PART A: ARTICLES

ECONOMIC OPPRESSION AS AN INTERNATIONAL WRONG OR AS CRIME AGAINST HUMANITY

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Abstract

The International Criminal Court (ICC) was established to secure the punishment of persons who have committed the most serious crimes which 'deeply shock the conscience of humanity.' Yet what shocks the 'conscience of humanity' and what leaves people yawning, depends to a large extent on how mass media select and present facts. While millions of innocent human beings have been killed and maimed over the last century in armed conflict and by mass killing, the overwhelming majority of those who fall victim to adverse human agency are not injured by proximate violence but as a result of being compelled to live in subhuman conditions. Many more die silently each year of preventable hunger and disease than from widely reported direct violence. These silent deaths are mostly the result of decisions made, without malice, by individuals pursuing political or economic interests. Yet, intentionally or recklessly depriving even a single person of basic necessities may give rise to criminal penalties. Failing by gross negligence to ensure basic necessities to a dependent person may also give rise to criminal penalties. Causing death by deprivation of air, water, food, shelter or medicines may amount to murder. Compelling a person to live in inhumane or degrading conditions amounts to inhumane treatment, a violation of customary international law. Such conditions are defined herein as those which do not fulfil minimal humanitarian standards applicable to prisoners of war. The present article examines the conditions under which measures which subject a civilian population to inhumane or degrading conditions of life or perpetuate such conditions, constitute an international wrongful act that may reach the level of a crime against humanity under customary and conventional law.

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2 'There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) Is attributable to the State under international law; and (b) Constitutes a breach of an international obligation of the State.' (Article 3 of the Draft Articles on State Responsibility (ILC) of Part 1 so far provisionally adopted or proposed on second reading, International Law Commission, as of April 1999.)

3 'Crimes against humanity' are recognised as among the major international crimes under customary international law and under the Statutes of the ICTY, ICTY and the ICC.
1. INTRODUCTION

In his book *The Fire This Time*, former US Attorney-General Ramsey Clark lists various proposals for a fairer global order. Among these he proposes the adoption of ‘international law criminalizing all forms of economic exploitation of poor countries, including seizure and all forms of theft and waste of natural resources, strategic properties, and human labour and skills’.\(^4\) In an interview with *Los Angeles Times* on 22 February 1994 he further urged the adoption of ‘a convention to define economic oppression against a whole people as a crime against humanity’.\(^5\) Almost one-fourth of mankind lived at the turn of the last millennium in extreme poverty,\(^6\) a condition manifested by the lack of clean water, malnutrition, high rates of child mortality and morbidity, low life expectancy, illiteracy, perception of hopelessness and social exclusion.\(^7\) Extreme poverty is a social pathology, the result of human agency, not a condition that somehow befalls a population.\(^8\) Even when natural calamities cause temporary destitution, only deliberate human policies could result in maintaining this destitution.\(^9\)

Our moral blindness towards the inhumanity of extreme poverty – the main factor for epidemics and hunger and the breeding ground for civil war and genocide\(^10\) – was well encapsulated by the following observation from a UNDP report: ‘Torture of a single individual raises unmitigated public outrage. Yet the deaths of more than 30,000 children a day from mainly preventable causes go almost unnoticed’.\(^11\) Since civil war broke out in the Democratic Republic of Congo (DRC) in 1998 until November 2002, 3.3 million people are reported to have perished. ‘Most of the deaths are attributable to sickness and famine’.\(^12\) Yet the civilised world has chosen to look the other way regarding a conflict that ‘has taken more lives than any other since World War II and is the deadliest documented conflict in African history’.\(^13\) Mr. Stephen Lewis, the UN Secretary-General’s special envoy for HIV/AIDS in Africa, calls the lack of resources to fight the epidemic ‘mass murder by complacency’. He said that those who watched it unfold ‘with a kind of pathological

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\(^12\) Petersen, Kim, ‘Mass Murder by Complacency’, *Africa Forgotten*, 11 April 2003, at www.dissidentvoice.org/Articles4/Petersen_Africa.htm.

equanimity' must be held to account. ‘There may yet come a day’, he said, ‘when we have peacetime tribunals to deal with this particular version of crimes against humanity’. 14 According to ADT Research of New York, the three major US television networks’ evening news programme devoted a combined total of 39 minutes in 2003 to the worldwide catastrophe of AIDS. 15

These outrages are not solely the result of human complacency. We submit that racist attitudes, gross negligence, wilful blindness and recklessness are also involved. Whereas the ordinary citizen may not be aware of many of the ills that afflict remote nations, foreign secretaries and officials of international organisations are served daily notice regarding such conditions. Decisions to act or refrain from acting on the evidence are routinely made by public officials. 16 *Prima facie* evidence exists that causally links extreme poverty to policies which ensure a steady flow of resources from the poor to the rich, 17 withhold aid and credits to developing countries, 18 facilitate capital flight 19 and kleptocracy, 20 impose economic sanctions against vulnerable economies, 21 condone environmentally destructive policies 22 and induce governments to impose socially regressive policies. 23 Lack of access to land and water

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16 The most potent economic power, the United States, refuses to recognise that economic and social rights are ‘human rights’ and has not ratified the ICESCR. Most developed States have yet refused to support an Optional Protocol to the ICESCR, which would provide victims of violations of economic, social and cultural rights a quasi-judicial forum and thus, some minimal international protection.
21 The United States imposes at any time unilateral trade sanctions against numerous developing countries (see list at www.treas.gov/offices/eotfc/ofac/sanctions/index.html). UN sanctions have been imposed in the last decade against Iraq, the former Yugoslavia, Libya, Haiti, Liberia, Rwanda, Somalia, UNITA forces in Angola, Sudan, Sierra Leone, FRY (including Kosovo), Afghanistan and Eritrea and Ethiopia, practically all of them developing countries, some wretchedly poor. See www.un.org/Docs/sc/committees/INTRO.htm; Davidsson, Elias, *The Iraq Sanctions – An Annotated Chronology* (2002), at www.juscogens.org/jus/econsanc/chronology.pdf.
by a rural population, a situation perpetuated deliberately by government policies (often in furtherance of the interests of a landowners’ elite), may also constitute a primary causal factor for maintaining that population in extreme poverty.\(^{24}\)

Those who engage in oppressive policies are rarely moved by malice. Leaders of colonial expeditions who invaded African and Asian countries and enslaved millions of people claimed they wanted to ‘civilize the barbarians’.\(^{25}\) They sometimes invoked the Scriptures and claimed to have God on their side.\(^{26}\) Today powerful actors invoke elaborate economic theories to garb their decisions which cause or perpetuate poverty with a respectable veneer or claim to be moved by humanitarian concern for other nations’ well-being.\(^{27}\) Substantial analytic efforts are required to deconstruct the ideological assumptions underlying economic theories\(^{28}\) and translate euphemisms used by international financial institutions and the Security Council\(^{29}\) into ordinary language, in order to expose such policies’ inhumane consequences.

Economic oppression is an institutional form of onslaught though its practitioners are individual human beings who act by deliberate choice, not automatons ‘driven by historical forces’\(^{30}\) [or by ‘market forces’\(^{31}\)]. Such individuals typically attempt to avoid transparency, accountability, willfully neglect to predict the

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\(^{25}\) See, for example, Fischer-Tinté, Harald and Mann, Michael, Colonialism as Civilising Mission, Cultural Ideology in British India, Anthem Press, March 2004.


\(^{27}\) George Bush, however, invokes religious principles in support of attacking other countries. A Google search on the string ‘God Bush War’ yields numerous articles on that subject.


\(^{30}\) The expression ‘historical forces’ is based on a particular interpretation of Marxist theory. Examples: ‘This barbaric project of the US ruling elite – driven by historical forces of which the Bush administration is utterly oblivious – is opposed by the vast majority of the world’s population’ (World Socialist web site at www.wsws.org/articles/2003/jul2003/confj22.shtml); or ‘For Karl Marx, the basic determining factor of human history is economics (…) Confrontation between [the wealthy classes and the labor classes] is unavoidable because those classes are driven by historical forces beyond anyone’s control’ at http://atheism.about.com/library/FAQs/religion/blrel_marx_econ.htm.

\(^{31}\) See, for example, Levenstein, Margaret C., Economic History: What Does it Have to Teach Us?, 18 April 1999, at www.econ.yale.edu/alumni/reunion99/levenstein.htm.
likely adverse consequences of their acts and then try to close their minds on reported adverse consequences.\textsuperscript{32}

The very remoteness between the actors and the victims facilitates wilful blindness and recklessness.\textsuperscript{33} To counteract such tendencies, a regime of accountability, including the imposition of penalties for grossly negligent and reckless conduct, should be established.

The purpose of the present study is to determine what legal principles can be invoked with regard to severe socio-economic deprivation or oppression and at what point such deprivation or oppression would amount to a crime against humanity.

2. UNLAWFULLY DEPRIVING INDIVIDUALS OF BASIC NECESSITIES

Basic necessities are those resources needed for individuals to maintain their physical and mental integrity. Such resources may be material resources, services or access opportunities. Depriving individuals of basic necessities may cause physical or mental sufferings, material losses, physical or mental injury, or death. Such deprivation may constitute a statutory offence under national law, a human rights violation or a crime under international law, or a combination thereof. The term ‘deprivation’ here includes acts that cause shortages, impair access to basic necessities and services or create a deficient environment (such as depriving individuals of clean air). The term also extends to the maintenance of individuals in a state of deprivation.

2.1. Under Municipal Law

US courts have determined that depriving prison inmates of medical treatment or denying prisoners ‘the minimal civilized measure of life’s necessities’ may amount to ‘cruel and degrading punishment’, a statutory violation in the US that may give rise to liability.\textsuperscript{34} US courts\textsuperscript{35} and the High Court of Australia\textsuperscript{36} have also found that
individuals fleeing from *economic* persecution, including deprivation of work or social welfare rights on discriminatory grounds, should be granted asylum. Economic persecution was thus recognised as equally severe, for the purposes of granting asylum, as torture.

Denying prisoners ‘the minimal civilized measure of life’s necessities’ may be ‘sufficiently grave to form the basis of an Eighth Amendment violation’. In addition to this ‘objective component’ of this Statute, a violation may occur if prison officials impose inhumane conditions of confinement with a ‘sufficiently culpable state of mind’. The long duration of a cruel prison condition may make it easier to establish knowledge and hence some form of intent. When inhumane conditions were kept on, their duration might suggest ‘deliberate indifference’ to the needs of prisoners, characterised as ‘wantonness’ and this state of mind might give rise to the charge of culpability.

Justice Powell in *Wilson* concluded: ‘Whether one characterizes the treatment received by [the prisoner] as *inhumane conditions of confinement*, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the “deliberate indifference” standard articulated in *Estelle*. The Court also disagreed with the Respondents who held that ‘deliberate indifference’ was appropriate only in ‘cases involving personal injury of a physical nature’, and that a ‘malice standard’ should be applied in cases such as this, which ‘do not involve (...) detriment to bodily integrity, pain, injury, or loss of life’. The Court continued:

> [W]e see no significant distinction between claims alleging inadequate medical care and those alleging inadequate ‘conditions of confinement’. Indeed, the medical care a prisoner receives is just as much a ‘condition’ of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates. There is no indication that, as a general matter, the actions of prison officials with respect to these nonmedical conditions are taken under materially different constraints than their actions with respect to medical conditions.

