Enforced Starvation: Exploring Individual Criminal Responsibility for State-Induced Famines

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Abstract

Hunger has caused and continues to cause more deaths than have been brought about by all the epidemics, pandemics, civil and inter-state wars, genocides and natural disasters humanity has suffered. This article seeks to differentiate between circumstances where people die from hunger, and where they are killed as a result of the use and manipulation of food, water supplies and weather patterns as a weapon of extermination. The author explores and exposes the myths behind famines as the result of natural disasters and unavoidable external circumstances, and attempts to find a mechanism under international criminal law by which those who use food as a weapon can be held accountable. The author illustrates the need for existing international law to address more directly this often ignored behaviour by use of illuminating case studies, and by addressing the root causes of famines.

1. Introduction

During 1999, there were reliable reports of the deliberate starvation by Milosevic of the people of Kosovo, which resulted directly in over 20,000 deaths. Aid was sent, but security forces prevented United Nations High Commissioner for Refugees convoys from delivering it.[1] Despite the prohibition of this behaviour in international criminal law, the indictment did not include enforced starvation but focused on acts of physical violence.[2]

Famines have been at the epicentre of the worst human rights catastrophes in history, claiming the lives of over 70 million people in the 20th Century,[3] yet perhaps have been the most ignored. From the Ukrainian famines of 1922 and 1932 where over 7 million Ukrainians were deliberately starved to death,[4] to the current situation in North Korea, where it is estimated over 2.5 million have perished,[5] famines have been created, manipulated and fashioned by governments. Where food supplies are a weapon wielded by authorities against those seeking to challenge that power, it has become increasingly clear that famine would in many cases be better termed as enforced mass starvation, as it is more often a result of human action than environmental disaster.[6] What this highlights is whether there is a need to codify existing law on enforced starvation in order to make it more visible. This article will explore whether it would be appropriate and necessary to create a new international offence which recognises that state-adopted policies enforced with the intention that mass starvation ensues, is criminal behaviour.

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[1] UNHCR Press Release, 18 January 1999, available at: http://www.unhcr.org/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&page=home&id=3ae6b8106c.

[2] ICTY, The Prosecutor of the Tribunal, Indictment, IT-02-54, 24 May 1999, at para. 100.

[3] Devereux, *Famine in the Twentieth Century*, (IDS Working Paper 105, 2001) at 1.

[4] Dolot, *Execution by Hunger: The Hidden Holocaust* (New York: W.W. Norton & Company, 1987) at 20.

[5] Amnesty International Press Release, available at: http://web.amnesty.org/library/index/engasa240032004.

[6] Independent Commission on International Humanitarian Issues, *Famine: A Man-Made Disaster*, (London: Pan World Affairs, 1985) at 28.

A. Dispelling the Myth

To establish faminism as a (new) international crime, it is necessary first to displace the fiction that famines are the inevitable result of unfortunate circumstances such as raging civil war and natural disasters, the belief of which is perpetuated by events such as 'Live Aid' and 'Band Aid.'[7] During the 1980's in Sudan and Ethiopia, the implementation of the 'scorched earth' policy together with the destruction of livestock and relief being prevented from reaching the starving,[8] resulted in the worst famine in Sudan's and Ethiopia's history. Despite the Ethiopian foreign minister telling a US official that 'food is a major element in our strategy against the secessionists,'[9] there was very little interest in calling for international criminal trials for those officials responsible for creating or prolonging the famine. This is yet another example of the tendency of the international community to focus on crimes that involve *only* mass violence,[10] which is clearly an arbitrary distinction to make for the victims of enforced starvations when the result, mass extermination, is often the same. The response from the developed world to what was in reality a human rights atrocity brought about by government policy, was characterised by pictures of cracked earth focusing misleadingly on drought for the reason behind the humanitarian disaster in Ethiopia. This misconception persists and is false: famines do not merely happen, famines are made and allowed to happen.

Once the connection between human agency and famines has been established by reference to some of the worst incidences of famine, the search in international criminal law and international humanitarian law (drawing from the International Criminal Court Statute) and the case-law from the International Tribunal for the Former Yugoslavia (ICTY) and the International Tribunal for Rwanda (ICTR)) for a foundation in which to anchor the definition of a famine crime can begin. Although some faminist[11] behaviour is already arguably caught by existing international criminal law (as will be examined below) existing provisions provide only patchwork coverage. Famines are not the sole and inevitable consequence of abstracts such as climate, food shortages or natural disasters, but in some situations are rather brought about through the intentional or reckless acts of tyrannical leaders through widespread and systematic human rights violations who should be held accountable as some of the world's worst criminals.

B. The Limits of this Article

The focus on individual criminal responsibility in this article is in recognition of the fact that although most induced famines are only possible as a result of a systematic plan carried out at every level of the state. It is generally accepted by states and jurists alike that state

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[7] Bard, 'The Right to Food', (1985) 70, *Iowa Law Review* 279 at 1279.
[8] de Waal, *Famine Crimes: The Politics and the Disaster Relief Industry In Africa* (Oxford: James Currey, 1997) at 94.
[9] Keller, 'The Weapon of Food: Drought, War and the Politics of Famine in Ethiopia and Eritrea', (1992) 30 *Journal of African Studies* 609 at 620.
[10] Morris, 'Accountability for International Crimes and Serious Violations of Fundamental Human Rights', (1996) 59 *Law and Contemporary Problems* 1 at 1.
[11] The term faminist is original to the author and is used to refer to a *person* who creates famine, or conditions that lead to famine. Similarly, 'faminism' is used to describe famine-inducing *behaviour*.

criminality does not, at present, exist in international law.[12] International criminal law can punish only individuals not abstract entities. There is also significant overlap between the law of human rights and international criminal law.[13] However these two bodies of law are in reality two different ways of looking at the same problem, and although it may be may be tempting to look to economic, social and cultural rights (in particular the right to food[14]) for a legal basis on which to build the definition of a famine crime, the right to food is considered by many as nonjusticiable and vague[15] and the International Covenant on Economic, Social and Cultural Rights (ICESCR) is generally criticised as creating only weak and imprecise legal obligations for states parties.[16] Although human rights treaties require states parties to guarantee rights through, among others, judicial measures, including criminal sanctions,[17] this is of limited use as most famines occur within the boundaries of a single state, and it is very unlikely that the violating state officials will be put on trial by their own state for carrying out state policy. For example North Korea is a party to the International Covenant on Civil and Political Rights (ICCPR) and ICESCR,[18] but the leader of North Korea, Kim Jong Il, will not be prosecuted by his own state for his massive violations of the right to food or the right to life. Rather it is more realistic to look to the exercise of international criminal law or the ICC.

It is important to emphasise, at the outset however, that behind every famine, there is not necessarily what could be classed as criminal conduct on behalf of the state. In this sense I do not intend to address all those acts of states which could be said to contribute to famine. For example, during the 1990s, the sanctions that the UN Security Council imposed on Iraq, Liberia, Sudan, Angola and Yugoslavia[19] caused massive disruptions in the distribution of food, and contributed directly, as stated by the UN Committee on Economic, Social and Cultural Rights, to starvation on a massive scale and famine.[20] Nor is it the purpose of this article to address the economic policies of governments that have negative impacts on food supplies for people living in other countries. It is recognised by jurists, economists and historians alike, that there are much deeper roots of famine to be found in unfair trade practices. For example, the price of agricultural produce in the European Union and United States has continually been kept artificially low to benefit (typically domestic) consumers and corporations by subsidising local producers rather than favouring the exports of developing countries.[21] World Bank policy and the Common Agricultural Policy[22] have all implemented programmes that result in 'dumping' and 'cash cropping', widely recognised as having

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[12] Harris, *Cases and Material on International Law*, 6th edn (London: Sweet & Maxwell, 2004) at 504. But see, generally, Pellet, 'Can A State Commit A Crime? Definitely, Yes!', (1999) 10 *European Journal of International Law* 425.

