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## Is Global Poverty a Crime against Humanity?

In his work on global poverty, Thomas Pogge (2010, 1-2) compares the discovery that all the adults he knew growing up in post-war Germany were in some way connected to the crimes of Nazis, with the children of today discovering that all the adults in affluent countries are similarly connected to an international system that “kills more efficiently than the Nazi extermination camps”. He is referring to his argument that the international economic system is responsible for the immiseration and deaths of millions of people. He compares the decision-making processes of major international institutions with the Wannsee Conference, which laid out the details of the Holocaust (Pogge 2010, 4). He deems ordinary citizens of a developed state as culpable for global poverty as ordinary Germans were for the Holocaust, insofar as they tacitly support and benefit from a system that facilitates the deaths of millions (Pogge 2008, 31-2, 141-2, 151; Pogge 2010, 29, 73-9). His comparisons are not limited to Nazi Germany, but also include Stalin’s USSR, China during the Great Leap Forward, and apartheid-era South Africa (Pogge 2008, 54, 102; Pogge 2010, 51-2). The comparison of global poverty with genocide and crimes against humanity is a recurring theme in Pogge’s work, but it has not been seriously explored.

This oversight is understandable. It seems to be little more than a rhetorical flourish to underscore his criticism of the international system. There are good reasons to be sceptical of hyperbolic statements. They could debase the moral currency of crimes against humanity by making it encompass any lamentable circumstance. The aim of this article is to evaluate this claim by testing Pogge’s thesis on the causes of global poverty against the definition of a

crime against humanity that has developed in international law since the end of the Second World War. It will be argued that there are sufficient parallels between Pogge's thesis on global poverty and the crimes of enslavement and apartheid to take the claim seriously, but with some reservations about the *mens rea* behind the "crime of poverty".

This is not a trivial conclusion. If global poverty is comparable with a crime against humanity, it raises several issues that may be uncomfortable for cosmopolitans and their fellow travellers. The first is urgency. The long-term reform that characterises most cosmopolitan literature, including Pogge's work, is not fit for purpose. Crimes against humanity require immediate action due to their severity. The debate on global poverty must provide guidance about what can be done immediately. Consequently, a non-ideal theory needs to be prioritised by cosmopolitans. This sort of guidance cannot be the anodyne non-ideal fallback of donating a sum of money to charity, knowing that it will not affect the causes of global poverty, but needs to match the urgency of the wrong being committed. Secondly, it brings into focus the global poor as active moral agents and not just docile supplicants. If the global poor are victims to an ongoing and intransigent crime against humanity, what are they morally permitted to do in their own defence? We do not blame the Jews of the Warsaw Ghetto for resisting the Nazis by force of arms, so could we blame the global poor if they took up arms against those responsible for the international system? This exposes the revolutionary core of cosmopolitanism that has been obscured by the polite discourse of contemporary liberalism.

That being said, this is only intended to open a conversation. The conception of a crime against humanity employed is drawn from international law rather than an independent conception of what makes a crime against humanity a unique form of moral wrong. This conception acts as a placeholder due to the lack of consensus on what makes crimes against humanity especially repugnant. This is tolerable, since the aim is to see whether Pogge's claim is more than rhetoric and the current understanding in international law provides a baseline for assessment. If global poverty meets this baseline, then it may be necessary to further examine the nature of crimes against humanity to ensure that the concept is not over-expansive.

The paper will begin by examining Pogge's analysis of the international system. This will then be compared with the elements of crimes against humanity found in international law, especially in the Rome Statute of the International Criminal Court (Rome Statute). It will be argued that the claim cannot be dismissed based on the elements, but that it is insufficient to confirm it. This requires the comparison with existing crimes against humanity, since Article 7(1)(k) of the Rome Statute allows that acts that are comparable to existing crimes against humanity be included in the category. The final part of the paper will compare global poverty with the crimes of enslavement and apartheid. It will argue that there is a sufficient similarity to take Pogge's claims seriously. This will be done by exposing the presence of extreme domination in all three, which decimates the capacity of human beings to live minimally autonomous and worthwhile lives. The paper will conclude with a comment on the implications for cosmopolitan theory.

## 1: The Pogge Thesis

Pogge's comparison between global poverty and crimes against humanity is derived from his thesis that global poverty is a violation of human rights. In order to test the validity of the comparison, it is necessary to accept this thesis as valid, or at least plausible. It is impossible to assess the comparison with crimes against humanity without understanding what exactly is the subject of the examination. This will hopefully convince sceptics that this thesis cannot be dismissed out of hand. This is admittedly a controversial starting point. However, this article is not a recapitulation or defence of the Pogge thesis, but is an enquiry into its implications if true.

### 1.1: The Structural Conception of Human Rights

The conception of human rights that serves as the foundation of Pogge's argument appears to be unconventional. This is because it is, to use his terminology, *institutional* rather than *interactional*. However, it will be shown that this is unproblematic, especially because it is compatible with interactional conceptions. The difference between the interactional and structural understanding is the agent against which rights claims are directed. In the former case, human rights are held by all individual human beings and directed against all other human beings regardless of shared institutions. The latter case makes human rights claims that individuals have against coercively imposed social institutions (Pogge 2008, 176). These are second order principles and only impose indirect duties on individual human beings. This includes the negative duty not to support coercively imposed social institutions that "foreseeably and

avoidably” leave people without secure access to the content of their human rights (Pogge 2008, 176).

This does not mean that in the absence of shared institutions human rights do not exist, but only that they are latent. Pogge compares this with the duty to keep one’s promises; it is a general obligation that is only triggered when entering into a specific social relationship (Pogge 2008, 176-7). It also does not deny the validity of interactional human rights. The structural conception has a distinct function; it provides a framework to judge coercively imposed social institutions (Pogge 2010b, 198).

This conception of human rights has three important features. The first is that it is broader than a legalistic understanding of rights. It requires secure access to the content of human rights and this does not entail that people hold a statutory right. If a person has reasonably secure access through the customary practices of their society, then there cannot be a human rights deficit (Pogge 2008, 53). The structural conception looks towards achieving reasonable thresholds of security to the contents of human rights rather than legal codification. The second feature is the importance of official disrespect. The violation of human rights is a public moral wrong, which is partly why such violations are so egregious. They can occur under the colour of law. This not only deprives people of the content of their rights, but also undermines the validity of such rights (Pogge 2008, 65). Official disrespect is not limited to the conduct of states, but to persons informally employed by the state, such as militias, or indeed by giving tacit consent for private organisations to act with impunity by doing nothing (Pogge 2008, 66-7). The third feature is that the obligations that

attach to individuals are negative. This avoids the libertarian scepticism of positive rights. Individuals are not required to provide a particular good, such as basic medicines or food, but are required to withhold support for social institutions that deny secure access to such goods (Pogge 2008, 178).

As to whether freedom from poverty is a human right, Pogge offers two lines of argument. The first stresses the importance of human flourishing as a component of any form of moral cosmopolitanism. If we value individual human beings as the basic unit of moral currency, then we must respect their right to live their conception of a good human life. It is impossible for a reasonable conception of a good human life to coexist with extreme poverty (Pogge 2008, 33, 175). The second argument is that freedom from poverty is already recognised in international human rights instruments. Article 25(1) of the Universal Declaration of Human Rights (UDHR) states:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Further, Article 28 of the UDHR also states:

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Consequently, Pogge claims that freedom from poverty is a recognised human right and, although it may be debateable whether it entails positive action, it

requires that we withhold support for coercively imposed social institutions that deny people secure access to their basic human rights (Pogge 2010a, 28-30).

## 1.2: Global Poverty as a Human Rights Violation

The way in which Pogge sets up his structural conception of human rights often focuses on the state rather than the international system. This is not surprising given that states are coercively imposed and are the most well-known violators of human rights. The international system is more complicated both in terms of whether it is coercively enforced and whether it actually does violate human rights. Pogge refers to it as being “imposed” on the world’s poorest people, although it is unclear what he means. However, there is an argument in his response in that those who say the international system is legitimate do so because the poor voluntarily sign up to it and “*volenti non fit iniura*” (Pogge 2010a, 33-4). However, consent only matters when there is a reasonable alternative. The global poor have no reasonable choice but to join what Pogge calls “WTO globalisation”. They require access to the markets of the developed world and lack a reasonable alternative (Pogge 2010a, 41-2). Consequently, the international system is considered coercive, not because there is no alternative for poor states seeking access to wealthy markets but, more simply, because the global poor have no alternative to the state-based system.

