

# Economic Crimes Against Humanity

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<b>Introduction</b> .....	497
<b>I. The Law and Development of Crimes Against Humanity</b> ..	499
A. A Brief History of Crimes Against Humanity .....	499
B. Crimes Against Humanity in the ICC and Beyond.....	501
<b>II. From Riches to Rags: The Situation in Venezuela</b> .....	502
A. The Crisis .....	502
B. The Sanctions.....	506
C. The ICC Proceedings.....	509
<b>III. The Nonviability of Sanctions Against Humanity</b> .....	510
A. Background.....	510
B. Four Structural Hurdles .....	511
1. <i>Territorial Jurisdiction</i> .....	511
2. <i>Causation</i> .....	513
3. <i>Mental Element</i> .....	514
4. <i>Legality</i> .....	516
C. Economic Sanctions in Article 7 of the Rome Statute ...	517
1. <i>The Chapeau Elements</i> .....	518
2. <i>Murder</i> .....	520
3. <i>Extermination</i> .....	522
4. <i>Deportation</i> .....	523
5. <i>Persecution</i> .....	524
6. <i>Other Inhumane Acts</i> .....	526
D. Other Implications .....	528
<b>Conclusion</b> .....	529

## Introduction

Venezuela is a consistent source of news. In just the first half of 2020 it made headlines with the Department of Justice’s indictment of President Nicolás Maduro on narco-terrorism and other criminal charges, and with the bizarre coup attempt against Maduro led by a former United States (U.S.) Green Beret.<sup>1</sup> One significant event that took place in February,

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1. Press Release, Dep’t of Just., Nicolás Maduro Moros and 14 Current and Former Venezuelan Officials Charged with Narco-Terrorism, Corruption, Drug Trafficking and Other Criminal Charges (Mar. 26, 2020) (on file at [https://www.justice.gov/opa/pr/53-CORNELL-INT’L-LJ-497-\(2020\)](https://www.justice.gov/opa/pr/53-CORNELL-INT’L-LJ-497-(2020)))

however, received considerably less media attention. On February 13, 2020, Venezuela filed a referral with the Office of the Prosecutor (OTP) of the International Criminal Court (ICC).<sup>2</sup> According to the referral, the United States has committed crimes against humanity in Venezuela by imposing unilateral coercive measures in the form of economic sanctions.<sup>3</sup> In a fifty-six-page Annex to the referral—which for all intents and purposes amounts to a legal brief—Venezuela set forth arguments on the jurisdiction, merits, and admissibility of its referral.<sup>4</sup>

Whether economic sanctions can amount to crimes against humanity seems to be an issue of first impression in the ICC. It is, however, the next case in a line of disputes attempting to extend crimes against humanity into new territories and factual scenarios.<sup>5</sup> This Note argues that economic sanctions applied in peacetime, such as the sanctions the United States imposed on Venezuela, do not amount to crimes against humanity. In doing so, this Note also comments on the merits of the Venezuelan referral and its broader policy implications.

This topic is timely and relevant for a number of reasons. First, in September 2019, the seventy-first session of the International Law Commission adopted the second reading of the Draft Articles on Crimes Against Humanity—the basis for a future treaty that is now closer to completion.<sup>6</sup> Second, Venezuela's submission, and the question it raises, is relevant to all States subject to non-Security Council sanctions, especially during and in the aftermath of the COVID-19 pandemic. Recently, U.N. experts called for the lifting of sanctions in Venezuela and elsewhere due to the pandemic, and Iran even argued that keeping sanctions in the midst of the coronavirus crisis is a crime against humanity.<sup>7</sup> Third, the question

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nicol-s-maduro-moros-and-14-current-and-former-venezuelan-officials-charged-narco-terrorism [https://perma.cc/D279-6WU6]; Joshua Goodman, *Ex-Green Beret Led Failed Attempt to Oust Venezuela's Maduro*, AP NEWS (May 1, 2020), https://apnews.com/79346b4e428676424c0e5669c80fc310 [https://perma.cc/JY76-XWFFY].

2. Letter from Nicolás Maduro Moros, President of Venez., to Fatou Bensouda, Prosecutor, Int'l Crim. Ct. (Feb. 12, 2020) (on file at https://www.icc-cpi.int/itemsDocuments/200212-venezuela-referral.pdf [https://perma.cc/V2M3-U6L9]).

3. *Id.* Economic sanctions are one example of unilateral coercive measures, but because they are the ones at issue in this case, this Note uses both terms interchangeably.

4. Annex I to the Prosecution's Provision of the Supporting Document of the Referral Submitted by the Government of Venezuela, ¶¶ 53-119, ICC-01/20-4-Anxl (Mar. 4, 2020) [hereinafter Annex].

5. See, e.g., Elias Davidsson, *Economic Oppression as an International Wrong or as a Crime Against Humanity*, 23 NETH. Q. HUM. RTS. 173, 174 (2005) (extending crimes against humanity to economic oppression); Sonja Starr, *Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situation*, 101 NW. U.L. REV. 1257, 1281 (2007) (extending crimes against humanity to kleptocracy); Ilias Bantekas, *Corruption as an International Crime and Crime Against Humanity*, 4 J. INT'L CRIM. JUST. 466, 474-76 (2006) (extending crimes against humanity to transnational corruption).

6. *Summaries of the Work of the International Law Commission*, INT'L L. COMM'N (Apr. 14, 2020), https://legal.un.org/ilc/summaries/7\_7.shtml [https://perma.cc/6UJY-EF55].

7. See Stephanie Nebehay, *Lift Sanctions on Iran, North Korea, Venezuela in Coronavirus Crisis: U.N. Rights Expert*, REUTERS (Mar. 31, 2020, 12:17 PM), https://

discussed in this Note also has far-reaching implications for the ICC's legitimacy. Often derided as a tool that powerful, rich states deploy against weaker, poorer nations,<sup>8</sup> the ICC is given the rare opportunity here to investigate the alleged abuses of a powerful country. But the ICC stands to lose legitimacy if it follows Venezuela's siren song that taking this case and holding the U.S. accountable will contribute to peace in Latin America.<sup>9</sup> As the old adage goes, "bad facts make bad law," and observers are justified in regarding courts that make bad law as bad courts. Fourth, this case has implications for the international criminal law (ICL) project as a whole. Establishing non-violent conduct such as economic sanctions as the basis for a crime against humanity risks pushing ICL further away from the situations of shocking violence it was designed to address in the first place. Whether or not ICL goes in this direction inevitably involves a judgment call about its goals and preferred policies.

This Note proceeds in three parts. Part I briefly describes the history and contours of crimes against humanity. Part II outlines the crisis in Venezuela, the U.S. sanctions imposed against Venezuela, and the proceedings before the ICC. Part III analyzes whether economic sanctions can amount to crimes against humanity by identifying four hurdles to this interpretation: (1) territorial jurisdiction, (2) causation, (3) mental element, and (4) legality; discussing economic sanctions in the context of Article 7 of the Rome Statute; and critically assessing Venezuela's claims. Ultimately, this Note contends that courts should avoid an interpretation of crimes against humanity that encompasses economic sanctions. A brief conclusion follows.

## I. The Law and Development of Crimes Against Humanity

### A. A Brief History of Crimes Against Humanity

The concept of "crimes against humanity" has been in use since the nineteenth century, albeit not always denoting an international crime.<sup>10</sup> Most commentators trace its modern use to the 1915 Joint Declaration by Great Britain, Russia, and France condemning "the new crimes of Turkey

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[www.reuters.com/article/us-health-coronavirus-un-sanctions/lift-sanctions-on-iran-north-korea-venezuela-in-coronavirus-crisis-un-rights-expert-idUSKBN2112N7](https://www.reuters.com/article/us-health-coronavirus-un-sanctions/lift-sanctions-on-iran-north-korea-venezuela-in-coronavirus-crisis-un-rights-expert-idUSKBN2112N7) [https://perma.cc/7N8D-VGNL]; 'Trump More Dangerous than Coronavirus': Iranian Admiral, AL JAZEERA (Apr. 6, 2020), <https://www.aljazeera.com/news/2020/04/dangerous-coronavirus-iranian-admiral-200406064200587.html> [https://perma.cc/H26G-DUZA].

8. See, e.g., Awol K Allo, *The ICC's Problem Is Not Overt Racism, It Is Eurocentrism*, AL JAZEERA (July 28, 2018), <https://www.aljazeera.com/indepth/opinion/icc-problem-simple-racism-eurocentricism-180725111213623.html> [https://perma.cc/N5N8-UAVY]; Alexandra Zavis & Robyn Dixon, Q&A: *Only Africans Have Been Tried at the Court for the Worst Crimes on Earth*, L.A. TIMES (Oct. 23, 2016), <https://www.latimes.com/world/africa/la-fg-icc-africa-snap-story.html> [https://perma.cc/Y856-RCXN].

9. Annex, *supra* note 4, ¶ 118 ("Action by the Office of the Prosecutor could contribute to deterrence of such threats to world peace.").