[13] See Skogly, 'Crimes Against Humanity – Revisited: Is There A Role for Economic and Social Rights?', (2001) 5 *International Journal on Human Rights* 58.

[14] Article 11(2), International Covenant on Economic, Social and Cultural Rights 1966, 999 UNTS 3.

[15] See, for example, Eide, 'Realisation of Social and Economic Rights and the Minimum Threshold Approach', (1989) 10 *Human Rights Law Journal* 35 at 37-8.

[16] Abbott et al., 'The Concept of Legalisation', (2000) 54 *International Organisations* 401 at 412. See also Goodwin-Gill, 'Obligation of Conduct and Result', in Alston et al., (eds), *The Right To Food* (Dordrecht, Netherlands: Martinus Nijhoff, 1984) 111.

[17] General Comment No. 31, 26 May 2004, CCPR/C.Rev.1/Add.13 at para. 18.

[18] North Korea ratified the two Covenants in 1981. See the official list of ratifications and reservations, available at: http://www.ohchr.org/english/countries/ratification/4.htm and http://www.ohchr.org/english/countries/ratification/3.htm.

[19] For detailed analysis of the effect of UN sanctions, see Pilger, *The New Rulers of the World* (London: Verso Books, 2003) at 56-70.

[20] General Comment No. 8, 12 December 1997, E/C.12/1997/8 at para. 3.

[21] Report of the Special Rapporteur on the Right to Food, 24 January 2005, E/CN.4/2005/47 at para. 40.

[22] Shepard, 'The Denial of the Right to Food in Africa', (1985) 15, *California Western International Law Journal* 528 at 528.

disastrous effects on food production in developing nations.[23] However discussion of the legality of this is also beyond the scope of this article.

This article is to focus on the very specific and intentional use of food as a method of performing massacres, and also where governments implement policies where famine is an unintended consequence, but once observed, is allowed to continue and actively prolonged. This, in keeping with existing international criminal law which, (as will be discussed below) criminalises behaviour on the basis of an intention to commit the offence in question or reckless indifference thereto.

C. Defining Famine

It is important at this stage to define famine, so as not to confuse it with the plethora of other situations involving malnutrition. Good examples are Kenya and India,[24] where acute food shortages and extreme hunger are still a considerable problem, however there is no famine.[25] In academic literature, the tendency has been over recent years to make the definition of famine increasingly broad. However, only the most severe forms of malnutrition can be included in the definition for the purposes of singling out truly criminal behaviour and distinguishing it from a mere 'food crisis.' I have modified the World Food Programme definition of famine,[26] taking into account Amartya Sen's emphasis on the particularly virulent nature of famines.[27] Such a definition that encapsulates the singularity of famine is used here. A famine is taken to mean a serious and widespread shortage of food across a country or region that dangerously affects the health of a significant number of the population to the extent that there are widespread deaths.

Part 2 will examine the link between human agency in order to establish how governments may engineer famine. Part 3, 4 and 5 will examine how these situations may fall within existing definitions or genocide, war crimes and humanitarian law, and crimes against humanity. Through this examination it will become apparent whether codifying existing international criminal law is necessary or adequate as a mean to redress faminist behaviour by governments.

2. Famine and Human Agency

This segment will look briefly at some of worst cases of enforced starvation in an attempt to demonstrate that famines are unlikely to occur solely as a result of massive crop failures or drought, but that they do commonly occur as the result of man-made starvation regimes. There is ample evidence of this when examining for example the weather patterns that affect neighbouring countries in a similar fashion, but where in one state there is famine, and no severe shortages of food in the other. The historic but also contemporary use of famine as a weapon in the Ukraine, Ethiopia and North Korea, provide particularly horrific examples spanning over a century of the use of hunger by governments against its own people.

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[23] Cleaver, *Food, Famine and the International Crisis*, in *Reading Capital Politically* (Austin: AK Distribution, 2002) at 26.
[24] Waal, *Famine Crimes: The Politics and the Disaster Relief Industry In Africa* (Oxford: James Currey, 1997) at 21.
[25] Sen, *Development as Freedom* (New York: Alfred Knopf, 1999) at 169.
[26] The World Food Programme Report on Famine, available at: http://www.wfp.org/Newsroom/in_depth/Europe/050729_famineasp?section=2.
[27] Sen, *Poverty and Famines* (Oxford: Clarendon Press, 1981) at 40.

A. Ukraine

Stalin is credited with performing the world's first, meticulously planned, grand-scale famine.[28] This is a perfect example of how leaders can resort to faminism as a weapon when the idea of physical annihilation is impractical or otherwise undesirable. Stalin's objective was to eliminate a social class and political faction, and did so in the realisation that starving a population was a much cheaper, and a much quieter way to engage in class warfare. All the areas that suffered famine in the Ukraine contained heavy concentrations of Kulaks and nationalists who were considered to be a hindrance to Stalin's plan to resurrect a politically uniform Russian Empire.[29] The main goal of this famine was to eliminate the middle class and the peasant Ukrainian farmers to force them into collectivisation.[30] Faminism was also used as an effective tool to break up the revival of Ukrainian culture that was occurring under approval of the communist government in Ukraine. Moscow perceived this as a threat to Soviet rule and acted to crush this cultural renaissance in a brutal manner. In 1932, Stalin increased the grain procurement quota for Ukraine by 44%. Not only was this excessive, but quite impossible to attain, and if enforced, 'could only lead to starvation of the Ukrainian people.'[31] There is extensive evidence to show that Stalin and his commanders were aware that this extraordinarily high quota would result in the inability of the Ukrainian people to feed themselves, as they received constant warnings that the grain quota would lead to death on an enormous scale,[32] but pursued the policies regardless. Soviet law was quite clear that no grain could be given to feed the peasants until the quota was met.[33]

The case was not one of necessity. Russia's grain output was less than usual, however there was no danger of starvation without the Ukrainian grain. Communist party officials with the aid of troops and secret police units were used to move against peasants who may have been hiding grain from the Soviet government. Even worse, an internal passport system was implemented to restrict movements of Ukrainian peasants so that they could not travel in search of food.[34] Ukrainian grain was collected and stored, guarded by military units and secret police units while Ukrainians were starving in the immediate area.[35] Aid shipments were offered by the international community and humanitarian organisations, but refused.

The result of these actions was a mass annihilation of its own people to achieve a set of economic goals, and to destroy the social basis of Ukrainian nationalism. The degree of intent and whether the famine was something more than mere reckless indifference to the effects of certain policies will be examined in Part 3.

B. Ethiopia

The Ethiopian famine is an excellent example of how a faminist can take advantage of a natural disaster to further political objectives. In Botswana, between the years of 1980 and

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[28] Mace, *The Man-Made Famine of 1933 in the Soviet Ukraine: What Happened and Why?* (Colorado: Westview, 1984) at 69.
[29] Conquest, *The Harvest of Sorrow: Soviet Collectivisation and the Terror-Famine* (London: Pimlico, 2002) at 10.
[30] Ibid. at 3.
[31] Ibid at 222-3.
[32] Procyk, *Famine in the Soviet Ukraine 1932-1933* (Cambridge: Harvard University Press, 1986) at 120.
[33] Mace, supra n.28 at 76.
[34] Conquest, supra n. 29 at 230.
[35] Dolot, *Execution by Hunger: The Hidden Holocaust* (New York: Norton, 1987) at 12.