The Supreme Court of India, linking the deprivation of basic necessities to the right to life, held that

> [a]n equally important facet of that right [to life] is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live.

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37 *Rhodes vs Chapman*, supra note 34.
40 *Wilson vs Seiter*, supra note 34.
41 *Idem* (emphasis added).
42 *Idem*.
43 *Olga Tellis vs Bombay Municipality Corporation*, [1985] 2 Supp SCR 51 (India); (1987) LRC (Const) 351 (Supreme Court of India), para. 2.1.
Even animals enjoy in some countries legal protection against the deprivation of food, drink, shelter, exposure to extremes of heat or cold and medical treatment, deemed in some quarters as ‘inhumane acts’. The existence of such laws demonstrates that the protection of living creatures against inhuman treatment is not based on reciprocal interests or on utilitarian considerations, but on the recognition that inhumane treatment is morally reprehensible.

2.2. As a Violation of the UN Charter

By acceding to the UN Charter, member States ‘pledge themselves to take joint and separate action in cooperation with the Organization’ for the promotion of: (a) higher standards of living, full employment, and conditions of economic and social progress and development; (b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. One of the purposes of the UN is to ‘develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace’. It follows that States which deprive a civilian population, either their own or that of another jurisdiction, of basic necessities, perpetuate such conditions by recklessness or gross negligence or contribute to such deprivation, violate their good faith obligations to promote higher standards of living and the universal respect for human rights.

2.3. As a Violation of Human Rights Law

The International Covenant on Economic, Social and Cultural Rights (ICESCR) contains numerous socio-economic provisions that State parties have pledged to ensure in a progressive manner, such as the right of everyone to an ‘adequate standard of living’, the right of everyone to enjoy the ‘highest attainable standard of physical and mental health’, the right of everyone to the ‘opportunity to gain his living by work’ and the right of everyone to education. While the obligation to ‘ensure’ these rights is of a progressive character, the correlative obligation to refrain from violating pre-existing standards of living and the other listed rights, is immediate. The Covenant also includes obligations regarding conduct that might affect third States, particularly the obligation to respect the right of self-determination of other nations and the imperative obligation to refrain from depriving a

44 See, for example, P.L. 2000, c.162, of the state of New Jersey, enacted on 7 December 2000 which threatens a fine or imprisonment for inhumane acts against animals, such as failing to provide an animal with necessary sustenance or protection (www.judiciary.state.nj.us/legis/civil/2000c162.htm).
45 UN Charter, Article 56.
46 Ibidem, Article 55.
47 ICESCR, Article 11.
48 Ibidem, Article 12.
49 Ibidem, Article 6.
50 Ibidem, Article 13.
51 Ibidem, Article 1(3).
people of its own means of subsistence. Such obligations arguably extend to economic policies pursued by States in their bilateral and multilateral relations.

In order to comply with the spirit and letter of the UN Charter, States are under a standing duty to exercise due diligence in their international relations in order not to cause violations of human rights in other jurisdictions, including violations of economic, social and cultural rights.

The International Covenant on Civil and Political Rights (ICCPR) also includes a number of provisions that relate to severe economic deprivation, particularly the right to life and the right not to be subjected to inhuman and degrading treatment. The obligations of States to respect these two rights is immediate and does not depend on their financial ability.

Common Article 5(1) to the ICCPR and the ICESCR declares that ‘[n]othing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or their limitation to a greater extent than is provided for in the present Covenant’. The Human Rights Committee relied on this provision to reject the interpretation of the Uruguayan Government that the obligation arising from the Covenant extends only ‘to all persons within its territory and subject to its jurisdiction’. The Committee found that the government had violated its obligations by having its agents commit violations in a neighbouring country. The Committee concluded that ‘it would be unconscionable to so interpret the responsibility under article 2 [of the Covenant] as to permit a Party to perpetrate violations of the Covenant in the territory of another State, which violations it could not perpetrate on its own territory.’

The UN Commission on Human Rights, for its part, adopted in 1995 a resolution castigating unilateral coercive measures by states which impede the full realisation of the rights set forth in the Universal Declaration of Human Rights and other international human rights instruments, in particular the right of everyone to a standard of living adequate for their health and well-being, including food and medical care, housing and the necessary social services.

52 Ibidem, Article 1(2).
53 Marianne Møllmann, in ‘Who Can Be Held Responsible for the Consequences of Aid and Loan Conditionalities? The Global Gag Rule in Peru and its Criminal Consequences’ (forthcoming in 2004 by Michigan University Women in Development Working Paper) series doubts, however, whether a consensus exists about the existence of such a duty. She writes: ‘Even if the UN Charter directs all members of the international community to respect and promote human rights, this directive is hardly “applied” extra-jurisdictionally in a consistent manner, nor would such an application easily be accepted. Indeed, the lack of remedies for transboundary abuses not covered by traditional international human rights and humanitarian law is at the root of the impunity problems mentioned in the introduction to this paper. More to the point, most of the situations in which international law has been applied extra-jurisdictionally have centered on crimes or abuses committed by someone other than the intervening state or entity.’
54 ICCPR, Article 6.
55 Ibidem, Article 7.
57 Commission on Human Rights Resolution 1995/45 (‘Human rights and unilateral coercive measures’).
Deprivation of basic necessities has been linked to inhuman or degrading treatment. Inhuman or degrading treatment occurs when the effects of a certain conduct constitute serious, or severe, mental or physical suffering or injury, provided the conduct was deliberate and the results foreseeable. Denying food, water, shelter or medical care to a person can cause as much suffering or injury to that person as a direct physical assault. How such effects are brought about is a secondary issue although it may have a bearing on gauging the severity of the suffering. To the extent that the State breaches the provisions of human rights covenants to which it is party or customary human rights, such as the prohibition of inhumane treatment, such violation entails the international responsibility of that State.\(^5\)

While victims of economic deprivation, short of those acts defined as crimes under international law, cannot yet obtain remedies at the global level,\(^5\) regional human rights courts and the UN Human Rights Committee have addressed violations of economic and social rights in the context of violations of civil or political rights such as inhumane or degrading treatment or when related to discriminatory practices.

In *Selçuk and Asker vs Turkey* the European Court of Human Rights recalled that ‘[i]ll treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 [of the Convention]. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim’.\(^6\) The petitioners, aged respectively 54 and 60 at the time, lived in the village of İslamköy all their lives. Their homes and most of their property were destroyed by security forces, depriving the applicants of their livelihoods and forcing them to leave their village. Taking into consideration ‘the manner in which the applicants’ homes were destroyed and their personal circumstances, it is clear [to the Court] that they must have been caused suffering of sufficient severity for the acts of the security forces to be categorised as inhuman treatment within the meaning of Article 3’.\(^6\)

The Court in *Selçuk* found a violation of Article 3 without having to demonstrate that applicants suffered any form of physical harm. The Court did not either deem it necessary to consider the motive of the action carried out by the security forces,\(^6\) for.

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\(^6\) *Ibidem*, para. 78.

\(^6\) *Ibidem*, para. 79.
such considerations are irrelevant to cases of ill treatment, which is prohibited in all circumstances, including those of a 'public emergency threatening the life of the nation'.

In *Tanko vs Finland* the European Commission of Human Rights stated that ‘where substantial grounds have been shown for believing that the person concerned would face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he is to be expelled’, expulsion might not be permissible under Article 3(3) of the Convention (emphasis added). The Commission did not ‘exclude that a lack of proper care in a case where someone is suffering from a serious illness could in certain circumstances amount to treatment contrary to Article 3’, that is to inhuman or degrading treatment.

In *López Ostra vs Spain*, the European Court of Human Rights stated that ‘severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely without, however, seriously endangering their health’. The Court, however, held that the ‘conditions in which the applicant and her family lived for a number of years [subject to fumes and nuisance] were certainly very difficult but did not amount to degrading treatment within the meaning of Article 3 [of the European Convention on Human Rights]’. In this case, the right to health (not directly judiciable under the European Convention on Human Rights) was adjudicated under the heading of the right to respect for his family life and home (Article 8 of the Convention).

In an important legal opinion, the African Commission on Human Rights elucidated the obligations of a government with regard to the right to health, shelter and food. It ruled that ‘[r]educed to their most basic level, however, the rights to health (the best attainable state of physical and mental health) and a healthy environment (general satisfactory environment favorable to their development) serve to prohibit governments from directly threatening the health and environment of their citizens’. With regard to the right to shelter, the Commission held that

[a]t a very minimum, [this] right obliges the (...) government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes. The State’s obligation to respect housing rights requires it, and thereby all of its organs and agents, to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to them in a way they find most appropriate to satisfy individual, family, household or community housing needs.

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63 Ibidem, para. 75.
64 See also *Parte ‘M’, R vs Secretary of State for Home Department Ex*, (1999) EWHC 479 (23 July 1999), Queens Bench Division (UK). The question revolved on the issue whether deportation of an AIDS patient to St. Kitts, where no appropriate treatment would have been available, constitutes inhuman treatment within the meaning of Article 3 of the European Convention on Human Rights.
66 Ibidem, para. 60.
68 Ibidem, para. 64.
A similar obligation of non-intervention related to the obligation of a government not to ‘destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent peoples’ efforts to feed themselves’.69 The decision of the Commission has direct application to economic sanctions, one of the forms of economic oppression, whereby States prevent a population from obtaining or using available resources to ensure their health, shelter and food security.

2.4. As a Crime under International Law

The Commentary to common Article 3 of the Geneva Conventions addresses the definition of humane treatment, and hence *inhumane treatment*, in the following terms:

> It would therefore be pointless and even dangerous to try to enumerate things with which a human being must be provided for his normal maintenance as distinct from that of an animal, or to lay down in detail the manner in which one must behave towards him in order to show that one is treating him ‘humanely’, that is as a fellow human being and not as a beast or a thing. The details of such treatment may, moreover vary according to circumstances – particularly the climate – and to what is feasible. On the other hand, there is less difficulty in enumerating things which are incompatible with human treatment. That is the method followed in the Convention when it proclaims four absolute prohibitions (...) No possible loophole is left; there can be no excuse, no attenuating circumstances.70

In the *Celebici* judgement, the Appeals Chamber of the International Criminal Tribunal on the former Yugoslavia (hereafter ICTY) relied on the finding of the Trial Chamber that ‘[b]y omitting to provide the detainees with adequate food, water, health care and toilet [facilities] Zdravko Mucic participated in the maintenance of the inhumane conditions that prevailed in the Celebici prison-camp’.71 He was convicted on fourteen counts of grave breaches of the Geneva Conventions and violations of the laws or customs of war, including ‘cruel treatment and wilfully causing great suffering or serious injury to body or health by virtue of the inhumane conditions in the camp’.72 The decision demonstrates that even when a perpetrator does not cause death or grievous injury to the victim, depriving a person of access to adequate food, water, health care and sanitation, may constitute an international crime.

In *Kayishema* and *Ruzindana*, the International Criminal Tribunal on Rwanda (hereafter ICTR) listed three elements of the crime of extermination. The first element of the crime is the participation of the accused, through acts or omissions ‘in the mass killing of others, or in the creation of conditions of life leading to the mass

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69 *Ibidem*, para. 68.


