

# “Austerity” Policies as Crimes Against Humanity: An Assessment of UK Social Security Policy Since 2008

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*‘I, Daniel Blake, demand my appeal date before I starve’*

I, Daniel Blake. (2016). [film] Directed by K. Loach. UK: eOne Film.

## Abstract

This article will examine as to whether U.K. social security policies since 2008 could constitute one or more crimes against humanity (CAH). This examination will focus on the likely approach of the International Criminal Court (ICC) based upon an analysis of existing international criminal jurisprudence including the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Following on from defining what constitutes a CAH, the extent to which social security policy in the U.K. may have been an attack for the purpose of constituting a CAH will be explored. Following this, the extent to which the pre-requisite mental element is satisfied will be analysed. It will ultimately be concluded that austerity driven social security policy in the U.K. can amount to crime against humanity of other inhumane acts under article 7 (1) (k) of the Rome Statute.

## I. Introduction

This article will critically examine the extent to which policies and actions relating to social security policies within the United Kingdom (U.K.) can constitute a crime against humanity (CAH). The research hypothesis posed is that social security policies in the U.K. can constitute a CAH.

This article proceeds in five sections which will inform a conclusion. Firstly, the place of Economic and Social Rights (ESRs) in the realm of CAH will be explored.<sup>1</sup> Secondly, what constitutes a CAH will be examined. It will be highlighted that the answer to the question rests on the extent to which an attack, without which a CAH cannot be said to have occurred, has taken place. In order to address this, and thirdly, the enumerated acts of extermination, torture, and other inhumane acts (OIA) will be examined. This is because an attack can be said to have occurred if the multiple commission of any one, or combination, of these acts can be established. Having addressed that acts have occurred, the *actus reus*, the fourth section of this article will examine the *mens rea*, or mental elements, which must be satisfied in order to establish individual criminal responsibility for the CAH of OIA. This article will engage with the current debate in international criminal law as to the mental element required

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<sup>1</sup> Given the focus on social security policy cultural rights will not be considered in this analysis

at the International Criminal Court (ICC) in relation to CAH. Following this, and fifthly, the prosecution of CAH in the U.K. will be explored.

It will ultimately be concluded that acts pertaining to the provision of social security in the United Kingdom can constitute a crime against humanity entailing individual criminal responsibility.

## **II. Crimes against Humanity and Economic and Social Rights Violations**

Today suffering exists which does not readily align with traditional concepts of CAH.<sup>2</sup> These new forms of suffering have been asserted to be the “product of economic policies.”<sup>3</sup> Skogly considers a shift in paradigm summarised as refocusing CAH towards the outcome, not the means, of creating suffering through severely damaging inhuman acts.<sup>4</sup> Such a shift may allow greater scope for prosecuting inhumane acts as the requirements laid down for a crime to constitute a CAH set a higher threshold than human rights abuse.<sup>5</sup> Some argue that the definition of CAH should be expanded to be based upon the punishment of human rights violations.<sup>6</sup> Within such an expansion the place of ESR violations within CAH would be more certain. This may alter state policies with the added effect being that the threat of prosecution<sup>7</sup> would also deter future misconduct.<sup>8</sup> This is important given that the violation of ESRs may be a mechanism through which some outcomes are achieved with it being suggested by Skogly that such violations “may amount to genocide.”<sup>9</sup>

This is supported by the contention that Civil and Political Rights “cannot be enjoyed on an empty stomach”<sup>10</sup> and this notion of indivisibility and interdependence, as supported by a number of international instruments,<sup>11</sup> is perhaps why some have argued against limiting CAH to the realm of integrity rights.<sup>12</sup> Although CAH often do occur as a consequence of the

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<sup>2</sup> Manfred Max-Neef “The good is the bad that we don't do. Economic crimes against humanity: A proposal” (2014) 104 *Ecological Economics* 152, 153

<sup>3</sup> Ibid.

<sup>4</sup> Sigrun I. Skogly “Crimes Against Humanity - Revisited: Is There a Role for Economic and Social Rights?” (2001) 5(1) *The International Journal of Human Rights* 58, 67

<sup>5</sup> Richard Vernon “What is Crime against Humanity?” (2002) 10(3) *The Journal of Political Philosophy* 231, 235

<sup>6</sup> Sévane Garibian “Crimes against humanity and international legality in legal theory after Nuremberg” (2007) 9(1) *Journal of Genocide Research* 93, 101

<sup>7</sup> Eamon Aloyo “Improving global accountability: The ICC and nonviolent crimes against humanity” (2013) 2(3) *Global Constitutionalism* 498, 517

<sup>8</sup> Diana Kearney “Food Deprivations as Crimes Against Humanity” (2013-2014) 46 *New York University Journal of International Law and Politics* 253, 256

<sup>9</sup> Skogly (n 4) 64

<sup>10</sup> Geoffrey Robertson *Crimes Against Humanity* (Penguin Books 2012), 220

<sup>11</sup> Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, (I) (25); See also Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF. 32/41 at 3 (1968), para. 13; See also Declaration on the Right to Development A/RES/41/128, 4 December 1986

<sup>12</sup> Skogly (n 4) 74

commission of violence this is not a pre-requisite.<sup>13</sup> An attack need not be violent in nature<sup>14</sup> and exerting pressure to act in a particular way may constitute an attack.<sup>15</sup> If a policy causes severe and widespread, or systematic, harm to civilians it “may constitute a (nonviolent) crime against humanity.”<sup>16</sup> In this sense some would argue that “it is immaterial where the suffering comes from”<sup>17</sup> and that the focus of CAH ought to be, as opposed the means, the extent to which the effect equates to severe and widespread or systematic harm.<sup>18</sup>

This article is premised upon the contention that austerity, as an economic policy, has severely adversely affected the enjoyment of ESRs within the U.K. More specifically, it is contended that, the welfare system reform which has occurred in the U.K. since 2008, and which has been justified by reference to these austerity policies,<sup>19</sup> has in some instances directly violated ESRs.<sup>20</sup> Thus social security policy has significantly harmed civilians in the U.K. This demonstrates the intersectionality which exists between social security policy and ESRs violations. This intersectionality is the means through which social security policy can be considered within the sphere of CAH. The purpose of the following sections is to establish the extent to which these ESRs violations can amount to a CAH.

### **III. What Constitutes a Crime against Humanity?**

CAH have been subject to “inconsistent definitions.”<sup>21</sup> Although acts which would constitute CAH today have occurred throughout history, the concept as one entailing legal criminal responsibility has been described as a major innovation of the International Military Tribunal at Nuremberg.<sup>22</sup> This is because it was “first articulated as an international offence in Article 6 (C) of the Charter of the Nuremberg tribunal.”<sup>23</sup> The aim of this was to punish acts “that were either organised by Nazi law or tolerated by the authorities”<sup>24</sup> by making individuals directly responsible under International Criminal Law.<sup>25</sup> In this sense, a CAH is a crime against humaneness so offensive to general legal principles that it becomes of international

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<sup>13</sup> Chile Eboe-Osuji “Crimes Against Humanity: Directing Attacks Against a Civilian Population” (2008) 2(2) *African Journal of Legal Studies* 118, 119

<sup>14</sup> Kriangsak Kittichaisaree *International Criminal Law* (OUP 2001) 94 refers to the *Akayesu* (n 58) para. 581 in support of this.