10. See Ziv Bohrer, *International Criminal Law's Millennium of Forgotten History*, 34 LAW & HIST. REV. 393, 472 (2016).

against humanity and civilization.”<sup>11</sup> Such language, in turn, is reminiscent of the 1899 Hague Convention’s Martens Clause, which refers to “the laws of humanity, and the requirements of the public conscience.”<sup>12</sup> In 1945, crimes against humanity found its way into the Charter of the International Military Tribunal (IMT). Article 6(c) reads:

*Crimes against humanity*: 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.<sup>13</sup>

The “in execution of or in connection with” clause of Article 6(c) meant that only crimes perpetrated after the start of World War II were cognizable before the IMT. Interestingly, the IMT touted crimes against the peace as the “supreme international crime,” yet it reserved its harshest penalties to those defendants convicted of the new and amorphous crimes against humanity.<sup>14</sup> Despite this promising debut, the notion of crimes against humanity remained undeveloped, even as the international community rushed to codify genocide in the Genocide Convention of 1948 and war crimes in the four Geneva Conventions of 1949 and the two Optional Protocols of 1977.<sup>15</sup>

The concept came back to the fore with the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) in 1993 and 1994, respectively. The statutes founding both tribunals included crimes against humanity in their material jurisdiction, defined as a list of predicate acts and overarching chapeau elements, albeit with differences: the ICTY retained the war nexus; the ICTR imposed a discrimination requirement.<sup>16</sup> Both statutes, as well as the jurisprudence of the courts that interpreted them, were instrumental guidance for the representatives of hundreds of nations that would soon gather in Rome to negotiate the statute of the future International Criminal Court.

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11. Telegram from French Foreign Off. to Turkish Gov’t (May 24, 1915) (on file at [https://www.armenian-genocide.org/Affirmation.160/current\\_category.7/affirmation\\_detail.html](https://www.armenian-genocide.org/Affirmation.160/current_category.7/affirmation_detail.html) [<https://perma.cc/MJ8N-Y4E8>]). Ironically, the term now most commonly used to describe Turkey’s atrocities against Armenians is “genocide,” not “crimes against humanity.” However, the term “genocide” was only coined decades later.

12. Hague Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 U.S.T. 1803, 54 L.N.T.S. 437.

13. Charter of the International Military Tribunal art. 6(c), Aug. 8, 1945, 82 U.N.T.S. 284.

14. BETH VAN SCHAACK & RONALD C. SLYE, *INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT: CASES AND MATERIALS* 426 (3d ed. 2015) (citing HANNAH ARENDT, *EICHMANN IN JERUSALEM* 257 (1963)).

15. See Darryl Robinson, *Defining “Crimes Against Humanity” at the Rome Conference*, 93 AM. J. INT’L L. 43, 45 (1999).

16. See U.N. Secretary-General, *Statute of the International Criminal Tribunal for the Former Yugoslavia*, art. 5, U.N. Doc. S/25704, annex (May 3, 1993); S.C. Res. 955, art. 3 (Nov. 8, 1994).

## B. Crimes Against Humanity in the ICC and Beyond

Article 7(1) of the Rome Statute defines crimes against humanity as follows:

[A]ny of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; . . . (d) Deportation or forcible transfer of population; . . . (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; . . . (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.<sup>17</sup>

Article 7(2), in turn, defines many of the terms used in 7(1). In addition, the Elements of Crimes, adopted pursuant to Article 9 of the Rome Statute, breaks down the material and mental elements the Prosecution must meet to prove a charge of crimes against humanity.<sup>18</sup> Article 7(2)(a), for example, defines “attack directed against any civilian population” as “a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”<sup>19</sup> Therefore, the chapeau elements of crimes against humanity are: (1) a widespread or systematic (2) attack directed at any civilian population, (3) pursuant to or in furtherance of a State or organizational policy to commit such attack, (4) with knowledge of the attack. The predicate acts are those listed on Article 7(1)(a) through (k).<sup>20</sup> With regards to the mens rea, Article 30 stipulates that a person can only be criminally responsible if he commits the material elements of the crime with the requisite intent and knowledge.<sup>21</sup> Accordingly, the ICC has interpreted that the mens rea for crimes against humanity is twofold: intent and knowledge to commit the predicate act pursuant to Article 30, and knowledge that the act is part of the widespread or systematic attack directed against the civilian population.<sup>22</sup>

As can be surmised from Article 7, crimes against humanity covers a wide range of conduct. Further, the open-ended provision in Article 7(1)(k) allows for consideration of unenumerated acts. However, Article 7 did not live up to all of the negotiating parties’ expectations. At the Rome

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17. Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

18. *See id.* at art. 9.

19. *Id.* at art. 7(2)(a).

20. *Id.* at art. 7(1).

21. *See id.* at art. 30.

22. *See* Prosecutor v. Katanga, ICC-01/04-01/07, Judgment, ¶¶ 781–82 (Mar. 7, 2014) [hereinafter Katanga Trial Judgment]; *see also* Prosecutor v. Bemba, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges, ¶ 138 (June 15, 2009) [hereinafter Bemba Decision on the Charges]; Prosecutor v. Ruto et al., ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 333 (Jan. 23, 2012) [hereinafter Ruto et al. Decision on the Charges].

Conference, Cuba had proposed to include the following to the list of actionable offenses under Article 7: “inhuman acts such as the [sic] economic, financial and commercial blockades intentionally causing great suffering or serious injury to body or to mental, physical health.”<sup>23</sup> The proposal received little support.<sup>24</sup> On the other hand, Cuba successfully argued for the inclusion of “the deprivation of access to food and medicine” in Article 7(2)(b), as an example of an act that could form the basis for the crime against humanity of extermination.<sup>25</sup>

In 2008, an effort to codify the definition of crimes against humanity began in the United States.<sup>26</sup> In 2013, the International Law Commission (ILC) included the item in its agenda and appointed Sean Murphy as Special Rapporteur.<sup>27</sup> The ILC presented the Second Reading of the Draft Articles to the U.N. General Assembly in May 2019; the definition proposed by Draft Article 3 is virtually identical to Article 7 of the Rome Statute, illustrating that the Rome Statute has attained recognition as a codification of customary international law.<sup>28</sup> In a comment to Draft Article 3(1)(k), the functional equivalent of the Rome Statute’s 7(1)(k), Cuba suggested the phrase “causing great suffering” be amended to “causing great suffering or hardship,” in order to cover situations “that do not fall within the meaning of ‘suffering’ but may very well constitute crimes against humanity, such as the scarcity or absence of material goods and services that are indispensable for [a person’s] life and development.”<sup>29</sup> Cuba may have been thinking about its own embargo but possibly about the situation of its economic lifeline, Venezuela, as well.<sup>30</sup>

## II. From Riches to Rags: The Situation in Venezuela

### A. The Crisis

Not too long ago, in what now seems a fable, Venezuela was the richest

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23. Alejandro Kirk, *Cuba: Economic Blockades Are Crimes Against Humanity*, TERRA VIVA, June 25, 1998, at 1, 1, <https://www.legal-tools.org/doc/f72f3c/pdf/> [<https://perma.cc/H3PJ-HVSV>].

24. See Robinson, *supra* note 15, at 52–53 n.59.

25. Rome Statute, *supra* note 17, at art. 7(2)(b); Robinson, *supra* note 15, at 52 n.59 (explaining that this clause was added at the request of Cuba).

26. See Madaline George, *Prospects for a Convention on the Prevention and Punishment of Crimes Against Humanity*, OPINIOJURIS (Aug. 10, 2019), <http://opiniojuris.org/2019/10/08/prospects-for-a-convention-on-the-prevention-and-punishment-of-crimes-against-humanity/> [<https://perma.cc/86NN-BYFC>].

27. *Id.*

28. See Int’l Law Comm’n, *Crimes Against Humanity: Text and Titles of the Draft Preamble the Draft Articles and the Draft Annex Provisionally Adopted by the Drafting Committee on Second Reading*, art. 3, U.N. Doc. A/CN.4/L.935 (May 15, 2019) [hereinafter *Draft Articles*].

29. Int’l Law Comm’n, *Crimes Against Humanity: Comments and Observations Received from Governments, International Organizations and Others*, ¶ 67, U.N. Doc. A/CN.4/726 (Jan. 21, 2019).

30. See Mimi Whitefield, *Cuba Is Slowly Losing a Lifeline as Venezuela Collapses*, L.A. TIMES (Oct. 3, 2019, 3:00 AM), <http://www.latimes.com/world-nation/story/2019-10-03/venezuela-meltdown-us-sanctions-batter-cuba> [<https://perma.cc/SM86-NT8B>].

country in South America.<sup>31</sup> In the 1960s, the country, which possesses the world's largest proven oil reserves, produced over 10% of the world's crude oil; its Gross Domestic Product (GDP) was many times larger than those of Brazil and Colombia;<sup>32</sup> and its health system was considered the best in Latin America.<sup>33</sup>

Today, Venezuela is South America's poorest nation—a mere shadow of its wealthy past.<sup>34</sup> After multiple price shocks, its oil production has hit a twenty-eight-year low.<sup>35</sup> Its health system has been crippled by an endemic lack of equipment and medicine, an exodus of doctors, and the return of previously eradicated diseases such as measles and malaria.<sup>36</sup> “Between 2013 and 2016, food imports fell 71[%] and medicine and medical equipment imports dropped 68[%].”<sup>37</sup> Maternal mortality skyrocketed by 65% in 2016 and infant mortality by 30%—the minister who divulged these statistics was swiftly fired.<sup>38</sup> An estimated 4.5 million refugees and migrants have fled Venezuela,<sup>39</sup> as the country now faces a 10,000,000% inflation rate<sup>40</sup> and the world's second-highest murder rate.<sup>41</sup>

In July 2019, the Office of the U.N. High Commissioner of Human Rights released a report on the situation of human rights in Venezuela after extensive fact-finding in the region.<sup>42</sup> The report's economic and social rights section paints an abysmal picture: the minimum wage (seven U.S.