As a coercively imposed social institution, the international system is a proper subject for human rights claims and makes it the target of Pogge’s claim that it “foreseeably and avoidably” causes global poverty, which constitutes a human rights violation. There are two ways in which the international system



does this: through the privileges granted to states under international law and the way in which powerful states set the rules of the global economy.

Any group that manages to secure the means of coercion within a state's territory tends to be recognised as the legitimate government regardless of how it came to power, how it treats its people, or even whether it has support from the people (Pogge 2008, 118). It also importantly gains the right to act in the name of its people, which brings with it four privileges that help to create or exacerbate global poverty. The resource privilege grants control over the natural resources in a territory and, with it, the legal power to transfer ownership. Consequently, a military dictatorship that came to power in a *coup d'état* can sell legal ownership of rights to a multinational corporation. Pogge compares this with a group of armed thugs seizing control of a warehouse from its guards and, instead of having to move the goods through a fence, they gain the legal right to dispose of these goods as they see fit (Pogge 2008, 118-9). The borrowing privilege grants the right to borrow from international bodies in the name of the people. The arms privilege grants the right to import weapons and the treaty privilege enables the government to create international obligations (Pogge 2008, 118-9, 171-2, 2010a, 48-9).

These privileges facilitate oppression and instability in weak states. The funds that are made available by resource and borrowing privilege can be used to secure oppressive regimes. They can be used to create patronage networks, such as among junior officers in the military, which in conjunction with the arms privilege to buy military ordinance that can be used maintain an authoritarian regime. Oppressive regimes, supported by domestic clients and international

institutions, have no incentive to provide secure access to the content of human rights (Pogge 2010a, 49-50, 2008, 120).

These privileges also destabilise weak states, especially those richly-endowed with natural resources. The resource privilege provides a strong incentive for powerful agents, such as the military, to seize power. The reward of seizing power outweighs the risks. The example given is of Nigeria, which produces 2mn barrels of oil per day. The military has ruled for approximately half of the country's post-independence history and corruption has been difficult to address, as removing the military's "prerequisites" could provoke a *coup* (Pogge 2008, 119). The borrowing privilege also has a destabilising effect. An authoritarian regime may borrow excessively with little public benefit and, should it be deposed by a popular revolution, the debts do not disappear. This constrains the new government's ability to create social conditions in which citizens have secure access to the content of their human rights, as much of the government's funds will be used to service debt (Pogge 2010a, 49). The privileges conferred to states, irrespective of their character or origins of their governments, help to create an international order in which it is difficult to secure human rights.

The second aspect of the international system that Pogge identifies as causing global poverty is how the asymmetric distribution of power between states influences the rules of the global economy. Powerful states can shape the agenda to suit their interests. This is evident in how such states maintain protectionist subsidies and tariffs, while insisting that weak states remove such obstacles. The USA, for example, provides \$4 billion in subsidies to its cotton

industry, which only produces a crop worth \$3 billion (Bales, Trodd, and Williamson 2009, 57). This effectively protects US cotton manufacturers from being outcompeted by rivals in the developing world. Pogge also identifies the Agreement of Trade-Related Aspects of Intellectual Property Rights (TRIPS) as an example of how the rules of the global economy run counter to the basic rights of the global poor. TRIPS includes provisions that extend the 20-year patent protection, effectively allowing “evergreen” patents (Pogge 2008, 225). The consequence of this is that patent-holders gain a price monopoly on their intellectual property (IP). IP rights to products such as films may not produce human rights problems, but when it comes to medicines it is a different story. The patent regime in TRIPS greatly reduced access to basic medicines by removing generic alternatives and granting monopolistic price control to the patent holder. This can increase the price of pharmaceuticals by a factor of 10 to 30 (Pogge 2008, 225-6). This, for Pogge, is a case of the rules of the global economy favouring property rights of the affluent over the right to life of people living in poverty.

Pogge identifies three factors that explain why poor countries would sign up to a regime that works against the interests of their citizens. The first is a lack of knowledge. Representatives of poor countries were excluded from the “green room” negotiations that set the terms of the agreement; instead, they were faced with a 28,000-page document that they could not have had time to fully understand and had to sign to gain access to markets. Second, most poor countries lacked the power to be able to negotiate. The asymmetric distribution of power compels poor states to sign up to rigorous patent regimes in order to

gain limited access to markets in the developed world. The third factor is that political power is asymmetrically distributed within many developing countries. The terms that leaders sign up to, thanks to the treaty privilege, may be unbeneficial or harmful to the majority of citizens, but the ruling class may accrue significant benefits by signing up. This gains credence when one sees that the signatories to the WTO agreement include Sani Abacha, Suharto, Robert Mugabe, and Mobutu Sese Seko (Pogge 2008, 233-4).

The privileges granted to states, together with the asymmetric distribution of power in setting the terms of the global economic cooperation, constitute a violation of basic human rights because they foreseeably and avoidably create or exacerbate poverty. This undermines the basic autonomy of individual human beings and runs counter to the rights found in human rights documents such as the UDHR.

### 1.3: Objections

The Pogge thesis has received criticism from those who think that the international system, while sub-optimal, does not harm the global poor and, in fact, has lifted many people out of extreme poverty. The World Bank, for example, places the level of people living in extreme poverty at a little over a billion in 2011, whereas in 1990 it was in striking distance of two billion (World Bank 2015). Of these, some 380 million people were lifted out of extreme poverty in China between 1987 and 2005 (Pogge 2010a, 100). This broad reduction in extreme poverty, coupled with China as the paradigm case of having benefited from WTO globalisation, seems to undermine the notion that global poverty is a human rights violation, let alone a crime against humanity.

However, the case against is not as straightforward as it seems. In the first place, the indices by which the World Bank counts those living in poverty are somewhat problematic. The international poverty line (IPL) is set at \$1.25 for extreme poverty and \$2.50 for severe poverty. Pogge reasonably suggests that this is an arbitrarily determined line that does not capture poverty. For example, if one were to set the IPL exclusively at \$2.50, then there would be no reduction in poverty between 1990 and 2005 (Pogge 2010a, 62-3). Moreover, when comparing the current IPL with previous ones, we see that the purchasing power of those counted has significantly declined. The 1985 IPL of \$1.02 had the purchasing power of \$1.85 in 2005 (Pogge 2010a, 66-7). This indicates that those just above today's IPL have lost a third of their purchasing power from their equivalents of thirty years ago. Adjusting the IPL in this way allows a rosier picture of global poverty alleviation to be painted. Yet, it is hard to imagine that a person living just above the IPL has secure access to the content of their human rights.

China's economic success is also ambiguous; it is undeniable that its remarkable growth has led to a large increase in GNI per capita. However, the actual distribution of wealth in China must be taken into consideration. The benefits of economic growth have been divided in a way that has fostered greater inequality. The bottom deciles of the Chinese population have seen their relative share of their country's wealth drop from 30.8% in 1990 to 16% in 2004. This has contributed to the further marginalisation of China's poor in domestic politics, especially considering that the richest decile's wealth has increased from 25% to 35% in the same period (Pogge 2010a, 100-2). The growth in inequality

means that the poorest people in China have been marginalised and have less secure access to the content of their human rights.

Additionally, it is impossible to decouple China's success from the overall global economy. Chinese economic growth is export-oriented. It is premised on gaining access to markets in the developed world. This places China in competition with other developing states. This has resulted in lower export prices, wages, and labour standards in all export-oriented developing states (Pogge 2010a, 103). Additionally, the dramatic increase in China's imports has helped to increase the price of basic resources such as petroleum and food. The interdependence of the global market cannot be set aside, and China's gains might explain why poverty is stagnant or increasing in other parts of the world (Pogge 2010a, 103-4). The China example is characterised by the "some-all" fallacy in that, since it has experienced rapid development, all developing countries should be able to as well. If they do not, then it is because of endogenous factors (Pogge 2010a, 43). However, China's growth occurs in the context of the international system, where its success has international consequences that might contribute to the impoverishment of its competitors.