71 The ‘Celebici’ Case, ICTY Appeals Chamber, Case No. IT-96-21-A, Judgement of 20 February 2001, para. 744.

72 *Ibidem*, para. 807.
The Trial Chamber explained that the ‘creation of conditions of life leading to the mass killing’ of others include ‘the institution of circumstances that ultimately causes the mass death of others. For example: Imprisoning a large number of people and withholding the necessities of life which results in mass death; introducing a deadly virus into a population and preventing medical care which results in mass death’.

In his final report on the Question of Impunity of Perpetrators of Human Rights Violations, UN Special Rapporteur El Hadji Guissé concluded that ‘violations of economic, social and cultural rights could be declared international crimes that are consequently subject to the principles of universal jurisdiction and imprescriptibility.

2. TOWARDS A DEFINITION OF ECONOMIC OPPRESSION

Having established that, under certain conditions, depriving a single individual of basic necessities may constitute a tortuous or criminal offence under municipal law, a human rights violation under international law or a war crime, we will now turn towards adverse economic measures imposed collectively on a population, a conduct designated herein as economic oppression.

Oppression is defined in the Webster’s Dictionary as the ‘exercise of authority or power in a burdensome, cruel, or unjust manner’.

The expression economic oppression is not known as a legal term under national or international law. A world-wide web search on 3 December 2003 of the text string ‘definition of economic oppression’ yielded only a single article which examines this concept in the light of economic theory and the Old Testament. The author’s treatment does not elucidate the concept of economic oppression in the light of human rights norms.

The term oppression is sometimes used as a synonym for persecution, particularly with regard to discriminatory measures against religious or ethnic minorities. Policies affecting socio-economic rights are sometimes also referred to as ‘oppressive policies’. As the term oppression does not require the existence of a discriminatory intent (as persecution does), it will be retained here.
We propose two definitions of economic oppression, one giving rise to civil liability, the other to criminal liability.

(i) Economic oppression as an international wrong refers to acts which seriously impair a civilian population from enjoying any economic or social right

Comments:
(a) The term ‘international wrong’ gives rise, under the doctrine of State Responsibility, to the duty of the offending State to repair the wrong. It does not exclude, necessarily, civil liabilities that could be borne by private actors, such as corporations.
(b) ‘Acts’ refers to any administrative, legislative or executive measures or policies.
(c) ‘Seriously’ refers to the nature of the act, the severity of the impairment, its duration, the vulnerability of the affected population or a combination thereof.
(d) The expression civilian population means any group of persons who are neither engaged in combat nor are prisoners of war and who are targeted as a group.
(e) ‘Economic and social rights’ refer to such rights enshrined in the International Covenant on Economic, Social and Cultural Rights.

(ii) Economic oppression as a crime against humanity refers to deliberate measures adopted with the intent or knowledge that they will subject a civilian population to inhumane conditions of existence or perpetuate such conditions

Comments:
(a) Inhumane conditions of existence are defined, for the present purpose, as conditions of human existence below those applicable, under international law, to prisoners of war. Such conditions must demonstrate a minimum level of severity such as to be likely to cause serious, or severe, mental or physical suffering or injury, or death.
(b) The actor must have intended to engage in the conduct (‘deliberate measures’); additionally the actor must have either intended the consequences or been aware that his conduct is likely to cause or perpetuate these consequences in the ordinary course of events. Even if the ultimate goal of the actor is to build a new and just society, introduce a free market system or ensure international peace and security, an actor is deemed to have intended the adverse consequences of his acts, if he is aware that such consequences will be likely to occur in the ordinary course of events.

80 This definition of ‘civilian population’ is based on the definition provided by Article 50 of the Additional Protocol I.

81 The rights of prisoners of war are codified in Sections II and III of the Third Geneva Convention of 12 August 1949 (Convention (III) Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949). These rights extend to personal safety, hygiene, adequate living quarters, adequate and nutritional food, health care, access to sufficient potable water, clothing, underwear and footwear, bedding, access to medical care, right to exercise religious duties and opportunities to practice intellectual, educational and recreational pursuits, sports and games.

82 This formulation echoes, though not entirely, Article 30 of the Rome Statute (mens rea).
(c) The expression *civilian population* means any group of persons who are neither engaged in combat nor are prisoners of war and who are targeted as a group.

(d) The term *subject* means that the measures are taken without the informed consent of the respective population. The adverse conditions are *forced* upon the population.

The imposition of economic oppression includes both the initial act of creating inhumane conditions as well as measures intended or foreseeable to perpetuate such circumstances. When inhumane conditions of life are *precipitated* by natural calamities, the deliberate or reckless *perpetuation* of such conditions – including an unjustified failure to provide assistance – may amount to economic oppression, as defined herein.

The present article focuses primarily on economic oppression as a crime under international law which gives rise to criminal liability, leaving aside the vast issue of civil remedies.

### 3. THE PROHIBITION OF COLLECTIVE DEPRIVATION IN INTERNATIONAL LAW

Depriving individuals of basic necessities can take place individually or collectively. In the latter case, the effects may differ from person to person, depending on their status, personal assets, physical strength, age, and other circumstances. In case of collective deprivation, some individuals may even profit, for example, by engaging in black market. To gauge whether acts constitute unlawful collective deprivation, there must be a minimal culpable intent and a demonstrable harm.

Human rights law was meant to provide protection to direct victims of violations. However, indirect violations of economic and social rights, such as measures imposed in wholesale fashion on a population, may also constitute violations of human rights or of international humanitarian law. Below are examples of statutory rules that prohibit collective deprivation.

Common Article 1 to the ICCPR and the ICESCR stipulates an imperative prohibition against depriving a people of its own means of subsistence. Common Article 1(2), second limb, of the ICCPR and the ICESCR stipulates: ‘In no case may a people be deprived of its own means of subsistence’.

Collective punishment and related acts are prohibited under international humanitarian law. Article 50 of the Annex to the 1907 Hague Convention No. IV stipulates that ‘[n]o general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of acts of individuals for which they cannot be regarded as jointly and severally responsible’. Article 33 of the Fourth Geneva Convention of 12 August 1949 prohibits ‘[c]ollective penalties and likewise all measures of intimidation’. Collective punishments are also prohibited under Article 75(2)(d) of Additional Protocol I to the Geneva Conventions.

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83 This definition of ‘civilian population’ is based on the definition provided by Article 50 of the Additional Protocol I.
84 Common Article 1(2), second limb, of the ICCPR and the ICESCR stipulates: ‘In no case may a people be deprived of its own means of subsistence’.
85 Laws of War: Laws and Customs of War on Land (Hague IV); 18 October 1907, Annex.
Starvation is prohibited as a ‘method of warfare’ under the provisions of international humanitarian law. Starvation is regarded as ‘a weapon to annihilate or weaken the population’. The First Additional Protocol to the Geneva Conventions of 12 August 1949 prohibits

to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

The prohibition of starvation, as a means of warfare, exemplifies a statutory principle of international law that addresses a grievous form of economic deprivation, committed in the framework of armed conflict. Paust points out that the ‘deliberate starvation of civilians’ has been recognised as a war crime as early as in 1919. The Appeal Chamber of the International Criminal Tribunal on the Former Yugoslavia (ICTY) affirmed that it is possible to establish criminal responsibility for causing starvation. For starvation to constitute a war crime it must be committed wilfully and cause death or serious injury to body or health. A starvation policy may cause severe or even chronic malnutrition among young children, impairing their ‘physical and mental development’. The children ‘fail to reach their full genetic potential for physical and mental development and this leads to the effects of chronic malnutrition being passed from generation to generation’. Preventing access to drinking water is one of the forms of

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88 Ibidem, Article 54(1) and Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1977), Article 14.
89 Commentary to Article 54 of the Additional Protocol I, para. 2090, p. 653 (emphasis added).
90 Additional Protocol I, supra note 87, Article 54(2). According to the Commentary to Article 54 ‘the words “such as” show that the list of protected objects is merely illustrative. An exhaustive list could have led to omissions or an arbitrary selection. As the text reveals, the objects concerned are basically objects for subsistence. General protection of civilian objects follows from Article 52. However, it cannot be excluded that as a result of climate or other circumstances, objects such as shelter or clothing must be considered as indispensable to survival.’ (para. 2103); the Commentary also explains the inclusion of phrase ‘for the specific purpose of denying (...) the civilian population or (...) the adverse Party,’ as meaning that it is impermissible to ‘deprive the enemy State of such objects indispensable to the civilian population’ (para. 2107).
93 Additional Protocol I, supra note 87, Articles 54 and 85(3) read together.
95 Idem.
starvation.\textsuperscript{96} Denying a population supplies for water treatment would render useless water installations, a violation of international humanitarian norms foreseeable to cause epidemics and deaths.\textsuperscript{97} In the formulation of the Geneva Conventions of 12 August 1949 (echoed in the Statute of the International Criminal Court) when such policies would cause ‘serious injury to body or health’, they would amount to grave breaches of the Conventions.\textsuperscript{98}

Under the provisions of the Statute of the International Criminal Court, the act of ‘[i]ntentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival’ is a serious violation of the laws and customs of war.\textsuperscript{99} The formulation ‘depriving them of objects indispensable to their survival’ in the Statute elucidates the formulation of Article 54(2) of Additional Protocol I (1977).\textsuperscript{100}

Genocide, extermination as a crime against humanity, the policy of Apartheid, starvation as a means of warfare, are defined as crimes under both customary international law and under the Statute of the International Criminal Court. Such policy-driven measures share the common characteristic of being collective forms of onslaught, whereby instigators are not targeting particular individuals but entire groups. Genocide, extermination and Apartheid are essentially human rights violations while starvation and collective punishment are defined as violations of the laws of armed conflict, which constitute equally human rights violations. Whatever the legal regime, the value that such prohibitions attempt to protect is the respect for human integrity and dignity.

Economic oppression, while not yet defined, as such, as a statutory violation of international law, shares with the above acts the attribute of being a collective form of onslaught.

4. CAUSATION IN COLLECTIVE FORMS OF ONSLAUGHT

In order to establish responsibility for the adverse consequences of a policy, it is necessary to establish a causal link between the policy and the consequences. One of the contemporary sources for studying causation in cases of collective onslaught is the jurisprudence of the UN Compensation Commission established by Resolution

\textsuperscript{96} Article 54 of the Additional Protocol I, supra note 87, entitled ‘Protection of objects indispensable to the survival of the civilian population’ includes under the prohibition of starvation, attacks, destruction, removal or other methods of rendering useless objects indispensable to the survival of the civilian population, ‘such as (...) drinking water installations and supplies (...) whatever the motive...’


\textsuperscript{98} Article 50 of the First Geneva Convention; Article 51 of the Second Geneva Convention; Article 130 of the Third Geneva Convention; and Article 147 of the Fourth Geneva Convention.

\textsuperscript{99} Rome Statute, Article 8(2)(b)(xxv).

\textsuperscript{100} This formulation now explicitly covers acts listed under Article 54 of the Additional Protocol I as well as those in the ICRC Commentary to that article, such as depriving an ‘enemy State of such objects indispensable to the civilian population’ (emphasis added).

