *What Is Hunger?*, WORLD FOOD PROGRAMME, <http://www.wfp.org/hunger/what-is> (last visited Oct. 20, 2013) (explaining that emergencies account for less than 8% of starvation deaths). For a food shortage to be declared a famine, “at least 20 per cent of households in an area face extreme food shortages with a limited ability to cope; acute malnutrition rates exceed 30 per cent; and the death rate exceeds two persons per day per

violations of State obligations under these conventions.⁷ In spite of these perpetual failures, the international community has been reticent to hold governments accountable for their complicity in starvation.⁸ While a number of regional courts have jurisdiction over right to food violations,⁹ this has proven slower to translate to the international arena. Yet, as Charles Kenny points out, “famine deaths in the modern world are almost always the result of deliberate acts on the part of governing authorities. That is why widespread starvation is a crime against humanity and the leaders who abet it should be tried at the International Criminal Court.”¹⁰ Kenny’s prescription appears increasingly likely, as recent years have witnessed a growing recognition among international criminal tribunals that right to food violations may invoke criminal responsibility.

Although the right to food originates in international human rights law, under which States bear the responsibility for violations, it is also possible to hold individuals responsible for grave violations of some human rights—including the right to food—through international criminal law. Indicting individual leaders for right to food violations would provide a much-needed measure of accountability for leaders who have traditionally acted with impunity, assured that they will never

10,000 persons.” *When a Food Security Crisis Becomes a Famine*, UN NEWS CENTER (July 21, 2011), <http://www.un.org/apps/news/story.asp?NewsID=39113#.UNEvA29fDQQ>.

7. See ALEX DE WAAL, *FAMINE CRIMES: POLITICS AND THE DISASTER RELIEF INDUSTRY IN AFRICA* 2 (1997) (“[H]uman rights abuses are invariably an intimate part of famine creation.”). While this paper focuses on starvation as a right to food violation, it could also be framed as a violation of the right to life under the International Covenant on Civil and Political Rights (ICCPR). See, e.g., David Marcus, *Famine Crimes in International Law*, 97 AM. J. INT’L L. 245, 261 (2003) (“[A] famine is ultimately a massively perpetrated violation of the right to life, the right that unquestionably crowns the pantheon of human interests in the commonly shared values of the world community.”).

8. Marcus, *supra* note 7, at 246 (pointing out that international criminal law “criminalizes government action that creates or abets famine,” and that “[i]nternational blindness to this criminal conduct of the most nefarious sort is odd, given that existing international law criminalizes . . . faminogenic behavior.”).

9. For example, the Economic Community of West African States Community Court of Justice (ECCJ) and the Inter-American Court of Human Rights adjudicate ESR cases.

10. Charles Kenny, *Famine Is a Crime*, FOREIGN POL’Y (July 25, 2011), http://www.foreignpolicy.com/articles/2011/07/25/famine_is_a_crime.

be held to answer for their starvation-inducing actions or policies. International criminal law could not only stem the tide of hunger in the short run by removing such actors, but could deter future leaders from using hunger as a weapon or ignoring a famished population in the long run.¹¹ When right to food violations are widespread or systematic, satisfy the requisite *mens rea* standard, and are perpetrated in accordance with a state or organizational policy, they may constitute a crime against humanity that invokes international criminal responsibility.

While widespread starvation could theoretically lead to prosecution under a number of legal mechanisms,¹² crimes against humanity (CAH) has proven a particularly viable framework for trying extreme violations of economic and social rights (ESR). To date, the majority of internationally prosecuted right to food violations have involved withholding food from imprisoned populations.¹³ The international community has demonstrated an increasing willingness to condemn government-generated starvation in recent years, with decades-old famines being recast as CAH. In 2008, for example, the European Union declared Ukraine's 1932 famine, which was contrived by Stalin to force the Ukrainian population into submis-

11. See Paul Howe & Stephen Devereux, *Famine Intensity and Magnitude Scales: A Proposal for an Instrumental Definition of Famine*, 28 *DISASTERS* 353, 367 (2004) (discussing the importance of accountability for famine crimes); see also DE WAAL, *supra* note 7, at 152 (noting the value of using international criminal law as a deterrent for preventing famine crimes). Though the deterrent effect of international criminal law is subject to intense debate, it is beyond the scope of this note.

12. For example, the ICC's Rome Statute prohibits governments from preventing relief from reaching affected populations during war. Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90, [hereinafter Rome Statute]. The Geneva Conventions establish a State's duty to provide humanitarian aid to populations living in territory under its control during armed conflict, or in lieu of that, permitting third parties to furnish assistance. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 55–60, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

13. See, e.g., Co-Prosecutor v. Kaing Guek Eay *alias* Duch, Case No. 001/18-07-2007/ECCC/TC, Judgment (July 26, 2010); Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-I, Judgment, ¶ 146 (May 21, 1999); Prosecutor v. Nikolic, Case No. IT-94-2-I, Indictment, ¶ 24 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 4, 1994) (all charging defendants, *inter alia*, with crimes involving withholding food from imprisoned populations).

sion, a crime against humanity.¹⁴ Domestic courts have likewise held ex-leaders guilty of CAH based on purposeful starvation: Ethiopia recently convicted deposed dictator Mengistu Haile Mariam and other government officials in his *Dergue* administration of CAH under domestic law for using starvation as a tool of war.¹⁵ The road has thus been paved for famine crimes to constitute a crime against humanity.¹⁶

Famine-creating behavior comes in many forms, including withholding humanitarian aid, preventing starving populations from reaching relief, or enacting policies that foment widespread famine without changing course once the consequences have become clear.¹⁷ However, criminalizing right to food violations only when they amount to famine constructs an arbitrary divide between what does and does not qualify as a crime against humanity. Article 7 of the International Criminal Court's (ICC) Rome Statute, which defines CAH, makes no mention of the time period over which the actions must unfold. As long as the perpetrator's behavior and mental state are sufficient, the amount of time elapsed between starvation

14. European Parliament Resolution of 23 October 2008 on the Commemoration of the Holodomor, the Ukrainian artificial famine (1932-1933), EUR. PARL. DOC. P6 TA(2008)0523 [hereinafter European Parliament Resolution], available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=//EP//TEXT+TA+P6-TA-2008-0523+0+DOC+XML+V0//EN&language=EN>.

15. Edward Kissi, *Ethiopia*, in ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY 292, 298 (Dinah Shelton ed., 2005). Mengistu and nearly 3,000 others have been indicted in absentia. As of 2004, 1,569 cases had been tried, leading to nearly 1,017 convictions. Six of these carry a death sentence. *Id.* at 299.

16. See Asbjørn Eide, *Famine*, in ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY, *supra* note 15, at 343, 343 ("When famine still occurs, it is either a result of deliberate action intended to cause starvation, serious mismanagement, bad or nonresponsive government failing to respond adequately to natural disasters, or lack of sufficient international cooperation in redressing a threatening situation. Some provoked famines may legally be characterized as genocide or crime against humanity."). Despite the allusion to domestic CAH charges, this Note will focus exclusively upon international CAH charges.

17. Right to food violations almost invariably implicate additional human rights violations. For example, freedom of movement, the right to water, and the right to personal security are just a few potential human rights violations that accompany and/or exacerbate right to food violations. While certainly an important issue, a deeper discussion of the intersectionality of rights is beyond the scope of this Note.

deaths should be irrelevant. As such, deaths that result from chronic malnutrition may likewise qualify as a crime against humanity.

Reviewing the current state of the relationship between ESR violations and CAH allows us to draw several conclusions:

- 1) Omissions are firmly entrenched as an acceptable *actus reus* under CAH, meaning that omitting to procure food, medical care, or other life necessities can amount to a crime against humanity;
- 2) While intent or knowledge have traditionally served as the *mens rea* requirement for CAH, there is an emerging recklessness standard in international criminal law; and
- 3) Right to food violations that do not amount to famine but cause widespread death or suffering should be criminalized as a CAH, assuming other requisite elements have been met.

The parameters of what constitutes a crime against humanity have transformed considerably since the term's inception—in fact, it was designed with that very potential for growth in mind, as will be discussed shortly—and will continue to progress. While there have yet to be CAH charges pressed against government leaders for widespread deaths resulting from chronic malnutrition outside of the prison setting, recent jurisprudence in international criminal law demonstrates that such an indictment is not out of reach. A CAH prosecution based on a right to food violation that engenders omnipresent hunger and starvation would be an evolutionary, not revolutionary, step.

This Note will proceed as follows. Part II reviews the UDHR's and ICESCR's right to food provisions, and confronts arguments that ESR are subordinate to civil and political rights (CPR) in a human rights hierarchy. Part III turns to the various textual elements of the Rome Statute's definition of Crimes Against Humanity, both in theory and as applied by international criminal tribunals. Next, Part IV joins CAH with ESR analysis by presenting case studies in which actors committed right to food violations that amounted to CAH. These examples highlight omissions as an acceptable *actus reus* and the emerging recklessness *mens rea* standard. Part V then assesses current right to food violations that meet these evolving

CAH criteria. Finally, Part VI concludes by arguing that the small handful of repeat offenders must be held accountable.