31. Callum Brodie, *Venezuela Was Once South America's Richest Country. Here's What Went Wrong*, WORLD ECON. F. (Aug. 7, 2017), <https://www.weforum.org/agenda/2017/08/venezuela-economic-woes-2017-explained/> [<https://perma.cc/LE6H-L4A7>].

32. Keith Johnson, *How Venezuela Struck It Poor*, FOREIGN POL'Y (July 16, 2018, 8:00 AM), <https://foreignpolicy.com/2018/07/16/how-venezuela-struck-it-poor-oil-energy-chavez/> [<https://perma.cc/7BRT-CV3C>].

33. See Julie Turkewitz & Isayen Herrera, *Childbirth in Venezuela, Where Women's Death Are a State Secret*, N.Y. TIMES (Apr. 10, 2020), <https://www.nytimes.com/2020/04/10/world/americas/venezuela-pregnancy-birth-death.html?searchResultPosition=1> [<https://perma.cc/2RVZ-3PXE>].

34. See Anatoly Kurmanaev, *Venezuela's Maduro, Used to Crises, Faces His Toughest One Yet*, N.Y. TIMES (Aug. 19, 2020), <https://www.nytimes.com/2020/04/13/world/americas/venezuela-maduro-oil.html> [<https://perma.cc/AK8E-QMS6>].

35. Johnson, *supra* note 32.

36. U.N. High Commissioner for Human Rights, *Human Rights in the Bolivarian Republic of Venezuela*, ¶¶ 17, 63, U.N. Doc. A/HRC/41/18 (Oct. 9, 2019) [hereinafter OHCHR Report].

37. MOISES RENDON & MAX PRICE, CTR. STRATEGIC & INT'L STUD., ARE SANCTIONS WORKING IN VENEZUELA? 3 (2019).

38. Turkewitz & Herrera, *supra* note 33.

39. *UN and Partners Call for Solidarity, as Venezuelans on the Move Reach 4.5 Million*, U.N. NEWS (Oct. 23, 2019), <https://news.un.org/en/story/2019/10/1049871> [<https://perma.cc/C6LX-CCE6>].

40. *Instability in Venezuela*, COUNCIL ON FOREIGN RELS. (Feb. 23, 2020), <https://www.cfr.org/interactive/global-conflict-tracker/conflict/instability-venezuela> [<https://perma.cc/Q6PR-L27R>].

41. See U.N. OFFICE ON DRUGS & CRIME, GLOBAL STUDY ON HOMICIDE: HOMICIDE TRENDS, PATTERNS AND CRIMINAL JUSTICE RESPONSE 40 (Luis Sundkvist ed., 2019).

42. OHCHR Report, *supra* note 36, ¶¶ 3-4, 6-9. In its comments to the Report, the Maduro government protested that the High Commissioner did not include the putative social and economic achievements of the twenty-two-year-old regime. But that is beside the point: past behavior, no matter how good, does not give a government a pass from fulfilling their human rights obligations.

dollars per month) can only cover 4.7% of the basic food basket; 3.7 million individuals (over 10% of the population) are malnourished; and adolescent pregnancies have increased by 65% since 2015, partially due to a severe lack of access to contraceptives.<sup>43</sup> The report is lapidary toward the Government of Venezuela: it chastises the Government for not demonstrating that it has “used all resources at its disposal to ensure the progressive realization of the right to food, nor that it has unsuccessfully sought international assistance to address gaps”; it affirms that violations of the right to health flow from “the Government’s failure to fulfil its core obligations, which are non-derogable, even for economic reasons”; it calls out the Government’s failure to publish comprehensive and accurate public health data as a violation of the right to health; and it sheds light on the Government’s conditioning of food assistance on political support.<sup>44</sup> This interdependence of the economic and political spheres is important as the economic and humanitarian crisis is coextensive with the country’s deep political crisis.

Following the death of President Hugo Chávez, who inaugurated the country’s socialist regime in 1998 and ruled the country uninterrupted for fifteen years, then-Vice President Nicolás Maduro won the presidency in April 2013.<sup>45</sup> Political polarization peaked when student protests against rising crime, hyperinflation, and scarcity erupted in February 2014.<sup>46</sup> The Government cracked down, and forty-three people were killed.<sup>47</sup> Later that year, oil prices tanked and sent the economy into recession; in 2015, GDP shrank by almost 6%.<sup>48</sup> Opposition to the Government grew, and in 2015, the opposition to Maduro won a majority in the National Assembly.<sup>49</sup> In 2017, Venezuela’s Supreme Court, stacked with judges loyal to Maduro, announced it would suspend the National Assembly and take over its functions.<sup>50</sup> Protests ensued, over one hundred people died, and the Supreme Court backed down.<sup>51</sup> Instead, the Maduro Government created a Constituent Assembly with legislative functions, sidelining the National Assembly.<sup>52</sup> Presidential elections were set to take place in May 2018, with the

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43. *Id.* ¶¶ 11, 15, 18.

44. *Id.* ¶¶ 13, 20, 22-23.

45. See Luc Cohen, *How Venezuela Got Here: A Timeline of the Political Crisis*, REUTERS (Jan. 28, 2019, 8:58 PM), <https://www.reuters.com/article/us-venezuela-politics-timeline/how-venezuela-got-here-a-timeline-of-the-political-crisis-idUSKCN1PN05S> [<https://perma.cc/638F-WB85>].

46. See William Neuman, *Protests Swell in Venezuela as Places to Rally Disappear*, N.Y. TIMES (Feb. 20, 2014), <https://www.nytimes.com/2014/02/21/world/americas/protests-swell-in-venezuela-as-places-to-rally-disappear.html> [<https://perma.cc/QE8W-QTRL>].

47. Javier Faria, *Venezuelan Teen Dies After Being Shot at Anti-Maduro Protest*, REUTERS (Feb. 25, 2015, 6:01 AM), <https://www.reuters.com/article/us-venezuela-protests/venezuelan-teen-dies-after-being-shot-at-anti-maduro-protest-idUSKBN0LS29K20150225> [<https://perma.cc/PJ3Z-TCVS>].

48. Johnson, *supra* note 32.

49. See Cohen, *supra* note 45.

50. See *id.*

51. *Id.*

52. See *id.*



main opposition leaders either jailed or barred from running.<sup>53</sup> As a result, the opposition declared the elections illegitimate and boycotted them. Maduro won reelection amid high abstention, but the opposition refused to recognize the results; the United States, thirteen Latin American governments, and the OAS followed.<sup>54</sup> The day after Maduro's re-inauguration, Juan Guaidó, the President of the National Assembly, invoked Article 233 of the Venezuelan Constitution, which stipulates that if the presidency is vacant, the President of the National Assembly shall form an interim government.<sup>55</sup> Since the May 2018 elections were fraudulent, Guaidó reasoned, Maduro was not a legitimate president and the presidency was thus vacant. Less than two weeks later, Juan Guaidó was sworn in as interim President by the National Assembly, vowing to end Maduro's "dictatorship" and call free and fair elections.<sup>56</sup> Maduro's government denounced Guaidó, claimed he was the spearhead of a coup organized by the Venezuelan right and the United States, and refused to back down.<sup>57</sup> In the following days, the United States; Canada; most of the Lima Group;<sup>58</sup> Australia; over a dozen European countries including the United Kingdom, France,

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53. See Scott Neuman, *Venezuela's Maduro Wins Boycotted Elections Amid Charges of Fraud*, NAT'L PUB. RADIO (May 21, 2018, 1:13 AM), <https://www.npr.org/sections/thetwo-way/2018/05/21/612918548/venezuelas-maduro-wins-boycotted-elections-amid-charges-of-fraud> [<https://perma.cc/YS97-4DP8>]; Andreina Aponte & Leon Wietfeld, *Factbox: Venezuela's Jailed, Exiled or Barred Opposition Politicians*, REUTERS (Feb. 19, 2018, 12:52 PM), <https://www.reuters.com/article/us-venezuela-politics-factbox/factbox-venezuelas-jailed-exiled-or-barred-opposition-politicians-idUSKCN1G31WU> [<https://perma.cc/9ZYX-DVTM>].

54. See Holly K. Sonneland, *Timeline: Venezuela's Political Standoff*, AMS. SOC'Y COUNCIL (July 31, 2019), <https://www.as-coa.org/articles/timeline-venezuelas-political-standoff> [<https://perma.cc/XNJ6-EE55>]; Press Release, Org. Am. States, OAS Permanent Council Agrees "to Not Recognize the Legitimacy of Nicolas Maduro's New Term" (on file at [https://www.oas.org/en/media\\_center/press\\_release.asp?sCodigo=001/19](https://www.oas.org/en/media_center/press_release.asp?sCodigo=001/19)) [<https://perma.cc/X2T7-8RLQ>].