1985 food production dropped by 17%, while in Ethiopia it fell by 11%.[36] Kenya's agriculture was even more severely affected by the same drought Ethiopia and Botswana suffered. However in Kenya there was no starvation. Kenya set up a 'drought response committee' to deal with the crisis,[37] whereas the Dergue (the military authority in power) manipulated the situation to starve out their enemies and deliberately prolonged the famine, hiding behind the shield of the natural disaster.[38] In Ethiopia there were 400,000 famine-related deaths in 1984 alone, and over 600,000 in 1985,[39] but in Botswana there was no famine and no deaths. The Ethiopian authorities realised that the drought provided them with an excellent opportunity to inflict starvation upon insurgent populations.[40] The world press displayed the famine in Ethiopia as due to a failure of the rains in Africa. However it has been pointed out that even though the Ethiopian government possessed a drought and famine early-warning system, it took no remedial measures internally and refused offers of foreign assistance.[41] The ruling Dergue exacerbated the consequences of the drought during the mid-1980s with a series of disastrous policy decisions, driven by a desire to completely eliminate its opponents.[42] Government policies such as forced relocation,[43] redistribution of land, and confiscation of grain,[44] makes the intention of the Dergue, argues Jonassohn, 'unambiguously clear'.[45] The forced relocation of over 1.5 million peasants from feeding centres set up in the north to areas more affected by the drought in the south meant there was even less food and resulted in widespread starvation and death. The Dergue persisted with these policies to depopulate rebel strongholds such as Tigre and Wollo so as allow for the extermination of those who remained.[46] The deliberate use of starvation as a military strategy on the battlefield was also commonplace, but hundreds of thousands of civilians were deliberately affected by the same measures used to starve militants. Farms were systematically bombed, livestock slaughtered and on one occasion a convoy of 23 UN trucks carrying 450tons of wheat were intentionally destroyed.[47] Waal concludes that drought and harvest failure did not cause the famine. Nor does he place emphasis on the economic and agriculture policies of the Dergue. Rather, 'the counter-insurgency campaign of the Ethiopian army and air force… [constituting in] major human rights abuses … lay at the heart of the campaign.'[48] Only a most generous interpretation of the events could lead one to conclude that these were the acts of a government trying to win an armed conflict against secessionists by any means necessary, but even if this were the case and the massive loss of civilian life was merely 'collateral,' there are many rules of armed conflict (examined below) that prohibit this kind of activity. Ethiopian authorities knew the effect their policies and military strategies were having and ruthlessly used famine as an instrument of extermination.

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[36] Sen, supra n. 25 at 179.
[37] Campbell, 'Response to Drought Among Farmers and Herders in Kenya', (1999) 27 *Human Ecology Journal* 337 at 401.
[38] Shepard, 'The Denial of the Right to Food in Africa', (1985) 15 *California Western International Law Journal* 528 at 535.
[39] Keller, 'The Weapon of Food: Drought, War and the Politics of Famine in Ethiopia and Eritrea', (1992) 30 *Journal of African Studies* 609 at 610.
[40] Jonassohn and Bjornson, *Genocide and Gross Human Rights Violations In Comparative Perspective* (London: Transaction, 1999) at 36.
[41] Shepard, supra n. 36 at 530.
[42] Keller, supra n. 39 at 620.
[43] de Waal, supra n. 24 at 117.
[44] Shepard, supra n. 36 at 533.
[45] Jonassohn and Bjornson, supra n. 40 at 38.
[46] Keller, supra n. 39 at 619.
[47] Smith, 'Ethiopia and the Politics of Famine Relief', (1987) 145 *Middle East Reports* 31 at 33.
[48] Waal, supra n. 24 at 115.

C. North Korea

North and South Korea have suffered the same unfortunate weather patterns yet the North suffers what has been called the most devastating famines of the 20th century, while the south remains completely untouched by famine.[49] The international community has, until very recently, ignored the human rights situation in North Korea, which is home to one of the world's most repressive governments.[50] On 15 December 2005 the UN General Assembly voted on a series of resolutions addressing the human rights situation in five countries including North Korea.[51] Even so, only a passing reference[52] was made to the famine, that North Korea has been facing for over two decades for the sake of the political survival of Kim Jong Il. The North Korean famine is historically unique due to the political and ideological grounds that resulted in a calamitous economic policy.[53] Despite the obvious proof that its policies were fundamentally flawed, the government continued to implement them causing starvation. At the height of the food shortage, Kim Jong Il introduced the 'Let's Eat Two Meals a Day' campaign when there was barely enough food, (or even feed and seed for its production) to cover one meal a day for the whole population.[54] It has been clear since the early 1990's that North Korea has not had the capacity to feed itself through domestic production and import capacities, yet it has recently requested that the United Nations halt all food assistance there.[55] Where once this aid would be enough to feed over 600.000 people, these will now certainly starve. In the past North Korea has also held its own people hostage by manipulation of food aid from, for example the United States,[56] demanding food aid as a prerequisite to diplomatic relations. North Korea's policy of collectivisation is fundamentally flawed, yet it pursues it, causing the starvation of millions and the acute malnutrition of over half of the population.

The classification of North Korean citizens into various categories of political loyalty determines their entitlement to food. North Koreans are not free to purchase food, rather they are divided into three main classes (the 'core class' 15%, the 'wavering' 58%, and the 'hostile class' 27%).[57] Due to acute food shortages those who are perceived as a politically dangerous receive little or no food and are left to starve, without rations, or the means by which to procure food. The famine in North Korea continues, and is a result of intentional acts of the state, based on a desire to stay in power at whatever cost.

D. Defining Faminist Behaviour

From the examples above, a simple definition of what would constitute a faminist in international criminal law can be formulated.

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[49] Schloms, *The North Korean Famine: Causes and Scale*, (Munster: Lit Verlag, 2004) at 92.
[50] Human Rights Watch Press Release, available at: http://hrw.org/English/docs/2005/04/04/nkorea10410_txt.htm.
[51] GA Res. 173, 15 December 2005, A/60/509/Add.3-IV.
[52] The resolution expressed the General Assembly's 'serious concern over reports of … high infant malnutrition … and failed … attempts to deliver food aid.' Ibid. at para. 4.
[53] Schloms, supra n. 49 at 92.
[54] Ibid. at 101.
[55] Brook, 'By Order of North Korea, U.N. Halts Food Assistance There', *New York Times*, January 7 2006, available at: http://www.nytimes.com/2006/01/07/international/asia/07korea.html.
[56] Amnesty International Press Release, supra n. 5.
[57] North Korean Freedom, available at: http://www.nkfreedom.org/important_nk_topics.html.

> A faminist is someone who has the intention to create or sustain conditions that result in famine and knowingly carries out activities that will induce famine, or recklessly ignores evidence that these policies will or are having the effect of starving a significant number of people.

The *mens rea* for a famine crime therefore is a specific intention to manipulate food and water supplies as a device for the annihilation of a significant number of persons. The lesser offence of the pursuance of policies that are known to be inducing or sustaining famine is characterised by recklessness. Where it is beyond a state's capabilities to prevent or mitigate famine, there can be no criminal sanction. Although Sen places emphasis on the wilful blindness of states to its starving population as a cause of famine,[58] mere indifference is not enough to warrant criminal sanction, however appalling the result.

The following sections will examine how adequately existing international law could deal with the faminist behaviour outlined in the examples above.

3. Famine and the Law of Genocide

Genocide is perceived as the most atrocious, barbaric and heinous of all international crimes,[59] so fitting the *actus reus* for faminism into the law of genocide has significant value. In addition the prohibition of genocide is also seen as being part of customary international law[60] and is generally accepted as having acquired *jus cogens* status and *erga omnes*[61] application. As seen above, the law of genocide could certainly include cases of enforced starvation in terms of such widespread extermination. The definition of genocide in the Genocide Convention is definitive in that it enjoys the status of custom, therefore binding both parties and non-parties, and also appears in the ICTY,[62] ICTR[63] and ICC[64] statutes.

An act of genocide as defined in Article 2 of the Genocide Convention is any of the acts listed below committed with the intention:

> [T]o destroy, in whole or in part, a national, ethnical, racial or religious group…:
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> (a) killing members of the group
> (b) causing serious bodily harm 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.