This attacks the heart of nationalist explanations for the causes of global poverty – or, as Pogge calls, it the "purely domestic poverty thesis". This claims that local factors are chiefly responsible for the wealth or poverty of a state. It is factors such as corruption, democratic citizenship, work ethic and the like that ultimately determine a state's prosperity (Pogge 2010a, 32-4, 2010b, 220). However, what the argument shows is that local culture cannot be isolated from the international system. The privileges help to support corrupt governments

and make it incredibly difficult for newly democratised states to root it out. The asymmetry in bargaining power leads to global trade agreements that favour the interests of developed states in a way that undermines secure access to basic goods, such as medicine. However, that being said, there is nothing in Pogge's thesis that suggests a "purely global poverty thesis". Local factors such as culture or resource scarcity may indeed produce poverty. Indeed, even if the international system was reformed so that citizens of the developed world do not violate their negative duty to refrain from supporting unjust social institutions, significant pockets of poverty may continue to exist in the developing world just as they do in the developed world today. However, this is not a problem for the Pogge thesis, which asserts that certain characteristics of the international system foreseeably and avoidably produce poverty in a way that is a human rights violation. It does not put forward a "purely international poverty thesis" (Pogge 2010b, 208-9, 246 fn.62).

#### 1.4: Guidance

The term "foreseeably and avoidably" recurs frequently in Pogge's works. It is important because it means that poverty is not just an unintended or unavoidable consequence of the international system, but something that is predictable and unnecessary. This is meant to diffuse what might be called the "Churchillian objection" to the Pogge thesis: the international system may be sub-optimal, it may even produce global poverty, but it is the best system we have. To paraphrase Churchill's pithy defence of democracy, WTO globalisation is the worst form of international economic organisation, except for all the other ones we have tried. The Churchillian critic may agree that poverty is foreseeable

but disputes whether it is avoidable. So, it is necessary to indicate why Pogge thinks this is not the case by looking at his alternatives.

The guidance provided by Pogge is ambitious. It ranges from fairer terms of economic cooperation within the existing framework to fundamental adjustments to the international system. The loosening or elimination of protectionist barriers to the developed market could generate upwards of \$700 billion in earnings for developing states from low technology and resource-based industries, according to the United Nations Conference on Trade and Development (UNCTAD). This estimation, it should be noted, does not include agricultural products (Pogge 2010b, 184). Lower projections, such as Cline's \$86.51 billion, could provide poverty relief to an estimated 500 million people (Pogge 2010b, 185). Additionally, Pogge also endorses reforms to prevent profit shifting, such as moving profits to low tax jurisdictions and expenses to jurisdictions with high tax relief, cracking down on tax havens, and the mitigation of debt in the developing world (Brock and Pogge 2014, 4-6, Pogge and Sengupta 2014, 8-9). These reforms would provide significant funds for poverty relief.

Given the prominence of the privileges in Pogge's analysis, it should not come as a surprise that he seeks their elimination or mitigation. One suggestion is that new democracies might "preauthorise" intervention by the United Nations or regional organisation in the event of a coup. This would act as a deterrent by increasing the risks associated with seizing power to gain access to a country's natural and financial resources (Pogge 2008, 159). However, there are less hazardous ways to reduce the damage done by the privileges, such as limiting



the borrowing privilege of authoritarian governments in a way that would not leave a newly democratic state liable for debts incurred. The example given is a constitutional amendment that prohibits international agents from lending to unconstitutional governments (Pogge 2008, 160-1). Pogge also suggests a “Democracy Panel” to monitor the democratic credentials of would-be borrowers and a “democracy fund” to help service the debts of new democratic states as they stabilise (Pogge 2008, 162-8). The resource privilege could be undermined by similar means to limit how governments that come to power via coup attempts, or other unconstitutional means, can sell resources; such means could include a constitutional amendment banning unconstitutional governments from selling resources and such governments being monitored by the Democracy Panel (Pogge 2008, 168-72). These recommendations may seem far-fetched, but they are not impossible. They rest on constitutional amendments in developing states and a relatively small international body performing a monitoring role.

The final two projects, the Global Resource Dividend (GRD) and the Health Impact Fund (HIF), are more radical. The GRD is a plan to redistribute wealth through a tax on the exploitation of natural resources. The GRD would constitute a 0.67% tax on the global product. In 2005, this would have raised \$300 billion for poverty relief, which would enable some 2.5 billion people to be lifted out of poverty (Pogge 2008, 211). How these funds would be distributed is a matter of debate, but could range from an international body to giving the funds directly to the global poor (Pogge 2008, 212). The GRD is not an impossible goal. Its costs are comparable to half of the USA’s annual defence

budget (Pogge 2008, 211). However, some may question whether it is a realistic goal. This misses the point. Even if the GRD is not realistic due to the world's affluent being unwilling, as opposed to being unable, it acts as a means to criticise the current international system. However, Pogge holds out hope because moral convictions have proved to be politically potent, as was the case with the abolition movement in the 19<sup>th</sup> century. Moreover, there are prudential reasons for affluent states to sign on, such as reducing global instability, refugee claims, and economic migration (Pogge 2008, 218-9).

The HIF is an alternative scheme to the current TRIPS regime for pharmaceutical research and dissemination. The HIF would amount to 2% of funds raised from the GRD, approximately \$6 billion *per annum* (Pogge 2010b, 185). Pharmaceutical innovators would have the option of signing up to the HIF when they produce a new drug or vaccine. This would require them to sell their product at cost for ten years. Profit is generated based on how the product improves the quality of global health instead of monopoly prices. Pogge claims that this would offer significant advantages over the current regime. It would improve access by lowering the cost of medicines (Pogge 2011, 540). It would encourage research into vital, but low-use, drugs, such as last line antibiotics to treat drug-resistant tuberculosis, since the profit would be determined by impact rather than units sold before patent expiry. It would also shift research away from maintenance treatments, which the current system favours due to the profitability of their long-term use, to prophylactic treatments such as vaccines, which would have profound impacts on global health (Pogge 2011, 541-2).

Interventions like the HIF are not unheard of in global health, as the HIF bears similarities to the creation of the Global Alliance for Vaccines and Immunization to encourage research into poverty-related diseases. The Gates Foundation donated \$750 million and helped raise \$5 billion to establish a pool of capital for the research of diseases that afflict the world's poor. These diseases have not received much attention from the pharmaceutical industry because the global poor are not reliable consumers; they may generate intense demand for treatments, but they cannot pay for them. The fund created by the Gates Foundation altered the logic of the market by creating a reliable consumer for such goods. The result of this, it is hoped, will drive down drug prices and encourage innovation in treatment (Cohen and Küpçü 2005, 46). However, the HIF would be a more comprehensive alternative to the current global health and patent regime.

### 1.5: Conclusion

The Pogge thesis claims that the current international system foreseeably and avoidably violates the human rights of hundreds of millions of people by creating or exacerbating global poverty. These violations can be traced to the privileges granted to states in international law and the use of asymmetric power to set unfair terms of economic cooperation. These are violations of human rights because they constitute "official disrespect" within a coercively imposed social institution. They are not the inevitable product of the best possible international system, but the product of the unwillingness to initiate reform. This constitutes a second-order human rights problem for the affluent since they are complicit

with this system, but what remains to be determined is whether this is complicity with a crime against humanity.

## 2. Elements of Crimes against Humanity

Crimes against humanity remain, as Hannah Arendt wrote, in a “tantalising state of ambiguity” (Arendt 2006, 257). This section will examine the elements found in international law. It will focus on Article 7 of the Rome Statute, but will draw on the judgments from the *ad hoc* tribunals and scholarship on crimes against humanity where necessary. In order for an act to be considered a crime against humanity, Article 7(1) of the Rome Statute states that it must be “committed as part of a widespread or systemic attack directed against any civilian population, with knowledge of the attack.” This can be broken down into five necessary conditions:

- i. There is an attack.
- ii. The relevant acts are part of the attack.
- iii. The attack must be widespread or systemic.
- iv. The attack must be directed against a civilian population.
- v. There must be knowledge of the attack.

The elements provide a general framework for crimes against humanity. If Pogge’s argument is incompatible with any of these elements, then we can say that his comparison is invalid.

### 2.1: Attacks, Acts, and Agents

The first two elements of a crime against humanity define the same as an act that occurs in the context of an attack. The idea that a crime against humanity is

necessarily part of an attack seems to preclude global poverty from the start. The term “attack” evokes the idea of violence and armed conflict. Although the history of crimes against humanity does gesture towards this, the evolution of the jurisprudence since the Nuremberg Trials has moved away from a necessary link between attacks and war or even violence.