II. THE RIGHT TO FOOD UNDER THE UDHR AND ICESCR

The UDHR serves as the foundational document for international human rights. In addition to “negative” civil and political rights, broadly translated as freedom from government intrusion, the UDHR affirms the inviolability of a host of “positive” economic and social rights that obligate state action.¹⁸ Article 25(1) states, “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care”¹⁹ The ICESCR, drafted eighteen years later in 1966, expands upon these commitments. Article 11 establishes the right to food²⁰ and details States’ obligations: “The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programs, which are needed . . . to

18. This distinction between “positive” economic and social rights and “negative” civil and political rights is an artificial construct. All human rights are equal, and if we agree that they are truly *rights*, cannot be bifurcated or ordered. See Philip Alston, Syllabus and Course Materials for Economic and Social Rights Course at New York University School of Law 30 (2012) (on file with author) (writing about the “artificiality of the distinctions between CPR and ESR, and between positive and negative rights”); see also Office for the High Commissioner on Human Rights, Key Concepts on ESCRs—Are Economic, Social and Cultural Rights Fundamentally Different from Civil and Political Rights?, <http://www.ohchr.org/EN/Issues/ESCR/Pages/AreESCRfundamentallydifferentfromcivilandpoliticalrights.aspx> (last visited Aug. 27, 2013) (explaining that the distinction between ESRs and CPRs did not exist under the UDHR, but grew out of Cold War tensions between the pro-CPR West and the pro-ESR Soviet bloc).

19. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 25, U.N. Doc.A/Res/217(III) (Dec. 10, 1948).

20. International Covenant on Economic, Social and Cultural Rights art. 11, para. 1, Dec. 16, 1966, S. TREATY DOC. NO. 95-19, 993 U.N.T.S. 3 [hereinafter ICESCR]. It should be noted, however, that the language “States Parties to the present Covenant recognize the right of everyone to . . . adequate food” arguably conveys a weaker obligation than the parallel language in the ICCPR, which uses language such as “everyone has a right to”. Philip Alston, *supra* note 18, at 105. Despite this phrasing, signatories nonetheless are obliged to take measures to achieve these rights. ICESCR, *supra*, at art. 2, para. 1.

ensure an equitable distribution of world food supplies in relation to need.”²¹ Signatories thus bind themselves to taking affirmative steps to prevent starvation. As Asbjørn Eide notes, Article 11 “establishes a set of obligations on states that, if fully implemented, would prevent famines from arising.”²²

In terms of implementation, the ICESCR instructs each party “to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means.”²³ While few dispute the ICESCR’s validity, critics claim the phrase “progressive realization” renders any attempts to enforce ESR commitments toothless:²⁴ Governments can always assert that they are in the *process* of implementing programs that will procure adequate education or healthcare. At the same time, the Committee on Economic, Social and Cultural Rights’ (CESCR) has recognized that assertion some obligations under the right to food “are of a more immediate nature, while other measures are more of a long-term character,”²⁵ undermining the argument that *all* food rights may be progressively realized. The CESCR’s General Comment 12 contrasts the right to *adequate* food, which it concedes may be progressively realized, against States’ “core obligation to take the necessary action to mitigate and alleviate hunger. . . even in times of natural or other disasters.”²⁶ This distinction indicates that not every right to food obligation may be interpreted as falling under the “progressive realization” rubric.

The acknowledgment of financial constraints further hampers efforts to hold States accountable for ESR failures, as States may deflect criticism by pointing to their meager budg-

21. *Id.* art. 11, para. 2.

22. Eide, *supra* note 16, at 349.

23. ICESCR, *supra* note 20, at art. 2, para. 4.

24. See Alston, *supra* note 18, at 105 (“[I]t is argued that the relative open endedness of the concept of progressive realization, particularly in light of the qualification about availability of resources, renders the obligation devoid of meaningful content.”); see also Maurice Cranston, *Are There Any Human Rights?*, 112 DAEDALUS, no. 4, 1983, at 1, 13 (contending that governments in Asia, Africa, and South America could not afford ESR).

25. Committee on Economic, Social and Cultural Rights, CESCR General Comment No. 12: The Right to Adequate Food (Art. 11), ¶ 16, U.N. Doc. E/C.12/1999/5 (1999).

26. *Id.* ¶ 6.

ets. In spite of these phrases that weaken the signatories' strength of commitment, ignoring ESR obligations to the point that chronic hunger and starvation spreads across the country represents a clear violation of the ICESCR. Surely a State with enough money to fund bloated military budgets and government salaries cannot hide behind financial pretexts in the face of relatively low-cost solutions to hunger.

Human rights activist and ESR skeptic Aryeh Neier further argues that these 'positive' rights have no place in the courtroom, and that "rights only have meaning if it is possible to enforce them."²⁷ Judicial enforceability, he posits, is a prerequisite for a norm to be characterized as a human right. If Neier's argument were accepted and taken to its logical conclusion, ESR violations could not be tried as CAH. Yet such a contention falls short on a number of grounds. Not only does this critique ignore the reality that ESR violations are, in fact, justiciable across many domestic, regional, and international courts,²⁸ but it overlooks the possibility of trying such violations outside of the ICESCR. The Geneva Conventions; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and Articles 6 (Genocide), 7 (Crimes Against Humanity) and 8 (War Crimes) of the Rome Statute all provide legal frameworks that criminalize ESR violations. Right to food, water, or health violations that cause death may also be framed as right to life violations, which is the "fundamental human right If it is not respected, all rights lack meaning States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur and, in particular, the duty to prevent its agents from violating it."²⁹ Prosecutors may

27. Aryeh Neier, *Social and Economic Rights: A Critique*, 13 HUM. RTS. BRIEF, no. 2, 2006, at 1, 1.

28. In the domestic context, for example, South African and Indian courts consistently adjudicate ESR cases. On the regional level, courts handling ESR cases include West Africa's ECOWAS Community Court of Justice (ECCJ), the Inter-American Court of Human Rights, and the African Court of Human and Peoples' Rights (ACHPR), just to name a few. International tribunals have also tried defendants based on a host of ESR violations, as will be discussed in Part IV *infra*.

29. Case of the "Street Children" (Villagrán Morales *et al.*) v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 144 (Nov. 19, 1999) (emphasis added).

thus ground hunger crimes in a number of enforceable legal mechanisms.

Furthermore, such arguments disregard the weak and sporadic enforcement of CPRs. Countless States violate CPRs with impunity, yet that does nothing to weaken our belief in their intrinsic value. Nor is it inevitable that rights are contingent upon enforceability. If we truly believe that something is a right inherent in human beings, whether or not our society is equipped to prosecute a breach of that right should be irrelevant—rights exist independent of enforceability mechanisms. In addition, even if we view human rights as social constructs without intrinsic value, documents like the UDHR and the ICESCR demonstrate the global community's unambiguous recognition of these norms.

In a similar vein, critics contend that ESRs are not real rights because of the supposed impossibility of identifying a specific perpetrator.³⁰ This argument falls flat. First, it is abundantly clear who violates ESR rights when people go hungry—the governments that have signed documents like the UDHR and the ICESCR yet fail to live up to their obligations. Because States willingly signed commitments to protect these rights, ignoring the obligations they have created for themselves constitutes a violation of their responsibilities. Second, this problem would be equally thorny as applied to many CPRs—if a citizen is denied the right to due process, how can we single out an individual perpetrator when the violation is indicative of systemic shortcomings? CPR violations are often widely dispersed across government organs. A right's existence does not hinge upon pinpointing a specific perpetrator.

Even if we *were* to view ESRs as subordinate to CPRs, this by no means grants a State permission to violate ESRs with impunity. The ICESCR may not spell out enforcement mechanisms, but when a State pursues harmful policies that violate ESRs with full knowledge of the consequences, it becomes criminal by violating other international treaties. Though these rights are rooted in international human rights law, as discussed above, it is possible to hold individuals responsible

30. See William Easterly, *UN Human Rights and Wrongs*, AID WATCH BLOG (June 8, 2009), <http://aidwatchers.com/2009/06/un-human-rights-and-wrongs/> (discussing the difficulty establishing specific obligations for positive rights).

for food deprivation under international criminal law. Severe breaches of ESRs that lead to widespread death or suffering constitute CAH, and should be prosecuted as such.

III. CRIMES AGAINST HUMANITY

Understanding the roots of CAH will help elucidate their application to right to food violations. The term “crimes against humanity” grew out of the Ottoman Empire’s methodically charted destruction of the Armenian population in 1915. Turkish authorities created a blueprint so detailed that authorities even dictated particular methods of execution, commanding soldiers to kill in inexpensive ways like stabbings, drowning, and burning so that military resources would not be wasted.³¹ An estimated 1.5 million Armenians died.³² Russia, England, and France decried “these new crimes of Turkey against humanity and civilization” in a joint declaration issued May 28, 1915.³³

The term remained in relative obscurity until the 1945 Nuremberg Tribunal adopted it as one of three crimes over which it exercised jurisdiction.³⁴ The Tribunal’s Charter delineated CAH as “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecution on political, racial, or religious grounds in execution of or in connexion [sic] with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.”³⁵ This has served as a template for future definitions of CAH, including those adopted by the Interna-

31. See Vahakn N. Dadrian, *Armenians in Ottoman Turkey and the Armenian Genocide*, in *ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY*, *supra* note 15, at 71, 75 (discussing the varied methods used during the genocide).

32. John Kifner, *Armenian Genocide of 1915: An Overview*, N.Y. TIMES, http://www.nytimes.com/ref/timestopics/topics_armeniangenocide.html (last visited Oct. 20, 2013).

33. UNITED NATIONS WAR CRIMES COMMISSION, *HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR* 35 (1948) (English translation).

34. William A. Schabas, *Crimes Against Humanity*, in *ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY*, *supra* note 15, at 209, 211.