The mass enforced starvation discussed in Part 2 would fit best most comfortably into category c). The Preparatory Commission for the ICC has recognised that 'the term conditions of life may include…deliberate deprivation of resources indispensable for survival, such as

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[58] Sen, supra n. 25 at 175, argues 'Famines are extremely easy to prevent…they require a severe indifference on the part of the government.'
[59] Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford: Oxford University Press, 2003) at 276.
[60] For example, *The Reservations Case*, Advisory Opinion, ICJ Reports 1951, 32.
[61] *Barcelona Traction Case (Belgium v. Spain)*, ICJ Reports 1970, 3.
[62] Article 4(2), Statute of the Criminal Tribunal for the Former Yugoslavia, (1993) 32 ILM 1159.
[63] Article 6, Statute of the Criminal Tribunal for Rwanda, (1994) 33 ILM 1602.
[64] Article 2(2), Rome Statute, (1998) A/CONF.183/9.

food.'[65] The commentary to the first Protocol Additional to the Geneva Conventions mentions the use of starvation as a tool in committing genocide: 'An action aimed at causing starvation could…be a crime of genocide if it were undertaken with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, according to the terms of the Genocide Convention.'[66] Jurists and commentators[67] such as Robinson, a leading expert on the Genocide Convention, states that withholding or placing a group on an inadequate diet could lead to a commission of genocide.[68] Case law of the ICTR also places emphasis on methods that lead to the *slow death* of victims, using the deprivation of food as a specific example.[69]

It is clear that faminist behaviour is more than adequately provided for in the definition of genocide if enforced starvation leads to the destruction of a particular group in whole or in part. However, the requisite mental element is very different for the crime of genocide from other international crimes, as it requires a specific intent, i.e. more than mere knowledge of the eventual outcome of the acts (or planned acts) is required.[70] Although the ICTR seems to have reduced the *mens rea* requirement for genocide by stating that the perpetrator 'knew or *should have known* that the act committed would destroy, in whole or part, a group',[71] this introduces the idea of reckless genocide and is at odds not only with the current understanding of the *mens rea* requirement, but also with the 'clearly intended result test' set out in other parts of the judgment,[72] and is therefore unlikely to become the accepted test.[73] The standard, accepted test is the requirement of *dolus specialis*, a very specific intent to destroy a group in whole or in part.

The *Jelisic* case best summarises the *mens rea* requirement: 'the special intent which characterises genocide supposes that the alleged perpetrator of the crime selects his victims because they are part of a group which he is seeking to destroy'.[74] The attack must therefore be *on account* of their *ethnic*, *racial*, or *religious* characteristics.[75] Commentators have pointed out that the main weakness of the definition of genocide is that the groups are very limited[76] in that the destruction of political groups,[77] economic groups, professional groups,[78] and so-called 'cultural groups'[79] are *not* included. The tribunals have also been extremely

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[65] Report of the Preparatory Commission for the ICC, Part 2, 7. PCNICC/2000/1/Add.2, available at: http://daccessdds.un.org/doc/UNDOC/GEN/N00/724/27/PDF/N0072427.pdf?OpenElement.

[66] ICRC Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, available at: http://www.icrc.org/ihl.nsf/COM/470-750069?OpenDocument.

[67] See, for example, Jonassohn and Bjornson, supra n.40 at 25.

[68] Robinson, *The Genocide Convention: A Commentary* (New York: Institute of Jewish Affairs, 1960) at 63-4.

[69] *Prosecutor v Akayesu*, ICTR-96-4-T, 2 September 1998, at paras 505-506; and *Kayishema and Ruzindana* Judgement, ICTR-95-1-A, Appeals Chamber, 1 June 2001, paras 114-117.

[70] Triffterer, 'Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such', (2001) 14 *Leiden Journal of International Law* 399 at 400.

[71] Akayesu, supra n. 69, at para. 520.

[72] Ibid. at paras 517-9.

[73] Akhavan, 'The Crime of Genocide in the ICTR Jurisprudence', (2005) 3 *Journal of International Criminal Justice* 989 at 993.

[74] *The Prosecutor v Goran Jelisic* IT-95-10-T 14 December 1999, at para. 67.

[75] Tournaye, 'Genocidal Intent Before the ICTY', (2003) 52 *International and Comparative Law Quarterly* 447 at 447.

[76] For example, see Bassiouni, 'Searching for Peace and Accountability' (1996) 59 *Law and Contemporary Problems* 9 at 15.

[77] Shaw, *International Law* 5th edn (Cambridge: Cambridge University Press, 2003) at 263.

[78] Ratner and Abrams, *Accountability For Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford: Oxford University Press, 2001) at 147.

[79] Schabas, 'Problems of International Codification – Were the Atrocities in Cambodia and Kosovo Genocide?', (2000-2001) 35 *New England Law Review* 287 at 291.

strict in their interpretations of who falls within these groups.[80] Indeed the ICC Statute itself specifically provides for a very strict interpretation of the crime.[81] Not only has this been the judicial attitude, but also, on proposals to enlarge the definition of genocide to include political and economic groups there was tremendous resistance in the General Assembly against to what would have been tampering with the 'authoritative definition…which was widely accepted by States.'[82] This extremely limited set of groups protected by the law of genocide greatly diminishes its effectiveness as a means of punishing faminism, and would allow perhaps result in all three of the faminists mentioned evading responsibility.

Although historians Dolot and Mace[83] advocate in the strongest of terms the case that genocide was committed against the Ukrainian people by Stalin,[84] other historians, and it would seem the majority of jurists also, are generally much more cautious in their approach. They tend to use the terms such as mass extermination in place of genocide, in recognition of the fact that the famine was indeed economically and politically motivated to break up the sense of Ukrainian nationalism. For example, Jonassohn, though strongly condemning the acts of Stalin, is uncomfortable using the word 'genocide' to describe the famine since the intent of Stalin to destroy the Ukrainian *nation* is not apparent to him.[85] Indeed, as the Kulaks were defined by their *economic* status, the use of famine as a weapon against them would not constitute genocide. Had Stalin's intention been to destroy the Ukrainian population as a *national* group, this clearly would have constituted genocide, however, there was no desire by Stalin to starve Ukrainians *because* of their nationality *per se*, but rather to force Ukrainians into collectivisation. The Ukrainian famine therefore resists characterisation as genocide.

There is even less evidence to suggest that the ongoing North Korean famine constitutes genocide. Although there is a general consensus among academics[86] and UN bodies[87] that auto-genocide (the commission of genocide against a group of which the *génocidaire* is himself a member) falls within the law of genocide, there is little evidence that Kim Jong Il desires to exterminate North Korean citizens on *account* of their nationality or status as members of any of the other *protected* groups. The targeted North Koreans are essentially political groups, which as stressed above, are not protected.

When the Dergue targeted inhabitants of Tigray, Wollo[88] and Eritrea,[89] some commentators have been keen to point out that as the population is comprised of distinct racial and religious groups, that this may have been a genocide. However it is unclear whether there was a *specific intent* to destroy these particular religious and ethnic groups because of their religion or ethnicity, or simply because it was part of the military campaign. Waal

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[80] See, for example, the case of *Prosecutor v Rutaganda* ICTR 96-3-T, 6 December 1999 at para. 56, 'It is clear that certain groups such as political groups and economic groups have been excluded from the protected groups'.

[81] Article 22(32), ICC Statute provides, 'The definition of a crime shall be strictly construed and *shall not be extended by analogy*'. [Emphasis added].

[82] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court. A/50/22 (1995).

[83] Dolot, *Who Killed Them and Why? The Famine of 1932-1933 in Ukraine* (Cambridge: Harvard University, 1984) at 110.

[84] Supra n. 28 at 37, 'The famine was a final solution on the most pressing nationality problem in the Soviet Union…which certainly constitutes an act of genocide'.