<sup>15</sup> Ibid.

<sup>16</sup> Aloyo (n 7) 504

<sup>17</sup> Skogly (n 4) 75

<sup>18</sup> Aloyo (n 7) 500

<sup>19</sup> Committee on the Rights of Persons with Disabilities (CRPD) “Inquiry concerning the United Kingdom of Great Britain and Northern Ireland carried out by the Committee under article 6 of the Optional Protocol to the Convention” CRPD/C/15/R.2/Rev.1, October 2016, para. 113; para. 113(a) explicitly links this to welfare system reforms justified in the context of austerity measures. Thus, this statement applies to social security policy.

<sup>20</sup> The Committee on the Rights of Persons with Disabilities “considers that there is reliable evidence that the threshold of grave or systematic violations of the rights of persons with disabilities has been met in the State party” see Ibid.

<sup>21</sup> Robert Cryer et al. *An Introduction to International Criminal law and Procedure Third Edition* (CUP 2014) 229

<sup>22</sup> Nina H. B. Jorgensen *The Responsibility of States for International Crimes* (OUP 2000) 118

<sup>23</sup> Ilias Bantekas *International Criminal Law Fourth Edition* (Hart 2010) 184

<sup>24</sup> William A. Schabas “Crimes Against Humanity: The State Plan or Policy Element” in Leila N. Sadat and Michael P. Scharf *The Theory and Practice of International Criminal Law* (Martinus Nijhoff 2008) 360

<sup>25</sup> Bruce Broomhall *International Justice & The International Criminal Court* (OUP 2003) 10

concern<sup>26</sup> serving as an exception to the antiquated rule that States could treat their citizens as they pleased.<sup>27</sup>

The International Military Tribunal's purpose was to address issues relating to World War II.<sup>28</sup> Therefore some argued that for acts to constitute a CAH they had to be linked to armed conflict.<sup>29</sup> This requirement is the 'armed conflict nexus' and was also a prerequisite element of CAH under the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>30</sup> This "contextual limitation"<sup>31</sup> narrowed the scope of CAH. However, it was described as "obsolescent"<sup>32</sup> in *Tadic*<sup>33</sup> and is no longer a requirement of CAH;<sup>34</sup> nor is it an element of the Customary International Law.<sup>35</sup> Therefore, it is now well settled<sup>36</sup> that no nexus to armed conflict is required to establish a CAH.<sup>37</sup>

One of the major achievements of the Statute of the International Criminal Court (ICC), also referred to in the literature as the Rome Statute, has been doing away with the requirement of armed conflict<sup>38</sup> thus recognising developments in customary international law.<sup>39</sup> The Statute has been described as being a codification of existing law<sup>40</sup> and Article 7 of this statute "is, for sure, the most detailed definition to date of"<sup>41</sup> CAH being the first codification of CAH in a multilateral treaty since Nuremberg.<sup>42</sup> This definition requires that one, or more, of the acts enumerated in Article 7(1) be committed alongside the contextual element,<sup>43</sup> that is, "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."<sup>44</sup>

### ***A. Widespread or Systematic***

The requirement that the crime is committed as part of a widespread or systematic attack is "the 'chapeau' of the Statute."<sup>45</sup> This chapeau sets a standard of seriousness to be surpassed

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<sup>26</sup> Kittichaisaree (n 14) 85

<sup>27</sup> Peter Malanczuk *Akehurst's Modern Introduction to International Law Seventh Revised Edition* (Routledge 1997) 354

<sup>28</sup> Antonio Cassese and Paola Gaeta *International Criminal Law Third Edition* (OUP 2013) 86

<sup>29</sup> Broomhall (n 25) 48

<sup>30</sup> Cryer et al. (n 21) 231

<sup>31</sup> Bantekas (n 23) 187

<sup>32</sup> William A. Schabas *An Introduction to the International Criminal Court Fourth Edition* (CUP 2011) 109

<sup>33</sup> *Tadic* Case Quoted Ibid.

<sup>34</sup> Broomhall (n 25) 49

<sup>35</sup> Robert Cryer *Prosecuting International Crimes* (CUP 2005) 251

<sup>36</sup> Cryer et al. (n 21) 233

<sup>37</sup> Mahmoud C. Bassiouni *International Criminal Law: A Draft International Criminal Code* (Sijthoff & Noordhoff 1980) 75

<sup>38</sup> Timothy LH McCormack "Crimes Against Humanity" In Dominic McGoldrick et al. *The Permanent International Criminal Court* (Hart 2004) 184

<sup>39</sup> Ibid. pp. 185

<sup>40</sup> Steven R. Ratner and Jason S. Abrams *Accountability for Human Rights Atrocities in International Law Second Edition* (OUP 2001) 49-50

<sup>41</sup> Mauro Politi and Giuseppe Nesi *The Rome Statute of the International Criminal Court* (Ashgate 2001) 79

<sup>42</sup> William J. Aceves and Paul L. Hoffman "Pursuing Crimes Against Humanity in the United States: The Need for a Comprehensive Liability Regime" in Mark Lattimer and Phillippe Sands *Justice for Crimes Against Humanity* (Hart 2003) 239-240

<sup>43</sup> Massimo Renzo "Crimes Against Humanity and The Limits of International Criminal Law" (2012) 31 *Law and Philosophy* 443, 444

<sup>44</sup> Article 7(1) The Statute of the International Criminal Court (ICC Statute)

<sup>45</sup> Kearney (n 8) 264

in order to incur international criminal responsibility<sup>46</sup> and is reflective of customary international law.<sup>47</sup> It prevents all inhumane crimes falling under the remit of CAH.<sup>48</sup> This ensures that only crimes committed as part of organisational action or policy reach the threshold of CAH<sup>49</sup> and the nature of the terms widespread and systematic are evidence of this purpose as some form of organisation is inherent.<sup>50</sup> Furthermore, the nature of the acts as occurring on a widespread or systematic basis can be taken as evidence of organisation or policy.<sup>51</sup> In *Jelusic* it was held that although these two requirements were not cumulative they could overlap.<sup>52</sup> These two terms therefore have different meanings<sup>53</sup> which have been labelled “alternative”<sup>54</sup> and “disjunctive”<sup>55</sup> conditions. In this sense, the prosecution need only prove that one threshold is satisfied.<sup>56</sup>

The term widespread refers to the scale of the acts. In *Kunarac* widespread referred to the “large-scale nature of the attack and the number of victims”<sup>57</sup> whereas in *Kayishema* the requirement was that it was “directed against a multiplicity of victims.”<sup>58</sup> *Akayesu* offers a more complex definition which additionally suggests that the acts must be carried out “collectively with considerable seriousness.”<sup>59</sup> Building on this Kearney observes that the ICC definition characterises widespread as “pertaining to ‘the large-scale nature of the attack and the number of targeted persons.’”<sup>60</sup> Cryer suggests that an assessment of whether or not an attack reaches this threshold must be decided on the facts.<sup>61</sup> Ultimately, there is no numerical threshold which, once surpassed, sees an attack classified as a CAH.