Complex questions of causation had to be dealt by panels of Commissioners, established by this Commission, whose task is to review and process claims.\(^\text{101}\) An example will suffice to illustrate the type of questions addressed by one of the panels:

Where the alleged cause of an injury or death was a road traffic accident that occurred while persons were departing from Iraq or Kuwait, the Panel considered the losses potentially attributable to Iraq because there was, depending on the circumstances of the case, a sufficiently direct causal link [to the invasion and occupation of Iraq]. Considerations related to the date and location of the accident, exactly how it happened, and whether Iraqi parties were involved in it.\(^\text{102}\)

More relevant to the question of economic oppression are the decisions of the Compensation Commission to honor ‘claims put forward for deaths or injuries that resulted from the lack of availability of proper medical facilities and treatment in Kuwait after 2 August 1990’.\(^\text{103}\) The rationale for honoring such claims was that as confirmed in United Nations reports, the level of health care in Kuwait was severely reduced and access to still-operating health care services was restricted as a consequence of the Iraqi occupation of the country.\(^\text{104}\)

Here the Commission linked specific harm to individual claimants with a general policy that affected the access to health care. The decisions of the Compensation Commission cover only civil remedies.

The question whether or not it is necessary, for the purpose of criminal prosecution, to demonstrate a proximate causation between the prohibited act and individual injuries in cases of massive deprivation has been addressed by international criminal tribunals. The tribunals established after World War II to try the leaders of the Axis powers did not require that a proximate causation be shown between political or administrative decisions and individual injury. The decision to convict these leaders was based on two main considerations: That these individuals possessed the requisite \textit{mens rea} to cause harm and that the harm caused by their decisions was massive, even if they could not know or predict the specific harm that would befall individual victims. When Adolf Eichmann was convicted by a Jerusalem court, the court found it sufficient to charge the defendant with causing ‘the deaths of \textit{approximately} half a million of the Jews of Hungary by means of their mass deportation to the extermination camp at Auschwitz and other places’.\(^\text{105}\) The conviction was based on his knowledge of the likely fate of the deported persons, even if he could not know the precise fate of each of them.

\(^{101}\) www.genevabriefingbook.com/chapters/uncc.html.


\(^{103}\) \textit{Idem}.

\(^{104}\) \textit{Ibidem}, pp. 223-224 (emphasis added).

The above reasoning was incorporated into subsequent instruments of international humanitarian law. Thus the following acts are punishable as war crimes if they cause death or serious injury to body or health: ‘Launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects’; and ‘launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects’. 106

Another class of acts, directly applicable to economic oppression, are those in which a State, a group of States or an international organisation induce the government of a third State to create or perpetuate inhumane conditions of existence for the population of that State in part or in whole. In that case the inducers do not directly oppress the population, 107 but engage in aiding, counselling or procuring the means for such oppression. The relative responsibilities of the external and domestic authors for the unlawful conduct must be determined in each case in the light of facts and of the specific rules applicable to secondary participation. 108 Alternately, external actors may be found to have acted in a grossly negligent way, which may or may not entail criminal liability.

5. ECONOMIC OPPRESSION IN THE LIGHT OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

The Rome Statute was drafted with particular emphasis on severe and/or massive acts of physical violence. Such acts are not typically committed by political leaders or public officers, though they may result from their policies, which remain often undeclared. Civilian decision-makers are not generally moved by specific intent to harm, even if their decisions cause massive injury. More typically they turn a blind eye to the consequences of their decisions or are simply reckless regarding the consequences.

Does the Rome Statute provide for the punishment of individuals who commit economic oppression, as defined herein? In order to answer this question, we will examine whether the constitutive elements of the crime of economic oppression can be accommodated within the Statute definitions of genocide or of murder, extermination or other inhumane acts, as crimes against humanity.

106 Article 85(3)(b) and (c) of the Additional Protocol I.
107 A detailed examination of this question was undertaken by Møllmann, loc.cit. (note 53).
108 Møllmann, ibidem, cites the decision of the US Court of Appeals for the Ninth District (2001:[9], [13]) which held that ‘aiding and abetting, as defined in international criminal law, is indeed relevant to the torts covered by the Alien Tort Claims Act, and noted that – in the Unocal Case – it had been sufficiently proven that Unocal were indirectly involved in the commission of the alleged crimes. Specifically the Court held that Unocal aided and abetted the Myanmar military in carrying out human rights abuses in connection with its oil pipeline project, since the company provided moral support and encouragement to the military with the knowledge that this support could and did lead to human rights violations.’ While the author acknowledges that this case addresses civil remedies she adds: ‘international criminal law standards for aiding and abetting are quite similar to domestic U.S. civil law (tort) standard for the same offense, and the latest Unocal ruling is therefore quite relevant to holding individuals responsible for transnational human rights violations.’
5.1. Economic Oppression as Genocide (Article 6)

For the purpose of the Rome Statute, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.109

It is well known that the crime of genocide requires the existence of a specific intent to destroy one of the listed categories as such. To the extent that inhumane conditions of life are imposed on a national, ethnic, racial or religious group, as such, with the intent to destroy this group in whole or in part, such oppressive conduct would amount to the crime of genocide, even if the aim had not been achieved. The determination of the existence of a specific intent does not depend on discovering declarations of intent by the alleged perpetrators who can be presumed to deny a genocidal intent. According to the jurisprudence of the International Criminal Tribunal on the Former Yugoslavia (hereafter ICTY), the criminal intent of genocide may be inferred from the circumstances.110

In addition to the general jurisdiction ratione personae of the ICC (as discussed below), the ICC has also jurisdiction, in respect of the crime of genocide, over persons who directly and publicly incite others to commit genocide.111

It is, however, rare that economic oppression, as such, is driven by a genocidal intent. More often economic oppression is informed by a reckless disregard to the adverse consequences of facially legitimate policies or by gross negligence.

5.2. Economic Oppression as a Crime Against Humanity (Article 7)

Crimes against humanity are policy-driven. Typically, their authors set in motion the chain of events that brings about the specific conduct of individual perpetrators who commit the acts falling within the definition of ‘crimes against humanity’. Indeed, unlike the common crime of murder for which the perpetrator is usually the only person responsible for that crime, ‘murder’ under ‘[crimes against humanity]’ is the product of some collective action.112

For the purpose of the Rome Statute a ‘crime against humanity’ means any of a number of listed acts ‘when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’.113 In the judgement of the ICTY (Kupreskic Trial) the Court affirmed that the ‘essence’ of crimes against humanity ‘is a systematic policy of a certain scale and gravity directed against a civilian population’.114

109 Rome Statute, Article 6.
110 ICTY, The Prosecutor vs Dusko Sikirica, Damir Dosen and Dragan Kolundzija – Case No. IT-95-8-T.
111 Rome Statute, Article 25(3)(c).
113 Rome Statute, Chapeau of Article 7(1).
114 ICTY, Trial Chamber, Prosecutor vs Zoran Kupreskic et al., Case No. IT-95-16-T, Judgement of 14 January 2000, para. 543.
To the extent that policies of deprivation are imposed on a civilian population, they would fulfil the general criteria of crimes against humanity. The expression ‘Attack directed against any civilian population’ is defined in the Statute as meaning ‘a course of conduct involving the multiple commission of acts (...) against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack’. The term ‘attack’ is not limited to violent acts. It extends to administrative and legislative measures imposed against a population without its consent, such as the imposition of apartheid and enslavement, which are also listed as crimes against humanity. We defined supra economic oppression as a crime against humanity when it is comprised of ‘measures committed with the intent or knowledge that they will subject a civilian population to inhumane conditions of existence or perpetuate such conditions.’ We will examine whether economic oppression could fall under the ambit of one or more of the following crimes against humanity: murder, extermination and other inhumane acts.

5.2.1. Economic Oppression as Murder (Article 7(1)(a))

Commenting on murder as an international crime, Cherif Bassiouni writes:

[C]ustomary practice of states, evidenced by international and national military prosecutions, reveals that murder is not intended to mean only those specific international killings without lawful justification. Instead, state practice views murder in its largo senso meaning as including the creation of life-endangering conditions likely to result in death according to reasonable human experience. This standard was used in war-related cases involving mistreatment of prisoners of war and civilians. He adds:

Notwithstanding the technical differences in the definitions of various forms of intentional and unintentional killing in the world’s major criminal justice systems, the widespread common understanding of the meaning of murder includes life-endangering conditions likely to result in death according to the known or foreseeable expectations of a reasonable person in the same circumstances.

Murder as a crime against humanity under the Rome Statute takes place when ‘[t]he perpetrator killed one or more persons’ and ‘when committed as part of a

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115 Rome Statute, Article 7(2)(a).
116 In Akayesu, para. 581, the ICTR noted that ‘an attack may (...) be non-violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in Art. 1 of the Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner’. Judgement and Sentence, Case No. ICTR-96-4-T.
118 Ibidem, p. 302
widespread or systematic attack directed against any civilian population, with knowledge of the attack.\textsuperscript{120} In a footnote attached to the Elements of Crime of murder it is added that ‘[t]he term “killed” is interchangeable with the term “caused death”. This footnote applies to all elements which use either of these concepts’.\textsuperscript{121} Such interpretation is consistent with the jurisprudence of the ICTY.\textsuperscript{122} Regarding the various forms of depriving life, Hart and Honoré write:

The notion of causing death is not of course confined to crude cases where the actor initiates changes in the victim’s body by introducing some foreign element; it also extends to cases where the actor shortens the victim’s life by depriving him of something needed by his organism for survival.\textsuperscript{123}

As long as an act causes the death of one or more persons, fulfils the \textit{mens rea} required for murder\textsuperscript{124} and is committed ‘as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’, it will amount to murder as a crime against humanity. Thus, for example, an act committed in the framework of a policy (systematic act) intended to deny to the inhabitants of a particular territory life-sustaining goods, with the awareness that this act will cause one or more deaths, would constitute murder as a crime against humanity.

\textbf{5.2.2. Economic Oppression as Extermination (Article 7(1)(b))}

Extermination has been recognised as a crime against humanity by Article 6 of the Nuremberg Charter;\textsuperscript{125} Article II(1) of Control Council Law No. 10;\textsuperscript{126} and Article 5 of the Charter of the International Criminal Tribunal for the Far East.\textsuperscript{127} It has also been included in the Statutes of the ICTY\textsuperscript{128} and of the

\textsuperscript{120} Rome Statute, Chapeau of Article 7(1) (crimes against humanity).
\textsuperscript{121} Elements of Crime, \textit{supra} note 119.
\textsuperscript{124} See, under paragraph 5.4, discussion of the \textit{mens rea} required for crimes against humanity.
\textsuperscript{125} Charter of the International Military Tribunal at Nuremberg, 8 August 1945, Article 6(c), at www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm.
\textsuperscript{127} Charter of the International Criminal Tribunal for the Far East at http://userpage.zedat.fu-berlin.de/~theissen/pdf/IMTFEStatute.PDF.
Extermination under the Rome Statute ‘includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population’. In order to amount to extermination, the conduct ‘constituted, or took place as part of mass killings of members of a civilian population’.

A large similarity exists between extermination and genocide. The first significant difference is that the crime of extermination under the Statute does not require that the group be targeted for destruction by virtue of its national, ethnical, racial or religious identity. It is sufficient to demonstrate that the particular population is targeted for destruction in whole or part.