[85] Chalk and Jonassohn, 'Conceptualisations of Genocide and Ethnocide', in Serbyn (ed.), *Famine in the Ukraine 1932-1933* (Edmonton: Canadian Institute of Ukrainian Studies, 1986) at 10.

[86] See for example, Luftglass, 'Crossroads in Cambodia', 2003-2004) 90 *Virginia Law Review* 893 at 903; Schabas, 'Sentencing by International Tribunals: A Human Rights Approach' (1997) 7 *Duke Journal of Comparative and International Law* 461 at 491; and Rothenberg, 'Let Justice Judge: Genocide as a Living Concept', (2002) 24 *Human Rights Quarterly* 924 at 949.

[87] E/CN.4/SR.1510 (1979).

[88] Waal, supra n. 24 at 112.

[89] Keller, supra n. 39 at 615.

concludes that the main purpose of the enforced starvation of these regions was the latter,[90] and not because of any intention to ethnically cleanse the regions by extermination and imposition of conditions of life that lead eventually to starvation.

It has been demonstrated that the borders of genocide with regards to its *dolus specialis* requirement are much too rigid and restrictive to include many, if not most, acts of faminism. There are wide loopholes which permit many groups to be exterminated under the excuse that there are, for example, extreme political circumstances, and, for this reason make it unsuitable for dealing with famine crimes as defined above.

4. Faminism as a War Crime and a Violation of International Humanitarian Law

International law has been developing in the area of the regulation of armed conflict since the middle of the nineteenth century,[91] to the point where now the rules of warfare are embodied in a number of sophisticated and extensive international instruments, many of which are representative of customary international law.[92] Various acts of enforced mass starvation as outlined in Part 2 are certainly contained within the ambit of international humanitarian law. This however does not necessarily make humanitarian law the ideal vehicle for capturing famine crimes.

Hunger and food supplies are perhaps the oldest, cheapest low-technology weapon in existence. History provides countless examples of where starvation has been used to force fortified places into surrender and other military tactics based on the human need for food and water in order to win battles and wars at any cost.[93] Even as recently as the current conflict in Iraq, the Special Rapporteur on the right to food, Jean Zielger, has said that, 'coalition occupying forces are using hunger and deprivation of water as a weapon of war against the civilian population'.[94] Historically, according to the Lieber Code, an authoritative document at its time, this kind of activity is expressly permitted.[95] Article 17 provides, 'war is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or *unarmed*, so that it leads to the speedier subjection of the enemy.'[96] Acts that were directed at starving civilians were perceived, until relatively recently, as a legitimate tool, of waging what has come to be known as, 'total war'; victory at any cost, by any means.[97] The *Von Leeb* case, decided in 1950 by the Nuremberg Tribunal, stated that, 'commanders may lawfully lay siege to a place controlled by the enemy…to cause its surrender. The cutting off of every source of sustenance…to reduce it by starvation…is deemed legitimate.'[98]

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[90] Waal, supra n. 24 at 115, 'The principal cause of the famine was the counter-insurgency campaign of the Ethiopian army.'

[91] For example, Henry Dunant's seminal work that lead to the adoption of the 1864 Geneva Conventions and the Lieber Code of 1863.

[92] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226.

[93] Allen, 'Civilian Starvation and Relief During Armed Conflict: The Modern Humanitarian Law', (1989) 19 *Georgia Journal Of International and Comparative Law* 1 at 4-5, states 'Regrettably, the practice of starvation of civilians…has…been a part of warfare since time immemorial.'

[94] 'US Troops Starve Iraqi Citizens', *BBC Online News*, 15 October 2005.

[95] Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, 3rd edn (Cambridge: Cambridge University Press, 2004) at 10.

[96] Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, available at: http://www.icrc.org/ihl.nsf/0/a25aa5871a04919bc12563cd002d65c5?OpenDocument.

[97] Jonassohn and Bjornson, supra n. 40 at 29.

[98] *US v Von Leeb*, 11 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, (1950) at 563.

The modern approach has tipped the balance in favour of humanitarian considerations over that of military necessity,[99] and starvation of civilian populations as a method of warfare is prohibited; the waging of total war is no longer acceptable. The Geneva Conventions of 1949 were the first instruments of international humanitarian law to move closer to an express prohibition on civilian starvation. According to Article 23 of Geneva Convention IV, there is an obligation to let 'essential foodstuff' through battle lines if intended for 'children under fifteen and expectant mothers.' However, there is a potentially large loophole in the protection accorded to children and pregnant women. Article 23 lays out the significant qualifications in paragraphs a), b) and c). The obligation is conditioned on there being no serious reason for suspecting,

> a) that the consignments may be diverted from their destination,
> b) that the control may not be effective, or
> c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the…consignments for goods which would be provided or produced by the enemy or through the release of such material, service or facilities as would otherwise be required for the production of such goods.

Allen has pointedly stated that the exceptions 'swallow the rules'[100] and Mudge argues that Article 23 represents nothing more than a 'clearly worded moral obligation.'[101] However, in occupied territories, there exists greater protection for civilians. Under Article 55 of Geneva Convention IV, the occupying force 'to the fullest extent of the means available' has a *duty* toward the *whole* civilian population, not only those expecting or children, to provide food-stuffs if it is 'inadequately supplied.' Indeed this makes practical sense as there would be little, if any, military necessity in starving a population already under occupied control. Although there appears to be an escape route for occupying forces in that it could be claimed that they do not have the 'available means' to provide for the civilian population under occupation, the commentary to the Geneva Conventions expresses in the strongest terms that nevertheless there exists a duty to ensure an adequate food supply by using 'all the means at their disposal.'[102] Even stronger protection appears to be afforded by Article 54 of Additional Protocol 1 to the Geneva Conventions, which provides that,

> 1. Starvation of civilians as a method of warfare is prohibited.
> 2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuff, agricultural areas for the production of foodstuffs, crops, livestock…for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever their motive, whether in order to starve out civilians…or any other motive.

Commentators have called Additional Protocol I a 'major accomplishment…that improves the situation [of civilians] dramatically',[103] and one that fundamentally changes the position of

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[99] Shaw, supra n. 77 at 1065.
[100] Allen, supra n. 93 at 39.
[101] Mudge, 'Starvation as a Mean of Warfare', (1969-1970) 4 *International Lawyer* 228 at 253.
[102] International Committee of the Red Cross Official Commentary to Geneva Convention IV, para. 310, available at: http://www.icrc.org/ihl.nsf/COM/380-600062?OpenDocument.
[103] Aldrich, 'Progressive Development of the Laws of War: A Reply to the Criticism of the 1977 Geneva Protocol Commentary', (1985-1986) 26 *Virginia Journal of International Law* 693 at 695-6.

the law dealing with tactics available to a besieging force, and makes it absolutely clear that destroying foodstuffs necessary for the survival of civilians is strictly forbidden.[104] However, what Article 54 gives with one hand, the ICRC Commentary to the Protocol appears to take away with the other. It seems to permit indiscriminate interference with civilian provisions if humanitarian assistance is provided.[105] By reference to this alone, one would be led to believe that even if a blockade were enforced that would induce the starvation of a civilian population, humanitarian assistance would have to be provided to mitigate the effects. However, reference to Article 70 of Additional Protocol I makes relief efforts for civilians exposed to starvation by a blockade 'subject to the agreement of the Parties concerned.' The Commentary asserts that these provisions were in place in recognition of the need to protect national sovereignty,[106] and that the parties involved are by no means entitled to refuse such an agreement arbitrarily or without good reason.[107] Notwithstanding what appear to be significant inroads into the prohibition of withholding humanitarian aid from civilians under a blockade, the activities of the Dergue in Ethiopia such as the systematic bombing of farms and slaughtering livestock do not fit into these loopholes and remain strictly prohibited by humanitarian law (had these events occurred during an international armed conflict).