Systematic however, refers to “the organised nature of the acts.”<sup>62</sup> In this sense the two are distinguished by a “high degree of forethought.”<sup>63</sup> Along this vein, a systematic attack is one which follows a “preconceived policy or plan.”<sup>64</sup> The *Akayesu* case goes further than this to also include, within the definition of systematic, the involvement of “substantial public or private resources.”<sup>65</sup> In sum, systematic is a level of precise<sup>66</sup> organisation or design. For the purpose of this article, a policy conceived in, initiated by, and passed down from, the highest

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<sup>46</sup> Alexander Zahar and Goran Sluiter *International Criminal Law* (OUP 2008) 209

<sup>47</sup> Lyal S. Sunga *The Emerging System of International Criminal Law* (Kluwer Law International 1997) 162

<sup>48</sup> Matt Halling “Push the Envelope – Watch It Bend: Removing the Policy Requirement and Extending Crimes against Humanity” (2010) 23 *Leiden Journal of International Law* 827, 828

<sup>49</sup> Ratner and Abrams (n 40) 68

<sup>50</sup> Mahmoud C. Bassiouni *Crimes Against Humanity in International Criminal Law Second Revised Edition* (Kluwer Law International 1999) 86

<sup>51</sup> Cryer (n 35) 255

<sup>52</sup> *The Prosecutor v Goran Jelusic* IT-95-10-T, Trial Chamber, 1999, para. 53

<sup>53</sup> David Marcus “Famine Crimes in International Law” (2003) 97 *American Journal of International Law* 245, 272

<sup>54</sup> *The Prosecutor of The Tribunal Against Clement Kayishema Obed Ruzindana*, ICTR-95-1-1, 1997, para. 123

<sup>55</sup> Melanie O’Brien “Protectors on trial? Prosecuting peacekeepers for war crimes and crimes against humanity in the International Criminal Court” (2012) 40 *International Journal of Law, Crime and Justice* 223, 227

<sup>56</sup> Cryer et al. (n 21) 234

<sup>57</sup> *Prosecutor v Dragoljub Kunarac* IT-96-23, 2002, para. 94

<sup>58</sup> *Kayishema* (n 54) para. 123; See also Marcus (n 53) 272 “‘Widespread’ refers to the number of victims”

<sup>59</sup> *The Prosecutor v Jean-Paul Akayesu* ICTR-96-4-T, 1998, para 580

<sup>60</sup> Kearney (n 8) 270

<sup>61</sup> Cryer et al. (n 21) 235

<sup>62</sup> *Kunarac* (n 57) para 94.

<sup>63</sup> Kearney (n 8) pp. 271

<sup>64</sup> *Kayishema* (n 54) para. 123; See also Marcus (n 53) 272

<sup>65</sup> *Akayesu* (n 59) para. 580

<sup>66</sup> Kearney (n 8)271

echelons of, government. As, such, a government's social security policy, reaches this threshold.

### ***B. Attack***

The preceding subsection suggests that social security policy can be both widespread and systematic. Consequently, if acts in this area can be established as attacks for the purposes of CAH they would constitute a CAH. However, the requirement of attack is more problematic due to the fact that its use in the ICC statute differs from its use in common parlance.<sup>67</sup>

In various judgements, an 'attack' is the context, the event even, "in which the enumerated crimes must form part."<sup>68</sup> Within a single attack one, or many, of the enumerated crimes may occur.<sup>69</sup> Thus an attack is the "accumulation"<sup>70</sup> of the enumerated crimes linked by the chapeau. In some circumstances this chapeau may be difficult to establish, therefore Hansen has argued that an accumulation of these acts "which is organized and follows a regular pattern will be taken as evidence of the existence of a policy."<sup>71</sup> The concept of attack is "elaborated in"<sup>72</sup> Article 7(2)(a) of the ICC Statute as meaning "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."<sup>73</sup> This definition is reproduced here in full in order that all the elements of an attack are plainly seen. The latter two of these elements, that the acts are against a civilian population and are part of a policy, are clearly fulfilled in regards to social security policy. Thus, the focus of this article is the nature of the acts. Therefore, in order to answer the research question, the extent to which social security policy and actions can equate to 'a course of conduct involving the multiple commission of acts referred to in paragraph 1' must be examined. This is because it need only be established that the Article 7(1) acts have occurred.<sup>74</sup> Thus, if the multiple commission of acts<sup>75</sup> occurs this constitutes an attack which, if of a widespread or systematic nature, may constitute a CAH.

## **IV. Acts related to Social Security Policies in the United Kingdom as amounting to 'a course of conduct involving the multiple commission of acts referred to in paragraph 1'**

Having now established what constitutes an attack, a number of the acts enumerated in Article 7(1) will be examined in the context of the United Kingdom. These acts are chosen given their intersectionality<sup>76</sup> with the field of social security provision. Extermination is

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<sup>67</sup> Aloyo (n 7) 510

<sup>68</sup> *Kayishema* (n 54) para. 122

<sup>69</sup> *Ibid.*

<sup>70</sup> Bantekas (n 23) 190

<sup>71</sup> Thomas O. Hansen "The Policy Requirement in Crimes Against Humanity: Lessons from And for The Case of Kenya" (2011) 43 *The George Washington International Law Review* 1, 12

<sup>72</sup> Bantekas (n 23) 201

<sup>73</sup> ICC Statute (n 44) art 7(2); See also Halling (n 48) 828; See also *Akayesu* (n 59) para. 581 "of attack' may be defined as an unlawful act of the kind enumerated in...the [ICTR] Statute"

<sup>74</sup> Claire Henderson "Australia's Treatment of Asylum Seekers" (2014) 12(5) *Journal of International Criminal Justice* 1161, 1166

<sup>75</sup> This terminology is chosen in the statute, as opposed to commission of multiple acts, so that it cannot be inferred that different types of acts *must* be committed; See Kittichaisaree (n 14) 94

<sup>76</sup> See section II

considered as it relates to “the intentional infliction of conditions of life.”<sup>77</sup> Building upon this, torture is considered as it relates to “the intentional infliction of severe pain or suffering.”<sup>78</sup> Finally, Other Inhumane Acts are also considered given that this relates to the infliction of suffering or serious injury to health by means of an inhumane act which is similar to other enumerated acts.<sup>79</sup> These acts are therefore highlighted as they can act, in relation to CAH, as a link between the conditions of life faced by civilians reliant on social security policy and the social security policies themselves. If it can be established that these acts have occurred as the result of social security policy it follows that a wide spread or systematic attack has occurred in the United Kingdom.