The second difference to the definition of genocide is that extermination does not require an intent by the perpetrator(s) that the population be ‘physically’ destroyed. The word ‘physically’ is absent from the definition of extermination. This difference was reflected in the debate that took place on 30 June 2000 at the PrepCom. As reported:

The second point of discussion concerned the outcome of the crime, with some delegations strongly holding that death was not necessary, and that this crime could be, for example, the result of a biological crime preventing births. Other delegations were strongly of the opposite view. It was ultimately agreed that at least one death was necessary, but as a concession to those arguing against the ‘result’ position, the final text includes footnotes pointing out that the conduct can involve direct or indirect killing, and can cover the infliction of conditions such as deprivation of access to food and medicine, and that the initial act in a mass killing would be covered.

As the term extermination under the Statute is not construed by the PrepCom to mean an intention to physically annihilate a population or part thereof, it follows that extermination can involve both direct and indirect killings, such as by causing gross deprivation of life-essentials, with the required intent (the term mass killing(s) is nowhere defined). In this connection we note that for the crimes of enslavement, torture, persecution and apartheid, the Statute begins the definition of the crime by the word ‘means’, while for extermination the definition begins by the word ‘includes’, implying that acts ‘calculated to bring about the destruction of part of a population’ may take other forms.

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131 Rome Statute, Article 7(1)(b) and (2)(b).

132 Second element of the crime of extermination (Elements Of Crime, see infra note 164).

In Kayishema and Ruzindana, the ICTR elucidated the concept of extermination:

Having considered the above, the Chamber defines the requisite elements of extermination: The actor participates in the mass killing of others or in the creation of conditions of life that lead to the mass killing of others, through his act(s) or omission(s); having intended the killing, or being reckless, or grossly negligent as to whether the killing would result and; being aware that his act(s) or omission(s) forms part of a mass killing event; where, his act(s) or omission(s) forms part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.

The term ‘mass’, which may be understood to mean ‘large scale’, does not command a numerical imperative but may be determined on a case-by-case basis using a common sense approach. The actor need not act with a specific individual(s) in mind.

The act(s) or omission(s) may be done with intention, recklessness, or gross negligence. The ‘creation of conditions of life that lead to mass killing’ is the institution of circumstances that ultimately causes the mass death of others. For example: imprisoning a large number of people and withholding the necessities of life which results in mass death; introducing a deadly virus into a population and preventing medical care which results in mass death. Extermination includes not only the implementation of mass killing or the creation of conditions of life that leads to mass killing, but also the planning thereof. In this event, the Prosecutor must prove a nexus between the planning and the actual killing.

We note that the jurisprudence of the ICTR includes reckless and grossly negligent conduct as constitutive mental elements of the crime of extermination whereas the Rome Statute requires a higher culpable mind for the attribution of guilt. Bassiouni notes that Article 7 of the Rome Statute (extermination) does not ‘address the issue of imputed intent as the result of foreseeability, or imputed intent as the result of what should have been foreseeable (sic)’. It appears therefore that policies imposing economic hardship on a civilian population, including the creation of conditions conducive to malnutrition, disease, low life expectancy and high infant mortality could amount to extermination as a crime against humanity under the Rome Statute, only if it can be shown that the perpetrators were aware that massive deaths would ensue as the natural consequences of their acts. Policies of mass starvation by the Soviet regime in Ukraine, by the Ethiopian regime against secessionist Eritreans, by the Pol Pot

134 Kayishema and Ruzindana, supra note 73.
135 Ibidem, para. 144.
136 Ibidem, para. 145.
137 Ibidem, para. 146.
139 See further the discussion of intent in section 5.4.

5.2.3. Economic Oppression as ‘Other Inhumane Acts’ (Article 7(k))

The last sub-category of crimes against humanity under the Rome Statute is that of ‘other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health’. \footnote{Rome Statute, Article 7(1)(k).} This sub-category is meant to allow for the prosecution of crimes against humanity not listed in the Statute, but of a ‘similar character’ with regard to the other listed crimes against humanity. According to Rottensteiner the \textit{ejusdem generis} principle of interpretation limits ‘other inhumane acts [to] include only acts that are of a \textit{nature similar} to those listed before, such as murder, extermination, enslavement, deportation, and torture’. \footnote{Rottensteiner, \textit{loc.cit.} (note 92) (emphasis added).} Bassiouni suggests that the term ‘other inhumane acts’ be ‘interpreted in close analogy’ to the listed crimes. \footnote{Bassiouni, \textit{op.cit.} (note 112), p. 331.} Can massive deprivation that causes increases in morbidity rates, be classified as an ‘other inhumane act’ under the heading of a crime against humanity, with regard to the \textit{ejusdem generis} principle of interpretation?

The expression ‘of a similar character’ apparently refers only to crimes against humanity rather than to all the crimes under the jurisdiction of the Court. It is difficult, however, to compare the various crimes against humanity in view of determining what is a ‘similar character’. Among these crimes figure assault crimes, such as murder, extermination, torture and sexual violence, but also enslavement, deportation, imprisonment and apartheid, which do not necessarily entail proximate violence. There may be vast variations in the sufferings of the victims or the effects of the conduct. Nor is it obvious how to proceed by analogy in the light of so diverse acts and consequences.

How, for example, is it possible to compare a person’s loss of life, which destroys all life-projects, and an act of deportation, which could be temporary? A person’s life-project may be effectively destroyed by sexual violence but retained in spite of long imprisonment or even torture. \footnote{Nelson Mandela became President of South Africa in spite of years of imprisonment and \textit{Apartheid}.}

In order to construe meaningfully the expression ‘of a similar character’ it appears necessary to invoke the common denominator of all crimes against humanity, namely the recognition that such crimes constitute a widespread or systematic attack on individuals’ inherent humanity. Crimes against humanity are, in
the words of François de Menthon, a French prosecutor in Nuremberg a ‘crime against the human status’.146

The principle of humanity, formulated in various ways, derives from the inherent dignity of every human person, without distinction. The Commentary to common Article 3, of the four Geneva Conventions discusses the meaning of ‘humane’ treatment and thus, implicitly that of ‘inhumane’ treatment:

It would therefore be pointless and even dangerous to try to enumerate things with which a human being must be provided for his normal maintenance as distinct from that of an animal, or to lay down in detail the manner in which one must behave towards him in order to show that one is treating him ‘humanely’, that is as a fellow human being and not as a beast or a thing...147

The European Court of Human Rights has listed various factors that may affect the determination whether a certain act amounts to ill-treatment within the scope of Article 3 of the European Convention. The act must

...attain a minimum level of severity. (...) The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, the age and state of health of the victim.148

The following elements are constitutive of the concept of inhuman treatment:
1. The act (of commission of omission) requires a minimal dolus, including the intent to engage in the act and awareness of the likely consequences.
2. The act must cause serious, or severe, mental or physical suffering or injury.

It is therefore submitted that acts deemed ‘inhuman’ under customary international law, including those listed in Article 8(2) of the Rome Statute as ‘war crimes’,149 would amount to ‘other inhumane acts’ (as a crime against humanity under the Statute), if they cause great suffering, or serious injury to body or to mental or physical health, fulfil the general requirements of crimes against humanity (‘acts (...) committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.’) and are committed with the required culpable mind.

According to the Official Records of the first session of the Assembly of the States Parties (to the ICC), ‘[w]ith respect to mental elements associated with elements involving value judgment, such as those using the terms “inhumane” or “severe”, it

147 Commentary to common Article 3 of the Geneva Conventions of 12 August 1949.
148 Cited in: Delalic et al., para. 556, see supra note 122.
149 Francis Deng, representing the UN Secretary-General, wrote in his report Legal Aspects Relating to the Protection against Arbitrary Displacement (Commission on Human Rights, UN Doc. E/CN.4/1998/53/Add.1 of 11 February 1998): ‘There is wide consensus that the key provisions of the four Geneva Conventions and the two Additional Protocols have acquired the status of rules of general or customary international law binding on all States.’
is not necessary that the perpetrator personally completed a particular value judgment, unless otherwise indicated'.

We submit that acts intended or likely to subject a civilian population to inhumane conditions of existence would constitute inhuman treatment under customary international law and should be regarded as crimes against humanity if directed against any civilian population in a widespread or systematic manner.

Economic oppression, as defined in this study, would thus fall under the ambit of ‘other inhumane acts’ as crimes against humanity, when imposed against a civilian population with the awareness that it will, in the ordinary course of events, cause great suffering, or serious injury to body or to mental or physical health.

5.3. Jurisdiction Ratione Personae

Article 25 of the Rome Statute contains the main provisions on the jurisdiction ratione personae of the Court. The ICC has jurisdiction over natural persons who have committed a crime within the jurisdiction of the Court alone, jointly with others or through other persons, regardless whether those other persons are criminally responsible. It has also jurisdiction over persons who order, solicit or induce the commission of such a crime; persons who for the purpose of facilitating the commission of the crime, aid, abet or otherwise assist in its commission or its attempted commission, including providing the means for its commission; and persons who in any other way contribute to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.

In addition the Court has jurisdiction over a person who

[\textit{an\textit{tries to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions. However, a person who abandons the effort to commit a crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.}}]

Even a policy deemed criminal under the Statute that does not achieve the intended level of harm, because victims or their government successfully mitigated the effects, may amount to a criminal act under the Court’s jurisdiction, if the perpetrators did not completely and voluntarily give up the criminal purpose.

It appears thus that the provisions of the Rome Statute regarding its jurisdiction ratione personae, provided territorial jurisdiction is satisfied, are adequate to reach


\footnotesize{\textsuperscript{151}} Rome Statute, Article 30(2)(b).

\footnotesize{\textsuperscript{152}} Ibidem, Article 25.

\footnotesize{\textsuperscript{153}} Questions remain as to the jurisdiction of the Court over nationals of States who have not ratified the Rome Statute. See, for example, Paust, Jordan J., ‘The Reach of ICC Jurisdiction Over Non-Signatory Nationals’, \textit{Vanderbilt Journal of Transnational Law}, Vol. 1, 2000.}
persons responsible for economic oppression, as defined herein, including acts of abetting and aiding the commission of such a crime.\footnote{154}{On the meaning of abetting and aiding in international criminal law, see, \textit{inter alia}, Mollmann, \textit{loc.cit.} (note 53). See also \textit{The Prosecutor vs Anto Furundzija} – Case No. IT-95-17-1-T; Stern, Peter, \textit{New Standard for Aider and Abettor Liability under the Alien Tort Claims Act}, November 2002, at \url{www.globalpolicy.org/intjustice/atca/2002/1111precedent.htm}; Abrahams, Charles, \textit{The Apartheid Lawsuit}, at \url{www.cadtm.org/pages/english/abrahamslawsuitapartheid.htm}.}

\section{5.4. The Requisite Mens Rea}

\subsection{5.4.1. Principals}

Unless otherwise provided in the Rome Statute, Article 30 of the Statute lays down the required culpable mind (\textit{mens rea}, \textit{dolus}, \textit{Vorsatz}):

\begin{quote}
\begin{center}
a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. 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.\footnote{155}{Rome Statute, Article 30.}
\end{center}
\end{quote}

Unless otherwise specified, the perpetrator must possess both intent and knowledge. Such \textit{mens rea} requirement appears higher than that set down by customary international law.\footnote{156}{This is, \textit{inter alia}, the opinion of Antonio Cassese in: \textit{International Criminal Law}, Oxford University Press, Oxford, 2003, p. 176.} The existence of intent and knowledge ‘can be inferred from relevant facts and circumstances’.\footnote{157}{ICC, \textit{op.cit.} (note 150), item 3.}