The initial formulation of crimes against humanity came about from the agreement between the Allies to try members of the Axis powers during the Second World War. This created the so-called “war nexus” in Article 6(c) of The Charter of the International Military Tribunal, which linked crimes against humanity to the laws of war. However, this did not last very long. The Allies sought to bring charges for acts committed prior to the war, such as the persecution of the Jews in Nazi Germany. Control Council Law No. 10 (CCL 10) recognised that “the grim fact of worldwide interdependence” meant that war crimes were not the only offences recognised by international law; there were also certain offences committed by the German state against its own citizens that violated “common international law” (Taylor 1949, 226). CCL 10 extended the scope of the Nuremberg Trials, since “common international law” cannot be limited to a specific context such as the Second World War (Arendt 2006, 257-8, Bassiouni 2011a, 144). This means that, even in peacetime, crimes can be committed by the state or another agent that necessitate international action.

The decoupling of crimes against humanity from war continued with the drafting of the Convention on the Prevention and Punishment of the Crime of Genocide, where Article 1 explicitly states that genocide can occur in times of peace and war. It is true that genocide and crimes against humanity are distinct

in international law, but, as Norman Geras (2011, p.22) points out, it is difficult to identify any argument that would decouple genocide from war, but not crimes against humanity like mass murder or enslavement. This was the prevailing opinion when the Rome Statute was being drafted. If crimes against humanity were linked to war, the Statute would have ignored these post-Nuremberg developments and, additionally, made it difficult to distinguish them from war crimes (Robinson 1999, 45-6).

War is not a necessary characteristic of an attack, but there may be an “armed conflict nexus”. Article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) identifies a direct link between crimes against humanity and armed conflict. However, no comparable link is made in Article 3 of the Statute of the International Criminal Tribunal for Rwanda (ICTR) or Article 7 of the Rome Statute. Indeed, the decision in *Akayesu* specifically stated that “an attack may be non-violent in nature, like imposing a system of apartheid... or exerting pressure on a population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systemic manner.”<sup>1</sup> This leaves the definition of an attack in a state of ambiguity. Indeed, when the Rome Statute was being drafted, some delegations wanted to replace “attack” with “widespread or systemic commission of such acts” (Robinson 1999, 47 fn.22). Yet, the term “attack” was included in Article 7(2)(a) of the Rome Statute and is understood to be “a course of conduct involving the multiple commission of acts referred to in paragraph 1.”

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<sup>1</sup> Judgement, *Akayesu* (ICTR-96-4-T), Chamber I, 2 September 1998, ¶581 (Hereinafter *Akayesu*)

Whether the acts that comprise an attack are necessarily violent is a matter of debate. David Luban has specifically argued that admitting non-violent acts would undermine crimes against humanity by making the definition overly capacious. The idea of an attack requires something more than a stable system of oppression or domination. Luban compares it with a military campaign that has the aim of annihilating or driving away the persecuted group instead of exploiting or oppressing it (Luban 2004, 101-2). If *Akayesu* is followed, it would allow frivolous cases to be introduced, such as forcing immigrants to assimilate by only having traffic signs, and government documents being produced in a single language. Regardless of how one feels about this, it does not seem to be a crime against humanity (Luban 2004, 103 fn. 68). This is an argument that one should feel sympathetic towards. Crimes against humanity are supposed to denote a particularly egregious form of wrong. However, this conservative interpretation of an attack has serious problems. Enslavement, for example, is considered a crime against humanity and certainly slavery has been marked by violence within the relationship. However, violence and coercion are only latent in the master-slave relationship. It is possible to conceptualise a slave-owning society where, due to a strong social norm against mistreating those whom one owns, slaves enjoy a life that is indistinguishable from that of a free labourer save for their legal bondage (Lovett and Pettit 2009, 16). Yet, this society would be violating Article 7(2)(c) of the Rome Statute's definition of slavery as "the exercise of any or all of the powers attaching to the right of ownership over a person". The wrongness of slavery does not only come from acts of violence that occur within it. If that were the case, then it would be redundant; the criminality of slavery would be covered in acts such as murder, imprisonment, and rape.

Enslavement is listed because it creates the conditions of oppression and exploitation that Luban dismisses. This is true even in hypothetical instances of benevolent slavery, as the slave-owner will always have the reserved power to treat their property as a thing rather than a person. Fredrick Douglass' account of being a slave shows why we should avoid the inclusion of direct violence as a necessary component of an attack:

But ask a slave what is his condition – what his state of mind – what he thinks of enslavement? And you had well address your inquiries to the *silent dead*. There comes no *voice* from the enslaved. We are left to gather his feelings by imagining what ours would be, were our souls in his soul's stead.

If there were no other fact descriptive of slavery, than that the slave is dumb, this alone would be sufficient to mark the slave system as a grand aggregation of human horrors (Douglass 2003, 258).

Enslavement shreds autonomy, because even the most well-kept slave lives at his or her owner's mercy. To use Luban's military metaphor, some attacks are like military occupations rather than campaigns. They are organised and purposeful, but not necessarily violent. What distinguishes them from the traffic sign example is that they create profound human rights deficits. The well-kept slave may enjoy a decent standard of living, but they does so at their owner's discretion. They do not have secure access to the contents of their human rights. As global poverty produces a human rights deficit that costs the lives of 18 million people a year, there does not seem to be a clear reason to exclude it on the grounds that it is non-violent (Pogge 2010a, 50).

It should also be noted that the definition of an attack identifies the type of agents that are capable of committing crimes against humanity. Article 7(2)(a) of the Rome Statute identifies an attack as being "pursuant to or in furtherance of



a state or organizational policy to commit such attack.” The reason for this is quite clear; the experience of the former Yugoslavia and Rwanda showed that sub-state actors, such as paramilitary militias, can perpetrate mass atrocities while being at arm’s length from the state (Bassiouni 2003, 187-8). What is important is not whether an organisation has formal sovereignty, but whether it has the capacity to plan and execute an attack on a civilian population (Robertson 2012, 514-5). This has been used to prosecute non-state actors. Indeed, the first indictees of the International Criminal Court were the leaders of the Lord’s Resistance Army, a terroristic guerrilla movement operating in Uganda and South Sudan. It would be absurd to assert that a large international organisation, such as the WTO, lacks the organisational capacity of a terrorist group. The former has complex bureaucracies that shape global economic policy in a way that affects the lives of billions of human beings. If sub-state actors are capable of committing crimes against humanity, then *ceteris paribus* international actors must be as well.

Consequently, the first two necessary conditions of the definition of a crime against humanity do not exclude the causes of global poverty, as they are the product of an organisational plan that requires the commissioning of multiple acts. However, what remains undetermined is whether the acts are comparable to those identified as crimes against humanity.

## 2.2: Widespread or Systemic

The third condition is that a crime against humanity be widespread or systemic. A crime against humanity is not an isolated instance of murder or rape. These acts are horrendous, but they must occur within the context of a larger plan in

order for them to be a crime against humanity. This removes, or at least minimises, random and uncontrolled conflict from the definition (May 2005, 122-3, Robertson 2012, 513-4). The definition of the terms widespread or systemic is found in *Akayesu*. A widespread attack is one that is “massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.”<sup>2</sup> Systemic is “thoroughly organised and following a regular pattern of on the basis of a common policy involving substantial public or private resources.”<sup>3</sup> This element, therefore, serves to link what would otherwise be disparate acts. This, like the inclusion of state or organisational policy, implies that there must be some form of “organisational responsibility” for the acts in question (Bassiouni 2003, 187-8). Given that Pogge’s thesis on global poverty is that the state system and international trade agreements are responsible for global poverty, it is likely to be considered widespread in the sense that the state system is global and systemic insofar as the global trade mechanisms are the product of the policy of certain actors.

### 2.3: *Mens Rea*

The final element goes to the mental state (*mens rea*) of the person who commits a crime against humanity. The Rome Statute requires that the agents have knowledge that they are part of an attack. This is the biggest challenge to the comparison with global poverty. When we think about those convicted for crimes against humanity, the image that comes to mind is probably someone like Duško Tadić, who has been described as a “freelance torturer” and participated

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<sup>2</sup> *Akayesu*, ¶580

<sup>3</sup> *Akayesu*, ¶580

in the ethnic cleansing around Prijedor during the Yugoslav Wars (Robertson 2012, 447). Alternatively, it could be someone like Joseph Kony, the leader of the Lord's Resistance Army, who directs a campaign of terror around Uganda-South Sudan frontier. These are men who deliberately inflict great harm on innocent people. This does not seem to be the case for someone like Roberto Azevêdo, the current Director-General of the WTO. It would be extremely shocking if he sought to harm the global poor in a way comparable to Tadić or Kony. However, *mens rea* is more complex than direct malevolence.