### **A. Extermination**

Article 7(1) (b) of the ICC Statute lists ‘Extermination’ as an enumerated act which is distinguishable from, and broader than, genocide as no persecutory elements are required.<sup>80</sup> Extermination is considered here given that it “includes the intentional infliction of conditions of life...calculated to bring about the destruction of part of a population.”<sup>81</sup> The ICC statute allows for assistance in defining the acts to be taken from the ICC Elements of Crimes.<sup>82</sup> These Elements can be referred to in attempting to define the parameters of customary international law regarding a particular act<sup>83</sup> and offer guidance that extermination requires the “mass killing of members of a civilian population.”<sup>84</sup> It has been argued that this “may encompass the withdrawal of food or other necessary items or consumables that sustain life”<sup>85</sup> and this links to the notion of inflicting conditions of life.<sup>86</sup> A broader definition has been provided by the ICTY in the *Brdanin* case where it was held that “the *actus reus* of the crime of extermination consists of any act, omission or combination thereof which contributes directly or indirectly to the killing of a large number of individuals.”<sup>87</sup> The Tribunal has also held that this encompasses the institution of circumstances causing the mass death of others.<sup>88</sup>

An argument pertaining to social security provision along these lines would be that this provision has caused conditions of life which ultimately, albeit indirectly, led to the deaths of large numbers of individuals within the UK. Such policies include fitness-for-work assessments which can result in individuals losing disability benefits contrary to the advice of

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<sup>77</sup> ICC Statute (n 44) art 7(2) b

<sup>78</sup> Ibid. art 7(2) e

<sup>79</sup> Ibid. art 7(1) k

<sup>80</sup> McCormack (n 38) 190

<sup>81</sup> ICC Statute (n 44) Article 7(2)(b); See also International Criminal Court (ICC Elements) “Elements of Crimes” <<https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>> accessed on 20<sup>th</sup> December 2016 Article 7(1)(b)

<sup>82</sup> ICC Statute (n 44) Article 9(1)

<sup>83</sup> Fannie Lafontaine “Canada’s Crimes against Humanity and War Crimes Act on Trial” (2008) 10 *Journal of International Criminal Justice* 269, 274

<sup>84</sup> ICC Elements (n 81) Article 7 (1)(b)(2)

<sup>85</sup> Bantekas (n 23) 191

<sup>86</sup> The Trial Chamber in the Extraordinary Chambers in the Courts of Cambodia have supported this view See; Randle C. DeFalco “Accounting for Famine at the Extraordinary Chambers in the Courts of Cambodia: The Crimes against Humanity of Extermination, Inhumane Acts and Persecution” (2011) 5 *The International Journal of Transitional Justice* 142, 148

<sup>87</sup> *Prosecutor v. Brdanin*, Case No. IT-99-36-T, Judgement, 2004, 389; Quoted in Kearney (n 7) 266

<sup>88</sup> *Kayishema* (n 54) para. 146

medical professionals<sup>89</sup> as well as punitive benefit sanctions.<sup>90</sup> This can be supported by the fact that 2,380 people were found to have died after having being found fit for work<sup>91</sup> which, in some circumstances, would have seen individuals lose benefits.<sup>92</sup> Of the 49 peer reviews which were “internal reports written by civil servants after investigations into suicides and other deaths that have been linked to benefit claims”<sup>93</sup> 10 of them involved the deceased having had their benefits sanctioned at some stage.<sup>94</sup> This equates to over twenty percent of the investigated deaths. The Department of Work and Pensions (DWP) asserts, because the cause of death was not recorded in collecting this data, that “no causal effect between the benefit and the number of people who died should be assumed.”<sup>95</sup> Thus this author is wary of making such assumptions. Even so, individual cases serve to highlight that links can, and indeed do, exist between the withdrawal of benefits and the deaths of those reliant on them.<sup>96</sup> The cases of David Clapson<sup>97</sup> and Mark Wood<sup>98</sup> stand testament to this. This is because they demonstrate that benefits withdrawals and sanctions has been causally linked to the deaths of some of those subject to them. More so, DWP staff are being trained to recognise suicidal

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<sup>89</sup> See the case of Mark Wood below (n 98)

<sup>90</sup> See the case of David Clapson below (n 97)

<sup>91</sup> Department of Work and Pensions “Mortality Statistics: Employment and Support Allowance, Incapacity Benefit or Severe Disablement Allowance” 2015, [accessed at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/459106/mortality-statistics-esa-ib-sda.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/459106/mortality-statistics-esa-ib-sda.pdf) on 06/01/2017] pp. 8

<sup>92</sup> Lutz Oette “Austerity and the Limits of Policy-Induced Suffering: What Role for the Prohibition of Torture and Other Ill-Treatment?” (2015) 15 *Human Rights Law Review* 669, 679

<sup>93</sup> John Pring “Comment: Long-awaited peer reviews suggest ministers failed to act after deaths of ‘vulnerable’ claimants” Disability News Service, 14<sup>th</sup> May 2016 <accessed at <http://www.disabilitynewsservice.com/comment-long-awaited-peer-reviews-suggest-ministers-failed-to-act-after-deaths-of-vulnerable-claimants>> accessed on 6th January 2017

<sup>94</sup> John Pring “One in five benefit-related deaths involved sanctions, admits DWP” Disability news Service, 15th May 2015 <<http://www.disabilitynewsservice.com/one-in-five-benefit-related-deaths-involved-sanctions-admits-dwp/>> accessed on 6th January 2017

<sup>95</sup> Department of Work and Pensions (n 91) 9

<sup>96</sup> Oette (n 92) 678

<sup>97</sup> David Clapson had his benefits terminated in July 2013 as a punitive measure for missing two appointments at the job centre. His cause of death was diabetic ketoacidosis which was itself caused by an acute lack of insulin. At the time of his death he had £3.44 in his bank account. This lack of finances no doubt contributed to Mr Clapson’s death at the time of which his stomach was empty of food. On top of this, this lack of finances will have contributed to his inability to pay for electricity which resulted in his electricity supply being cut off. This resulted in the fridge in which Mr Clapson stored his insulin not working. This would affect the ability of the insulin to fulfil its purpose. For these reasons, it is contended that as the benefit sanction resulted in Mr Clapson’s dire financial situation, and that financial situation contributed to his death, the benefit sanction was causally linked to his death. See Ashley Cowburn “The deaths, sanctions and starvation that prove I, Daniel Blake is accurate – despite what some critics say” The Independent, 28<sup>th</sup> October 2016 <<http://www.independent.co.uk/news/uk/politics/i-daniel-blake-accuracy-ken-loach-benefits-sanctions-deaths-iaian-duncan-smith-toby-young-a7384581.html>> accessed on 6th January 2017