According to the jurisprudence of the ICTY, based on the provisions of the Geneva Conventions of 12 August 1949 and their Additional Protocols, and on common and civil criminal law, ‘intent should be defined as including recklessness’, at least with regard to murder.\footnote{158}{\textit{Delalic et al.}, supra note 122.} In \textit{Kayishema and Ruzindana}, the ICTR extended \textit{recklessness} and \textit{gross negligence} to the required intent of committing extermination.\footnote{159}{Kayishema and Ruzindana, see supra discussion of extermination and note 120.}

Caesius argues that ‘[c]ertain of the substantive provisions [of the Rome Statute] (...) may be considered retrogressive in the light of existing law. These include (...) the omission of recklessness as a culpable state of mind at least for some crimes;\footnote{160}{It appears that Article 30 of the Rome Statute is to be interpreted differently whether the impugned acts are war crimes or crimes against humanity. According to the Report on the PrepCom held from 16 until 26 February 1999 (report compiled by Ferid Vergili and Matthias Neuner, at \url{www.iccnow.org/html/ics199903.html}): ‘On the controversial issue of the “concept of intent” [with regard to war crimes] many delegations said that Art. 30 includes recklessness (dt.: “Fahrlässigkeit”) or \textit{dolus eventualis} to use the terminology of civil law systems.’} and excessive breadth given to the defences of mistakes of law, superior order and self-defense.’\footnote{161}{Caesius, A., ‘The Statute of the International Criminal Court: Some Preliminary Reflections’, \textit{European Journal of International Law}, Vol. 10, No. 1, 1999, pp. 144-171 (Abstract).} Yet, another commentator disputes this reading of the \textit{mens rea}
provisions of the Rome Statute. According to an eminent scholar who attended the Rome Conference, a consensus existed at the time that the term ‘intent’ in Article 30 would cover recklessness as well as ‘wilful blindness’.162 The notion of ‘knowledge’, i.e. awareness by an actor of the foreseeable consequences of his conduct is included in Article 30(2). According to Cassese, this type of knowledge ‘coincides with recklessness’, namely the conduct of an actor who is aware of and consciously disregards a substantial and unjustifiable risk that a result described by a statute as an offence will occur in the ordinary course of events.163

Public leaders who adopt policies known to have severe adverse consequences, typically claim not to desire those adverse consequences and go often to great lengths to remain oblivious of the consequences, in order to claim lack of awareness.164 It would be unconscionable if the Court should decide to reject ‘recklessness’ as a sufficiently culpable mind for crimes against humanity, as this would effectively provide impunity for the most grievous acts by political leaders.

5.4.2. Accomplices

As for aiders and abettors, the ICTY held that ‘it is not necessary for the accomplice to share the mens rea of the perpetrator, in the sense of positive intention to commit the crime’. It is sufficient that they know that by their act they assist the principals in the commission of the crime. In its Furundžija judgement, the ICTY Trial Chamber cited, as an example, the Zyklon B Case, where the accused were not charged of sharing the exterminatory intent of the principals. The accused merely intended to sell insecticide to the SS (for profit, that is a lawful goal pursued by lawful means). The charge against them, of aiding or abetting, was that they knew what the buyer intended to do with the product they were supplying, without necessary intending the ensuing extermination.165 In another case cited by the Chamber, drivers who materially contributed to the commission of a criminal act, were acquitted because they had no knowledge that they were contributing to the commission of a criminal act.166

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163 Cassese, op.cit. (note 156), pp. 164 and 168.

164 In his first edition of Crimes Against Humanity in International Law, op.cit. (note 112), (1986) p. 360, footnote 48, Bassiouni provides the following example: ‘In the case of Funk, the Minister of Economy and President of the Reichsbank [under the Nazi regime], he claimed not to have seen nor to have knowledge that the gold deposited by the S.S. with his authorization, in the bank’s vaults (actually in the basement of the building where his office was located) had come from dispossessing Jews, including gold that had been removed from the teeth and glasses of those who had been sent to the death camps. Assuming his contention to be true, Mr. Funk must have gone to great length not to see or know what he claimed he didn’t see or know existed in his own basement and which was place there by his authorization.’


166 Ibidem, para. 239.
Furthermore, noted the Chamber, ‘it is not necessary that the aider and abettor should know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.’

Finally, the Chamber reminds that the ‘notion of aiding and abetting is to be distinguished from the notion of common design, where the actus reus consists of participation in a joint criminal enterprise and the mens rea required is intent to participate.’

Should economic oppression amount to a crime under the subject-matter jurisdiction of the ICC, its jurisdiction over persons would extend not only to individuals who gave legal force to acts of economic oppression, but equally to persons who aided, abetted, induced, counselled or otherwise assisted others in the commission of such oppression. This would, for example, include individuals representing governments or international organisations who had induced a government by threats, bribes or by other acts, to engage in economic oppression within its own jurisdiction. In the words of ICTY in Furundzija, ‘[a]ction which decisively encourages the perpetrator is sufficient to amount to assistance: the knowledge that he will receive assistance during or after the event encourages the perpetrator in the commission of the crime. From this perspective the willingness to provide assistance, when made known to the perpetrator, would also suffice, if the offer to help in fact encouraged or facilitated the commission of the crime by the perpetrator’.

6. IS IT DESIRABLE AND FEASIBLE TO CRIMINALISE ECONOMIC OPPRESSION?

Social inequality, exploitation and economic oppression have not traditionally been combated through judicial means, but through social and political struggle. Marxist analysis tends to ascribe social injustice to structural causes that should be combated by political, rather than judicial means. Courts were long considered by socialists as the forum where the rich settle disputes among themselves. Activists for social and global justice are belatedly discovering the normative power of law as a complement to political struggle. Yet, objections can be expected to be made by both traditional leftists on one side and by vested corporate interests on the other, against the criminalisation of economic oppression.

Here follow some of potential objections that can be expected against a penal approach to economic oppression.

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167 Ibidem, para. 246.
168 Ibidem, para. 249.
170 The United States, host of the largest transnational corporations and the sole current super-power, opposes the establishment of any supranational judicial mechanism empowered to initiate a review of US foreign activities and policies in the light of public international law, human rights norms or humanitarian law; the US thus refuses to adhere to the Inter-American Convention on Human Rights, disregards decisions of the International Court of Justice, opposes judicial review by the Court of Security Council decisions and spends significant efforts to undermine the newly established International Criminal Court.
Criminalising economic oppression might jeopardise economic development. Potential investors would live in the continuous fear of being dragged to frivolous criminal suits.

Establishing causation and attributing criminal responsibilities for the consequences of macro-economic decisions, may be all but impossible. In many cases, a host of factors, domestic, international and natural, contribute to a situation of extreme poverty. Particularly vexing are situations in which a government would collude with international financial institutions or corporations, with each party blaming the other for the adverse consequences of their commonly formulated policies. Probative material would probably be difficult to obtain in such cases unless backed up by Security Council resolutions. Legal battles in such cases may drag for years.

World poverty and inequality are essentially political and ethical problems that must be tackled by political and educational means. Attempting to address these problems by reaching guilty individuals would be futile. Responsibility for world poverty and inequality is shared by millions of individuals, including shareholders, corporate officers, bankers, economists, politicians and consumers in wealthy States who profit from the inequitable world order. How is it possible to attribute legal responsibility to some and not to others? Are the causes for the adverse conditions structural rather than the result of decisions of identifiable individuals?

Individuals and corporate entities seeking to maintain civilian populations or nations in oppressive conditions – such as to maintain their own privileges – typically garb their oppressive policies in humanitarian rhetoric, contrive concern for the poor and even provide some relief. Under such conditions, it would be hard for a criminal court to prove the requisite criminal intent.

Powerful nations and international institutions who refuse even to recognise their obligations to take human rights considerations into account when designing and implementing policies that affect the poor of the world, can hardly be expected to endorse proposals that might subject them to potential criminal prosecution.

To focus on the most extreme form of violations of economic, social and cultural rights, might weaken the struggle for more attainable goals, such as securing remedies for more common violations of economic, social and cultural rights.

Including economic oppression as a crime against humanity might dilute the Rome Statute, which was drafted for only the most grievous international crimes, and subject the Court to a flood of frivolous claims.

Each of the above objections is rebuttable:

(i) The recent adoption of an international convention against corruption was not considered by the international community as jeopardising legitimate economic activities. On the contrary, it was approved by powerful economic nations. The existence of strong trade unions in Western democracies, originally resisted in the name of economic efficiency, did not impair the growth of industries. On the contrary, workers’ struggle provided business with incentives to develop new technologies, safer machinery and support universal education. Where economic and social rights are justiciable, no evidence suggests that this has impaired

Møllmann, loc.cit. (note 53), formulates it thus: ‘The main characteristics of the human rights violations that result from the imposition of aid conditionalities are that they are transnational, indirect, possibly unintended, and maybe unpredictable.’ (emphasis added).
legitimate economic activities. Those engaging in honest economic activities have nothing to fear from criminalising economic oppression, as defined herein.

(ii) US courts have dealt successfully with complex problems of causation, such as in cases of mass torts. The UN Compensation Commission has, equally, provided reparation to victims of the Iraqi invasion and occupation of Kuwait, without deeming it necessary to lay out in detail the causal chain between general acts and the individual harm. International criminal tribunals have equally dispensed with proving causation between acts and individual victimisation, when the impugned acts were shown to have significantly contributed to unlawful effects, in a statistical sense.

(iii) Bringing cases of economic oppression to a court of law will not end extreme poverty. It will, however, help to expose, wherever applicable, the bad faith of powerful actors who refuse to increase transparency and accountability in the areas of international economics and finance and oppose measures that would empower victims of violations of economic rights. The prosecution of economic oppression may deter the adoption of reckless policies against civilian populations by future decision-makers and may lead to investigations into the mechanism of oppression, secure just reparation to the victims, and can contribute to the development of case-law in the field of socio-economic rights. One form of reparation to victims of human rights violations is ‘satisfaction and guarantees of non-repetition’ which should include, where applicable, ‘judicial or administrative sanctions against persons responsible for the violations’. These specific judicial tasks do not replace but complement and facilitate political struggle for a fairer world order.

(iv) Criminal law is confronted daily by defendants who claim to have been motivated by the best of intentions or who claim not to have realised the gravity of their acts. In cases of economic oppression, the main actors have typically been put on notice regarding the adverse consequences of their policies. If they then continue such policies, refuse to investigate the consequences, avoid accountability and transparency, hide evidence or act in blatant bad faith, a court might infer that they have been aware of these consequences and possess the requisite culpable mind.