As most famines occur within a state's own borders, Additional Protocol II to the Geneva Conventions is of greater relevance to this article, as it prescribes rules that govern *internal* armed conflicts (Article 1(1)).[108] Article 14 of Additional Protocol II is very similar to Article 54 of Protocol I in that it prohibits the destruction of foodstuffs and agricultural lands essential for the survival of civilian populations, as is the commentary, which asserts that no measure of military necessity justifies the starvation of civilians.[109] However, as in Additional Protocol I, Article 18 of Additional Protocol II makes the duty to provide humanitarian aid 'subject to the consent of the High Contracting Parties' involved. This makes a nonsense of the provision; had an armed conflict erupted in the Russian Empire between the Russians and Ukrainians during the imposed famine, would Stalin have consented to humanitarian relief frustrating his very plans to starve the Ukrainians? Indeed as stated above, Stalin refused foreign aid into Ukraine. Despite this, the 1977 Protocols still provide for significant protection, if not a complete ban on the starvation of civilians.

Cassese asserts that attacks on civilian food supplies are prohibited by customary international law.[110] However, the inexactitudes of custom cannot be underestimated, especially given the lack of state practice in this area.[111] Despite this however, developing custom has extended many of the protections of law previously only applicable to armed conflicts of an internal nature.[112] The case law of the international tribunals has gradually eroded the rule that necessitates such a conflict.[113] The seminal *Tadic*[114] case and *Celebici*[115]

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[104] Dinstein, 'Siege Warfare and the Starvation of Civilians' in Delissen and Tanja (eds), *Humanitarian Law of Armed Conflict Challenges Ahead* (Dordrecht, Neth, Boston: Nijhoff, 1991) at 148-50.
[105] International Committee of the Red Cross Official Commentary to Protocol I at para. 2095. Available at: http://www.icrc.org/ihl.nsf/COM/470-750069?OpenDocument.
[106] Ibid. at para. 2805.
[107] Ibid.
[108] Common Article 3 also prescribes an irreducible minimum standard of treatment for civilians and *hors de combat* in *internal* armed conflicts. This is discussed below.
[109] International Committee of the Red Cross Official Commentary to Protocol II, at para. 4795, available at: http://www.icrc.org/ihl.nsf/COM/470-750001?OpenDocument.
[110] Cassese, 'The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law', (1984) 3, *UCLA Pacific Basin Law Journal* 55 at 91.
[111] Meron, 'International Criminalisation of Internal Atrocities', (1995) 89 *American Journal of International Law* 554 at 555.
[112] Ibid. at 558.
[113] Than and Shorts, *International Criminal Law and Human Rights* (London: Sweet and Maxwell, 2003) at 119.
[114] *Prosecutor v Tadic*, Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, at para. 129.

decision are prime examples of how the ICTY has expanded international criminal responsibility and jurisdiction. In *Celebici* it was stated that, 'as a matter of [custom], breaches of international humanitarian law committed in internal conflicts…could also attract individual criminal responsibility.'[116] These developments are reflected in the ICC Statute, which although only specifically criminalises the deliberate starvation of civilians[117] in times of *international* armed conflict,[118] does criminalise serious violations of Article 3 common to all four of the Geneva Conventions in Article 8(2)(c), which *does* apply in times of internal armed conflict. Although the rights contained therein are much less specific than those contained in Additional Protocol II, common Article 3 has the advantage of being representative of customary international law[119] so binds all states, and there is no doubt that mass enforced starvation would fit into common Article 3. This innovation is crucial for punishing faminism. However, this body of law with its requirement of an armed conflict would still only cover one of the three famines mentioned, that imposed by the Dergue.

The current extensive protection available to civilians from the use of food as a weapon in times of armed conflict seems to be paradoxical *vis-à-vis* the protection afforded where there is no armed conflict. An important question is why do citizens in times of peace not seem to enjoy as strong protection from enforced hunger as civilians are during an armed conflict? Indeed, it seems to make no logical sense that people would appear to have even more enforceable rights during a time where it is expected that civil liberties and rights are to be compromised in the name of achieving military goals than in peace time. The requirement of a nexus of armed conflict limits greatly the usefulness of the vast body of humanitarian law in dealing with most incidences of faminism.

5. Famines as Crimes Against Humanity

Crimes against humanity have evolved considerably since the one article definition in the Nuremberg Charter,[120] to the extensive Article 7 definition in the ICC Statute. Some commentators have regarded the concept and parameters of crimes against humanity as 'notoriously elusive'[121] and over-flexible, and so falling foul of the *nullum crimen sine lege* rule. Indeed there is much scholarly debate as to what the precise required elements for the commission of a crime against humanity actually are.[122] However it is this very broadness and flexibility that some consider to be an infirmity,[123] which may make it more accommodating to capturing faminist behaviour.

This section will examine how the existing body of law on crimes against humanity

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[115] *Prosecutor v Delalic* IT-96-21-A, 20 February, 2001.
[116] Ibid. at para. 160.
[117] Article 8(2)(b)(xxv), ICC Statute, provides that '[i]ntentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival' is a war crime.
[118] Article 8(2)(b), ICC Statute.
[119] Than and Shorts, supra n. 112 at 120.
[120] Article 6(c), Nuremberg Charter defines crimes against humanity as, 'Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.'
[121] McAuliffe deGuzman, 'The Road from Rome: The Developing Law of Crimes Against Humanity', (2002) 22 *Human Rights Quarterly* 335 at 336.
[122] See, for example, Robinson, 'Defining Crimes Against Humanity at the Rome Conference', (1999) 93 *American Journal Of International Law* 43 at 43.
[123] Bassiouni, *Crimes Against Humanity in International Criminal Law* (The Hague: Kluwer Law International, 1992) at 479.

prohibits faminist behaviour. Reference will be made to the ICC Statute, which is considered by jurists and the international community to be the definitive source of crimes against humanity, as the culmination of many years of state practice and an accurate representation of customary international law.[124] It also has the advantage of perceived legitimacy as the product of multilateral negotiations between 160 states,[125] whereas the Yugoslavia and Rwanda Tribunals were often criticised for being illegitimate and having no basis in law as a creature of UN Security Council, which was accused of acting in violation of the rule *delegatus non potest delegare*.[126] Notwithstanding the need for compromise to account for the tension between maximalist and minimalist approaches during the negotiations in Rome, the ICC Statute significantly increases the definition of crimes against humanity contained in the ICTY Statute. However, reference to the ICC Statute is limited by the fact that currently no case law exists that interprets these specific provisions. Conversely, the ICTY and ICTR have a significant body of case law that although was taken into account during the creation of the ICC Statute in Rome, is still important to discuss in the analysis.

The Yugoslavia and Rwanda Tribunals and the ICC all offer distinct definitions of crimes against humanity in their respective statutes,[127] however the similarities are greater than the differences. Article 7(1) of the ICC Statute provides that, '[f]or the purpose of this statute, 'crimes against humanity' means any of the following acts when committed as part of a wide spread or systematic attack directed against the civilian population, with knowledge of the attack.' In order to adequately cover the *actus reus* and *mens rea* requirements, the elements essential for analysis are as followed: when the crimes can be committed (i.e. discussion of the absence in the ICC Statute of a nexus to war), whether there exists a requirement of a discriminatory motive, the meaning of 'widespread or systematic,' and finally the knowledge of the attack, or *mens rea* requirement.