35. United Nations, *The Charter and Judgment of the Nürnberg Tribunal—History and Analysis: Memorandum Submitted by the Secretary-General*, at 4, U.N. Doc. A/CN.4/5 (1949).

tional Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Each iteration renders its own unique interpretation, shifting the term's scope to include modern conceptions of what so shocks the conscience that it must be called a crime against humanity.³⁶

Today, the most commonly referenced definition is found in Article 7 of the Rome Statute. The enumerated acts that qualify as CAH include murder, extermination, enslavement, forcible transfer of population, torture, rape, persecution, enforced disappearances, apartheid, and “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”³⁷ To qualify, the crime must be “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”³⁸ This phrase, known as the “chapeau” of the Statute,³⁹ is further clarified in section 2(a), which explains that an “[a]ttack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.⁴⁰ The policy re-

36. See Marcus, *supra* note 7, at 271 (“While the case law of the ICTY and the ICTR has made significant strides toward defining the parameters, crimes against humanity remain in a state of flux, as evidenced by the difficulty experienced by the publicists at the Rome Conference in arriving at a satisfactory definition.”); see also Payam Akhavan & Mora Johnson, *International Criminal Tribunal for the Former Yugoslavia*, in *ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY*, *supra* note 15, at 555, 559 (“The definition of crimes against humanity found in Article 5 of the ICTY Statute is based on the Nuremberg Charter, but it incorporates enumerated acts such as imprisonment, torture, and rape, which were not included in the charter. Furthermore, while the Charter required that crimes against humanity be linked to an international armed conflict, the ICTY Statute also includes internal armed conflicts.”).

37. Rome Statute, *supra* note 12, art. 7, para. 1.

38. *Id.*

39. See Preparatory Committee for the International Criminal Court, Commentary Submitted by Switzerland on Article 7 of the Statute of the International Criminal Court, at 2 (1999), available at <http://www.iccnw.org/documents/3rdSesProposalArticle7.pdf> (referring to the aforementioned phrase as the chapeau, which outlines the general requirements of a statute).

40. Rome Statute, *supra* note 12, art. 7, para. 2.

quirement means that ad hoc actions or omissions by a government representative would not qualify. While Article 7's language expressly indicates that State actors are potential CAH perpetrators, whether the term "organizational" extends this crime to non-state actors is still being debated.⁴¹ However, careful drafters would not have included "or organizational policy" in addition to "State" policy had they not intended non-state actors to be reached in the proper circumstances, indicating a likelihood that non-state actors may qualify as perpetrators. The various elements of Article 7 will be considered in turn.

A. Actus Reus: *Actions and Omissions*

At first glance, the phrase "commission of an act" appears to preclude omissions from qualifying as an "attack" under the Rome Statute. This could in turn bar a CAH prosecution against government actors that fail to feed detainees or fail to alter famine-generating policies in spite of an awareness that they create widespread starvation. Yet the Elements of Crimes, a document drafted to assist judges in the interpretation of Articles 6, 7, and 8 of the Rome Statute,⁴² explicitly permits omissions to be tried as crimes against humanity: "Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack."⁴³ Drafters incorporated this language because "it was clear that a majority of delegations had concerns about a blanket requirement of action. Delegations did not want to exclude situations where a State or organization deliberately encouraged crimes through *inaction*. In essence, it was realized that there could indeed be a policy of encouragement without tangible action."⁴⁴

41. Thomas Obel Hansen, *The Policy Requirement in Crimes Against Humanity: Lessons from and for the Case of Kenya*, 43 *GEO. WASH. INT'L L. REV.* 1, 1 ("Given inconsistent case law and clear disagreement in the literature, crucial questions, such as whether non-state actors can commit crimes against humanity, remain unanswered.")

42. INTERNATIONAL CRIMINAL COURT, *ELEMENTS OF CRIMES I* (2011). The *ELEMENTS OF CRIMES* is not binding on judges.

43. *Id.* at 5 n.6.

44. Darryl Robinson, *The Elements of Crimes Against Humanity*, in *THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 57, 75 (Roy S. Lee ed., 2001).

In addition to the Elements of Crimes' explicit inclusion of omissions as a form of attack, international tribunals have prosecuted omissions as CAH. The Extraordinary Chambers in the Courts of Cambodia (ECCC) tried members of the Khmer Rouge for CAH for their failure to provide adequate food and medical attention to prisoners.⁴⁵ ICTR⁴⁶ and ICTY⁴⁷ prosecutors have likewise brought CAH charges against government officials for their failure to provide detainees with food, and judges from both tribunals have expressly noted omissions as a potential *actus reus* for a plethora of CAH charges.⁴⁸ Omissions unquestionably fall into the scope of crimes against humanity.

B. Mens Rea: Purpose, Knowledge, or Recklessness?

The *mens rea* requirement for CAH is less straightforward than the *actus reus* requirements discussed above, and appears

45. See, e.g., Co-Prosecutor v. Kaing Guek Eav *alias* Duch, Case No. 001/18-07-2007/ECCC/TC, Judgment (July 26, 2010) (convicting notorious prison chief "Duch" for crimes against humanity based on, *inter alia*, omitting to feed the prison population). The judgment details the conditions within the prison: "Food rations were extremely scarce and usually consisted of rice gruel, rice soup or banana stalk served twice a day. Guards would scoop the food from a bowl into mugs or plates and order the detainees in the common rooms to distribute it among themselves. Due to the scarcity of food, detainees resorted to eating insects that fell on the floor, for which they could be beaten if a guard saw them. Witness VANN Nath described being so hungry that if he had been offered human flesh, he would have eaten it." *Id.* ¶ 268.

46. See Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, ¶ 146 (May 21, 1999) (charging the accused with extermination for "imprisoning a large number of people and withholding the necessities of life which results in mass death").

47. See Prosecutor v. Nikolic, Case No. IT-94-2-I, Indictment, ¶ 24 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 4, 1994) (charging Nikolic with CAH under the "inhumane acts" category for failure to provide prisoners with adequate food).

48. Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence, ¶ 84 (Dec. 6, 1999) ("It can be any act or omission, or cumulative acts or omissions, that cause the death of the targeted group of individuals."); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 8 (Sept. 2, 1998) (holding that either an act or omission may constitute a crime against humanity); Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶ 389 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004) ("The *actus reus* of the crime of extermination consists of any act, omission or combination thereof which contributes directly or indirectly to the killing of a large number of individuals.").

to be in a state of flux. The Rome Statute's Article 30 indicates that the attack must be committed with intent and knowledge,⁴⁹ but at least one ICTY chamber—and arguably the ECCC as a whole—have relied upon a recklessness standard.⁵⁰ This ambiguity renders it difficult to assign the crime a single *mens rea*. Plausible arguments could be made for purpose, knowledge, or recklessness. For example, several enumerated acts in the Rome Statute's CAH provision demand that acts or omissions intentionally further widespread or systematic crimes, signaling a purpose standard.⁵¹ However, as David Marcus notes, “[i]ntent is defined in such a way as to become blurred into knowledge, so that the ICC effectively requires only the latter.”⁵² This becomes apparent when reviewing the ICC's Elements of Crimes, which asks for “intent, knowledge, or both.”⁵³

Unlike the ICC, international tribunals have designated *mens rea* thresholds that either explicitly or implicitly require recklessness or *dolus eventualis*.⁵⁴ *Dolus eventualis* indicates that

49. The Statute states that unless specified otherwise, an act must be committed “with intent and knowledge.” It continues on to say, “For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is *aware that it will occur in the ordinary course of events*.” Rome Statute, *supra* note 12, at art. 30 (emphasis added).

50. *Brđanin*, Case No. IT-99-36-T at ¶ 395 (“The *mens rea* standard required for extermination does not include a threshold of negligence or gross negligence: the accused’s act or omission must be done with intention or recklessness (*dolus eventualis*).”); see also *Duch*, Case No. 001/18-07-2007/ECCC/TC at ¶ 371 (July 26, 2010) (“The requisite intention to inflict inhumane acts is satisfied when the perpetrator . . . knew that the act or omission was likely to cause serious physical or mental suffering or a serious attack upon the human dignity.”). See *supra* Part III.B of this Note for analysis of the ECCC Tribunal’s potential recklessness standard.

51. The definitions of extermination, torture, forced pregnancy, persecution, and enforced disappearances of persons all include the idea of intent. Rome Statute, *supra* note 12, at art. 7 ¶ 2.

52. Marcus, *supra* note 7, at 274.

53. INTERNATIONAL CRIMINAL COURT, *supra* note 42, at 1.

54. International criminal law equates recklessness with *dolus eventualis*. See Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offenses*, 12 CRIM L.F. 291, 301 (2001) (suggesting that the Preparatory Committee on the Establishment of an International Criminal Court in a Compilation of Proposals seemed to view *dolus eventualis* and recklessness as substantially the same,

the act “is constituted by knowledge of a *possible* (as distinct from inevitable) outcome of one’s actions combined with a positive mental or emotional disposition towards it”⁵⁵ The ICTY Trial Chamber delivering the *Brđanin* verdict in 2004 unequivocally held that recklessness is an appropriate *mens rea* for CAH.⁵⁶ Scholars have likewise argued that recklessness suffices in CAH charges,⁵⁷ with one even interpreting the ECCC’s *mens rea* standard as falling “between negligence and recklessness.”⁵⁸ The ECCC has arguably embraced this *dolus eventualis* threshold, demanding that the defendant know the act or omission was *likely* to result.⁵⁹

although the author recognizes that some civilians may have viewed *dolus eventualis* as more akin to knowledge). While the majority of sources equate *dolus eventualis* with recklessness, there has been some argument as to whether it indicates “knowledge” in certain circumstances. Paul T. Smith, *Recklessness in Dolus Eventualis*, 96 S. AFR. L.J. 81, 83 (1979) (discussing cases where *dolus eventualis* involved arguably only “foresight of consequences”).

55. Greg Taylor, *Concepts of Intention in German Criminal Law*, 24 OXFORD J. LEGAL STUD. 99, 102 (2004) (emphasis added); see also Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgement, ¶ 39 (Int’l Crim. Trib. for the Former Yugoslavia July 29, 2004) (explaining that *dolus eventualis* indicates knowledge of a possible or potential outcome as analyzed in multiple jurisdictions).

56. Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgement, ¶ 395 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004) (“The *mens rea* standard required for extermination does not include a threshold of negligence or gross negligence: the accused’s act or omission must be done with intention or recklessness (*dolus eventualis*).”).

57. Marcus, *supra* note 7, at 271–79 (arguing that governments that implement policies which create famine, and continue these policies after learning of their famine-creating tendencies, are reckless and guilty of crimes against humanity under the “other inhumane acts” category); see 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*, 5 INT’L J. TRANSITIONAL JUST. 142, 152 (2011) (noting that the required *mens rea* for CAH can be either intent or recklessness).

58. Rehan Abeyratne, *Superior Responsibility and the Principle of Legality at the ECCC*, 44 GEO. WASH. INT’L L. REV. 39, 47 (2012).

59. Co-Prosecutor v. Kaing Guek Eav *alias* Duch, Case No. 001/18-07-2007/ECCC/TC, Judgement, ¶ 371 (July 26, 2010) (“The requisite intention to inflict inhumane acts is satisfied when the perpetrator had the intention to inflict serious physical or mental suffering . . . or knew that the act or omission was *likely* to cause serious physical or mental suffering or a serious attack upon the human dignity.” (emphasis added)). ECCC Law Article 5, which defines crimes for humanity, is silent on *mens rea*.

It is conceivable that this language indicates a recklessness standard.⁶⁰

Whether or not the ECCC's "likely to result" requirement indicates a recklessness standard depends on whether the word "likely" is closer to "possible" (reckless) or "practically certain" (knowing). "Likely" is virtually equidistant between "possible" and "practically certain," making it difficult to label "likely" as definitively fitting into one category over the other. This equivocal *mens rea* requirement is not isolated to the ECCC. In the ICTY's *Lukić & Lukić* judgment, the court states, "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."⁶¹ Similar to "likely," the word "probable" falls between "possible" and "practically certain." The mixed and at times confusing jurisprudence on CAH *mens rea* standards leaves the door open for prosecutions based upon recklessness standards. Given the *Brđanin* precedent and the ECCC ambiguity, a prosecutor in a future international or hybrid criminal tribunal could reasonably argue that international criminal law recognizes that right to food violations predicated upon recklessness may amount to a crime against humanity.

While the *mens rea* requirements are imprecise, one aspect of it is clear: CAH does not require specific intent.⁶² Specific intent refers to "those actions that must be done with some specified further purpose in mind."⁶³ As applied to genocide, for example, this means that the perpetrator acts with the ex-

60. DeFalco, *supra* note 57, at 152.

61. Prosecutor v. Lukić, Case No. IT-98-32/1-T, Judgment, ¶ 939 (Int'l Crim. Trib. for the Former Yugoslavia July 20, 2009) (emphasis added); *see also* Prosecutor v. Krnojelac, IT-97-25-T, Judgment, ¶ 132 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002) ("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.*" (emphasis added)).

62. INTERNATIONAL CRIMINAL COURT, *supra* note 42, at 5; Robinson, *supra* note 44, at 59.

63. SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 218 (2007).

press purpose of eradicating a particular population.⁶⁴ The lack of a specific intent requirement means that CAH does not require the actor to have intended the *exact* results that flowed from his or her actions. The ICTY illustrated this principle in *Tadić*, explaining that a CAH conviction does not “require either a concrete idea of the consequences or an ‘abominable attitude.’”⁶⁵ Only general intent, or the intention that your action will forward some broader outcome, is required.⁶⁶

C. *Widespread or Systematic*

Finally, the Article 7 chapeau also requires that the attack be “widespread or systematic.” Though the subjective nature of “widespread” creates ambiguity, interpretations from international tribunals provide (slightly) more precise parameters. The ICTR’s *Akayesu* judgment defined widespread as “massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.”⁶⁷ The ICC provided its own definition in 2007, which characterized widespread as pertaining to “the large-scale nature of the attack and the number of targeted persons.”⁶⁸

64. See Brittan Heller, *Noticing Genocide*, 116 YALE L. J. POCKET PART 101, 103 (2006), <http://yalelawjournal.org/images/pdfs/67.pdf> (“One element of the crime of genocide is *dolus specialis*, the specific ‘intent to destroy’ another group.”).

65. Prosecutor v. Tadić, Case No. IT-94-I-T, Opinion and Judgment, ¶ 657 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997) (citing Vol. I Entscheidungen des Obersten Gerichtshofes Für Die Britische Zone in Strafsachen, case 16, 60–62); see also Laurence Carrier-Desjardins, *The Crime of Persecution and the Situation in Darfur: A Comment on the Al Bashir Arrest Warrant Decision*, HAGUE JUSTICE PORTAL (Aug. 28, 2009), <http://haguejusticeportal.net/index.php?id=10761> (“[T]he Pre-Trial Chamber considered it particularly important to distinguish between the specific intent required for the crime of genocide and the specific intent required for crimes against humanity of persecution.”).

66. Robinson, *supra* note 44, at 61 (writing that a CAH charge “should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization”).

67. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 580 (Sept. 2, 1998); see also Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment and Sentence, ¶ 204 (Jan. 27, 2000) (using essentially the same language).

68. Prosecutor v. Ahmad Harun & Ali Kushayb, Case No. ICC-02/05-01/07, Decision on the Prosecution Application Under Article 58(7) of the Statute, ¶ 62 (Apr. 27, 2007).

Though neither *Akayesu* nor the ICC's test constructs a bright-line tipping point for the number of people who must be affected, the emphasis on large scale is clear. Systematic, on the other hand, indicates that the perpetrators designed the attack with precision. The ICC characterizes systematic as "the organised nature of the acts of violence and the improbability of their random occurrence."⁶⁹ A high degree of forethought distinguishes systematic from widespread.

The choice of "widespread *or* systematic" is telling: The disjunctive "or" demonstrates that either adjective in isolation qualifies an act or omission as a crime against humanity.⁷⁰ This means that as long as an attack is widespread, it need not incorporate pre-planned policies or strategies. Right to food violations that were not consciously engineered can thus still qualify as CAH under the "widespread" category as long as they meet other CAH criteria. This disaggregation of CAH prerequisites does not erase the requirement of a government policy, but it does advance the idea that an "attack" does not have to be centrally planned.

In sum, current international criminal law jurisprudence demands that a crime against humanity be (1) an act or omission, (2) of widespread or systematic nature, (3) undertaken pursuant to a state or organizational policy, and (4) carried out with intent, knowledge, or even with reckless disregard of the consequences. When State action meets all of these criteria and simultaneously breaches ICESCR obligations, right to food violations can rise to the level of CAH.

IV. LINKING BREACHES OF THE ICESCR TO CAH

Though CAH charges involving starvation and malnourishment have not been explicitly framed as right to food or right to health violations, that is precisely what they are. When a court convicts a defendant for *depriving* a population of something, this illustrates its belief that there is some inherent *right* to that good. Even if tribunals do not articulate CAH charges involving food deprivation as ESR violations, this does

69. *Id.*

70. Robinson, *supra* note 44, at 63; *see also* Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence, ¶ 68 (Dec. 6, 1999) (establishing that a CAH "requires that the attack be either of a widespread *or* systematic nature and need not be both").

not undercut the fact that courts view access to food, water, and medical care as a right.

While the majority of CAH charges target civil and political rights violations, international tribunals reveal an increasing proclivity to try ESR breaches as crimes against humanity. The growing inclusion of ESR violations stems from the elastic definition of CAH. The precise meaning of CAH “has not yet settled into its final form. Its nature, scope, application, and legal elements are still somewhat unsettled.”⁷¹ The Rome Statute drafters believed the term’s fluidity would account for progressive development that would capture previously unimagined crimes of such magnitude.⁷² This indicates that drafters intended CAH to be interpreted in light of modern norms. In particular, the insertion of “other inhumane acts” highlights the drafters’ desire for flexibility. As one ICTY chamber explained, “other inhumane acts” was “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.”⁷³ Thus, even if a particular act or omission has never been prosecuted or explicitly defined as a crime against humanity, it is by no means precluded from being characterized as one in the future.

Those who would not include widespread or systematic starvation as a crime against humanity may point to the Rome Statute’s *travaux préparatoires*: The Rome Conference rejected efforts to enumerate “modern” violations like mass starvation, economic embargoes, and terrorism within Article 7.⁷⁴ However, this was likely the result of an assumption that such atroc-

71. M. Cherif Bassiouni, *Revisiting the Architecture of Crimes Against Humanity: Almost a Century in the Making, with Gaps and Ambiguities Remaining—the Need for a Specialized Convention*, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 43, 56 (Leila Nadya Sadat ed., 2011); see also Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, 81 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans, and Burgenthal) (“The substantive content of the concept of crimes against humanity . . . is undergoing change.”).

72. Robinson, *supra* note 44, at 57.

73. Prosecutor v. Kuprešić, Case No. IT-95-16-T, Judgment, ¶ 563 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

74. Schabas, *supra* note 34, at 213; Herman von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 79, 102–03 (Roy Lee ed., 1999).

ities would fit under the umbrella of other enumerated acts.⁷⁵ Including mass starvation would prove redundant in the same way that specifying a particular method of murder like “mass shootings” would be; since mass starvation is easily subsumed under other categories, express mention would prove superfluous.

Of the acts cataloged by the Rome Statute as a CAH, three are particularly amenable to supporting charges based upon right to food violations. Prosecutors may charge persons who commit widespread right to food violations with persecution, extermination, and other inhumane acts under the Rome Statute. Within these categories, precedent reveals that “omissions” are an appropriate *actus reus*, that recklessness is an emerging *mens rea* standard, and that famine is not the only right to food violation amenable to prosecution. The following subsections will consider the aforementioned categories’ application to right to food violations.