55. See CONSTITUCIÓN DE VENEZUELA [CONSTITUTION] Dec. 15, 1999, art. 233 (Venez.); see also Sonneland, *supra* note 54.

56. See Sam Meredith, *One Year On: The Day Venezuela Became Known as the Country with Two Presidents*, CNBC (Jan. 23, 2020, 4:27 AM), <https://www.cnn.com/2020/01/23/venezuela-crisis-one-year-on-from-guaidos-challenge-to-maduro.html> [<https://perma.cc/4X7J-2E54>]; see also OHCHR Report, *supra* note 36, ¶¶ 28–41. The Report details the rampant violations of civil and political rights by Maduro's regime including, inter alia: limitations of freedom of expression and opinion (including print, media, radio, and TV channel closures, and detention of journalists); armed repression and militarization of civil society and political institutions to surveil and terrorize civilians; limitations on trade union activity; excessive use of force by government forces in anti-government demonstrations; and arbitrary detentions (including the staggering figure of 15,045 persons detained for political motives between January 2014 and May 2019) with documented cases of torture and sexual violence. *Id.*

57. See *Guaidó y la Antidemocracia Impuesta por EE.UU.*, TELESUR (Jan. 24, 2019), <https://www.telesurtv.net/telesuragenda/venezuela-guaido-gobierno-transicion-golpe-estado-eeuu-derecha-20190124-0020.html> [<https://perma.cc/4LAF-FNTT>].

58. Argentina, Brazil, Costa Rica, Chile, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, and Saint Lucia formed the Lima Group in 2018 to coordinate a regional response to the Venezuelan Crisis. See Press Release, Ministry of Foreign Relations of Peru, *Declaración del Grupo de Lima* [Declaration of the Lima Group] (Sept. 15, 2018) (on file at <https://www.gob.pe/institucion/rree/noticias/19021-declaracion-del-grupo-de-lima>).

Spain, and Germany; and the European Parliament recognized Juan Guaidó as the caretaker President of Venezuela. Meanwhile, Russia, China, Turkey, Iran, Bolivia, Cuba, and Nicaragua remained steadfastly by Maduro's side.<sup>59</sup> Two years later, the stalemate remains. In December 2020, the regime recaptured a majority in the National Assembly, once again amid high abstention and the opposition's boycott.<sup>60</sup> Despite recognition from over fifty states, Guaidó's movement has been unable to remove Maduro from office. Maduro, firmly backed by Russia and China, has pledged to incarcerate Guaidó.<sup>61</sup> Internationally mediated peace talks faltered, and the United States ramped up the pressure.

## B. The Sanctions

U.S. sanctions against Venezuela for terrorism and drug trafficking related activities have been in place for over a decade.<sup>62</sup> In 2014, Congress passed the Venezuela Defense of Human Rights and Civil Society Act, which directed the President of the U.S. to impose individual sanctions on those most responsible for human rights violations.<sup>63</sup> The following year, President Barack Obama issued Executive Order (E.O.) 13692, blocking assets and restricting visas for eight individuals in the Maduro administration who were deemed responsible for the violent crackdown on the 2014 student protests.<sup>64</sup> Currently, the U.S. has sanctioned at least 166 individuals<sup>65</sup> and forty-seven entities.<sup>66</sup> In 2017, Canada imposed individual asset freezes and dealings prohibitions; Canadian sanctions now target 113

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59. See Rosalba O'Brien, *Guaidó vs Maduro: Who Is Backing Whom in Venezuela?*, REUTERS (Apr. 30, 2019, 3:06 PM), <https://www.reuters.com/article/us-venezuela-politics-support-factbox/guaido-vs-maduro-who-is-backing-whom-in-venezuela-idUSKCN1S62DY> [<https://perma.cc/CWZ5-XENG>].

60. Ahead of the elections, Maduro's regime changed the composition of the National Assembly to increase representation of its strongholds and used the courts to intervene the major opposition parties and designate eligible candidates. See *La Unión Europea Ampliará las Sanciones en Venezuela a 30 Dirigentes Implicados en las Elecciones de Diciembre Pasado Ordenadas Ilegalmente por Maduro*, INFOBAE (Feb. 20, 2021), <https://www.infobae.com/america/venezuela/2021/02/20/la-union-europea-ampliara-las-sanciones-en-venezuela-a-30-dirigentes-implicados-en-el-proceso-electoral-de-diciembre-pasado-ordenado-por-maduro/> [<https://perma.cc/GXG4-QBR5>].

61. *Venezuela's Maduro Says Arrest of Juan Guaidó 'Will Come'*, AL JAZEERA (Feb. 14, 2020), <https://www.aljazeera.com/news/2020/02/venezuela-maduro-arrest-juan-guaido-200214185506708.html> [<https://perma.cc/MTX2-QCC8>].

62. See CLARE RIBANDO SEELKE, CONG. RSCH. SERV., *VENEZUELA: OVERVIEW OF U.S. SANCTIONS* (2021), <https://crsreports.congress.gov/product/pdf/IF/IF10715> [<https://perma.cc/HK7V-XR9A>] [hereinafter CRS OVERVIEW].

63. See *id.*

64. See RENDON & PRICE, *supra* note 37, at 1.

65. These individuals include "Maduro; his wife, Celia Flores, and son Nicolás Maduro Guerra; . . . Diosdado Cabello (Socialist party president); eight Supreme Court judges; the leaders of Venezuela's army, national guard, and national police; four state governors; the director of the [C]entral [B]ank; and the foreign minister." CRS OVERVIEW, *supra* note 62.

66. See RENDON & PRICE, *supra* note 37, at 1; *Venezuela: 19 Officials Added to the EU Sanctions List*, EUR. COUNCIL (Feb. 22, 2021), <https://www.consilium.europa.eu/en/press/press-releases/2021/02/22/venezuela-19-officials-added-to-the-eu-sanctions-list/> [<https://perma.cc/DZR4-VNX9>].

Venezuelans.<sup>67</sup> Mexico and Panama slapped their own individual sanctions in 2018, and the European Union (EU) recently sanctioned nineteen Venezuelan officials following the December 2020 elections, bringing to fifty-five the total number of Venezuelans subject to EU sanctions.<sup>68</sup>

President Trump imposed broader financial sanctions. In August 2017, Trump issued E.O. 13808, prohibiting the Venezuelan government, including *Petróleos de Venezuela S.A. (PdVSA)*, the state-owned oil company, from accessing U.S. financial markets.<sup>69</sup> E.O. 13872 (March 2018) prohibits U.S. persons from transacting in *petro*, the Venezuelan government-controlled cryptocurrency fabricated to circumvent the sanctions.<sup>70</sup> E.O. 13835 (May 2018) cut off the Venezuelan government and its subsidiaries from international debt financing with U.S. persons or taking place in the United States.<sup>71</sup>

The Trump administration also shifted toward sectoral sanctions. Pursuant to E.O. 13850 (November 2018), the Department of Treasury blocked all of PdVSA's property and interests subject to U.S. jurisdiction, and prohibited U.S. persons from engaging in business with the company, or as the U.S. government put it, "engag[ing] in corrupt transactions with the Maduro government."<sup>72</sup> In March 2019, the U.S. sanctioned the state-owned gold mining company "for using illicit gold operations to support Maduro."<sup>73</sup> Individuals were also sanctioned under E.O. 13850, including thirteen individuals and nineteen entities for "siphon[ing] millions of dollars from Venezuela's emergency food aid system."<sup>74</sup> Other entities sanctioned under E.O. 13850 include the Venezuelan counterintelligence agency and the Central Bank, whose access to U.S. currency were cut off.<sup>75</sup> In August 2019, then-President Trump issued E.O. 13884, freezing the property and interests of the Maduro government in the United States and under the control of U.S. persons, and prohibiting unauthorized transactions by U.S. persons with the Maduro regime.<sup>76</sup> This amounted to a complete embargo, "plac[ing] Venezuela on par with North Korea, Iran, Syria and Cuba . . . ."<sup>77</sup> While the sanctions regime includes exceptions for humanitarian aid, these are not always effective as prospective buyers still have obstacles accessing financing.<sup>78</sup>

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67. *Canadian Sanctions Related to Venezuela*, GOV'T CAN. (Jan. 14, 2020), [https://www.international.gc.ca/world-monde/international\\_relations-relations\\_internationales/sanctions/venezuela.aspx?lang=eng](https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/venezuela.aspx?lang=eng) [<https://perma.cc/2M5A-YUML>].

68. See RENDON & PRICE, *supra* note 37, at 2.

69. CRS OVERVIEW, *supra* note 62.

70. *Id.*; RENDON & PRICE, *supra* note 37, at 2.

71. CRS OVERVIEW, *supra* note 62.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*; RENDON & PRICE, *supra* note 37, at 3.

76. CRS OVERVIEW, *supra* note 62.

77. Vivian Salama, *U.S. Expands Sanctions Against Venezuela into an Embargo*, WALL ST. J. (Aug. 5, 2019), <https://www.wsj.com/articles/u-s-expands-sanctions-against-venezuela-into-an-embargo-11565053782> [<https://perma.cc/VW5T-N7DR>].