Cherif M. Bassouni and Mark A. Drumbl have denoted three types of people who commit crimes against humanity: policy makers, intermediate agents, and low-level executors. The policy makers are the most important because they are the moral authors of the crime. These are the agents who have the power to commission the crime without having a direct connection to the material element of the crime (Bassiouni 2011a, 18, Drumbl 2007, 25). Consequently, knowledge and intent are different than they would be for someone conducting mass killings. They are "held to an objective standard of reasonableness and foreseeability without requiring the higher standard of specific intent (or *dolus specialis*)" (Bassiouni 2011a, 19). *Dolus specialis* would characterise someone like Tadić, who participates in murder and torture rather than someone who organises such acts, but might not directly participate in them. The relevant comparison with the architects of global poverty would be the standards used to judge policy makers rather than low-level executors.

In order for someone to be guilty of a crime against humanity, according to Article 7(1) of the Rome Statute, they must have knowledge that their acts are

part of a widespread or systemic attack. William A. Schabas (2002, 1018) has described knowledge in the context of the ICTY trials as “awareness that circumstance exists or a consequence will be a likely outcome.” This is complemented by the requirement of intention in Articles 7.1.k and 7.2.e-g of the Rome Statute, at least in the context of torture, persecution, extermination and, most importantly for our case, “other inhumane acts”. It is important to note that intent here does not need to be discriminatory insofar as it targets a specific person or group. There does not need to be detailed knowledge of the attack. The *Kunarac* Trial Chamber of the ICTY stated that the accused must either intend to commit the offence, that his acts were part of an attack on civilians, or that he “took the risk” that his acts would be part of such an attack (Schabas 2002, 1024-5).<sup>4</sup> This seems to close the door to global poverty, since intentionality of this sort does not characterise those who might harm the global poor. The drafters of TRIPS sought to negotiate trade conditions favourable to patent holders, such as pharmaceutical companies, in their states. They did not intend to immiserate the global poor. However, there are certain instances in international criminal law where intention is set aside: command responsibility, joint criminal enterprise, and wilful blindness or recklessness.

Command responsibility emerged during the trials after the Second World War. It was formalised during the trial of General Tomoyuki Yamashita, who commanded Japanese forces during the occupation of the Philippines. During this time, soldiers under his command committed atrocities against civilians and prisoners of war. However, Yamashita himself neither ordered nor

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<sup>4</sup> Judgment, *Kunarac, Kovac and Vukovic* (IT-96-23-T & IT-96-23/1-T), Trial Chamber, 22 February 2001, ¶434

participated in these atrocities. Nevertheless, he was found guilty and executed on the grounds that he made no attempt to discover or deter these widespread abuses. Bassouni (2011a, 163) has called Yamashita's conviction a "blot on the history of American justice" that resulted in the execution of a man who did not commission atrocities and did not have the knowledge to stop them. Command responsibility formed the basis for the ICTY trials of Radovan Karadžić and Ratko Mladić (Robertson 2012, 523). It is also included in Article 28 of the Rome Statute pertaining to the responsibilities of commanders and other superiors. With that in mind, command responsibility has limited applicability in the case of global poverty, as command responsibility pertains only to military commanders or politicians like Karadžić, who was the President of the Republika Srpska and Supreme Commander of its armed forces. Trying to apply it outside of a military context would stretch a concept that is already controversial. However, what command responsibility establishes is that acts in international criminal law can cover omissions. It establishes that, if a person occupies a certain role, in this case a military officer, then they have certain responsibilities for the actions of others and, if they omit to properly monitor what is done under their watch, they are criminally liable.

The second way in which intention has been mitigated in international criminal law is through joint criminal enterprise. It is a form of liability that emerged from the ICTY. In *Vasiljevic*, the Appeals Chamber defined three types of joint criminal enterprise (Bassiouni 2011a, 560-563). In the basic type, all co-perpetrators possess the same criminal intent, as would be the case where a group carried out a massacre and each person had the intent to kill. The second

category is the systemic form, which is “characterised by the existence of an organised system of ill-treatment”, such as concentration or extermination camps.<sup>5</sup> The final type is extended joint criminal enterprise “where one of the perpetrators commits an act which, while outside the common purpose, is nevertheless a natural and foreseeable consequence of the effecting of that common purpose”.<sup>6</sup> The *mens rea* for this final type requires the intention to participate in the common plan, but also adds responsibility for outcomes that weren’t intended but were foreseeable and in which the agent willingly took the risk that such crimes could occur.<sup>7</sup>

In the context of the ICTY, joint criminal enterprise replaced command responsibility as the main theory of responsibility in prosecutions as it applies to civilians and paramilitaries (Osiel 2005, 1786-7).<sup>8</sup> Although joint criminal enterprise is most closely identified with the ICTY, it is arguably included in the Rome Statute under the “common purpose doctrine” (Bassiouni 2011a, 573-4). Joint criminal enterprise provides another means to sidestep the problem of direct intent. Those who set up concentration camps or ethnically cleanse a certain area may not intend mass killings to occur, but they are a foreseeable consequence. This is relevant in the case of global poverty, since Pogge repeatedly stresses that the poverty generated by the international system is foreseeable and avoidable even if it is not the aim of policy makers.

The final response to the *mens rea* issue is to claim that recklessness is sufficient. The idea of reckless is linked with charges of criminal negligence. It is

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<sup>5</sup> Judgment, *Vasiljevic* (IT-98-32-A), Appeal Chamber, 25 February 2004, ¶98 (Hereinafter *Vasiljevic*)

<sup>6</sup> *Vasiljevic*, ¶99

<sup>7</sup> *Vasiljevic*, ¶101

<sup>8</sup> *Vasiljevic*, ¶100

distinct from wilful blindness insofar as it does not require the agent to avoid information that he or she suspects to be criminal. Instead, they will have engaged in a course of action that has foreseeable harmful consequences. The difficulty with making the case for recklessness is that this tends not to be sufficient for crimes against humanity. However, there is reason to think that the law is evolving towards accepting recklessness as being sufficient. This would allow the mental state of *dolus eventualis* to be equivalent to *dolus directus* in crimes against humanity, where the former indicated the awareness of a likely outcome and the latter of a certain outcome. Diane Kearny has made the argument that famine and food deprivations resulting in the violation of socioeconomic rights can be prosecuted. Unlike Pogge, her focus is on states and sub-state actors, but her reasoning is helpful for the international context. She notes that recklessness has featured in crimes against humanity in the Extraordinary Chambers in the Courts in Cambodia (ECCC) and the ICTY (Kearney 2013, 282-4). In *Duch*, the ECCC, which is responsible for trying the crimes committed by the Khmer Rouge, ruled that the intention behind an inhumane act was “likely to cause serious physical or mental suffering or a serious attack on human dignity”.<sup>9</sup> The key word here is “likely”. It makes it possible to argue that it is closer to the standard of “possible” rather than “practically certain” (Kearney 2013, 269). This is supported by the ICTY Trial Chamber’s judgment in *Brđanin*, which states the “accused’s act or omission must be done with intention or recklessness (*dolus eventualis*)”.<sup>10</sup> This, Kearney

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<sup>9</sup> Judgment, *Kaing Guek Eav alias Duch* (001/18-07-2007/ECCC/TC), Trial Chamber, 26 July 2010, ¶371

<sup>10</sup> Judgment, *Brđanin* (IT-99-36-T), Trial Chamber, 1 September 2004, ¶395

argues, gives the *dolus eventualis* credibility as the *mens rea* for crimes against humanity (Kearney 2013, 284).