A. *Persecution*

The Rome Statute defines persecution as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”⁷⁶ Persecution stands apart from other crimes against humanity in that it requires “specific intent,” meaning that the perpetrator targeted members of a particular national, ethnic, political, or religious group.⁷⁷ As noted by the ICTY Trial Chamber in *Krnjelac*, violation of fundamental rights amounting to persecution can take various forms, and there is no comprehensive list of acts that qualify.⁷⁸ Among other things, international tribunals have tried defendants for persecution based upon “destruction of property or means of subsistence, destruction and damage of religious or educational institutions, unlawful detention of civilians, harassment, humiliation and psychological abuse, [and] violations of political, social, and

75. Von Hebel & Robinson, *supra* note 74, at 103 (explaining that “mass starvation” “likely fall[s] under the categories ‘murder,’ ‘extermination,’ or ‘other inhumane acts’”).

76. Rome Statute, *supra* note 12, art. 7, para. 2.

77. See DAVID L. NERSESSIAN, GENOCIDE AND POLITICAL GROUPS 155 (2010) (distinguishing persecution as a crime requiring a heightened *mens rea*).

78. Prosecutor v. Krnjelac, IT-97-25-T, Judgment, ¶ 433–34 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002).

economic rights.”⁷⁹ There is nothing radical about prosecuting widespread food or medical treatment deprivations—otherwise cast as right to food and right to health abuses—as persecution. The ICTY, ICTR, and ECCC have all tried defendants for persecution for withholding food or medicine from populations under their control.⁸⁰

In spite of these patterns, not nearly enough has been done to hold government leaders accountable for ESR violations that qualify as persecution under the CAH framework. Though food shortages generate from a complex web of political, economic, and environmental factors,⁸¹ “famines are easy to prevent if there is a serious effort to do so.”⁸² Chronic malnutrition is arguably more difficult to prevent due to its wider dispersal, but widespread starvation associated with malnutrition is likewise preventable if the government puts forth a concerted effort.⁸³ Well-publicized indices like the Global Hunger Index provide readily accessible information regarding malnutrition rates within state borders,⁸⁴ which undermines a government’s ability to claim there is no “knowledge” that their

79. Schabas, *supra* note 34, at 215.

80. See *Prosecutor v. Nikolic*, Case No. IT-94-2-I, Indictment, ¶ 24 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 4, 1994) (accusing Nikolic of crimes against humanity for depriving detainees of adequate food and providing living conditions that threatened their health and welfare). Similarly, one example of extermination given by the ICTR is “[i]mprisoning a large number of people and withholding the necessities of life which results in mass death.” *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Judgment, ¶ 146 (May 21, 1999). See *infra* Part IV.C for a discussion of the *Duch* case, demonstrating the ECCC’s willingness to criminalize food and medical care deprivation as CAH.

81. See FRANCIS M. DENG & LARRY MINEAR, *THE CHALLENGES OF FAMINE RELIEF: EMERGENCY OPERATIONS IN THE SUDAN* 38 (1992) (describing the complex roots of hunger).

82. Amartya Sen, *Democracy as a Universal Value*, J. DEMOCRACY, July 1999, at 3, 7; see also John Osgood Field, *Introduction*, in *THE CHALLENGE OF FAMINE: RECENT EXPERIENCE, LESSONS LEARNED* 1, 1 (John Osgood Field ed., 1993) (“Famine is preventable in an interconnected world of plenty.”).

83. See CHRONIC POVERTY RESEARCH CTR., *THE CHRONIC POVERTY REPORT 2004-2005*, at v (2005), available at http://www.chronicpoverty.org/uploads/publication_files/CPRI_ReportFull.pdf (“Such deprivation and suffering exists in a world that has the knowledge and resources to eradicate it.”).

84. For example, Burundi, Eritrea, and Haiti are labeled as having “extremely alarming” hunger rates. INTERNATIONAL FOOD POLICY RESEARCH INSTITUTE, *GLOBAL HUNGER INDEX 5* (2012), available at <http://www.ifpri.org/publication/2012-global-hunger-index>. Considering the Global Hunger In-

policies engender widespread starvation and hunger. Because leaders have the ability to avert famine and the majority of starvations, those who consciously choose not to do so are either recklessly, knowingly, or perhaps even intentionally fomenting extensive suffering, and should be prosecuted for CAH under the persecution subheading accordingly.

1. *Persecution in Somalia*

Somalia's recent food crisis exemplifies a right to food violation that rises to a crime against humanity under the persecution subheading.⁸⁵ In 2011, famine swept across southern Somalia, inciting a mass exodus of Somali nationals into neighboring states.⁸⁶ The number of Somalis crossing daily into Ethiopia—which suffered from the most severe drought the Horn of Africa had seen in sixty years,⁸⁷ yet was not struck by an accompanying famine⁸⁸—reached into the thousands before dropping off precipitously.⁸⁹ Though it would be tempting to attribute this decline to increased food inside state borders, the World Food Programme's Giammichele De Maio hypothesized a grimmer explanation: those left inside were too emaciated to reach refugee camps.⁹⁰

But this conjecture was perhaps even less disturbing than the reality on the ground. Al Shabab, the militant group controlling the afflicted region, actively blocked Somalis from escaping across the border into refugee camps or reaching government-held Mogadishu, instead placing them into canton-

dex's high profile, these governments cannot, therefore, claim to be unaware that their policies contribute to continued starvation and malnutrition.

85. Because Somalia has not ratified the Rome Statute, the ICC would not have jurisdiction absent a Security Council referral.

86. Mark Tran, *UN Declares Famine in Somalia*, *GUARDIAN* (July 20, 2011), <http://www.guardian.co.uk/global-development/2011/jul/20/un-declares-famine-somalia>.

87. *Id.*

88. The climatic conditions endured by the Somalis were also seen in Ethiopia and Kenya, yet, as Ed Carr put it, "famine stops at the Somali border." Kenny, *supra* note 10.

89. Joshua Hersh, *Somalia Famine: Aid Workers Report Fewer Refugees Making It to Food Supplies Safely*, *HUFFINGTON POST* (Sept. 28, 2011), http://www.huffingtonpost.com/2011/07/29/somalia-famine-aid-workers_n_913369.html.

90. *Id.*

ment camps.⁹¹ This only compounded the effects of their previous actions, which had provoked famine in the first place: One year earlier, Al Shabab expelled aid organizations in an effort to purge the region of all things Western.⁹² By the time they relaxed aid restrictions, the famine had not only spiraled out of control, but few western organizations were enthused at the prospect of returning to an area where the fundamentalist group had executed forty-two aid workers between 2008 and 2009.⁹³ Ten million Somalis went hungry,⁹⁴ and an estimated 50,000 to 100,000 people starved to death in a matter of months.⁹⁵ Half of the starvation deaths were children.⁹⁶

Al Shabab's actions directly caused tens of thousands of deaths and fit easily within the parameters of persecution as defined by the Rome Statute.⁹⁷ The organization intentionally committed a widespread attack against a civilian population that it knew would cause great suffering. Its actions combined more traditional forms of persecution (physically arresting their countrymen who were in search of food) with reckless pursuit of policies that brought about widespread death and suffering (evicting aid organizations in the face of ongoing drought). With such a large number of deaths and pervasive suffering, the "widespread" element of CAH is easily met. The systematic policy element is likewise present. Arresting the fleeing masses and expelling NGOs and IGOs, the only reliable sources of food inside Somali borders, were both undertaken pursuant to group policy. Special intent would prove the

91. Jeffrey Gettleman, *Somalis Waste Away as Insurgents Block Escape from Famine*, N.Y. TIMES, Aug. 2, 2011, at A1.

92. *Id.*

93. Kenny, *supra* note 10.

94. *Somali Islamists Maintain Aid Ban and Deny Famine*, BRITISH BROADCASTING COMPANY (July 22, 2011), <http://www.bbc.co.uk/news/world-africa-14246764>.

95. Katharine Houreld, *Somalia Famine Response Too Slow, Thousands of People Died Needlessly: Report*, HUFFINGTON POST (Jan. 18, 2012), http://www.huffingtonpost.com/2012/01/18/somalia-famine-response_n_1212799.html.

96. *Id.*

97. Of course, this assumes that either 1) Al Shabab can be considered a state actor, or 2) the term "organizations" does in fact subject non-state actors to CAH requirements. However, even if Al Shabab were deemed an occupying power rather than a state organ, the organization could nevertheless be held to task for its human rights violations under the Geneva Conventions.

most difficult attendant circumstance to establish; though Al Shabab targeted Somali nationals for placement in cantonment camps to avoid international embarrassment,⁹⁸ it is hard to gauge whether this persecution was based upon nationality, political, or religious affiliation. Nevertheless, this crime against humanity is also a textbook violation of Somalis' rights to food and health, to say nothing of the innumerable other human rights violations that one could assign to Al Shabab. When a perpetrator knowingly violates ESRs to the extent that it brings about widespread death, suffering, or injury, such actions constitute a crime against humanity.

2. *Persecution in Palestine*

Israel's treatment of Palestinians provides another example of ESR violations that rise to the level of persecution.⁹⁹ In 2002, Israel began constructing a wall inside West Bank borders, purportedly as "a defensive measure, designed to block the passage of terrorists, weapons and explosives into the State of Israel."¹⁰⁰ However, the wall's placement "deep *inside*" Palestine, rather than along the Israeli-Palestinian marchlands, indicated that the move was one of aggression.¹⁰¹ In addition to detaching over 15% of its land and 270,000 Palestinians from the remainder of the West Bank territory, the wall "has severely negative consequence for hundreds of thousands of Palestinians, notably unprecedented disproportionate and dis-

98. See *Somali Islamists Maintain Aid Ban and Deny Famine*, *supra* note 94 (explaining that Al Shabab did not want to be "seen as people who oversaw a large-scale humanitarian disaster").