The requirement of a nexus to an armed conflict contained in Article 5 of the ICTY Statute represents a significant obstacle to rooting famine crimes within the law of crimes against humanity as was seen in the analysis of humanitarian law, which would not have applied to either the Ukrainian famine or the North Korean famine as having taken place in peace-time. Despite a small minority of delegates (who eventually acceded to the majority's view[128]) arguing that crimes against humanity could not be committed in peace time,[129] it is clear that customary law has developed in such a way that an armed conflict (whether international *or* internal[130]) is not required.[131] In the ICTR Statute, the link to an armed conflict does not appear at all,[132] nor does it appear in the ICC Statute.[133] The International Law Commission in its authoritative commentary to the 1996 Draft Code of Crimes stated that, 'the definition of crimes against humanity…does *not* include the requirement that an act was committed in time of war.'[134] The case law of the ICTY reflects this position despite provisions in its statute to the opposite effect. In *Tadic* it was expressly observed that the requirement is not supported by other international instruments or customary law, and

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[124] Ratner and Abrams, supra n. 78 at 50.
[125] However it should be noted that the Rome Statute is a *treaty*, so only those state parties are bound by it. However the treaty provisions which represents customary international law are of course binding on *all* states.
[126] Chesterman, 'An Altogether Different Order: Defining the Elements of Crimes Against Humanity', (1999-2000) 10 *Duke Journal of Comparative and International Law* 307 at 338.
[127] Article 5, ICTY Statute; Article 3, ICTR Statute; and Article 7, ICC Statute.
[128] Ratner and Abrams, supra n. 78 at 56.
[129] Kirsch and Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process', (1999) 93 *American Journal Of International Law* 1 at 7.
[130] Skogly, supra n. 13 at 65.
[131] Than and Shorts, supra n. 113 at 90.
[132] Article 3, ICTR Statute.
[133] Article 7, ICC Statute.
[134] Report of the ILC on the work of its 48th session, A/51/10 (1996) at 48 at para. 6.

stressed the requirement was merely *jurisdictional*, and not a *substantive* element of the crime.[135] This development in the law is essential as many famines are committed by governments against their own populations in peacetime. The ICC can now potentially respond effectively to such atrocities committed in peacetime (as in the Ukraine and North Korea) and punish what would previously have been a domestic crime and not a crime against humanity.

Fortunately neither the ICC Statute nor the ICTR Statute require a discriminatory motive on 'national, political, ethnic, racial or religious grounds.' This would be fatal to, for example, the case against Stalin who was arguably discriminating against the Kulaks because of their economic status. Fortunately, neither the ICTY Statute nor the ICC Statute require that the crime be committed with a discriminatory motive. Furthermore, it was stated by the ICTY in *Tadic* that no other relevant international instruments supported the requirement of a discriminatory motive.[136] The removal of this criterion avoids the imposition of an unnecessary and onerous task on the prosecution[137] and further closes the net around faminists, as yet more behaviour qualifies as violations of international criminal law.

A. The Actus Reus

The two *actus reus* requirements can be easily identified; firstly, the perpetrator must have committed, through his actions, one of the specific offences contained in Article 7(1)(a)-(k) of the ICC Statute, and secondly, the act must be committed as part of a widespread or systematic attack directed against the civilian population.[138] The term 'widespread and systematic', although not mentioned in the ICTY Statute, has, as pointed out by Fenrick, 'always been regarded as an element of the offence.'[139] As such it was necessarily included in the ICTR Statute and the ICC Statute. The term warrants explanation as it was the most controversial and hotly contested issue in the negotiations,[140] and its precise meaning is far from a settled matter. The *Akayesu* decision provides perhaps the most often cited definition of the term: 'The concept of 'widespread' may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. The concept of 'systematic' may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources.'[141] 'Widespread'[142] refers to the number of victims, and 'systematic' to the existence of a policy or plan.[143] The 'widespread' criterion poses little problems for acts of faminism, as famines by definition *are* widespread and as defined above, a faminist must, by his acts, impose starvation on a *significant number of people*. Potential problems arise, however, when examining the other criteria required for the commission of a crime against humanity.

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[135] *Prosecutor v Tadic* IT-94-1-A, 15 July 1999, at para. 249.
[136] *Prosecutor v Tadic* IT-94-1-T, 7 May 1997, at paras 650-2.
[137] Robinson, supra n. 122 at 46.
[138] McAuliffe deGuzman, supra n. 120 at 337.
[139] Fenrick, 'Should Crimes Against Humanity Replace War Crimes?', (1999) 37 *Columbia Journal of Transnational Law* 767 at 777.
[140] Robinson, supra n.122 at 47.
[141] *Akayesu*, supra n. 69 at para. 579.
[142] By definition all famines must be 'widespread,' and as the commission of a crime against humanity must be *either* widespread *or* systematic, the criterion of 'systematic' will not be analysed in detail.
[143] Chesterman, supra n. 125 at 314.

The International Law Commission's Draft Codes' definition,[144] Article 3 of the ICTR Statute and ICTY decisions[145] clearly state that the test is in fact disjunctive, (i.e. that the attack has to only be *either* systematic *or* widespread), however, the question as to whether the test should be disjunctive or conjunctive ('widespread *and* systematic') was the subject of much debate at the Rome conference.[146] The main concern was that the disjunctive definition would be over-inclusive and would turn the commission of a wave of widespread but *unrelated* crimes into crimes against humanity, thus omitting what has been called 'the essential characteristic of crimes against humanity':[147] the existence of a policy or plan. The view of the majority of states was that a conjunctive test would be too restrictive[148] as this would mean the prosecutor would have to establish the 'systematic' criterion and in addition meet the very high threshold of a widespread attack.[149] Although, as discussed above, establishing the 'widespread' criterion is not difficult in cases of enforced famines, the compromise that was reached could potentially effect the criminalisation of certain cases of faminism.

The deadlock was finally broken with the adoption of a conjunctive test of a 'widespread *or* systematic attack,' but 'attack' is defined in Article 7(2)(a) of the ICC Statute as 'a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or furtherance of a State or organisational policy to commit such attack.' The task of the prosecutor therefore is to first show that the attacks were widespread, and then that these attacks were connected by a 'policy' element. The danger with introducing this 'policy' element is that it may be interpreted as introducing a *mens rea* element into the *actus reus* elements. This of course could potentially exclude recklessly committed famines. If it were to be said that famine crimes must be part of a deliberate plan by the state to exterminate citizens, it would make little sense to say that a government has recklessly implemented a policy calculated to annihilate citizens through famine. Guzman however asserts that this would not be the case as 'the policy requirement should be viewed as a jurisdictional element with no bearing on the *mens rea* of the perpetrator.'[150] If this is the case, which it most likely is, then recklessly committed famines still fall within the ambit of crimes against humanity.

The existence of a 'policy' is considered to be a very broad term and a criterion that is much easier to satisfy than the high threshold test of what constitutes a 'systematic' attack.[151] This is a logical conclusion to draw as it would have been contrary to the intention of the majority of states who vehemently opposed requiring widespread *and* systematic to include the requirement of a 'policy' as a co-requisite to the widespread criterion if it had the same meaning as 'systematic.' There is no doubt that most induced famines would fail to meet the even more stringent 'systematic' criteria.[152]

The most appropriate offence into which to fit famine crimes is perhaps that of extermination, defined in Article 7(2)(b) of the ICC Statute as, 'the intentional infliction of

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[144] ICL Report, supra n. 134 at 47, at para. 3.
[145] *Tadic*, supra n.136 at para. 653.
[146] McAuliffe deGuzman, supra n. 121 at 374.
[147] Bassiouni, supra n. 123 at 244.
[148] Hwang, 'Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court', (1999) 22 *Fordham International Law Journal* 457 at 495.
[149] *Akayesu*, supra n. 69 at para. 581.
[150] McAuliffe deGuzman, supra n. 121 at 375.
[151] Than and Shorts, supra n. 113 at 92-3. See also Ratner and Abrams, supra n. 78 at 60.
[152] In case of *Prosecutor v Blaskic* ICTR-95-14, 3 March 2000, at para. 203, a test was set out in order to determine whether the acts are systematic in nature. The main elements are the existence of a political objective to weaken a community formulated by high-level authorities, and the perpetration of a criminal act on a large scale. The three histories discussed clearly fall within these criteria.

conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of the population.' This language is borrowed form the Genocide Convention. However the offence does not suffer from the same prohibitively high *mens rea* requirement as the crime of genocide. The ICTY distinguishes extermination from genocide by the fact that the targeted population need not belong to any of the protected groups, and that it also covers situations 'where some members of the group are killed while others are spared.'[153] As for the number of victims required for an act or series of acts to be considered 'extermination', the ICTY held that the offence 'generally involves a large number of victims.'[154] It can also be committed by acts *or* omissions,[155] particularly useful for cases of recklessly induced famines and where a government observes a famine taking place, and adopts it for their own purposes by doing nothing to alleviate or mitigate the effects.