<sup>98</sup> Mark Wood died months after an Atos fitness-for-work assessment found him fit for work and the jobcentre, on account of this decision, stopped his employment and support allowance leaving him £40 per week to live on. This was despite a letter from his doctor, Nicholas Ward, to the job centre declaring Mr Wood ‘absolutely unfit for work.’ His cause of death was probably ‘caused or contributed to by Wood being markedly underweight and malnourished’. Between April 2013, around the time his benefits were cut, and his death in August 2013 Mr Wood’s Body mass index, which can be used to measure whether an individual is of a healthy weight for their height, dropped from 14.1-11.5. This drop correlates with the withdrawal of benefits. On the basis of this is contended that Mr Wood’s death was causally linked to the withdrawal of benefits. See Amelia Gentleman “Vulnerable man starved to death after benefits were cut” The Guardian, 28<sup>th</sup> February 2014 <<https://www.theguardian.com/society/2014/feb/28/man-starved-to-death-after-benefits-cut>> accessed on 6th January 2017

intention and this is evidence that death has become part of the benefit and social security structures in the U.K.<sup>99</sup>

This reasoning, however, faces difficulties in establishing the intent of the perpetrator who must know that the conduct is part of a widespread or systematic attack.<sup>100</sup> The requirement of intent has been supported in the ICTY<sup>101</sup> and DeFalco has highlighted “establishing the requisite *mens rea* for each accused”<sup>102</sup> as a difficulty in obtaining conviction for extermination. Meaning guilty mind<sup>103</sup> *mens rea* relates to intention which is “a condition for criminal liability”<sup>104</sup> and has been referred to as the ‘mental element’ by the ICC.<sup>105</sup> A lesser degree of intent may be found in some of the case law where the notion of having knowledge that multiple deaths “were a probable consequence of the act or omission”<sup>106</sup> was deemed sufficient. The ICTR has held that the *mens rea* standard may be one of “intention, recklessness, or gross negligence.”<sup>107</sup> This requires the perpetrator to be “reckless, or grossly negligent as to whether the killing would result”<sup>108</sup> with an awareness that their acts formed part of a mass killing event.<sup>109</sup> The notion of an emerging standard of recklessness in international criminal law for CAH will be explored in further detail below.<sup>110</sup> Given that the DWP is training staff to recognise suicidal intention a strong argument could be made that recklessness or gross negligence are present in these circumstances. However, this notion is qualified by the widespread or systematic attack being against particular groups<sup>111</sup> and this acts as a bar to this line of argument. Thus, there is difficulty in establishing the crime of extermination.

## ***B. Torture***

Article 7(1) (f) of the ICC Statute enumerates torture as a CAH. This is defined as the intentional infliction of physical or mental severe pain or suffering<sup>112</sup> unless arising from lawful sanctions.<sup>113</sup> There is evidence of suffering in the UK as a result of social security policy and yet Torture and ill-treatment do not feature in this debate.<sup>114</sup> This is despite the fact that the European Court of Human Rights (ECtHR) has found that claims based upon the intersectionality between social security provision and Article 3 of the European Convention

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<sup>99</sup> Frances Ryan “Death has become a part of Britain’s benefits system” The Guardian, 27<sup>th</sup> August 2015 <<https://www.theguardian.com/commentisfree/2015/aug/27/death-britains-benefits-system-fit-for-work-safety-net>> 6th January 2017

<sup>100</sup> ICC Elements (n 81) Article 7 (1)(b)(4)

<sup>101</sup> *Prosecutor v. Milomir Staki*, IT-97-24-T, 2003, para. 641

<sup>102</sup> DeFalco (n 86) 150

<sup>103</sup> Schabas (n 32) 223

<sup>104</sup> Gerhard Werle and Florian Jessberger “‘Unless Otherwise Provided’: Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law” (2005) 3 *Journal of International Criminal Justice* 35, 35

<sup>105</sup> Ibid.

<sup>106</sup> *Lukic & Lukic* before the ICTY Quoted in Kearney (n 8) 269

<sup>107</sup> *Kayishema* (n 54) para. 146

<sup>108</sup> Ibid. para. 144

<sup>109</sup> Ibid.

<sup>110</sup> See Section V.

<sup>111</sup> *Kayishema* (n 54) para. 146

<sup>112</sup> Cassese and Gaeta (n 28) 95

<sup>113</sup> ICC Statute (n 44) Article 7(2)(e)

<sup>114</sup> Oette (n 92) 670

on Human Rights (ECHR)<sup>115</sup> may be successful in certain circumstances,<sup>116</sup> provided that the “minimum level of severity”<sup>117</sup> is met. The case law suggests that state responsibility will arise when an individual is wholly dependent on the state and is faced “with official indifference when in a situation of serious deprivation or want incompatible with human dignity.”<sup>118</sup>

In 2013, 291,000 Job Seekers Allowance (JSA) claimants were subject to sanctions, although the number of those recommended for sanctions was much higher.<sup>119</sup> The public purpose of such sanctions, is to engender, through coercion, the JSA claimant’s transition into employment.<sup>120</sup> The sanctions have caused “reduced food consumption, including hunger; homelessness; and stress-related illnesses, particularly anxiety, depression and suicide.”<sup>121</sup> Even so, outside of the detention setting there is a lack of clarity as to what conditions amount to the intentional infliction of severe mental or physical suffering.<sup>122</sup> This is especially so for the purposes of this article. This is because for CAH of torture to occur, the victims must be “in the custody or under the control of the perpetrator.”<sup>123</sup> Thus, there would be some difficulty in establishing the crime of torture for the purposes of CAH. Further still, and once again, there is difficulty establishing the *mens rea* required to successfully prosecute along this vein.

### **C. Other Inhumane Acts**

The requirement that these Other Inhumane Acts (OIA) be “of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”<sup>124</sup> is the only limiting factor to the application of this provision and provides clarity, and some degree of legal certainty.<sup>125</sup> This “residual”<sup>126</sup> catch all<sup>127</sup> clause was envisioned to prevent any “lacuna”<sup>128</sup> in the punishment of CAH which may have been the result of an exhaustive list of Crimes.<sup>129</sup> This has the potential to allow for evolution<sup>130</sup> and thus create a wider concept of CAH.<sup>131</sup> The extent to which the acts linked to social security are similar to other acts in the statute<sup>132</sup> is thus the final point of analysis upon which the answer to the research questions will be found.

Despite the fact that the acts in question may not have reached the thresholds set forth by the crimes of extermination or torture, the preceding two sub-sections illustrate how the effects of

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<sup>115</sup> The Prohibition of Torture

<sup>116</sup> *Larioshina v. Russia*, no. 56869/00, 2002, para 3.