78. See *id.*

About the sanctions' effects, the report by the U.N. High Commissioner of Human Rights (OHCHR Report) observed:

The economy of Venezuela, particularly its oil industry and food production systems, were already in crisis before any sectoral sanctions were imposed. Figures published by the Central Bank of Venezuela on 28 May 2019 show that key economic indicators began to decline dramatically well before August 2017. Nevertheless, the latest economic sanctions are exacerbating further the effects of the economic crisis, and thus the humanitarian situation, given that most of the foreign exchange earnings derive from oil exports, many of which are linked to the U.S. market.<sup>79</sup>

A report by the Center for Economic and Policy Research, as well as a 2018 Report by Alfred de Zayas, the Human Rights Council's Independent Expert on the Promotion and Protection of a Democratic and Equitable International Order—both extensively cited in Venezuela's pleading—more explicitly and causally linked the sanctions to the crisis.<sup>80</sup> In the Independent Expert's Report, a single line, with a single footnote, started connecting the dots: “Moreover, sanctions can amount to crimes against humanity under Article 7 of the Rome Statute.”<sup>81</sup>

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79. OHCHR Report, *supra* note 36, ¶ 27 (citations omitted).

80. MARK WEISBROT & JEFFREY SACHS, CTR. ECON. & POL'Y RSCH., ECONOMIC SANCTIONS AS COLLECTIVE PUNISHMENT: THE CASE OF VENEZUELA I (2019), <https://cepr.net/images/stories/reports/venezuela-sanctions-2019-04.pdf> [<https://perma.cc/XZ8G-A6Q8>] (“We find that the sanctions have inflicted, and increasingly inflict, very serious harm to human life and health, including an estimated more than 40,000 deaths from 2017–2018; and that these sanctions would fit the definition of collective punishment of the civilian population as described in both the Geneva and Hague international conventions, to which the [U.S.] is a signatory. They are also illegal under international law and treaties which the [U.S.] has signed, and would appear to violate [U.S.] law as well.”). The Brookings Institution has released its own report disputing Weisbrot and Sachs' conclusions and methodology, essentially arguing that because economic deterioration was well underway before the 2017 sanctions, there is insufficient basis to causally link the sanctions to the economic and humanitarian crisis. See DANY BAHAR ET AL., BROOKINGS INST., IMPACT OF THE 2017 SANCTIONS ON VENEZUELA: REVISITING THE EVIDENCE 9 (2019), [https://www.brookings.edu/wp-content/uploads/2019/05/impact-of-the-2017-sanctions-on-venezuela\\_final.pdf](https://www.brookings.edu/wp-content/uploads/2019/05/impact-of-the-2017-sanctions-on-venezuela_final.pdf) [<https://perma.cc/3HDM-SLU4>]; Rep. of the Independent Expert on the Promotion of a Democratic and Equitable International Order on His Mission to the Bolivarian Republic of Venezuela and Ecuador, ¶¶ 36, 39, U.N. Doc. A/HRC/39/47/Add.1 (Aug. 3, 2018) [hereinafter Independent Expert's Report] (“The effects of sanctions imposed by Presidents Obama and Trump and unilateral measures by Canada and the European Union have directly and indirectly aggravated the shortages in medicines such as insulin and anti-retroviral drugs. To the extent that economic sanctions have caused delays in distribution and thus contributed to many deaths, sanctions contravene the human rights obligations of the countries imposing them. . . . In short: economic sanctions kill.”) (citations omitted).

81. Independent Expert's Report, *supra* note 80, ¶ 36. The source footnoted for this assertion in the Independent Expert's Report leads to a single blog post by Fernando Casado, a Spanish lawyer and professor in Ecuador, and declared sympathizer of Maduro and Chávez. Casado's blog post is short and riddled with conclusory statements and flawed reasoning. For example, Casado asserts:

[T]he sanctions against Venezuelan state officials constitute a type of persecution based on political motives, since *there are no elements* in which to sustain the accusations of the United States and the rest of the countries that supported it. The lack of evidence and legal elements suggest that their crime has been their identification by sanctioning countries as chavistas.

### C. The ICC Proceedings

Venezuela's 2020 self-referral was not the OTP's first foray into Venezuela. In February 2018, the Prosecutor opened a preliminary examination into crimes allegedly committed in Venezuela "in the context of demonstrations and related political unrest" since at least April 2017.<sup>82</sup> And in September 2018, six members of the Lima Group jointly requested the Prosecutor to examine crimes against humanity committed in Venezuela by the Venezuelan Government against its civilian population since February 2014.<sup>83</sup>

The preliminary examinations of both the OTP and Venezuela I looked into crimes against humanity that had violence at its core: the OTP focused on violence in the context of political activity and Venezuela I on government repression characterized by "arbitrary detentions, murders, extrajudicial executions, torture, sexual abuse and rape."<sup>84</sup>

Venezuela II, on the other hand, framed the predicate acts as unilateral coercive measures in the form of economic sanctions. According to the Annex of Venezuela II, since the 2015 sanctions and throughout the most recent sanctions wave, the United States has "systematically exerted its influence in inflicting pain and suffering on the civilian population of Venezuela so as to attain an explicit purpose . . . forbidden by public interna-

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Fernando Casado, *Trump's Crimes Against Venezuela Must Be Brought Before the International Criminal Court*, INTERNATIONALIST 360° (Apr. 11, 2018), <https://libya360.wordpress.com/2018/04/11/trumps-crimes-against-venezuela-must-be-brought-before-the-international-criminal-court/> [https://perma.cc/3Q4R-5VXL] (emphasis added). Casado chooses to ignore that sanctions were imposed as a result of a violent crackdown on peaceful protestors first, and later expanded to target sectors engaged in corruption and the financing of illegal acts. His poor reasoning, in essence, amounts to the following: sanctions are unfounded because there is no evidence they *are not* unfounded. *Id.* Further, Casado does not analyze the nexus requirement (that persecution must be committed in connection with another act in Article 7) of his persecution claim, which thereby fails as a matter of law. Then, Casado argues that the requirements of Article 7(1)(k) are met in a single paragraph and in the most conclusory fashion:

The indiscriminate sanctions against the people of Venezuela that prevent the importation of food, medicine and machinery for the productive sector, clearly constitute inhuman acts that are intentionally aimed at causing the crimes contemplated in the previous sections of the same article (death, suffering, extermination, forced migrations) constituting crimes against humanity.

*Id.* Casado then goes on to discuss whether the U.S. sanctions could constitute genocide or aggression. *Id.*

82. Fatou Bensouda, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on Opening Preliminary Examinations into the Situations in the Philippines and in Venezuela (Feb. 8, 2018) (transcript available at <https://www.icc-cpi.int/Pages/item.aspx?name=180208-otp-stat> [https://perma.cc/GJ8N-KZXH]).

83. Letter from the Republic of Argentina, Canada, the Republic of Colombia, the Republic of Chile, the Republic of Paraguay and the Republic of Peru, to the Prosecutor, Int'l Crim. Ct. (Sept. 26, 2018) (referring the situation in Venezuela under Article 14 of the Rome Statute) (on file at [https://www.icc-cpi.int/itemsDocuments/180925-otp-referral-venezuela\\_ENG.pdf](https://www.icc-cpi.int/itemsDocuments/180925-otp-referral-venezuela_ENG.pdf) [https://perma.cc/K99B-A94X]). This preliminary examination is now known as Venezuela I, while Venezuela's self-referral is known as Venezuela II.

84. *Id.*

tional law, namely the change of regime in another State.”<sup>85</sup> After describing the sanctions’ purported effects on the rights of the child as well as the rights to food, health, education, and water, whose stand-alone violations are not actionable under the Rome Statute, the Annex turns to crimes against humanity.

The pleading describes unilateral coercive measures as a form of non-violent warfare directed against Venezuela’s civilian population as a whole, or at least against civilians who support the Maduro government.<sup>86</sup> The Annex glosses over the widespread or systematic, and state or organizational policy requirements, considering their satisfaction self-evident. In terms of predicate acts for crimes against humanity, the Annex sets forth murder, extermination, deportation, persecution, and other inhumane acts.<sup>87</sup> Each of these claims will be discussed in detail in Section III.C.3. below.

There is no doubt that sanctions are harmful. The issue this Note will address next is whether they are also a crime.

### III. The Nonviability of Sanctions Against Humanity

#### A. Background

While the issue of economic sanctions as crimes against humanity is before the ICC for the first time, Venezuela’s claim is not completely *sui generis*. In a 2005 article, Elias Davidsson argued that the Rome Statute can include liability for the crime of economic oppression, which includes oppression committed through policies of deprivation and economic sanctions.<sup>88</sup> Relatedly, over twenty years ago, a U.N. official opined that the U.N. sanctions that crushed the Iraqi economy amounted to genocide.<sup>89</sup> And at the very inception of ICL, the IMT convicted Hans Frank of crimes against humanity in part for being “a willing and knowing participant . . . in the economic exploitation of Poland in a way which led to the death by starvation of a large number of people.”<sup>90</sup>

In light of this, Cuba’s proposal to include “economic, financial and commercial blockades” in Article 7 was not entirely devoid of background.<sup>91</sup> Unfortunately for Venezuela, from a *travaux préparatoires* standpoint, the failure of the Rome Conference to adopt Cuba’s proposal provides strong evidence that the drafters of the Rome Statute did not intend to include economic blockades as acts that could give rise to liability. Given that the Rome Statute is only concerned with “the most serious

85. Annex, *supra* note 4, ¶ 15.

86. *See id.* ¶¶ 70, 82, 87.