The *actus reus* elements of famine crimes are more than adequately accommodated for within crimes against humanity. However the *mens rea* requirement is perhaps more problematic especially in regard to fitting in recklessly induced famines.

B. The Mens Rea

Article 7(1) of the Rome Statute provides that the perpetrator 'must have knowledge of the attack'. Article 7(1) of the ICTY Statute ascribes responsibility to those who 'planned, instigated, ordered committed or otherwise aided and abetted in the planning, preparation or execution of a crime.' This catches every level of state authority that perpetrates famine crimes, from the head of state who plans, to the soldier on the ground who carries out the orders. As defined above, faminism must be carried out 'knowingly' by the perpetrator, placing the offender well within the *mens rea* standard. For intentionally committed famines, that is when starvation is intentionally inflicted upon a civilian population by, for example, the bombing of food convoys (as in Ethiopia) or the imposition of high food quotas in order that mass starvation ensues (as in the Ukraine), the *mens rea* requirement is unproblematic. However, what of the systematic destruction of individuals' ability to feed themselves that results from flawed economic and agricultural policies that are *recklessly* maintained by the state? Does this also fulfil the *mens rea* requirement? Cassese is extremely critical of the absence of a specific recklessness provision as a culpable *mens rea* under the ICC Statute,[156] however, on a close examination of the law of superior responsibility, which has its roots deep in international law,[157] recklessly induced famines are also prohibited under international criminal law.

It is very well established that if a civilian or military superior fails to prevent or punish their subordinates for the commission of criminal acts, that superior accrues criminal responsibility, even if that superior did not directly participate in the act or did not share the same intent as the subordinate who committed the offence.[158] Nor is it even essential that the non-military superior have *actual* knowledge,[159] but that he 'consciously disregarded

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[153] *Prosecutor v Kristic* IT-98-33-T, 2 September 2001, at para. 502.
[154] Ibid, at para. 501.
[155] *Rutaganda*, supra n. 80 at para. 84.
[156] Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', (1999) 10 *European Journal of International Law* 144 at 154.
[157] Lippman, 'The Evolution and Scope of Command Responsibility', (2000) 13 *Leiden Journal of International Law* 139 at 140.
[158] Bantekas, 'The Contemporary Law of Superior Responsibility', (1999) 93 *The American Journal Of International Law* 573 at 575.
[159] *Tadic*, supra n. 136, at para. 638.

information that clearly indicated that the subordinates were committing crimes'.[160] The standard is even lower for military superiors who simply '*should have known*'.[161] There is a general consensus of academic opinion that the correct *mens rea* for subordinates[162] is that outlined by the ICTY in the *Kupreskic* case where it was stated that 'the requisite *mens rea*…is comprised by the intent to commit the underlying offence, combined with the knowledge of the broader context in which that offence occurs'.[163] Therefore, if a government official orders the imposition of a grain procurement quota, and the subordinate, while carrying out the order to enforce the quota, sees that these acts are leading to widespread starvation, he is 'knowingly' committing a crime against humanity. The superior then receives reports that enforcements of his policies are leading to starvation, which he recklessly ignores and continues enforcing the policies. As the behaviour of the subordinate goes unpunished and nothing is done to prevent starvation, the criminal acts are imputed to the superior, who is guilty of a crime against humanity and recklessly inducing a famine. Famine crimes as defined above fall well within the law of crimes against humanity.

6. Conclusion

It has been demonstrated that existing international criminal law can be applied to cases of enforced mass starvation. However, it is also clear that there are many limits and difficulties with this. In respect to genocide a strict *mens rea* requirement, coupled with the protection of a limited number of groups means that faminist behaviour will only be caught by this element of international criminal law in limited circumstances. Of the three examples discussed in Part 2, perhaps only the Ethiopian famine would be caught by the prohibition on genocide. In relation to war crimes and international humanitarian law, while rules have developed to protect vulnerable elements of the civilian population during a siege, or the whole civilian population during occupation there are two limitations. Firstly, there is much scope for the warring parties to apply a restrictive interpretation. Secondly, and most obviously, this part of international criminal law will only apply during an armed conflict. The previous discussion suggests that the most accommodating area of existing international criminal law for faminism is crimes against humanity, although again problems exist as to whether deprivation of food can be classified as an 'attack' in itself.

In light of these considerations it is submitted that there does exist a benefit in codifying the existing scattered law relating to faminism. Such codification by its nature would not fall foul of the *nullum crimen sine lege* rule, but rather bring together all the disparate elements of faminism found in international criminal law into one cohesive provision. The principal advantage of this would be to make faminism more visible as behaviour worthy of attracting criminal condemnation. Firstly, it would help to dispel the myth that famines are the sole product of natural disaster. Schabas points out that, 'the declaratory value of criminal law is probably its most important contribution to the struggle against impunity. Society declares that certain specific kinds of conduct are wrong…and it adds it to the collective memory.'[164] This declaratory value cannot be underestimated, as so many governments find themselves at present able to hide behind the popular perception of famines as 'natural' disasters thus

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[160] Article 28(b)(i), ICC Statute.
[161] Article 28(a)(i), ICC Statute.
[162] Keith, 'The *Mens Rea* Requirement for Superior Responsibility as Developed by ICTY Jurisprudence', (2001) 14 *Leiden Journal of International Law* 617 at 633.
[163] *Prosecutor v Kupreskic*, IT-95-16 14th January 2000 at para. 556.
[164] Schabas, 'Sentencing by International Tribunals: A Human Rights Approach', (1997) 7 *Duke Journal of Comparative and International Law* 461 at 516.

simultaneously avoiding condemnation and attracting sympathy. Secondly, it would mean that in future those like Milosevic would be just as likely to face indictments relating to faminism as other crimes under international criminal law. It is nonsensical and arbitrary to distinguish crimes on the basis of their physically violent characteristics, rather than on their horrific results (in this case, the number of those killed through enforced starvation).

There is no doubt of the effect that codification of international crimes has had on responses to human rights catastrophes.[165] For example, the Clinton administration performed semantic gymnastics to avoid using the word 'genocide' because of the duty to prevent the crime, and the same has occurred in relation to Sudan.[166] Codification of famine crimes might make such political manoeuvring more difficult by restricting the circumstances when massive human rights violations can be considered as 'acceptable'.

One factor that may dissuade states from establishing a specific crime of faminism is that it might highlight the potential contradiction in using at one extreme a criminal sanction for behaviour that leads to mass starvation of a specific population, while using little more than high-minded rhetoric[167] to redress the current unfair distribution of wealth in the world which results in 10 million children dying each year of preventable diseases.[168] Thus while specifically criminalising faminist behaviour begins to recognise the inadequacy of how we deal with massive and extreme (though non-violent) human rights violations, it merely deals with a symptom of a very sick world.

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[165] Reisman, 'Legal Responses To Genocide and Other Massive Violations of Human Rights', (1996) 75 *Law and Contemporary Problems* 75 at 75.
[166] Russell, 'UN Backtracks Over "Genocide" in Sudan', *Daily Telegraph*, 2 February 2005.
[167] For example, the Millennium Development Goals, which will not be achieved by their target.
[168] UNDP Human Development Report 2005, available at: http://hdr.undp.org/reports/global/2005/pdf/HDR05_complete.pdf.