<sup>117</sup> *O'Rourke v. United Kingdom*, no. 39022/97, 2001, p.5

<sup>118</sup> *Budina v. Russia* no. 45603/05, 2009, p.6

<sup>119</sup> Oette (n 92) 676

<sup>120</sup> Ibid. pp. 671

<sup>121</sup> Ibid. pp. 675

<sup>122</sup> Ibid. pp. 681

<sup>123</sup> ICC Elements (n 81) Article 7(1)(f)

<sup>124</sup> ICC Statute (n 44) Article 7(1)(k)

<sup>125</sup> Bassiouni (n 50) 331

<sup>126</sup> Cryer et al. (n 21) 261; See also Cassese and Gaeta (n 28) 98; See also Bantekas (n 23) 194

<sup>127</sup> McCormack (n 38) pp. 201

<sup>128</sup> Kittichaisaree (n 14) 126

<sup>129</sup> Bantekas (n 23) 194; See also McCormack (n 38) 201

<sup>130</sup> Schabas (n 32) 119

<sup>131</sup> Skogly (n 4) 70

<sup>132</sup> ICC elements (n 81) Article 7(1)(k)

social security provision have had similar effects. This demonstrates the similar nature of the acts in question to the enumerated crimes for the purposes of article 7(1) (k). In regard to food deprivation, Kearney suggests that OIA may be the “most viable way that ESR violations can be criminalized under the CAH umbrella.”<sup>133</sup> This point is used to add credence to this author’s claim that acts relating to social security policy which result in ESRs violations have the potential to be classified as a CAH under the ICC Statute. This provision is of importance given that it does not require special intent or a specifically targeted group.<sup>134</sup> What it requires is “serious bodily or mental harm.”<sup>135</sup> There is strong evidence to support that such harm has occurred in the U.K. and that “the threshold of grave or systematic violations of the rights of persons with disabilities has been met in the State party.”<sup>136</sup> Given that it was established above that great harm and deaths have occurred, on a large scale, due to the imposition of conditions of life as a result of social security policy the use of Article 7(1) (k) may allow these acts of a similar nature to extermination and torture to be classified as a CAH.

### **V. Mens Rea and Other Inhumane Acts**

The preceding section has demonstrated that acts relating to social security policy which have resulted in ESRs violations have the nature of CAH in that they may constitute OIA. However, in order to be successfully prosecuted these acts, the *actus reus*, must be accompanied by the *mens rea*. This mental element is defined in Article 30 of the ICC Statute and requires that “unless otherwise provided”<sup>137</sup> the material elements of a CAH, as a crime falling under the jurisdiction of the ICC, can only incur criminal responsibility, liability, and punishment if “committed with intent and knowledge.”<sup>138</sup> Intent and knowledge are further elaborated upon later in Article 30. Intent is split between conduct and consequence with it being required that “in relation to conduct, that person means to engage in the conduct”<sup>139</sup> and regarding consequences “that person means to cause that consequence or is aware that it will occur in the ordinary course of events.”<sup>140</sup> Knowledge, meanwhile, “means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”<sup>141</sup>

Article 30 codifies “the mental element as a general requirement of individual criminal responsibility for the first time in international criminal law”<sup>142</sup> and sets a high<sup>143</sup> threshold of *mens rea* in requiring both intent and knowledge.<sup>144</sup> This standard applies in all cases, regarding international criminal law, unless a rule specifically regulating the *mens rea* exists.<sup>145</sup> This general standard appears to be limited to intent alone.<sup>146</sup> Thus, the ICC has

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<sup>133</sup> Kearney (n 8) 283

<sup>134</sup> Ibid. 282

<sup>135</sup> Bantekas (n 23) 194

<sup>136</sup> CRPD (n 19) para. 113: para. 113(a) explicitly links this to welfare system reforms justified in the context of austerity measures. Thus, this statement applies to social security policy.

<sup>137</sup> ICC Statute (n 44) Article 30(1)

<sup>138</sup> Ibid.

<sup>139</sup> Ibid. Article 30(2) a

<sup>140</sup> Ibid. Article 30(2) b

<sup>141</sup> Ibid. Article 30(3)

<sup>142</sup> Werle and Jessberger (n 104) 36

<sup>143</sup> Schabas, *An Introduction to the International Criminal Court Third Edition* (CUP 2007) 223

<sup>144</sup> Antonio Cassese *International Criminal Law Second Edition* (OUP 2008) 74

<sup>145</sup> Werle and Jessberger (n 104) 40

<sup>146</sup> Ferrando Mantovani “The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer” (2003) 1 *Journal of International Criminal Justice* 26, 32

adopted a mental element defined by a high level of culpability.<sup>147</sup> This appears counter to tribunal cases which have indicated that a standard below this high level of direct intent (or *dolus*) can be applied in order to establish culpability.<sup>148</sup> Furthering this, Werle and Jessberger contend that, on account of the wording of Article 30(2) (b) “recklessness and *dolus eventualis* do not meet the requirements.”<sup>149</sup>

Despite Cassese’s suggestion that recklessness or *dolus eventualis* have the potential to be encompassed by the definition of intent enshrined in Article 30(2)<sup>150</sup> debate exists as to whether this is indeed the case with cases both supporting and rejecting the inclusion of recklessness as adequate *mens rea* for prosecution in international criminal law.<sup>151</sup> If rejected the resulting high standard for the mental element may act as a barrier to prosecuting the CAH of OIA in the U.K.

However, the seeming requirement of a high level of intent may only apply in circumstances in which it is not otherwise provided. In this sense, Article 30, in starting with the phrase “unless otherwise provided,”<sup>152</sup> may in fact only exclude *dolus eventualis* or recklessness “as far as it is not otherwise provided.”<sup>153</sup> Schabas contends that, because the definitions of crimes within the ICC Statute “have their own built-in mental requirements,”<sup>154</sup> this high standard, as a general rule, will not apply to the crimes enumerated in the ICC Statute in many circumstances. Some authors contend that the implications of this are that Article 30 “should be interpreted as a default rule that is applied only if there are no specific rules on the mental element at all in either the other provisions of the ICC Statute, the Elements of Crimes or customary international law.”<sup>155</sup> Schabas suggests that, pertaining to CAH, there exists a pre-existing *mens rea* requirement; that of “knowledge of the attack”<sup>156</sup> and if the reasoning in this paragraph is accepted it follows that CAH, including OIA, are not subject to the default Article 30 rule.