The *mens rea* component can be satisfied in the sense that, while the primary aim of the international economic system is not to impoverish the world's most vulnerable people, this is a foreseeable and avoidable outcome of the economic policies pursued by the institutions of the global economy and affluent states (Pogge 2008, 36-7). Therefore, while the impoverishment of millions of people and subsequent poverty-related deaths may not have been the direct aim of these organisations and agent, it is an anticipatable by-product. This may differentiate it from different types of crimes against humanity, but does not seem sufficient to set it aside. Mao's Great Leap Forward, for example, has been cited as a crime against humanity. It involved the mass exportation of food to pay for the development of China's industrial base, to the point that it produced a famine that killed upwards of 45 million people between 1958-62 (Makino 2001, 50, Dikötter 2010, 324-34). This seems to be an instance of mass killing as per the Rome Statute, but presumably the intention of the Chinese government was not to kill these people. They were merely the predictable collateral damage in pursuit of a misguided plan for economic development. If Pogge is to be believed, the global poor have been the grist to the mill of a more successful leap forward. Another comparison might be that mass extermination is comparable to first-degree murder, whereas global poverty is comparable to gross or criminal negligence causing death. These crimes carry different sentences, but both are criminal charges. The type of intentionality at play with global poverty is that of deliberately constructing an international system that



causes or perpetuates severe poverty, resulting in the unnecessary deaths of millions of people. This sense of intentionality is not alien to the legal conception of crimes against humanity.

This section has shown that the lack of intentionality in causing global poverty does not undermine the comparison with crimes against humanity. International criminal law has modes of responsibility such as joint criminal enterprise and recklessness that can be applied. However, I will add two caveats here. The first is that this only shows that there is a possibility the mental element is present in the causes of global poverty. It is beyond the scope of this paper to assess whether those in charge of the institutions that produce global poverty have acted with recklessness, for example. The second is that these forms of liability are not without their detractors. Joint criminal enterprise especially has attracted criticism. The fear is that it casts the net so wide for guilt and responsibility that it would undermine post-conflict reconciliation (Badar 2004, Bassiouni 2011a, 574-5, Drumbl 2007, 39-41, Schabas 2002, 1033-5). It is beyond the scope of this article to assess the arguments for and against these modes of liability. It is sufficient to say that they are a part of international criminal law and provide a response to the problem of intentionality.

#### 2.4. Conclusion

This part of the article tested whether the elements of crimes against humanity, which act as necessary conditions for the comparison with global poverty, provide reasons to dismiss Pogge's claims. It has been argued that, as the

definition of an attack is not contingent on the presence of war or armed conflict, the causes of world poverty cannot be dismissed. The causes of world poverty also cannot be described as isolated, but rather form part of a widespread and systemic policy pursued by states and international organisations. The victims of global poverty are usually not part of the armed forces or the police and can be counted as civilians. Finally, despite the apparent lack of malicious intent, the policies that cause global poverty cause grievous harm in a foreseeable and avoidable way. This satisfies the *mens rea* element. This is not enough to confirm that global poverty is a crime against humanity, but it does show that the claim is not as implausible as it first appears.

### 3.0: Slavery, Apartheid, and Global Poverty

The Rome Statute lists ten acts that can be considered crimes against humanity. The mass immiseration of human beings is not among them. However, the drafters of the statute recognised that crimes against humanity are an evolving concept and that there is a need for interpretive flexibility (Bassiouni 2011b, 56, Kearney 2013, 272). Consequently, they included “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” in Article 7(1)(k). This opens the possibility that global poverty is comparable to a crime against humanity if it has sufficient similarities with the listed acts. The focus of this section will be on the crimes of enslavement and apartheid, as they capture how crimes against humanity can occur at an interactional level, between persons, and at a systemic level, between persons and social institutions. They share a common element of extreme

domination that is also found in the causes of global poverty and this makes Pogge's comparison plausible.

### 3.1: Domination

Domination can be understood in the following terms: a social relationship or institution is dominating if X, an agent, possesses the capacity to arbitrarily interfere in the choices available to Y, a dependent agent (Blunt 2015, 5, Pettit 2008, 102-10, Skinner 2008, 84-5, Lovett 2010, 119, Pettit 1997, 52). Domination has two different socially constituted modes: interactional and systemic. The interactional mode applies to relationships where an individual has arbitrary power over another person. The systemic mode applies to relationships and institutions in which the status of a person is arbitrarily determined and incontestable, though the individual might not be subjected to interactional domination (Blunt 2015, 12-19). Domination is considered especially abhorrent because it dehumanises the subject by stripping him or her of minimal autonomy, understood as the ability to choose and pursue their own conception of a good life (Pettit 1997, 90-2, Lovett 2010, 130-1, Laborde 2006, 369-70, 2010, 54-55). Indeed, in extreme cases of domination, it makes one's life or death dependent on the whims of another agent.

### 3.2: International Domination, Enslavement, and Global Poverty

The crime of enslavement is defined in Article 7(2)(c) of the Rome Statute as "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children." This definition is not limited to

chattel slavery, but extends to informal relationships comparable to chattel slavery (Bassiouni 2011a, 378-81). This flexible conception of slavery means that a comparison with global poverty cannot be dismissed out of hand simply because the global poor are not in a legal relationship of enslavement.

Slavery is often held up as the archetypical example of domination, insofar as the slave-owner has a nearly unlimited capacity to interfere in the choices available to the slave (Pettit 1997, 31-5, Lovett 2010, 154-6, Lovett and Pettit 2009, 14, Blunt 2015, 6-7). The person who is caught in a contemporary form of slavery is in a similar relationship with their master as the chattel slave is with his. The trafficked sex worker, for example, is liable to the arbitrary interference of her pimp in nearly all aspects of her life and has no recourse against him. It may not be recognised as legal, but this is irrelevant so long as the elements of slavery, such as control of movement, psychological control, and forced labour are present (Bassiouni 2011a, 379-80). She is still subjected to the possibility of arbitrary interference in a way that undermines her minimal autonomy or denies her self-ownership.

People living in extreme poverty are often those caught in contemporary slavery. It is a predictable outcome of the world's economic system. The number of people kept in these forms of slavery is not insignificant. It is estimated that some 27 million people are enslaved, the majority of which are found in, or are from, developing and least-developed countries (Bales 2012, 8-10). In comparison, the total number of people trafficked in the transatlantic slave trade from the sixteenth to eighteenth centuries totalled 11 million (Kara 2009, 4). Slaves have become an attractive commodity to many industries. This is due to a

collapse in the price of slaves as a result of massive population growth in the developing world. Since the 1950s, slaves have become worth less than \$100, down from historical highs of \$40,000 (Bales, Trodd, and Williamson 2009, 50-2). These low acquisition costs, when coupled with low transport costs, can lead to a thousand-fold return on investment when slaves are sold in the developed world (Kara 2009, 25). Poverty is a central cause of human trafficking. It acts as a push factor for the desperate. This is especially true for women, who are more vulnerable to poverty as they are often blocked from property ownership, credit, and inheritance (Scarpa 2008, 13, Bales 2012, 31-3).

However, while we may accept that there are large numbers of enslaved people in the world today, it is not clear how this connects with the causes of global poverty. Cecile Laborde (2010, 54) has argued that extreme poverty is not itself dominating; it leaves people vulnerable to the development of dominating social relationships, but international organisations and powerful states do not explicitly endorse these sorts of relationships (Bales 2012, 31-2). However, Laborde's claim, while correct, is isolated from the causes of global poverty. International organisations create the conditions in which these relationships are more likely to occur, and citizens of developed states benefit from these slave-based relationships. If we look at Pogge's critique of the resource and borrowing privileges, we can see that they undermine the capacity of developing states to produce minimally just and stable forms of government that can protect vulnerable people from relationships of slavery. As such, there is a causal connection between the institutions that create global poverty and contemporary forms of slavery.

We should not limit our analysis to those living in what is slavery in all but name. Domination can be used to frame other social relationships that are more directly connected with the global economy. Workers in sweatshop factories, for example, can be considered as subjected to extreme domination. They may not be formally or informally in bonded labour, but working in dangerous conditions for minimal pay may be the only way they can make a living. The corporations that run these factories possess arbitrary power. The workers are in circumstances where, if they complain about working conditions or attempt to unionise, they may be fired or worse (Pettit 1997, 140-3). This can be connected to the two privileges undermining minimally just political institutions; it can also be connected to the organisations that draft the rules of the global economy, which often require the government to minimise social spending and deregulate the market in a way that produces brutal conditions for industrial labour. As such, there is a more explicit form of causal responsibility. This is further supported by the fact that people in the developed world benefit from the cheap goods that are produced in these circumstances (Bales 2012, 235-40). Again, there may be an objection that this is morally repugnant, but it is not criminal. However, Robertson (2012, 232-3) asserts that many multinational corporations knowingly employ informal slave labour or wage-slaves in the developing world and asserts that this should produce some form of criminal liability. Yet, even if this were not the case, as mentioned previously, the fact that global poverty produces relationships of extreme domination is foreseeable and avoidable. This creates circumstances comparable to recklessness or wilful blindness, as contemporary slavery or slave-like conditions is a likely outcome of our shared social institutions.