99. If widespread death had resulted, extermination would also have been an appropriate charge. Similar to Somalia, establishing jurisdiction in the ICC would be difficult absent a Security Council referral.

100. Israeli Ministry of Defense, *The Israel Ministry of Defense and the Israel Defense Forces (IDF) Have Completed the First Stage of the Security Fence Project, Israel's Security Fence*, *on Time*, ISRAEL'S SECURITY FENCE (July 31, 2003), <http://www.seamzone.mod.gov.il/Pages/ENG/news.htm> (under "News Briefs," click on the hyperlink for the relevant date in order to expand the text).

101. AMNESTY INTERNATIONAL, ISRAEL AND THE OCCUPIED TERRITORIES: THE PLACE OF THE FENCE/WALL IN INTERNATIONAL LAW 4 (Feb. 19, 2004), *available at* <http://www.amnesty.org/en/library/asset/MDE15/016/2004/en/36f9d952-d634-11dd-ab95-a13b602c0642/mde150162004en.pdf> ("The fact that for the most part the fence/wall runs and is planned to run deep *inside* the West Bank, and not *between* Israel and the Occupied Territories, indicates that it is not, as claimed by the Israeli authorities, designed only [as a defensive measure].").

criminationary restrictions on their movements within the Occupied Territories and other violations of their fundamental rights, including the right to work, to food, to medical care, to education, and to an adequate standard of living.”¹⁰² These calculated ESR deprivations combine the requisite ingredients for persecution under CAH: There was a clear state policy to deprive a group of their fundamental rights, and the actions were directed against a group by virtue of their identity. The acts also constituted clear violations of the ICESCR.

The International Court of Justice (ICJ) agreed. Issuing an Advisory Opinion in response to a request from the U.N. General Assembly, the Court affirmed that the ICESCR was applicable in the Occupied Territories, that the wall was “tantamount to *de facto* annexation,”¹⁰³ and that it “impede[d] the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights.”¹⁰⁴ In addition to violating the ICESCR, the ICJ noted that Israel breached the Fourth Geneva Convention and the ICCPR.¹⁰⁵

When the wall construction is viewed in conjunction with more recent Israeli acts targeting Palestinians, it is hard to deny that these systematically designed series of actions amount to CAH. A blockade instituted in 2006, for instance, prevented food, fuel, medicine, and construction material from entering the Gaza Strip, leading human rights groups to accuse the Israeli government of “collectively punishing” Palestine.¹⁰⁶ As Israel tightened its grip around Gaza, National Geo-

102. *Id.* at 3, 6.

103. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 184 (July 9).

104. *Id.* at 192.

105. *Id.* (noting that Israeli action violated both the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War and the liberty of movement protected by the ICCPR).

106. AMNESTY INTERNATIONAL, *GAZA BLOCKADE—COLLECTIVE PUNISHMENT 5* (2008), available at <http://www.amnesty.org/en/library/asset/MDE15/021/2008/en/6300b18f49de11dd-9394-c975c4bd488d/mde150212008eng.pdf>; *Israel/Egypt: Choking Gaza Harms Civilians*, HUMAN RIGHTS WATCH (Feb. 18, 2009), <http://www.hrw.org/en/news/2009/02/18/israeleypt-choking-gaza-harms-civilians> (quoting Human Rights Watch researcher Fred Abrahams as saying, “Israel’s major military operation destroyed many lives and dramatically worsened Gaza’s humanitarian crisis. Security concerns do

graphic reported that the government “banned the importation of nearly everything that would have allowed Gazans to live above a subsistence level.”¹⁰⁷ In 2008, the Israeli government wrote a position paper that calculated how many calories per day each Gazan would need to survive.¹⁰⁸ Fixing the figure at 2,279 calories, the Israeli Defense Forces (IDF) cut back the number of food trucks entering Gaza accordingly, decreasing the number of entrants from 400 to 106 per day.¹⁰⁹ Accusations surfaced that the real figure fell far below 106, with the IDF permitting entry to as few as 67 trucks each day.¹¹⁰ According to a diplomatic cable, Israel told American officials that its actions were designed to keep the Gazan economy “on the brink of collapse.”¹¹¹ Today, two-thirds of Gaza’s economy is operated through underground tunnels designed to avoid Israeli blockades,¹¹² and “for the majority of Gazans, the tunnels remain the lifeline.”¹¹³ This underscores excessive stringency and sweeping impact of the Israeli blockade.

Israel’s ICESCR violations constitute an archetypal case of persecution under Article 7 of the Rome Statute. The deprivation of food was systematically planned, pursuant to state policy, intentionally carried out, and targeted a group based upon national identity. This example also demonstrates that breaching the right to food, which the ICJ found that Israel had in fact done by constructing the wall, does not have to amount to famine or withholding food from prisoners to reach the status of CAH. By cutting food imports down below the calculated

not justify the collective punishment of 1.5 million people by keeping out the aid and supplies they desperately need.”).

107. James Verini, *The Tunnels of Gaza*, NAT’L GEOGRAPHIC, Dec. 2012, at 29, 42.

108. *Israel Counted Calories in Gaza Blockade Study*, FORWARD ASS’N (Oct. 17, 2012), <http://forward.com/articles/164421/israel-counted-calories-in-gaza-blockade-study/>.

109. *Id.*

110. Jonathan Cook, *Israel’s Starvation Diet Formula in Gaza and the Expansion of the ‘Dahiya Doctrine’*, MONDOWEISS (Oct. 24, 2012), <http://mondoweiss.net/2012/10/israels-starvation-diet-formula-in-gaza-and-the-expansion-of-the-dahiya-doctrine.html>.

111. *Israel Pushed Gaza to ‘Brink of Collapse’: Wikileaks*, NBC NEWS (Jan. 5, 2011, 12:48 PM), http://www.msnbc.msn.com/id/40926651/ns/us_news-wikileaks_in_security/t/israel-pushed-gaza-brink-collapse-wikileaks/.

112. Verini, *supra* note 107, at 51.

113. *Id.* at 65.

daily minimum number of calories that would sustain the Palestinian population, the Israeli government intentionally aimed to generate undernourishment throughout the Palestinian territories. Because persecution envelops both death and suffering, mass starvation deaths do not have to result—it is enough to demonstrate the actions caused large-scale anguish. If a prosecutor could establish individual responsibility in certain government leaders, there would be little trouble establishing these series of events as CAH.

B. *Extermination*

The Rome Statute defines extermination as “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.”¹¹⁴ Extermination is similar to persecution, but differs in two significant aspects. First, extermination—whether by physical violence or by inflicting conditions upon a group that will inevitably lead to death—must extinguish a segment of the targeted population.¹¹⁵ Persecution, by contrast, is not restricted to actions that cause death. Second, extermination does not demand the special intent of targeting a group based on religious, ethnic, or national grounds.¹¹⁶

As alluded to above, Stalin was guilty of orchestrating perhaps the most notorious famine in history, killing between six

114. Rome Statute, *supra* note 12, art. 7, para. 2. This definition could be interpreted as requiring only an *attempted* extermination. International tribunals, however, have defined extermination in such a way that requires actual achievement of the extermination. See, for example, the ICTR’s definition in *Prosecutor v. Seromba*, Case No. ICTR-2001-66-A.

115. *Prosecutor v. Ntakirutimana & Ntakirutimana*, Case No. ICTR-96-10 & ICTR-96-17-T, Judgment and Sentence, ¶ 813 (Feb. 21, 2003); see also *Seromba*, Case No. ICTR-2001-66-A, Judgment, ¶ 189 (Mar. 12, 2008) (defining extermination as “any act, omission, or combination thereof which contributes directly or indirectly to the killing of a large number of individuals”). There is no pre-determined figure that constitutes “large-scale.”

116. NERSESIAN, *supra* note 77, at 155. However, this does not apply to the ICTR, which did require the mass murders to be undertaken against members of a particular group. The ICTR defined extermination as “killing persons, or causing persons to be killed, during mass killing events as part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds.” *Seromba*, Case No. ICTR-2001-66-A, at ¶ 101.

and seven million Ukrainians¹¹⁷ in a deliberate attempt to crush the population's resistance to farm collectivization.¹¹⁸ Also known as the Holodomor famine—Ukrainian for “extermination by starvation”—the tragedy began when Stalin purposefully demanded exorbitant grain quotas that left millions so utterly bereft of food that “[s]tarving peasants consumed domestic animals, including dogs and cats, together with various food surrogates like tree buds, weeds, and herbs. Some resorted to cannibalism, and dug up human corpses and the carcasses of dead animals.”¹¹⁹ These gruesome scenes unfolded as the U.S.S.R., which confiscated the Ukrainian harvest, exported food to the rest of the world.¹²⁰ Stalin's role in generating the famine was integral, as “[he] was not only well informed about the famine, [but] was its chief architect and overseer.”¹²¹ This massive violation of the right to food fits underneath the extermination subheading, as the Soviets first commandeered the Ukrainians' agricultural output and then prevented emergency food aid with the intention of destroying the “insubordinate” population. The European Parliament recognized Holodomor as a crime against humanity in 2007.¹²² This is perhaps the most clear-cut example of an ESR violation qualifying as CAH: The systematic (and widespread) right to food violation was engineered to inflict conditions that would decimate a population. Because Stalin did so with the intention of eradicating Ukrainians, this CAH falls under the extermination subheading.