(v) Recognising that a goal cannot be achieved because of formidable opposition by powerful agents does not cancel the desirability of that goal. It may only raise questions about the means to achieve that goal. Individuals, groups and nations have often acted with determination against heavy odds and succeeded. But even the mere assertion of rights and of desiderata affects public consciousness and thus contributes to the establishment of new norms. Marcus, similarly, argues that ‘[c]odification of famine crimes can help debunk [the popular] myth [that they are the result of natural disasters, not human misconduct] and force governments to take legal action (...) [I]f famine crimes were codified, the international community


173 By ‘just’ we mean reparation based on entitlements (human rights) rather than on discretionary goodwill.

would be forced, by virtue of the clear criminalization of faminogenic conduct, to
determine whether a famine had erupted as a result of criminal behaviour. It could
not take advantage of the currently scattered state of the law to shield itself from
honestly confronting those responsible for mass starvation.\footnote{Marcus, \textit{loc.cit.} (note 140), p. 280.}

(vi) Nobody claims that the struggle for the recognition and protection of civil
and political rights and the establishment of human rights courts has thwarted the
establishment of international criminal courts. These have remained complemen-
tary campaigns. Human rights courts deal with individual cases of violations that
seldom give rise to criminal liability, but may prompt the payment of compensation
to victims. International criminal courts deal with severe, systematic and often
massive violations of human rights committed either in times of armed conflict or in
peace. The criminalisation of severe violations of economic and social rights can
help focus public opinion on the necessity to deter and prevent such violations in all
their forms. It might be easier to secure an international consensus for the
criminalisation of the most egregious violations of economic and social rights than
to establish international judicial mechanisms that would deal with a large caseload
of moderate violations of such rights.

(vii) Far from diluting the Rome Statute, the inclusion of economic oppression
may strengthen the credibility of the Court by including crimes that affect a
substantial part of mankind. It is, however, appropriate here to suggest that the
definition of extermination, as a crime against humanity, should replace that of
genocide whose narrow definition precludes its applicability to acts such as the
genocidal measures by the Khmer Rouge in Cambodia between 1975-1979, causing
the deaths of 1.7 million people,\footnote{Cambodian Genocide, Summary, at www.yale.edu/cgp/} the murder of over 500,000 ‘communists’ in
Indonesia between 1965-1966\footnote{The Campaign to End Genocide, Indonesia and East Timor, at www.endgenocide.org/genocide/
indonesia.html.} or the creation or maintenance of famine by the
former Ethiopian and current North-Korean regimes.\footnote{Marcus, \textit{loc.cit.} (note 140).} The alleged importance of
differentiating between an intent to exterminate a group, as such (genocide), and
extermination based on general intent (crimes against humanity) does not appear
to be justified by ethics or policy. Crimes against humanity should be reserved for
massive or systematic human rights violations that exceed in severity or extent
individual human rights violations and require punishment but do not reach the
specific intent required for genocide. Impunity for massive or systematic violations
of human rights cannot be tolerated.

The UN General Assembly adopted on 3 December 1973 the ‘Principles of
international co-operation in the detection, arrest, extradition and punishment of
persons guilty of war crimes and crimes against humanity’.\footnote{General Assembly Res. 3074 (XXVIII), 3 December 1973.} The first Principle
stipulates that ‘War crimes and crimes against humanity, wherever they are
committed, shall be subject to investigation and the persons against whom there
is evidence that they have committed such crimes shall be subject to tracing, arrest,
trial and, if found guilty, to punishment’. By this resolution States have recognised
their obligation to investigate in good faith situations where \textit{prima facie} evidence
exists of possible war crimes or crimes against humanity. The fact that millions of
human beings die yearly of hunger and diseases resulting from human agency, requires that UN member States and the United Nations organisation investigate this conduct in the light of international criminal law and ensure that persons who have contributed to these deaths be subject to tracing, arrest, trial and possibly punishment. The United Nations, who have imposed the most comprehensive economic sanctions on any nation in its history, have not attempted to determine who is responsible for the deaths of over half a million children in Iraq, in excess of expected mortality, through the period of the sanctions. This fact alone should raise serious questions regarding the good faith of the collective membership of the organisation, of the Security Council and of the Secretary-General.

7. SOME INCONSISTENCIES AND SHORTCOMINGS OF THE ROME STATUTE

While economic oppression may fulfil, in some cases, the requirements of the statutory crimes against humanity, the Rome Statute appears inconsistent in several respects.

Inconsistency can be observed between the listed war crimes and crimes against humanity. None of the following acts appear punishable under the Statute when committed in times of peace (that is outside the framework of ‘armed conflict’):

(i) Inhumane treatment. To subject a civilian population to inhumane treatment, such as deprivation of food, water or other essentials, could only be prosecutable as a crime against humanity if it could be shown that the actor intended his conduct to cause deaths or was aware that deaths would ensue. Such inhumane treatment could be then prosecutable under the heading of murder or extermination as a crime against humanity. No such nexus to death is, however, required for inhumane treatment to constitute a war crime (Rome Statute, Article 8(2)(ii)).

(ii) Wilfully causing great suffering, or serious injury to body or health, as a war crime (Rome Statute Article 8(2)(iii)). While the residual crime against humanity (‘other inhumane acts’) refers to such effects, it requires that the acts be of a ‘similar character’ to other crimes against humanity, a requirement which might exclude policies intended to cause malnutrition or terrorising a civilian population without actually intending to cause deaths.

(iii) Intentionally using starvation of civilians as a method of warfare (Rome Statute Article 8(2)(xxv)) by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions. It is difficult to understand why imposing starvation on a civilian population would only constitute a punishable crime when committed within the framework of armed conflict. There is no equivalent crime against humanity.

(iv) Committing outrages upon personal dignity, in particular humiliating and degrading treatment, as a war crime (Rome Statute Article 8(2)(xxi)). Even massive, protracted and policy-driven outrages upon human dignity – if not prosecutable under the heading of persecution or of sexual crimes – could not be prosecutable as crimes against humanity, only as war crimes.

(v) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, as a war crime (Rome Statute Article 8(2)(ix)). While the destruction of churches, mosques or synagogues could
be construed as a crime against humanity, if committed in relation with another crime against humanity, such as murder, the massive destruction of hospitals, as such, could not be prosecuted as a crime against humanity.

Marianne Møllmann captures well such inconsistencies in the following terms: ‘If the logic of international humanitarian law is that states have a duty to avoid criminal acts toward civilians in all territories – their own as well as those they might have gained access to by force – there can be no valid reason for limiting these duties to war situations in a world where access and influence can be forced by financial means as easily as by arms’.180

The International Criminal Court was established in order that ‘the most serious crimes of concern to the international community as a whole (...) shall not go unpunished’.181 Yet, as currently adopted, the Rome Statute can hardly be invoked to address some of the most odious human agency of concern to the international community as a whole. Every day thousands of children die of preventable malnutrition and diseases. Measles, for example, is often seen as a relatively harmless disease, but there are more than 14 million cases reported each year, which claim the lives of at least 700,000 children, 400,000 of them in Sub-Saharan Africa. ‘This mortality rate is unacceptable as it is fully preventable [with inexpensive medicines]’, says Daniel Tarantola, director of vaccines and biologicals for the World Health Organisation (WHO).182 Behind these deaths lies a reckless disregard for human life: it would require only a minute fraction of the funds earmarked by rich nations for weaponry and war, to prevent these 700,000 yearly deaths. Who are the decision-makers who deliberately opt not to eradicate these deaths? Between 1990 and 1999 over half a million children under the age of five died in Iraq in excess of expected mortality rates, as a result of economic sanctions imposed by the United Nations.183 It is undisputed that these massive premature deaths occurred as a result of human agency. Yet the provisions of the Rome Statute do not adequately address such forms of indirect mass killings nor the failure by States to investigate such mass killings.

Among crimes against humanity figure ‘enforced prostitution’. While the Statute does not provide any definition of ‘enforced prostitution’, the ICRC Commentary on Article 27(2) GC IV describes this term as ‘i.e. the forcing of a woman into immorality by violence or threats’.184 In India parents reportedly induce their daughters to engage in prostitution out of poverty.185 Should the parents be

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180 Møllmann, loc. cit. (note 53).
181 Rome Statute, Preamble.
183 In the diplomatic formulation of UNICEF, ‘If the substantial reduction in child mortality throughout Iraq during the 1980s had continued through the 1990s, there would have been half a million fewer deaths of children under-five in the country as a whole during the eight year period 1991 to 1998’. As a partial explanation, Carol Bellamy, UNICEF Executive Director, referred to the statement of the Security Council Panel on Humanitarian Issues of March 2000: ‘Even if not all suffering in Iraq can be imputed to external factors, especially sanctions, the Iraqi people would not be undergoing such deprivations in the absence of the prolonged measures imposed by the Security Council and the effects of war.’ UNICEF Iraq Child and Maternal Mortality Surveys, 23 July 2000, at www.unicef.org.uk/news/Iraq1.htm.
184 ICRC Commentary to Article 27(2) of the Fourth Geneva Convention (“Treatment of women”).
penalised for such conduct while those causing their poverty be afforded impunity? In Argentina women over 60 have been compelled by poverty, apparently exacerbated by IMF austerity measures, to engage in prostitution. In Jamaica and the Dominican Republic prostitution has increased, also as a consequence of austerity measures induced by international financial institutions. Yet the economists who design and the political leaders who implement economic policies, whose foreseeable consequences are likely to compel women and children to engage in prostitution, cannot be held accountable by the Statute, due to the stringent mens rea requirements, even if such policy-makers can easily predict the likely consequences of their policies.

The Rome Statute is based on the premise that the most egregious destruction of human values is committed by proximate violence. In fact, the most egregious international crimes have historically been those planned and instigated by political leaders and motivated by cold interests. Today’s technology permits powerful oppressors to remain oblivious to the consequences of their acts and hide behind the corporate or institutional veil. The Rome Statute is thus predicated on prosecuting primitive forms of criminal conduct, leaving unaddressed crimes committed with modern, technologically superior, means, but with similar consequences to the victims. A couple of examples will illustrate this observation. It is today possible by cybernetic means and remote control to cripple a whole computer-driven economy, including banks, hospitals and public utilities. Such action, silent, cool and efficient, could be as deadly as dropping a nuclear bomb, particularly if accompanied by a successful blockade. Weather modification technology represents another remote-control opportunity for powerful nations to devastate the economic well-being of whole populations. In neither case does the perpetrator need to invade a country and bring the victims under his jurisdiction (with the attendant human rights obligations). It is even possible to hide or mask the origin of signals or even stage events as accidents. A number of eminent observers argue that crimes against the environment – which may affect the lives of coming generations – may justify equivalent treatment as crimes against humanity. Yet, the Statute does not address such emerging types of massive

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188 See, for example, Schmitt, Michael N., ‘Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework’, Columbia Journal of Transnational Law, Vol. 37, No. 3, 1999, pp. 885-937. In the Gulf war of 1991, the US specifically targeted power plants for destruction in the knowledge that this would affect the health and lives of the civilian population, including access to clean water.
190 See discussion of the decision by the Grand Chamber of the European Court of Human Rights that found Yugoslavian bombing victims’ application against NATO member States inadmissible, by Schorkopf, Frank, in German Law Journal, Vol. 3, No. 2, 2002.
192 See, for example, McGowan Wald, Patricia (former Judge of the ICTY), ‘The Nexus’, The Environmental Forum, Jan./Febr. 2001, pp. 46-51.
onslaught. Article 22(2) of the Statute stipulates, moreover, that the ‘definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted’. By this provision the Statute excludes the progressive development by the Court of a jurisprudence that could take into consideration unforeseen forms of criminal conduct that have similar injurious effects to those caused by the listed crimes and are equally blameworthy.