87. *Id.* ¶¶ 89, 91, 95, 101, 109.

88. *See* Davidsson, *supra* note 5, at 192, 204.

89. Mark Siegal, *Former UN Official Says Sanctions Against Iraq Amount to Genocide*, CORNELL CHRON. (Oct. 1, 1999), <https://news.cornell.edu/stories/1999/09/former-un-official-says-sanctions-against-iraq-amount-genocide> [<https://perma.cc/86CQ-YL2M>].

90. VAN SCHAACK & SLYE, *supra* note 14, at 424.

91. *See* discussion *supra* Section I.B.

crimes of concern to the international community as a whole,<sup>92</sup> the failure to include economic, financial, and commercial blockades must mean that economic sanctions, as a lesser form of blockades, were also intentionally left out. If the drafters intended that these acts could be covered by Article 7(1)(k), such that they did not have to be explicitly mentioned, then there would be some record of this in the legislative history of the Statute.

Despite the lack of textual support, Venezuela claims that the text of Article 7 already includes unilateral coercive measures, without having to resort to an unenumerated predicate act.<sup>93</sup> In analyzing this issue, particular attention should be had to Article 22(2): “The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.”<sup>94</sup>

## B. Four Structural Hurdles

This section addresses four structural hurdles that vitiate the interpretation of economic sanctions applied in peacetime as crimes against humanity. These four issues will also permeate the discussion of the chapeau elements and predicate acts of crimes against humanity, undertaken below in Section III.C. The four structural hurdles are: (1) territorial jurisdiction, (2) causation, (3) mental element, and (4) legality.

### 1. Territorial Jurisdiction

Article 12 of the Rome Statute, which by some accounts was one of the most contentious issues at the Rome Conference, lays out the territorial jurisdiction of the ICC.<sup>95</sup> Article 12(2) stipulates that, when acting through a State Party referral or *proprio motu*, the court can exercise jurisdiction if “the State on the territory of which the conduct in question occurred” is a State Party or has accepted jurisdiction.<sup>96</sup>

Venezuela, a State Party, concedes that “[t]he unilateral coercive measures adopted by the Government of the United States of America . . . appear to have been imposed outside the territory of Venezuela but with the evident purpose of having effects within the territory of Venezuela.”<sup>97</sup> Because the United States is not a State Party, Venezuela resorted to the effects doctrine. In the *Situation in Bangladesh/Myanmar*, the Pre-Trial Chamber III defined the effects doctrine as the theory “according to which the State may assert territorial jurisdiction if the crime takes place outside the State territory but produces effects within the territory of the State.”<sup>98</sup>

92. Rome Statute, *supra* note 17, at Preamble.

93. See generally Annex, *supra* note 4.

94. Rome Statute, *supra* note 17, at art. 22(2).

95. See Dennis Paul Ardis Jr., *How Much Is Enough? The ICC’s Territorial Reach over Cross-Border Crimes*, 41 N.C. J. INT’L L. 189, 190 (2016).

96. Rome Statute, *supra* note 17, at art. 12(2)(a).

97. Annex, *supra* note 4, ¶ 53.

98. Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Ban-

The evidence Venezuela musters in support of the application of this theory, however, suggests that Venezuela is conflating the effects doctrine with other, more established theories of jurisdiction previously used by the Court. The Annex cites the Jurisdiction Decision in the *Bangladesh/Myanmar* case as an example where “the Pre-Trial Chamber appears to have contemplated a situation of ‘effects jurisdiction.’”<sup>99</sup> But this misreads the decision: the Pre-Trial Chamber was explicitly applying the constitutive theory of jurisdiction, not the effects doctrine.<sup>100</sup> Similarly, paragraph 56 of the Annex cites the OTP’s *Article 5 Report on the Situation in the Republic of Korea*.<sup>101</sup> In that case, the OTP argued for territorial jurisdiction when North Korea bombed a South Korean vessel, even if the bombing came from North Korea, because “[i]t is not possible to separate the conduct of firing from the conduct of hitting the targeted area; this would create an artificial distinction when the acts are one and the same.”<sup>102</sup> In that case, however, the OTP also premised jurisdiction on the constitutive principle, not on the effects doctrine.<sup>103</sup>

Initially, Professor Schabas had noted that because the Rome Statute is silent on whether effects jurisdiction is permissible, “there are compelling arguments in favour of a strict construction of Article 12 and the exclusion of such a concept.”<sup>104</sup> But the Pre-Trial Chamber III in *Bangladesh/Myanmar* reasoned that State Parties “must be presumed to have transferred to the Court the same territorial jurisdiction as they have under international law.”<sup>105</sup> However, the Chamber found that three other principles of territorial jurisdiction were satisfied in *Bangladesh/Myanmar*, and thus declared that it “d[id] not otherwise deem it necessary to formulate abstract conditions for the Court’s exercise of territorial jurisdiction for all

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gladesh/Republic of the Union of Myanmar, ¶¶ 56-57 (Nov. 14, 2019) [hereinafter *Bangladesh/Myanmar Authorization Decision*].

99. Annex, *supra* note 4, ¶ 58.

100. See Request Under Regulation 46(3) of the Regulations of the Court, ICC-RoC46(3)-01/18, Decision on the Prosecution’s Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute, ¶¶ 77-78 (Sept. 6, 2018) [hereinafter *Bangladesh/Myanmar Jurisdiction Decision*]; see also *Bangladesh/Myanmar Authorization Decision*, *supra* note 98, ¶ 56 (describing the constitutive theory as conferring territorial jurisdiction when “at least one constitutive element of the crime occurred on the territory of the State” asserting jurisdiction).

101. Annex, *supra* note 4, ¶ 56.

102. OFF. PROSECUTOR, INT’L CRIM. CT., SITUATION IN THE REPUBLIC OF KOREA: ARTICLE 5 REPORT ¶ 39 (2014).

103. See *id.* at 12 n.17.

104. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 76 (3d ed. 2011).

105. *Bangladesh/Myanmar Authorization Decision*, *supra* note 98, ¶¶ 56, 60. Interestingly, while the Chamber mentioned four other territoriality principles and accompanied each with an extensive footnote citing the many states that have adopted each concept in their criminal codes, the footnote accompanying the effects doctrine struck a somewhat more skeptical tone and only said: “The origins of this concept are reported to lie in the case of [*United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945)]. It is noted however that the concept was developed mainly in the field of antitrust and competition law.” *Id.* ¶ 56 n.98.



potentially transboundary crimes contained in the Statute.”<sup>106</sup> Thus, at best, the Chamber seemed to have left the question of effects jurisdiction for another day.

If the ICC eventually addressed the effects doctrine, the commonly proposed test is whether the effects on the State claiming jurisdiction are “direct, substantial and reasonably foreseeable.”<sup>107</sup> In this case, isolating the effect of a package of sanctions in an already decimated economy and society may be impossible. Sanctions, individual or sectoral, have a specific target, either a person or a company. To the extent that sanctions affect persons not targeted, the ensuing effects are not direct in the plain meaning of the term. With regards to sectoral sanctions on companies, it is hard to know to what extent their reduced cash flow impacts the population at large, and whether the effects are substantial or reasonably foreseeable. Any attempt to prove this before a Chamber would unravel into a battle of the experts and require judges to pass judgment on complex economic models and counterfactuals—matters entirely unfamiliar to the ICC. Ultimately, addressing effects requires studying conduct, causes, and consequences, which is related to the second hurdle in considering sanctions as crimes against humanity: causation.

## 2. Causation

Judge Chile Eboe-Osuji aptly characterized the topic of causation as “a perennial thorn in the side of criminal law.”<sup>108</sup> Causation requires ascertaining the causal link between the accused’s act and the victim’s harm; without it, punishment is unjustifiable as it goes against the principle of personal culpability.<sup>109</sup> According to Cherif M. Bassiouni, “[c]ausality can be of a direct or of a contributing nature and it must be established through a rational causal connection. . . . Criminal law doctrine in most legal systems rejects criminal responsibility that is not based, at least, on the standard of reasonable foreseeability.”<sup>110</sup> The Rome Statute repeatedly uses the word “cause,” but neither it nor the Elements of Crimes provide a definitive standard of causation to be applied.<sup>111</sup>

In *Prosecutor v. Krnojelac*, a Trial Chamber of the ICTY found the defendant not guilty of the crime against humanity of murder after the victim of the defendant’s beating hung himself, finding that causation was not satisfied.<sup>112</sup> Alas, the Trial Chamber did not clarify what causal

106. *Id.* ¶ 62.

107. MICHAEL VAGIAS, *THE TERRITORIAL JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT* 164 (2014).

108. *Prosecutor v. Bemba*, ICC-01/05-01/08-3636-Anx3, Concurring Separate Opinion of Judge Eboe-Osuji, ¶ 156 (June 14, 2018).