C. *Other Inhumane Acts*

The catchall term capping Article 7 criminalizes “[o]ther inhumane acts of a similar character intentionally causing

117. *Revelations from the Russian Archives: Ukrainian Famine*, LIBRARY OF CONGRESS (July 22, 2010), <http://www.loc.gov/exhibits/archives/ukra.html>.

118. Laura Sheeter, *Ukraine Remembers Famine Horror*, BRITISH BROADCASTING COMPANY (Nov. 24, 2007), <http://news.bbc.co.uk/2/hi/europe/7111296.stm>.

119. Roman Serbyn, *Ukraine (Famine)*, in *ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY*, *supra* note 15, at 1055, 1059.

120. *Id.*

121. *Id.*

122. European Parliament Resolution, *supra* note 14. It is worth noting that the EU Declaration is not based on international criminal law or individual responsibility, so its understanding of CAH is slightly different than it would be in a tribunal.

great suffering, or serious injury to body or to mental or physical health.”¹²³ Drafters incorporated this expansive terminology to account for the impossibility of delineating each and every act and omission that could possibly constitute a crime against humanity.¹²⁴ However, because they feared that this open-ended phrasing might violate *nullum crimen sine lege*,¹²⁵ the drafters incorporated the phrase “of a similar character” to narrow the likelihood of dissimilar acts being charged under this statute.¹²⁶ The special intent requirement does not apply to “other inhumane acts,” meaning that the act or omission does not have to be targeted against a group on national, eth-

123. Rome Statute, *supra* note 12, art. 7, para. 1. Courts have stated that they will not apply blanket requirements on “other inhumane acts” but will determine each potential case according to its own merits. *See* Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, ¶ 151 (May 21, 1999) (writing that whether acts or omissions qualify as “other inhumane acts” will depend upon whether they “constitute a serious attack on human dignity,” and will be determined on a “case-by-case basis”); Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶ 544 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (“Ultimately, the question of whether any particular act . . . constitutes inhuman(e) treatment, is a question of fact to be judged in all the circumstances of the particular case.”).

124. Robinson, *supra* note 44, at 106–07; *see also* Schabas *supra* note 34, at 215 (describing how the Rome Statute attempts to deal with the ambiguity of the phrase “other inhumane acts” by limiting them to those acts that are similar to acts qualifying as crimes against humanity and also intentionally cause great suffering, or serious injury to body or to mental or physical health).

125. *Nullum crimen sine lege* refers to the principle that a person should not be held liable for an act unless the conduct had already been declared criminal at the time it was committed. *See* JONATHAN LAW & ELIZABETH A. MARTIN, A DICTIONARY OF LAW (7th ed. 2009), available at <http://www.oxfordreference.com/view/10.1093/acref/9780199551248.001.0001/acref-9780199551248-e-2643>.

126. Robinson, *supra* note 44, at 107. At the same time, it could be argued that the term “of a similar character” brings very little objectivity to the interpretation. This line of argument has been put forward by M. Cherif Bassiouni, who argues that the category “other inhumane acts” violates the principle of *nullum crimen sine lege*. *See* M. Cherif Bassiouni, “Crimes Against Humanity”: *The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT’L L. 457, 478 (1994) (noting the problems that the ambiguity of the phrase “raises with respect to legality”); *see also* M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS. 9, 15 (1996) (stressing the need to clarify the ambiguity in the definition of CAH).

nic, political, or religious grounds.¹²⁷ International tribunals have recognized a host of behaviors that fall into the category, including forced public nudity,¹²⁸ pillaging property,¹²⁹ forcible transfer,¹³⁰ forced marriage,¹³¹ imprisonment in inhumane conditions,¹³² and mutilation.¹³³

“Other inhumane acts” is perhaps the most viable way that ESR violations can be criminalized under the CAH umbrella. The expansive language permits an array of acts or omissions to qualify, and because there are myriad ESR violations that governments may commit with the knowledge that widespread suffering will probably result, the category’s flexibility renders it an appropriate fit. Depriving detained populations of food has become a commonly prosecuted “other inhumane act[].”¹³⁴ For example, the ECCC recently convicted ex-Khmer Rouge prison commissioner Kaing Guek Eav (better known as “Duch”) for CAH under the “other inhumane acts”

127. See *Persecutions on Political, Racial and Religious Grounds*, CENTRE D’OBSERVATION DE LA JUSTICE INTERNATIONALE TRANSITIONNELLE, [http://www.cojite.org/tl_files/cojite/content/Concepts%20Cles/Persecutions%20\(persecutions\).pdf](http://www.cojite.org/tl_files/cojite/content/Concepts%20Cles/Persecutions%20(persecutions).pdf) (last visited Oct. 1, 2013) (listing persecution as the only enumerated act that requires specific intent).

128. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 697 (Sept. 2, 1998).

129. Matthew Lippman, *Crimes Against Humanity*, 17 B.C. THIRD WORLD L.J. 171, 201 (1997).

130. *Prosecutor v. Stakić*, Case No. IT-97-24-A, Judgment, ¶ 317 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006).

131. *Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL-04-16-T, Judgment, ¶ 703 (June 20, 2007).

132. *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Judgment, ¶ 209 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001).

133. *Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-T, Judgment and Sentence, ¶¶ 303–316 (May 16, 2003).

134. See, e.g., *Prosecutor v. Nikolic*, Case No. IT-94-2-I, Indictment, ¶ (Int’l Crim. Trib. for the Former Yugoslavia Nov. 4, 1994) (including “providing inadequate food” under a charge of inhumane acts); see also *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Judgment, ¶ 146 (May 21, 1999) (finding that extermination charges under CAH may include “[i]mprisoning a large number of people and withholding the necessities of life which results in mass death”). Food deprivation is also an omission that may be criminalized under other international laws, such as a war crimes charge under the Geneva Conventions or charges under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. While these present viable alternatives to a CAH prosecution under certain circumstances, they will not be discussed here.

subheading, *inter alia*, for omitting to provide prisoners with food and medical treatment.¹³⁵ In this case, “[t]he Accused acknowledged that the deprivation of adequate and sufficient food was deliberate and meant to debilitate the detainees in order to maintain control over the prison population, prevent riots and facilitate the generation of confessions.”¹³⁶ While the tribunal concluded Duch’s omissions were intentional, the court’s *mens rea* threshold explicitly included knowledge¹³⁷ and could arguably be interpreted as recklessness. The *actus reus* (omitting food rations), *mens rea* (intent), and attendant circumstances (this represented the policy of the Khmer Rouge, and was both systematic and widespread practice) were all present to secure a CAH conviction based upon starvation.

The ECCC’s mandate and the *Duch* case each highlight an evolving norm in the application of international criminal law to ESR violations. First, *Duch* reinforces the appropriateness of omissions being tried as CAH. The defendant was convicted for failing to take an affirmative step, in this case providing adequate sustenance. Second, the ECCC’s mandate demonstrates that it is possible to hold a defendant accountable under a recklessness standard. While it is difficult to determine with certainty whether “likely” (the ECCC standard) is closer to “possible” (recklessness) or “practically certain” (knowledge), the indeterminate language means lawyers have increasing opportunities to argue that a *dolus eventualis* standard is appropriate. Many have argued that the ECCC standard is indeed recklessness,¹³⁸ and as demonstrated by the

135. Co-Prosecutor v. Kaing Guek Eav *alias* Duch, Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶¶ 268, 273 (July 26, 2010). The Court explained that “[f]or an inhumane act to be established, it must be proved that the victim suffered serious harm to body or mind, and that the suffering was the result of an act or omission of the perpetrator.” *Id.* ¶ 368.

136. *Id.* ¶ 269.

137. *See id.* ¶ 371 (“The requisite intention to inflict inhumane acts is satisfied when the perpetrator had the intention to inflict serious physical or mental suffering or to commit a serious attack upon the human dignity of the victim, or knew that the act or omission was likely to cause serious physical or mental suffering or a serious attack upon the human dignity.” (emphasis added)); *see also supra* Part III.

138. For examples of recklessness used as the *mens rea* standard, see Marcus, *supra* note 7, at 274 (“[C]urrent international criminal law supports the *mens rea* requirement of . . . recklessness for a second-degree famine crime.”); DeFalco, *supra* note 57, at 152 (stating that a *mens rea* of at least

ICTY's 2004 *dolus eventualis* standard in *Brđanin*, the ever-changing CAH jurisprudence may be headed in that direction.

V. ESR VIOLATIONS AS CAH IN LIGHT OF EMERGING NORMS

If these emerging norms solidify, many government leaders who intentionally, knowingly, or recklessly pursue such policies will be vulnerable to CAH charges based upon widespread or systematic ESR deprivations. This is not to advocate charging all leaders with CAH for the persistence of any amount of malnutrition within their borders. Rather, this is to say that the relatively small number of repeat offenders who continually pursue policies that engender starvation and hunger must be held accountable. Eighty percent of stunted children live in just twenty countries,¹³⁹ demonstrating the concentration of right to food violations in a small number of States and reinforcing the causal link between poor governance and extensive hunger. These governments are undoubtedly aware that their policies create unnecessary suffering, yet continue with policies that produce hunger.¹⁴⁰

While some possible indictees would be the usual suspects—authoritarian government leaders presiding over low income States—others are less obvious. For example, in spite of India's status as a rising power with a vibrant democracy, Indians endure extremely high rates of malnutrition and starvations that result from chronic food deprivation.¹⁴¹ A barrage of statistics attest to this sad reality: An estimated 5,013 Indian children starve to death *every day*, comprising one-third of the

recklessness is required for inhumane acts as CAH); Abeyratne, *supra* note 58, at 47 (describing how Additional Protocol I to the Geneva Conventions of 1949 required a *mens rea* between negligence and recklessness for violations).