An additional reason for the overemphasis of the Rome Statute on acts of proximate violence, as opposed to structural violence, may be that the Statute reflects a male-oriented perception of human dignity. The victory of women’s organisations who succeeded to have sexual crimes, such as rape and enforced prostitution, defined as crimes against humanity, suggests that men did not previously regard such crimes as sufficiently odious to have them defined as international crimes. Is it possible that economic oppression, whose main victims are women and children, is regarded by men as less devastating of human dignity as the other acts defined in the Statute as criminal offences?

8. CONCLUDING OBSERVATIONS

The Rome Statute represents a compromise which reflects the interests of States and their respective elites rather than a universally-shared conception of human dignity. Those who drafted the Statute were mostly men who did not and could not adequately represent the victims of international crimes, such as economic oppression. Apart from the fact that the United States declined to ratify the Statute, withdrew its signature and pressurised other States to exempt US nationals from the jurisdiction of the Court, numerous procedural and substantive hurdles were established at the outset to limit the jurisdiction of the Court mainly to proximate means of criminal conduct, such as indiscriminate military attacks, torture, rape and outright killings. While the criminalisation of such conduct is necessary, it is far from adequate with regard to the crimes committed indirectly against the poor of the world.


194 The Inter-Parliamentary Union in its resolution of 20 September 1996 (Beijing) underlined ‘that the current world economic order is still unjust, and therefore hinders the realization of human rights and fundamental freedoms and adversely affects women and children in particular’ (emphasis added), Preamble, www.ipu.org/conf-e/96-1.htm.

195 Møllmann, loc. cit. (note 53), points out: ‘[W]omen’s interests seem to be at the bottom of this power scale, with women and girl children suffering systematic discrimination and abolition of their most basic rights in many countries worldwide, without this registering as a prime concern with the majority of those advocating for social interests and human rights.’

196 Lieutenant Colonel Michael A. Newton, member of the United States delegation to the ICC PrepCom, provides the following observations: ‘Every nation represented in the negotiations at the PrepCom comes prepared to represent its interests’ (p. 209); ‘[R]esponsible nations like the United States, who use their power to maintain or restore international peace and security or conduct difficult humanitarian missions, should not have to fear the possibility of politically motivated prosecutions’ (p. 209); ‘Americans should be proud of how hard Ambassador Scheffer and the rest of our delegation has fought to represent our national interests [at Rome]’ (p. 210). In Newton, M.A., ‘The International Criminal Court Preparatory Commission: The Way It Is & The Way Ahead’, Virginia Journal of International Law, Vol. 41, 2000, pp. 204-216.
Among the provisions by which leading oppressors could be put beyond the reach of the Court are the apparently excessive burden to prove a criminal intent as well as the restrictive provision on treaty interpretation referred to above. 197

The mens rea requirement for crimes against humanity appears to exclude from the jurisdiction of the Court reckless, namely the disregard by the perpetrator of a substantial and unjustifiable risk to cause a particular harm. 198 By excluding recklessness, the Statute appears to depart significantly from general principles of criminal law as well from the jurisprudence of the ICTY199 and the ICTR. 200 Gross negligence by States and international organisations, who bear an implied duty of due diligence, is equally excluded, as a culpable state of mind by the Statute.

Decision-makers adopt policies in order to achieve political or economic goals, not to harm people. To achieve goals that require the imposition of harm, they routinely close their minds to the adverse consequences of their actions, both at the stage of conceiving the policy and at the implementation stage. By remaining oblivious to the consequences, politicians spare themselves pangs of conscience and insure themselves against future charges. This type of wilful blindness, common to all decision-makers, does not appear to be reached by the Statute, at least with regard to economic oppression. Wilful disregard for the foreseeable or likely consequences of one’s acts is, however, construed as a sufficiently culpable mind to secure conviction under general criminal law, including for murder. 201

Examples of economic oppression which should give rise to civil or criminal liability under international law may include, inter alia, IMF-imposed conditionali-

197 Rome Statute, Article 22(2).
198 According to US Penal Law 125.05 (3.) ‘A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.’ Similar provisions exist in the criminal statutes of other countries.
199 The ICTY has consistently included recklessness in the mens rea of killing. See, inter alia, the Delalic et al. Case, supra note 122, paras 437-439.
200 See discussion of extermination in section 2.2 and of mens rea in 5.4.
201 ‘In most common law jurisdictions, the mens rea requirement of murder is satisfied where the accused is aware of the likelihood or probability of causing death or is reckless as to the causing of death. The civil law concept of dolus describes the voluntariness of an act and incorporates both direct and indirect intention. Under the theory of indirect intention (dolus eventualis), should an accused engage in life-endangering behaviour, his killing is deemed intentional if he “makes peace” with the likelihood of death. In many civil law jurisdictions the foreseeability of death is relevant and the possibility that death will occur is generally sufficient to fulfill the requisite intention to kill.’ Delalic et al. Case, supra note 122, paras 434-435.
204 The website of The Campaign Against Sanctions on Iraq (CASI), provides links to numerous articles on economic sanctions, at www.casi.org.uk/.
creating severe environmental hazards to health, facilitating kleptocracy and failure to provide humanitarian relief. They also include gross violations by governments of socio-economic rights within their own jurisdictions, such as mass evictions, faminogenic policies or gross negligence in eradicating extreme poverty. Such acts are designated in the present article generically as economic oppression.

It is well known that the governments of the richest States, particularly the United States, have consistently opposed the establishment of a legal protection mechanism for victims of violations of economic and social rights. While globalisation and privatisation increasingly affect the socio-economic conditions of individuals across national borders, individuals who suffer violations of economic or social rights resulting from globalisation in general or from specific policies or measures in particular, are not provided with any legal remedies at the international level and often not either at the domestic level. Their attempts to flee economic destitution is met with increasing barriers raised by richer nations, a phenomenon regarded by some as the emergence of a global Apartheid.

The UN Committee on Economic, Social and Cultural Rights affirmed in 2001 that the

[International] Covenant [on Economic, Social and Cultural Rights] empowers the poor by granting them rights and imposing legal obligations on others, such as States. Critically, rights and obligations demand accountability: unless supported by a system of accountability, they can become no more than window-dressing. Accordingly, the human rights approach to poverty emphasizes obligations and requires that all duty-holders, including States and international organizations, are held to account for their conduct in relation to international human rights law.

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206 See, for example, Chossudovsky, Michel, 'Financial warfare', at www.geocities.com/Eureka/Concourse/8751/edisi03/chossu01.htm.
207 The Supreme Court of India (supra note 43), in a case concerning the future of half of the population of Bombay (squatters), demonstrated (para. 2.3) that evicting these squatters from the pavements of Bombay would cause them lose their job and thus their livelihood. Without livelihood, they would be inevitably deprived of their lives. Were the Municipality of Bombay to carry out massive eviction of these squatters, it would engage in the crime of economic oppression, regardless of the otherwise legitimate motive of the authorities.
208 Marcus, supra note 141. The author provides three examples of government-induced famine: the Soviet-induced famine in Ukraine 1992-1993; the government’s manufactured food-shortages in Ethiopia 1983-1985; and the enforcement of policies responsible for calamitous hunger in North-Korea in the mid-1990s. The author divides faminogenic policies into four degrees, according to their underlying mens rea: famine resulting from incompetence and corruption (ordinary negligence); famine resulting from indifference to the fate of a population undergoing famine (criminal negligence); the imposition of measures that knowingly cause famine, though not intending such result (recklessness); and the deliberate imposition of famine as a means of extermination (specific intent). He argues for the ‘formal criminalization of these last two degrees of faminogenic behaviour as crimes against humanity’ (p. 247).
209 The United States has not ratified the International Covenant on Economic, Social and Cultural Rights.
The UN General Assembly, through the language of the Declaration of Basic Principles of Justice of Crime and Abuse of Power, recognised, as *victims*

persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.\(^{212}\)

This Declaration vindicates the view that individuals subject to violations of economic human rights should be legally empowered and be designated as *victims*, with the attended rights to reparation. The entitlements to reparation of victims of statutory violations are transmissible to their heirs.

The World Conference on Human Rights held in Vienna in 1993, in its Vienna Declaration and Programme of Action referred specifically to the problem of impunity. It viewed

with concern the issue of impunity of perpetrators of human rights violations, and supports the efforts of the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities to examine all aspects of the issue.\(^{213}\)

The question of *impunity* of perpetrators of human rights violations, with a particular focus on economic, social and cultural rights, was addressed in a report by El Hadji Guisse.\(^{214}\) In his report to the UN Human Rights Commission the author first reviews the most glaring past violations of economic, social and cultural rights, namely slavery, colonialism, *Apartheid* and the looting of the cultural heritage of the Third World. He notes that these practices have remained unpunished and without reparation. The most usual contemporary practices which cause violations of economic, social and cultural rights are listed by him as debt, structural adjustment programmes, deterioration of terms of trade, embargoes, corruption, laundering of drug money, tax and customs fraud. As a response to such violations the author recommends preventive action, including ‘political, economic, legislative and administrative measures aimed at eliminating all practices and all procedures conducive to violations of economic, social and cultural rights’;\(^{215}\) and ‘repressive and/or remedial action, aimed at penalizing violations which have already been committed. Sanctions could take the form of a series of practical measures, such as restitution, indemnification, compensation, cancellation, reparation, reinstatement, etc.’\(^{216}\)

It is unrealistic to expect wealthy elites to support measures that would criminalise their policies of exploitation, economic domination and the oppression

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\(^{214}\) Guisse, *supra* note 75.

\(^{215}\) *Idem*.

\(^{216}\) *Idem*.
of the poor. The struggle for the social and global justice is a continuous historical process in which each generation is involved. An important phase of this struggle is to demonstrate that adverse measures, such as economic oppression, are not the result of blind economic forces, but of identifiable decisions taken by identifiable human beings, who act not out of malice but in order to further vested interests while remaining wilfully blind to the consequences for human lives, dignity and values. Making key decision-makers accountable, including under criminal law, for their decisions that affect basic rights of whole populations, may provide a safeguard or deterrent against reckless and grossly negligent conduct. This appears also to be the reasoning for imposing criminal sanctions to corporate offenders, including consultants,\(^{217}\) for a growing list of severe offenses against consumer safety and the environment.\(^{218}\)

Should the International Criminal Court serve faithfully its purpose, namely to ‘guarantee lasting respect for the enforcement of international justice’ with respect to the ‘most serious crimes of concern to the international community as a whole’,\(^{219}\) it would be necessary to fully extend its jurisdiction to economic oppression as a crime against humanity, as defined above, and possibly to other policies which facilitate the perpetuation of global exploitation, human misery and obscene levels of inequality in the world.\(^{220}\)


\(^{218}\) See, for example, Memorandum by Thomas J. Murrin, Deputy Secretary, General Counsel of the US Department of Commerce, 19 August 1989, regarding ‘Liability of Federal Employees for Environmental Law Violations’, at www.seco.noaa.gov/documents/fedEmployeeLiability2.html.

\(^{219}\) Preamble of the Rome Statute of the ICC.

\(^{220}\) There is no other term than ‘obscenity’ to designate the circumstance that the average wealth of each of the 200 richest individuals is equivalent to the yearly income of 22 million poor persons. Source: UNDP report ‘Rights Empowering People in the Fight Against Poverty, supra note 11.