Furthermore Aloyo highlights that, the intent in relation to OIA has been defined by the elements of crimes<sup>157</sup> as the perpetrator being “aware of the factual circumstances that established the character of the act.”<sup>158</sup> This has been interpreted as referring to “those circumstances that render the consequences the ordinarily expected result of the act.”<sup>159</sup> It follows from this line of reasoning that a perpetrator should be culpable, and satisfies the mental requirements of the CAH of OIA, if the result of their actions is the normal consequence, ordinarily expected, of such acts. This aligns with the *Enigster* Case,

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<sup>147</sup> Cryer et al. (n 21) 383

<sup>148</sup> Ibid. 243; See also the discussion of intent in the final paragraph of Section IV(A)

<sup>149</sup> Werle and Jessberger (n 104) 53; *Dolus Eventualis* can be defined as knowing the likely result or outcome see Kearney (n8) 268

<sup>150</sup> Cassese (n 144) 73

<sup>151</sup> Bantekas (n 23) 44

<sup>152</sup> ICC Statute (n 44) Article 30(1)

<sup>153</sup> Werle and Jessberger (n 104) 53

<sup>154</sup> Schabas (n 143) 224

<sup>155</sup> Werle and Jessberger (n 104) 55

<sup>156</sup> Schabas (n 143) 224

<sup>157</sup> ICC Elements (n 81) article 7(1)(k)

<sup>158</sup> Aloyo (n 7) 514

<sup>159</sup> Ibid.

highlighted by Cassese,<sup>160</sup> which held that “as to intent, it is a well-known rule that any person in his right mind is held to intend the natural consequences of his actions.”<sup>161</sup>

Beyond this, Kearney suggests that “there is an emerging recklessness standard in international criminal law.”<sup>162</sup> Recklessness and *dolus eventualis* are common standards in domestic jurisdictions which warrant full criminal responsibility of the offender.<sup>163</sup> Recklessness has been described as “the *mens rea* of foreseeability”<sup>164</sup> and this definition allows acts of which the consequences were, albeit not the primary aim of the act,<sup>165</sup> probable to be punished. Building upon this, regarding foreseeability, the *W* case<sup>166</sup> demonstrates that when a consequence is commonly known a perpetrator who causes an individual to face such consequences acts “at least with *dolus eventualis* for the serious consequence suffered by victim.”<sup>167</sup> Thus, in cases where such consequences are commonly known a perpetrator cannot argue that no foresight existed as to the consequences of their actions. The negative effects of actions relating to social security in the U.K. have become well known, especially so during the reign of the austerity imposing governments since 2008. For example, as referenced above, DWP staff are being trained to recognize suicidal intention. This demonstrates that it is known to the DWP that deaths have been occurring. As the policies have continued, unchanged, this may allow an argument of recklessness to be made. In aligning this analysis with the contentions made within this article, it is contended that the effects of continuing policies which have led to consequences of the CAH of OIA occurring satisfy the mental element requirements. This is because, after seven years, the implications of such policies can in no way be unknown to those implementing them as they are commonly known. Consequently, the effects of the perpetrator’s actions are foreseeable to them.

If it is accepted that, given the specific mental elements within CAH, Article 30 does not apply in these circumstances, or failing this Cassese’s suggestion that recklessness or *dolus eventualis* have the potential to be encompassed by the definition of intent enshrined in Article 30(2) is instead accepted, it must also be accepted that a lesser standard of intent will suffice to satisfy the mental element of a CAH. This author has demonstrated that such a level of intent, be that *dolus eventualis* or recklessness, has been satisfied given that the effects of social security policies are common knowledge, and therefore the consequences of such policies are foreseeable. This foreseeability demonstrates that perpetrators are aware of the factual circumstances that established the character of the act given that the consequences were the ordinarily expected result of the policies, and acts to implement them. This would appear to satisfy the mental element of intent for the CAH of OIA found in the elements of crimes. Further still, this foreseeability would satisfy the *mens rea* requirements if a lesser standard of recklessness or *dolus eventualis* is accepted. In this author’s opinion, these two prongs, relating to foreseeability, suggest that the mental elements of the CAH of OIA have been satisfied. Combined with the analysis in the second and third sections of this article,

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<sup>160</sup> Cassese (n 144) 61

<sup>161</sup> Ibid.

<sup>162</sup> Kearney (n 8) 258

<sup>163</sup> Werle and Jessberger (n 104) 51

<sup>164</sup> Marcus (n 53) 276

<sup>165</sup> Bantekas (n 23) 43

<sup>166</sup> Highlighted in Antonio Cassese *The Oxford Companion to International Criminal Justice* (OUP 2009) 970

<sup>167</sup> Ibid.

which contended that a widespread or systematic attack against a civilian population has occurred and is continuing to occur in the U.K. the satisfaction of the required mental elements, the *mens rea*, will allow individual criminal culpability to be found.

Many individuals have been involved in the design, implementation and enforcement of the social security policy which this author has argued has led to ESRs violations and as such to the CAH of OIA. This includes *inter alia*; elected ministers; civil service staff, particularly those in the Department of Work and Pensions (DWP); jobcentre staff, who impose sanctions; and Atos employees, who conduct the work capability assessments. It is, however, not the purpose of this article to determine who exactly incurs individual criminal responsibility in regard to the circumstances in which a CAH is established on account of ESRs violations caused by Social Security Policy. Rather, it has been to establish that such responsibility can exist. As such this author accepts that further research is required in order to build upon these findings by identifying those who ought to incur such responsibility.

## **VI. Prosecuting Crimes against Humanity in the United Kingdom**

Building upon these preceding sections, which have addressed the nature of international criminal law more generally, this section will apply the findings of this article to the context of the U.K. The International Criminal Court Act 2001 (ICCA)<sup>168</sup> “gives effect to the Rome Statute of the International Criminal Court”<sup>169</sup> within the U.K. Making it “an offence against the law of England and Wales for a person to commit... a crime against humanity”<sup>170</sup> within the U.K.<sup>171</sup> Article 50(1)<sup>172</sup> couples, and aligns, the concept of a CAH in the domestic law of the U.K with that definition set forth under Article 7 of the ICC Statute. Further, the provisions of Article 7 of the Rome Statute are included in Schedule 8, Article 7 of the ICCA. Consequently, as this definition has been elaborated upon in the preceding sections, it need not be repeated here.

The intent requirements in the Law of the U.K. relating to CAH mirror the requirements laid down in Article 30 of the ICC Statute. This demonstrates the principle of positive complementarity whereby States are encouraged to prosecute international crimes domestically. However, this is with the addition of a fourth section which, not only recognises that s.66 of the ICCA corresponds with Article 30<sup>173</sup> but also, allows the U.K. Courts to “take into account any relevant judgment or decision of the ICC.”<sup>174</sup> More crucially, “account may also be taken of any other relevant international jurisprudence”<sup>175</sup> and this section would therefore allow account to be taken of the ICTR and ICTY judgements, referred to earlier in this article.<sup>176</sup> Both the ICTR and ICTY have accepted lesser degrees of intent including “recklessness, or gross negligence”<sup>177</sup> as to whether killing

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<sup>168</sup> International Criminal Court Act (ICCA) 2001

<sup>169</sup> Anonymous “The International Criminal Court Act 2001” Criminal Law Review, October 2001, pp.767

<sup>170</sup> ICCA (n 168) s.51(1)

<sup>171</sup> Ibid. s.51(2) a

<sup>172</sup> ICCA (n 168)

<sup>173</sup> Ibid. s.66(4)

<sup>174</sup> Ibid.