139. *Hunger Statistics*, WORLD FOOD PROGRAMME, <http://www.wfp.org/hunger/stats> (last visited Oct. 2, 2013).

140. See SAVE THE CHILDREN, A LIFE FREE FROM HUNGER 62 (2012), available at <http://www.savethechildren.org.uk/sites/default/files/docs/A-Life-Free-From-Hunger-UK-low-res.pdf> ("For example, some governments in Africa have maintained tariffs that inflate food prices during the drought season while failing to develop regional and national food reserves, thus exacerbating the food crisis.").

141. Lauren Birchfield & Jessica Corsi, *The Right to Life Is the Right to Food: People's Union for Civil Liberties v. Union of India & Others*, 17 HUM. RTS. BRIEF, no. 3, 2010, at 15, 15.

world's total childhood starvations;¹⁴² half of the country's children are malnourished;¹⁴³ two-thirds of the women are anemic;¹⁴⁴ and India falls into the "alarming" category of the Global Hunger Index.¹⁴⁵

These disquieting figures stand in stark contrast to what might be expected from the world's second fastest growing economy.¹⁴⁶ Lack of political will accounts for India's failure to meet its right to food obligations. Despite the government's promises to roll out a food security bill that would potentially alleviate much of the hunger, progress has stalled.¹⁴⁷ This is due in no small part to an intra-government clash between India's executive and judicial branches. Prime Minister Manmohan Singh has allowed tens of thousands of tons of food to rot in storage—enough to feed nearly 200,000 people for one month¹⁴⁸—while the daily starvation death toll reaches into the thousands. When the Indian Supreme Court responded to a Public Interest Litigation lawsuit by instructing the government to distribute 17.8 million tons of food that were "in imminent danger of rotting," Prime Minister Singh

142. Devinder Sharma, *Starvation Deaths in India*, INDIAN HEALTH FRONT (Sept. 10, 2010), <http://indianhealthfront.wordpress.com/2010/09/10/starvation-deaths-in-india/>.

143. Right to Food Campaign, Statement on the PM's Observation on the Supreme Court, Made in Editors' Conference on 6th September, 2010 (Sept. 8, 2010), *available at* www.righttofoodindia.org/data/rtf_campaign's_statement_on_primer_minister's_observation_on_sc.pdf.

144. *Id.*

145. *Academics Bemoan Poor Ranking of India in Global Hunger Index*, THE HINDU (Aug. 5, 2013), <http://www.thehindu.com/news/cities/Tiruchirapalli/academics-bemoan-poor-ranking-of-india-in-global-hunger-index/article4991752.ece>.

146. *India Still Second Fastest Growing Economy: Chidambaram*, THE HINDU (July 27, 2013), <http://www.thehindu.com/business/Economy/india-still-second-fastest-growing-economy-chidambaram/article4959820.ece>.

147. Ashwin Parulkar, *The Big Letdown of the Food Security Bill*, WALL ST. J. (Oct. 18, 2012, 9:00 AM), <http://blogs.wsj.com/indiarealtime/2012/10/18/the-big-letdown-of-the-food-security-bill/>.

148. Chamberlain, *supra* note 5. When asked why he would not distribute the grains, Singh responded that "an estimated 37 percent live below poverty line. How can free food be given to so many?" Arunachalam Vaidyanathan, *PM Takes on Supreme Court over Free Grain Order*, NDTV (Sept. 7, 2010), <http://www.ndtv.com/article/india/pm-takes-on-supreme-court-over-free-grain-order-50026>. This apathetic response indicates that Singh believes that if he cannot feed *everyone*, he will not obey Supreme Court orders to feed *anyone*.

accused the Court of crossing into legislative territory.¹⁴⁹ Singh further contended that distributing rations to the impoverished would “destroy[] any incentives for farmers to produce.”¹⁵⁰ The Court retorted that their directive was an order, not a suggestion.¹⁵¹

While this right to food battle was being waged in the marble halls of government, reporters chronicled the desperation felt amongst the majority of the population. Vignettes like village elders stabbing children in the stomach with hot pokers to “cure” their distended stomachs remain frighteningly common.¹⁵² In the Indian context, not only has “the executive. . . failed to ensure that the rights of people are protected,” but “[t]he Prime Minister’s concern seems to be more towards expanding the reach of the corporates rather than protecting the livelihoods of more than 60% of our population who depend on agriculture.”¹⁵³ Even members of India’s Parliament have decried this as “criminal neglect.”¹⁵⁴ Though some have argued that the Indian government is blameless because of the high cost of alleviating poverty,¹⁵⁵ this argument conflates the cost of poverty alleviation with the cost of preventing mass starvations. It further ignores the possibility of shifting spending priorities to food.¹⁵⁶

149. Chamberlain, *supra* note 5.

150. *Id.*

151. *Id.* It should be noted that the Indian Supreme Court boasts an admirable track record when it comes to protecting ESRs.

152. *Id.* (“The child will scream loudly as the flesh begins to blister. . . . The more the child screams, the happier everyone will be, because the villagers of Mirgitand in India’s Jharkhand state believe the only way they can “cure” the distended stomachs of their famished children is by branding them with pokers. . . . Even though some children have died, the villagers continue because the alternative—providing enough nutritious food to sustain their children or paying for medical treatment—is simply not an option.”).

153. Right to Food Campaign, *supra* note 144.

154. *As Crops Rot, Millions Go Hungry in India*, EXPRESS TRIB. (July 2, 2012), <http://tribune.com.pk/story/402357/as-crops-rot-millions-go-hungry-in-india/>.

155. J.P., *Feast and Famine: Demography and Development*, ECONOMIST (Nov. 14, 2012), <http://www.economist.com/blogs/feastandfamine/2012/11/middle-income-countries-and-fighting-poverty>.

156. For example, India spends over \$36 billion on their military annually. Laxman K. Behera, *India’s Defence Budget 2011-12*, INST. FOR DEFENSE STUD. &

When faced with the immediate threat of death and suffering, an executive who pursues a line of policy while knowing that it will probably lead to thousands of deaths should be tried for a crime against humanity. Prime Minister Singh's failure to feed his population when there is a surplus of available food, with full knowledge that the omission will probably lead to needless widespread death, constitutes an attack against the population. This right to food violation simultaneously contravenes the UDHR, ICESCR, and evolving jurisprudence on CAH. When weighed against the magnitude of other actions and omissions criminalized as CAH, surely allowing thousands of people to starve to death on a daily basis while literally allowing tons of food to rot must likewise be criminalized.

VI. CONCLUSION

Analyzing the relationship between ESR violations and CAH reveals an evolving state of affairs. Cases like *Duch*, *Rutaganda*, and *Nikolic* demonstrate that omitting to provide food or medical care is an appropriate *actus reus* in CAH jurisprudence. Less established is the necessary *mens rea*: While the action or omission itself must be intentional, conventional wisdom says the results must be known to the perpetrator. Yet there is increasing room to allow for a reckless *mens rea*, as revealed by cases like *Britanin* and the ECCC's vague wording which has been interpreted as a recklessness standard.¹⁵⁷ Finally, the ICJ's recent Advisory Opinion on the Israeli wall points to an increasing willingness to condemn right to food violations that do not amount to famine. A right to food violation that induces slow but steady starvation or large-scale hunger may be characterized as a crime against humanity as long as it meets other appropriate criteria. Whether starvation unfolds over one month or one year should be immaterial.

To date, there have been no CAH prosecutions in international courts for reckless government policies that create widespread hunger outside of the prison context. The constancy of chronic malnutrition renders it less attention-grabbing, and thus less likely to attract the notice of prosecutors or media,

ANALYSIS (Mar. 7, 2011), http://www.idsa.in/idsacomments/IndiasDefenceBudget2011-12_lkbehera_070311.

157. DeFalco, *supra* note 57, at 152; *see also* Abeyratne, *supra* note 58, at 47 (arguing that the ECCC *mens rea* is recklessness or even negligence).

than violent crimes. Yet hunger claims more lives and leaves more destruction in its wake than many acts and omissions that have been tried as CAH. As David Marcus rightly argues, “[t]hose who deliberately or recklessly starve their own citizens through systematic human rights violations commit crimes against humanity and should no longer go unpunished.”¹⁵⁸

This lack of accountability fosters continued ESR violations. Twentieth century leaders like China’s Mao Zedong, the Kims of North Korea, Ethiopia’s Haile Selassie, and Nimeiri of Sudan have all committed tragic right to food violations that washed away an untold number of lives without any meaningful international reprimand. Government actions and omissions literally mean life or death for millions. While it is no panacea for hunger, criminalizing extreme food violations will provide a measure of much-needed accountability. As Paul Howe and Stephen Devereux write, “There remains an urgent need to establish global accountability structures for protecting the right to food and ensuring freedom from famine. . . . [One problem with current structures is] the absence of direct lines of accountability to affected populations.”¹⁵⁹ If an effective system is installed to guarantee that leaders answer for their murderous or otherwise vicious policies, millions of lives can be saved and an unquantifiable amount of suffering alleviated. Prosecuting right to food violations as CAH would be an incremental step, not a leap, in international jurisprudence, and it appears that we are headed that way.

158. Marcus, *supra* note 7, at 248.

159. Howe & Devereux, *supra* note 11, at 367; *see also* DE WAAL, *supra* note 7, at 152 (“The main challenge to using the law to deter famine crimes is enforcement. To date, no-one has ever been brought to court charged with the war crime of starvation or a similar charge Taking a more long-term view of war famines, the priority is to create effective deterrents, of which criminal liability is the most obvious and potentially the most effective option.”); SAVE THE CHILDREN, *supra* note 140, at 77 (recommending that governments be held accountable for preventing child malnutrition).