Those living in extreme and severe poverty are in circumstances akin to slavery. Their poverty makes them easy targets for exploitation in relationships that are structurally similar to slavery. The neo-liberal economics of international institutions, as well as the dependence on access to rich markets, has compelled developing states to deregulate their economies and remove labour protections. This has placed many workers in circumstances akin to slavery. This is not simply due to the fact that they are subjected to harsh working conditions, but also because they are vulnerable to arbitrary interference by their bosses and foremen. Wage-slavery is compatible with the broad definition of slavery found in the Rome Statute and can be traced to the imposition of unjust terms of cooperation at the global level.

### 3.3: Systemic Domination, Apartheid, Slavery, and Global Poverty

The crime of apartheid warrants comparison with global poverty as it highlights the structural side of crimes against humanity. It first appeared as a crime against humanity in the International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention). The crime of apartheid was defined in Article 2 of the Apartheid Convention as “similar policies and practices of racial segregation and discrimination as practised in southern Africa.” This includes policies that prevent racial groups from participating in political, social, economic, and cultural life, as well as denying basic human rights and freedoms. Geras (2011, 124-9) has used this to suggest that gender discrimination is comparable with apartheid, if one substitutes gender for race. The argument is compelling when drawing on the definition of apartheid found in the Apartheid Convention, since women are often subjected

to inferior status in the laws of many countries. However, Article 7(2)(h) of the Rome Statute is more stringent, defining the crime of apartheid as “inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.” This means that a system in which a racial group is deprived of its rights has not committed the crime of apartheid; it must be supplemented by widespread or systemic acts such as murder or rape. One could, for example, have the right of a fair trial removed by a regime due to one’s race, but, thanks to good luck, not be subjected to the severe deprivation of liberty or miscarriage of justice. This restricted definition of apartheid is unfortunate since it neglects one of the core elements of what makes apartheid detestable. It is not just that members of a racial group are subjected to acts like rape, torture, and murder, but that they are constantly subjected to the possibility of these acts.

Apartheid is not only characterised by interactional domination, but by systemic domination as well. In the former case, interactional domination occurs in the direct interaction between dominant and subservient members of racial groups. The police officer that beats a member of the subjected group with impunity is an example of this. However, it is possible to conceptualise an apartheid regime in which such direct interactional domination does not occur. Francis Lovett (2010, 117-8) gives the example of a regime in which there is racial discrimination, but the laws are publically known and impartially enforced. This, he claims, is not an instance of domination, though it may be one



of unfairness, because the subjugated group is not vulnerable to arbitrary interference and can confidently plan their lives. However, this neglects how arbitrary power has been exercised in setting the terms of social cooperation in the background. An apartheid system is characterised by the use of arbitrary power to assign a group of persons an inferior status in society. This status may be protected by law and impartially enforced, but it is still dominating. For example, the university admissions officer in this idealised apartheid state may deny the application of a student from the “wrong” racial background without acting arbitrarily; he or she is following the letter of the law and, if they violated it, they would be reprimanded. However, the applicant is still dominated, as there is no way for him to challenge the laws, which have arbitrarily circumscribed the choices available to him. Consequently, apartheid is a crime against humanity not only because it subjects certain people to interactional domination by privileged racial groups, but also because it is characterised by the use of arbitrary power to shape the terms of social cooperation. It is a case of systemic domination (Blunt 2015, 12-18).

This notion of apartheid as systemic domination was recognised in the Apartheid Convention, but apparently lost in the Rome Statute. However, it does remain implicitly intact based on the presence of the crime of enslavement. The Rome Statute makes apartheid a second order crime against humanity in that it requires rape, murder, or slavery to occur within the context of racial oppression rather than racial oppression in itself. However, the inclusion of slavery in Article 7(1)(c), broadly defined, retrieves systemic domination since slavery has interactional elements (the master beating the slave) and systemic elements (the

powers of the master defined by law or by practice). The member of the racial group that has its status arbitrarily defined, but then impartially enforced, is in circumstances comparable to a victim of slavery. This retrieval of the systemic domination component of the crime of apartheid helps to open the comparison with the causes of global poverty.

It has been noted how the international system produces circumstances of domination, such as contemporary slavery and sweatshop labour. This dealt largely with interactional domination, such as abuse by a pimp or employer. Instead of retreading this ground, this section will focus more on systemic domination. The way in which the asymmetric distribution of power in the international system produces unfair terms of social cooperation has been noted earlier in this article. These factors essentially place the terms of global economic cooperation at the discretion of the world's wealthiest states. This produces circumstances of systemic domination that are comparable with apartheid. This is not to claim that the international system is premised on racial exclusion, but rather the comparison is like Geras' substitution of gender for race. The global poor are excluded from setting the terms of international social cooperation in a similar way that black and coloured citizens were in South Africa.

However, there may be objections to this comparison. In the first place, the apartheid regime was explicit in its exclusion of black South Africans, whereas the international system is not. Indeed, the rise of the "BRICS" states indicates that power is migrating away from the developed states (Narlikar 2010). However, the lack of formal exclusion does not do much. As Pogge notes, the delegations of poor countries to the WTO have been effectively excluded by a

lack of legal expertise; this is further bolstered by the fact that these states often have corrupt oligarchic governments that negotiate on behalf of the ruling elite rather than the common citizen (Pogge 2008, 28-9). Additionally, the rise of the BRICS states should not be overstated. The fact is that many of the world's poorest persons do not live in these nascent economic powerhouses. The world's worst-off persons often live in the least developed countries. It is naïve to think that the BRICS speak on their behalf or even have complementary economic interests. In this sense, the shift of economic power away from Europe and North America does not mean that the BRICS states are looking to radically reform the system (Narlikar 2010, Vickers 2013, 12, Glosny 2010, 128-9). Even if economic power is reorienting, the billion worst-off persons are still subjected to an international system that deeply affects their basic autonomy, but over which they have no control. This is comparable to apartheid.

The use of arbitrary power to shape the rules of the global economic system can be compared to the system of apartheid, in that it creates a system of exclusion that produces circumstances comparable to slavery, insofar as those subjected to it have no control over the terms of the social institution. Alternatively, if we use the terms of the Apartheid Convention, we can claim it is a system that excludes people from the objects of their human rights. Consequently, it can be argued that global poverty is at least comparable with two crimes against humanity: the crimes of enslavement and apartheid.

#### 4.0: Responsibility and Resistance

Despite the parallels between global poverty and crimes against humanity, it seems fanciful to think that many people in affluent countries will support the

idea that they are complicit with the causes of global poverty in the same way that ordinary Germans were complicit with the Holocaust, which may explain why cosmopolitanism gains little real political traction. This brings up an interesting aspect of the phenomenology of crimes against humanity: those who participate in them sometimes do not think they are doing anything wrong. The mass atrocities that comprise crimes against humanity are often characterised by agents who participate or acquiesce because they believe that the victims are somehow less than human, or less worthy of humane treatment (Bassiouni 2011a, 60-2). Daniel Goldhagen (1996, 38) has argued that ordinary Germans became willing participants in the Holocaust because eliminationist anti-Semitism became so pervasive that to question it would require them to dismantle the foundations of their worldview. It is hard to discount how individuals can become desensitised to their complicity with radical injustices when their activities have been normalised. If individuals can believe that murdering their neighbours based on their ethnicity or religion is morally acceptable, then it is possible that similar circumstances can exist with how people view their attitudes towards the global poor.

Jonathan Leader Maynard (2014, 830-4) provides an account of the justificatory mechanisms common in ideologies that lead to mass atrocities that may be useful in explaining attitudes towards the global poor. The one that seems especially relevant to the global poor is “deagentification”, where perpetrators do not see their actions as the product of meaningful agency; that the atrocity is the product of inevitable historical forces that one cannot challenge. The examples given by Leader Maynard (2014, 831-2) are Nazi

attitudes towards violent racial competition as a law of nature, and the Stalinist belief that historical materialism necessitates the liquidation of whole classes. This has a parallel in the Churchillian critic's view, in that the current international economic system might be sub-optimal, but it is the best one available and that "the poor will always be with us." However, if Pogge is correct and global poverty is the foreseeable and avoidable, then this is a grand delusion. This leads to the question: what is to be done?