109. *See Prosecutor v. Bemba*, ICC-01/05-01/08 A, Dissenting Opinion of Judge Mmasenono Monageng and Judge Hofmański, ¶ 333 (June 8, 2018).

110. M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION* 496 (2011).

111. *See generally* Rome Statute, *supra* note 17.

112. *See Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment, ¶ 342 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002) [hereinafter *Krnojelac Judgment*].

requirement it applied. In *Prosecutor v. Delalić et al.*, dealing with murder as war crimes, the ICTY explained that “the conduct of the accused *must be a substantial cause* of the death of the victim.”<sup>113</sup> More recently, when laying out the elements of murder as a crime against humanity in the *Bemba* case, the Pre-Trial Chamber II repeated that “the Prosecutor must prove the causal link between the act of murder and the victim’s death.”<sup>114</sup> For that proposition, the Chamber cited the work of Philippe Currat, who in turn cited *Delalić* and the “substantial cause” standard. Currat stated, “[p]our reprendre les termes de l’affaire *Delali[ć] et consorts*, dans ce cas, l’action ou l’omission de l’accusé n’est pas une cause substantielle de la mort de la victime,”<sup>115</sup> which translates to: in this case, as in *Delalić* case, the action or omission of the accused is not a substantial cause of the victim’s death.

Each crime may have a separate causation requirement, but they are all bound to have one. Again, untangling the causal chain between economic sanctions and harm may be impossible, especially where there are many other intervening variables. While it may be undisputable that sanctions aggravate an economic crisis, it is almost always uncertain to what extent they do so. In the Venezuelan case in particular, the OHCHR, the Brookings Institution, and the Center for Strategic and International Studies erred on the side of caution, reasoning that most of the economic deterioration was well underway when the sectoral sanctions were implemented in 2017, in particular after the 2015 collapse in oil prices.<sup>116</sup> If anything, that other reports claim to be able to attribute 40,000 deaths to the U.S. sanctions proves precisely how thorny this issue is.

### 3. *Mental Element*

Just as it would be a miscarriage of justice to punish a defendant that did not bring about a consequence, it would be unjustifiable to punish a defendant that did not have a guilty mind. The mental element of the offense presents a particularly significant hurdle in the case of economic sanctions. Sanctions by definition have a specific target, which would render damage to non-target subjects as collateral and likely unintended.<sup>117</sup>

Under the Rome Statute, crimes against humanity require a twofold mental element: one for the predicate act and one for its relation to the chapeau elements.<sup>118</sup> With regards to the former, Article 30 provides:

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113. *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Judgment, ¶ 424 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (emphasis added).

114. *Bemba Decision on the Charges*, *supra* note 22, ¶ 132.

115. *Id.* (citing PHILIPPE CURRAT, *LES CRIMES CONTRE L’HUMANITÉ DANS LE STATUT DE LA COUR PÉNALE INTERNATIONALE* 146 (2006)).

116. See discussion *supra* Section II.B.

117. See Richard N. Haass, *Economic Sanctions: Too Much of a Bad Thing*, BROOKINGS INST. (June 1, 1998), <https://www.brookings.edu/research/economic-sanctions-too-much-of-a-bad-thing/> [<https://perma.cc/M9D8-ZMVW>].

118. See Margaret McAuliffe deGuzman, *The Road from Rome: The Developing Law of Crimes Against Humanity*, 22 HUM. RTS. Q. 335, 337 n.5 (2000).

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
  - (a) In relation to conduct, that person means to engage in the conduct;
  - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.<sup>119</sup>

In *Katanga*, the Trial Chamber II further clarified Article 30(2)(b) and 30(3):

The words “will occur[,”] read together with the phrase “in the ordinary course of events[,”] make clear that the required standard of occurrence of the consequence in question is near but not absolute certainty. The standard is therefore “virtual certainty[,”] otherwise known as “oblique intention” . . . .

Thus, this form of criminal intent presupposes that the person knows that his or her actions will necessarily bring about the consequence in question, barring an unforeseen or unexpected intervention or event to prevent its occurrence. In other words, it is nigh on impossible for him or her to envisage that the consequence will not occur.<sup>120</sup>

Some commentators correctly observed that this is a very high standard.<sup>121</sup> The Trial Chamber II also cautioned: “the Chamber must refer to the ‘ordinary course of events’ in establishing intent and knowledge only where an unintended *consequence* is at issue.”<sup>122</sup> Economic sanctions causing unintended consequences for those not targeted may be one of those cases.<sup>123</sup> However, the threshold for the mental element is so high that it would only be satisfied in exceptional circumstances, if at all. Because of the many factors, both foreign and domestic, that operate in countries ravaged by economic crises, it would be very challenging for the

119. Rome Statute, *supra* note 17, at art. 30.

120. Katanga Trial Judgment, *supra* note 22, ¶¶ 776-77.

121. See Kevin Jon Heller, *The ICC and the Deportation of Civilians from Syria to Jordan*, OPINIOJURIS (Mar. 25, 2019), <http://opiniojuris.org/2019/03/25/the-icc-and-the-deportation-of-civilians-from-syria-to-jordan/> [<https://perma.cc/94EE-CLRJ>].

122. Katanga Trial Judgment, *supra* note 22, ¶ 779 (emphasis in original).

123. It could be also argued that *dolus eventualis* (the civil law analog of recklessness) is a good conceptual fit for sanctions with unintended consequences, but the predominant position is that Article 30 excludes *dolus eventualis* altogether. See Jens David Ohlin, *Targeting and the Concept of Intent*, 35 MICH. J. INT’L L. 79 (2013); WAR CRIMES RSCH. OFF., *MODES OF LIABILITY AND THE MENTAL ELEMENT: ANALYZING THE EARLY JURISPRUDENCE OF THE INTERNATIONAL CRIMINAL COURT* 68-70 (2010), <https://www.wcl.american.edu/impact/initiatives-programs/warcrimes/our-projects/icc-legal-analysis-and-education-project/reports/report-13-modes-of-liability-and-the-mental-element-analyzing-the-early-jurisprudence-of-the-international-criminal-court/> [<https://perma.cc/36FL-M6X5>].

Prosecution to demonstrate that those responsible for sanctions on a group of individuals or companies were virtually certain that their sanctions would bring about the alleged deaths, deaths on a massive scale, or deportations.

In addition, under Article 7(1), crimes against humanity also requires knowledge that the act was part of a widespread or systematic attack directed against the civilian population.<sup>124</sup> Because the attack is understood as the circumstance of the offense, knowledge in this case entails awareness that such an attack exists and the act is part thereof.<sup>125</sup> But the difficulties inherent in conceptualizing sanctions as an attack in the first place (see Section III.C.1 below), stand in the way of satisfying this requirement too.

#### 4. Legality

The prospective jurisdiction of the ICC and the relatively good definition of the crimes and their elements mean that legality issues rarely come before the Court. To be sure, Venezuela's self-referral asks the OTP to investigate crimes against humanity strictly enumerated in Article 7. However, the conduct Venezuela alleges as criminal is so unlike the conduct that the ICC typically deals with, that to say it can be found in the four corners of the Rome Statute is not entirely accurate either. Even Venezuela admits that its complaint is "unique in the annals of international criminal law."<sup>126</sup> Thus, no matter how much Venezuela tries to shoehorn the facts in the law, legality concerns may exist insofar Venezuela is asking to criminalize conduct—the imposition of sanctions—that is not per se criminal.

Article 22 of the Rome Statute deals with *nulla crimen sine lege*:

- 1) A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
- 2) The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.<sup>127</sup>

According to Bassiouni, legality requires "a clear and unambiguous identification of the prohibited conduct."<sup>128</sup> Surely, the decisionmakers that imposed sanctions clearly and unambiguously knew that murder is prohibited, but assuming *arguendo* that Venezuela's claim is meritorious,

124. Rome Statute, *supra* note 17, at art. 7(1).

125. See Bemba Decision on the Charges, *supra* note 22, ¶ 87 ("The attack is to be seen as the circumstance of the crimes against humanity. . .").

126. Annex, *supra* note 4, ¶ 117.

127. Rome Statute, *supra* note 17, at art. 22(1)-(2).

128. M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 247 (2d ed. 2012).

the issue is whether they knew they were committing murder just as the defendant who purposely shot someone knew he was committing murder.

A good starting point is the legality of unilateral coercive measures. As of 2020, states as diverse in size and influence as the U.S., Canada, the United Kingdom, Mexico, Panama, Saudi Arabia, Bahrain, and Egypt, as well as the United Arab Emirates and the EU, employ them.<sup>129</sup> In 2014, the Human Rights Council appointed “a Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights”; the vote divided developed countries against developing countries.<sup>130</sup> An observer of this trend commented: “In spite of frequent calls for the cessation of such practice, a prohibition of [unilateral coercive measures] has not crystalized. Nevertheless, the resolutions are indicative of a clear divide on the issue of economic coercion between developing and developed states; a divide that is responsible for the current uncertainty.”<sup>131</sup> That the Special Rapporteur recommended that the General Assembly request an advisory opinion from the International Court of Justice on the legality of unilateral coercive measures further underscores this uncertainty.<sup>132</sup> Yet, even if unilateral sanctions were illegal as a matter of state responsibility, it would not necessarily follow that they amount to criminal conduct.<sup>133</sup>

### C. Economic Sanctions in Article 7 of the Rome Statute

The four structural hurdles identified in the preceding part highlight some of the essential weak spots in Venezuela’s interpretation of the Rome Statute. This section now turns to the black letter definition of crimes against humanity under Article 7 (set forth in Section I.B above), and

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129. See discussion *supra* Section II.B.; Matt Smith, *How Is Qatar Coping With Its Economic Embargo?*, BRIT. BROAD. CO. (Jan. 10, 2019), <https://www.bbc.com/news/business-46795696> [<https://perma.cc/S3QV-VYAY>].