<sup>175</sup> Ibid.

<sup>176</sup> See the discussion of intent in the final paragraph of Section IV(A)

<sup>177</sup> *Kayishema* (n 53) para. 146

would result<sup>178</sup> with awareness that the act formed part of a mass killing event.<sup>179</sup> This demonstrates the potential for the U.K. Courts to prosecute when there is knowledge that multiple deaths “were a probable consequence of the act or omission.”<sup>180</sup> This argument can be extrapolated, and combined with the findings of the previous section, to contend that as deaths as a result of social security policies in some circumstances are commonly known and thus foreseeable, as a probable consequence, individuals have satisfied the mental elements in the U.K. This mental element, as *mens rea*, is required “before a defendant can properly be treated as blameworthy for the consequences of his actions”<sup>181</sup> and consequently this finding is of significance as it naturally follows that individuals can be held to account in the U.K. courts for their actions.

This links to the notion of oblique intent which, in British law, satisfies the *mens rea* by presuming intent when, although intent is disputed, the result of an action was “virtually certain.”<sup>182</sup> In U.K. law this oblique intent has been described as established by, for the purposes of the offences specified in the ICCA statute, the ICCA 2001.<sup>183</sup> Thus, if a result, pertaining to a CAH, is foreseeable in the ordinary course of events “irrespective of whether it is his aim that it should occur”<sup>184</sup> the individual whose actions cause that result to occur can be prosecuted for CAH under U.K. law. This allows an individual to be held as intentionally causing a result when “although it is not his purpose to cause it, he knows that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other result.”<sup>185</sup> Therefore, in considering once again the purpose of benefit sanctions,<sup>186</sup> as a manifestation of social security policy in the U.K., including, but not exclusively, punishing individuals, and coercing and conditioning them into certain behaviours it is clear that the results of a nature of a CAH of OIA are not the intended purpose. However, it is also clear, and it has been well documented,<sup>187</sup> that these sanctions have resulted in conditions of life which this author believes to be tantamount to OIA. Further, in many circumstances these results are part and the parcel of the ordinary course of events; they are foreseeable. Consequently, they can incur individual criminal responsibility and can be prosecuted in the U.K. under the ICCA 2001 as they satisfy both the material and mental elements.

Despite this, in order to be instituted the ICCA requires the consent of the Attorney General.<sup>188</sup> Once instituted, such proceedings are triable only by indictment<sup>189</sup> and, if a guilty verdict is returned, “a person convicted of an offence is liable to imprisonment for a term not exceeding 30 years.”<sup>190</sup> Other than already highlighted, the means of prosecution goes beyond the research hypothesis of this article and will not be addressed here. Regardless of

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<sup>178</sup> Ibid. para. 144

<sup>179</sup> Ibid.

<sup>180</sup> *Lukic & Lukic* (n 106) 269

<sup>181</sup> Winnie Chan and Andrew P. Simester “Four Functions of Mens Rea” (2011) 70(2) *Cambridge Law Journal* 381, 383

<sup>182</sup> Bantekas (n 23) 41

<sup>183</sup> Kate Grady “International crimes in the courts of England and Wales” (2014) 10 *Criminal Law Review* 693, 701; See also Anonymous (n 169) 768

<sup>184</sup> Anonymous (n 169) 768

<sup>185</sup> Itzhak Kugler “The definition of oblique intention” (2004) 68(1) *Journal of Criminal Law* 79, 80

<sup>186</sup> See the discussion of coercion in the final paragraph of Section IV(B)

<sup>187</sup> Ibid.

<sup>188</sup> ICCA (n 168) s.53(3)

<sup>189</sup> Ibid. s.53(2)

<sup>190</sup> Ibid. s.53(6)

this, the fact that a CAH capable of being prosecuted has occurred is not diminished simply by the fact that the prosecution itself may face difficulties. In addition to the previous sections of this article, this section has served to highlight that the mental element, and thus criminal culpability, can be established regarding the CAH of OIA as a result of social security policies in the U.K.

## **VII. Conclusion**

Through analysing what constitutes a crime against humanity, and having outlined the requirements of the chapeau of the ICC Statute, this article suggested that the extent to which acts relating to social security policy were an attack had to be examined. In undertaking this examination, it was found that this question could only be answered in considering the extent to which social security policy can equate to ‘a course of conduct involving the multiple commission of acts referred to in paragraph 1’ of the ICC Statute. Although partial cases were made for the crimes of both extermination and torture having taken place it was clear that both these lines of analysis had their undoings. They did however serve to provide evidence that the crime of ‘other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health’ may well have occurred multiple times. If this reasoning is accepted an attack has occurred. This conclusion is reached given that the effects of social security policy in the United Kingdom have been such as to cause serious injury to health as well as death. The number of victims of sanctions should fulfil the requirement of “widespread” and this article has already contended that as this was governmental policy it fulfils the requirement of “systematic”.

In addressing the mental element required by both the ICC Statute and ICCA 2001 this author sought to argue that individual criminal responsibility can be established, and thus prosecutions can occur, for the results of these social security policies. It was highlighted that Article 30 of the ICC statute appears to require a high threshold of intent, in order for such responsibility to be established. Even so, Cassese, as a proponent of the view that recklessness and *dolus eventualis* can be read into the Article, as well as a number of academics, who support the contention that Article 30 does not apply to CAH as such crimes specify their own intent requirements, were highlighted. Neither of these two approaches, be that the acceptance of either the higher or lower threshold of intent, can be conclusively determined to be correct. However, section 66(4) of the ICCA 2001 allows the determination of intent, in domestic prosecutions of CAH in the U.K., to take account of relevant international jurisprudence from sources other than the ICC. As both the ICTR and ICTY have held that the lesser standard of intent, including recklessness, satisfies the *mens rea* it follows that the U.K. Courts can, if they so choose, determine that the lower threshold of intent is in fact appropriate for the establishment of individual criminal responsibility for CAH in the U.K. Thus, the *mens rea*, or mental element, can in fact be established in regarding the CAH of OIA in the U.K. as a result of social security policy. It is contended that these crimes can be prosecuted in the U.K. as the lesser mental element of recklessness or *dolus eventualis* is satisfied.

In conclusion, this author has established that Economic and Social Rights Violations caused by social security policies can amount to a widespread *and* systematic attack against a civilian population and this, combined with the satisfaction of the mental elements, answers the research hypothesis in the affirmative: social security policies in the U.K. can constitute a

crime against humanity. Using this finding as a springboard, and in order to establish the extent to which the U.K.'s austerity influenced social security policies since 2008 can be prosecuted as a crime against humanity, future research must analyse the social security policies themselves in more detail. In combination with this, such research must also identify those who may incur individual criminal responsibility.