The crime against humanity analogy brings into focus the severity of the wrong in a way that mere injustice does not. As Pogge (2008, 11; 2010, 71) mentions, it would have been unacceptable if Roosevelt's reaction to Nazi extermination camps was a pledge to reduce the number of people in the camps by 20% over two decades. Yet, many cosmopolitan solutions to global poverty, Pogge's included, are at best distant prospects. Crimes against humanity produce a state of moral urgency and exceptionalism. This is reflected in how crimes against humanity override norms, such as state sovereignty, sovereign immunity, and superior orders. There is a special odiousness about crimes against humanity. This is reflected in the sentiment that crimes against humanity "outrage the conscience of humanity", though what the cause of this outrage is is the matter of some debate. This is true even if in practice international criminal law is slow and imperfect. One only has to be reminded that Joseph Kony remains at large, even though he was one of the first people indicted by the International Criminal Court. This is a problem of the imperfect and evolving nature of international criminal law rather than the concept of crimes against humanity.

Cosmopolitans must reorient their guidance from a long-term ideal theory to a more immediate non-ideal theory. It must not confine itself to the systemic reforms, but the ways in which individuals might escape its worst effects and speed the realisation of the reforms that cosmopolitans advocate. This requires that the scope of the debate be broadened. Typically, the literature has focussed on the duties of affluent persons, but resistance asks what the global poor are permitted to do in reaction to ongoing, intransigent, and radical injustice. This will help to reframe the global poor as agents in this debate rather than victims or passive recipients of duties of justice.

This is not an easy adjustment, as resistance introduces the ethics of political violence into the debate on global poverty. In a recent exchange with Kasper Lippert-Rasmussen, Pogge (2013, 110) rejected the idea of violence, specifically “redistributive wars”, as “macho” and unproductive. I share some of Pogge’s concerns about redistributive wars, but his rejection of violent resistance is unconvincing. His argument rests on three claims: that human rights cannot be forfeited, that violence undermines the credibility of reform, and that redistributive wars would violate the principles of just war theory. The first is a reaction to Lippert-Rasmussen’s argument that the persons who support unjust social institutions have lost their right to not be killed in a redistributive war (Lippert-Rasmussen 2013, 67-8). Pogge (2013, 100) rejects this on the grounds that human rights are inalienable. However, this does not mean that there are no circumstances that excuse human rights violations. The doctrine of double effect, that excuses civilian casualties when they are collateral damage from an attack on a legitimate target, is an example of this

(Walzer 2006, 152-9). Pogge must have this in mind when he condemns the bombings of Dresden, Hiroshima, and Nagasaki for killing civilians when the war was all but won (Pogge 2013, 100-1). The problem with this analogy is that the global poor are not in the position that the Allies were in the last year of the Second World War. The more accurate analogy, given Pogge's claim that 18 million people die per year from poverty-related causes, would be the British Empire's bombing campaign against Germany in the early years of the war. These attacks deliberately terrorised and killed civilians but have been justified on the grounds that the British Empire was facing an existential threat or "supreme emergency" that suspended the normal rules of war (Walzer 2006, 251-63). Pogge's claim that human rights are inalienable is plausible, but his dismissal of instances where human rights can be excusably violated is not.

The second element is that redistributive wars would undermine arguments for reform. They would compromise the "forum where in which the world's poor have an unbeatable advantage: the forum of clear-headed moral debate and justification" (Pogge 2013, 110). This would be compelling if there was progress in reforming the systemic causes of global poverty; however, by Pogge's own argument, there has been little movement to improve the lives of the global poor. It seems that moral debate and justification have done little to alleviate their suffering. This brings about the problem of privilege when writing about global poverty. Debate may be appealing to the academic, but the academic does not suffer when those in power do not listen to their arguments. If one debates with a guard at Dachau but fails to convince him that genocide is wrong, it would seem rather bizarre to say that the prisoners should not resort to

violence. This does not mean that violence is justified in the case of global poverty, but casts doubt at the ability of moral debate to persuade and whether it is justifiable to condemn violence in circumstances of intransigent, radical injustice.

Finally, Pogge convincingly argues that redistributive wars would violate the principles of just war theory by being unwinnable or unnecessary. They would be unwinnable insofar as the combined military might of the developed world would doom any alliance of poor states to defeat. This would violate the principle that wars are only just when there is a reasonable prospect of success (Pogge 2013, 103-4). Secondly, if there were an alliance of reform-minded states, this would make the war unnecessary because there would be a reasonable prospect of peaceful reform. The war would violate the principle of last resort in just war theory (Pogge 2013, 104-5). It's hard to disagree with this assessment, but it shows that just war theory might not be the right framework for looking at violent resistance and global poverty. In the first cases, the idea of a redistributive war seems wildly implausible, since the international system supports elites in developing states. If an alliance of reform-minded states existed, there would already have been a sea change in the international system. State-based models of political violence do not capture the reality of the global poor. Cosmopolitans would do better to examine such arguments through the lens of non-state actors and revolutionary movements.

Moreover, just war theory principles such as "reasonable chances of success" do not match moral intuitions about resisting radical injustices. The Warsaw Ghetto Uprising in 1943 had no chance of ending the persecution and



extermination of the Jews in Nazi-occupied Europe, but it is seen as a morally laudable example of rejecting the passivity of victimhood. Resistance may harm innocent people, but that does not necessarily make it impermissible. One only has to consider the many slave uprisings in history, from Spartacus through to Nate Turner and the Haitian Revolution, in which innocent people died. Finally, resistance might even take the form of terror. *Umkhonto we Sizwe*, the armed wing of the African National Congress, employed terrorism and sabotage against the apartheid government with limited success. Yet, few would say that the imprisonment of Nelson Mandela and many others was a just response. I have no intention of putting forward a “macho” politics that endorses violence. My point is that the ethics of political violence surrounding extreme injustices like crimes against humanity and genocide are far more complex than Pogge admits. They raise deeply uncomfortable questions, but these questions cannot be batted aside.

This leads to a second point, that violence and resistance are not synonyms. It is possible that the most effective means to bring about the reforms Pogge advocates is through non-violent resistance. The 20<sup>th</sup> century had notable non-violent political movements led by people like Ghandi and Martin Luther King who achieved major reforms. There is no reason to assume that non-violence might produce similar results for the global poor. Indeed, non-violent resistance to global poverty may provide an interesting framework by which to assess activities such as illegal migration by the global poor. Illegal migrants may break the law trying to enter Europe or America, but they might not be doing anything wrong if the citizens of the developed world are complicit with the

causes of their poverty. It provides a means to rebut, for example David Miller's mixed feelings about illegal immigrants trying to reach Europe via the Spanish enclaves of Ceuta and Melilla. He admits sympathy for their poverty, but indignation at their attempt to cross the border: "Do they think they have a natural right to enter Spain in defiance of the laws that apply to everyone else who might like to move there?" (Miller 2007, 2-4). They may not have a "natural right", but our wealth and their poverty are interconnected. Crossing a border illegally is a wrong that pales in comparison to the immiseration of millions of other human beings. Illegal migration could be interpreted as resistance to international rules that benefit the affluent by allowing the free movement of capital, but burden the poor by limiting the free movement of persons. It could be that cosmopolitans might have a duty to run an underground railroad to those suffering in extreme poverty if their governments refuse to take action to reform the international system. This is merely a suggestion of how a theory of resistance could develop and provide guidance. It shows that we should not limit our thinking about resistance to violent state-centric models such as war theory.

I'm afraid that Pogge's belief, that the injustice of global poverty can be remedied through debate and long-term reform, is out of step with his comparison with crimes against humanity. What the analogy makes clear is that cosmopolitans need to take non-ideal theory seriously. If the global poor are being subjected to something comparable to slavery and apartheid, then the guidance provided by political theory needs to match the depths of this injustice. Questions about the ethics of resistance, especially regarding political violence, cannot be set aside as macho bravado. These questions need to be addressed

with the same rigor that has been brought to uncovering the causes of global poverty, even if it leads cosmopolitans into uncomfortable territory.

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