130. Human Rights Council Res. 27/21, U.N. Doc. A/HRC/RES/27/21, ¶ 22 (Oct. 3, 2014).

In favour: Algeria, Argentina, Benin, Botswana, Brazil, Burkina Faso, Chile, China, Congo, Côte d’Ivoire, Cuba, Ethiopia, Gabon, India, Indonesia, Kenya, Kuwait, Maldives, Mexico, Morocco, Namibia, Pakistan, Peru, Philippines, Russian Federation, Saudi Arabia, Sierra Leone, South Africa, United Arab Emirates, Venezuela (Bolivarian Republic of), Viet[nam].

Against: Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, Republic of Korea, Romania, the former Yugoslav Republic of Macedonia, United Kingdom of Great Britain and Northern Ireland, United States of America.

Abstaining: Costa Rica, Kazakhstan.

*Id.* ¶ 28.

131. Alexandra Hofer, *The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?*, 16 CHINESE J. INT’L L. 175, 212 (2017). However, the sanctions against Qatar by a group of Arab nations suggests that the developed-versus-developing categorization may be an oversimplification.

132. See U.N. Secretary-General, *Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights*, ¶ 48, U.N. Doc. A/73/175 (July 17, 2018).

133. *Cf.* Prosecutor v. Hinga Norma, [2004] SCSL ¶¶ 24–25 (Sierra Leone) (explaining that conduct that violates conventional and international humanitarian law does not necessarily entail individual criminal responsibility).

argues that it should not be construed to encompass economic sanctions. Because some of the elements of the crime inevitably raise issues tied to the structural hurdles, reference will be made to them throughout.

### 1. *The Chapeau Elements*

This Note agrees with Venezuela's contention that, if economic sanctions amounted to an attack as defined by Article 7(2)(a), then the widespread or systematic requirement would be satisfied. Sanctions are typically imposed as a battery of measures, in an organized way, satisfying the systematic requirement.<sup>134</sup> But an attack directed against the civilian population must be established before deciding whether such attack was widespread or systematic.

Article 7(2)(a) defines the "attack" chapeau element as "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."<sup>135</sup> The attack need not be military in nature and may encompass any form of violence.<sup>136</sup> As Robinson notes, the modifier "directed" implies an element of premeditation and direction, also found in the "pursuant to a State policy" element.<sup>137</sup>

In *Katanga*, the Trial Chamber stated that establishing a policy needed demonstrating that the State meant to commit an attack against a civilian population.<sup>138</sup> But economic sanctions target specific individuals' property, and other collateral damage may fall outside the scope of what and who the sanctions are meant to target. This, incidentally, highlights a strange element in Venezuela's claim that is likely to be the case across all scenarios of sanctions: none of the targets of the sanctions—neither the rich, powerful individuals nor the companies—of the purported "attack" suffered the consequences that Venezuela claims *others* suffered from acts that were allegedly part of the attack. In short, Venezuela claims that economic sanctions against individuals in the Maduro government, PdVSA, and others were an attack directed against the civilian population, but none of the sanctions' *actual, named* targets were even remotely affected by

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134. See Ruto et al. Decision on the Charges, *supra* note 22, ¶ 179.

135. Rome Statute, *supra* note 17, at art. 7(2)(a).

136. See *Katanga* Trial Judgment, *supra* note 22, ¶ 1101.

137. Robinson, *supra* note 15, at 7.

138. See *Katanga* Trial Judgment, *supra* note 22, ¶ 1113. In another part of the judgment, the Trial Chamber describes the meaning of "directed against a civilian population" in a way that hints at the fact that economic sanctions are not really encompassed in their interpretation:

In order to determine whether the attack may be said to have been so directed, [one must] consider, inter alia, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time[,] and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.

the predicate acts committed as part of the purported attack.<sup>139</sup> Perhaps attempting to resolve this paradox, Venezuela's Annex says that "even those measures that are ostensibly directed against specific individuals are, because of their breadth and the lengthy list of names of individuals, in substance measures that impact on the economy of the country as a whole."<sup>140</sup> But this is nonsensical: there are just over one hundred individuals subject to asset freezes and visa restrictions; it defies reality to say that these individual sanctions impact the economy as a whole to the extent Venezuela claims.

Further, if the state policy must be directed at committing the attack in question, this means that for economic sanctions to be a course of conduct that establishes an attack, they must be directed at committing the multiple acts they allegedly amount to: murder, extermination, deportation, persecution, rape, torture, etc. But that this is not necessarily so is often betrayed by the facial text of the resolutions, imposing the sanctions and their specific targets. In fact, even Venezuela claims that the goal of the sanctions is to produce regime change, which is essentially a political goal.<sup>141</sup> In *Ruto et al.*, the Pre-Trial Chamber II found that the purported policy of expelling the opposition and creating a uniform voting bloc did not satisfy Article 7(2)(a) because it was "merely political in nature and may not aim at committing an attack against the civilian population."<sup>142</sup> Like creating a uniform voting bloc, regime change is a political goal. Somewhat shockingly, the Annex affirms that regime change is "the actual purpose" of the U.S. state policy, thus implying that the policy is *not* directed at attacking the civilian population.<sup>143</sup> Seeking regime change may infringe upon cardinal principles of non-intervention and self-determination, but it does not give rise to individual criminal responsibility.

Ultimately, because the attack requirement is defined with reference to the Article 7(1)(a)-(k) acts, any claim that sanctions constitute an attack is contingent on whether sanctions can be the basis for any of the underlying predicate acts. This Note turns to them next, covering only the five acts raised by Venezuela: murder, extermination, deportation, persecution, and other inhumane acts.<sup>144</sup> The remaining acts included in Article 7—enslavement, imprisonment, torture, rape, enforced disappearance, and apartheid—are so removed from the nature and operation of economic sanctions that they would not be a good fit doctrinally, either in this or in any other case.

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*Id.* ¶ 1104.

139. See *Treasury Sanctions Venezuelan Business to Isolate Maduro*, AP NEWS (Apr. 12, 2019), <https://apnews.com/article/b0c023c3897f402a93f54481d63b175a> [<https://perma.cc/38L6-7X85>].

140. Annex, *supra* note 4, ¶ 82.

141. See *id.* at Executive Summary.

142. *Ruto et al.* Decision on the Charges, *supra* note 22, ¶ 213.

143. Annex, *supra* note 4, ¶ 85.

144. Federico Wynter, *US Sanctions in Venezuela: Economic Crimes Against Humanity?*, OPINIOJURIS (May 23, 2020), <https://opiniojuris.org/2020/05/23/us-sanctions-in-venezuela-economic-crimes-against-humanity/> [<https://perma.cc/2UAV-TTZX>].

## 2. Murder

The Rome Statute does not define the crime of murder; the Elements of Crimes succinctly say the actus reus for murder is the killing or causing death of one or more persons.<sup>145</sup> In *Bemba*, the Pre-Trial Chamber II added that “the victim has to be dead and the death must result from the act of murder.”<sup>146</sup> Because the actus reus of murder also includes its consequences, in *Bangladesh/Myanmar* the Pre-Trial Chamber III specified that both the killing and the death must be established.<sup>147</sup> To be sure, identifying the precise victim or finding the corpse is not always necessary, but the Chamber in *Bemba* elaborated that “the Prosecutor is still expected to specify, to the extent possible, inter alia, the location of the alleged murder, its approximate date, the means by which the act was committed with enough precision, the circumstances of the incident and the perpetrator’s link to the crime.”<sup>148</sup>

This may be an insurmountable obstacle in cases of deaths attributed to economic sanctions, where casualties are geographically widespread; the means by which the act was committed are likely impossible to ascertain (e.g., what specific piece of the sanctions was responsible for, and how it contributed to, the death); and the defendant’s link to the crime is hard to untangle, as described above in Sections II.B.1 and II.B.2. Indeed, Venezuela’s claim merely says:

[S]ignificant increases in mortality rates have been recorded in Venezuela. Children, in particular, have been victims. There is a reasonable basis to believe that the deaths were a consequence of deprivation of access to medicines and medical equipment, and that this was attributable at least in part to the deliberate attempts to disrupt and destroy the economy of Venezuela.<sup>149</sup>

However, Venezuela’s evidence supporting this is wrong at worst, and inconclusive at best. The Annex argues that as a result of unilateral coercive measures, the child mortality rate grew from 14.66 deaths per 1,000 live births in 2013 to 20.04 deaths per 1,000 live births in 2016.<sup>150</sup> But as described above in Section II.B, sanctions only targeted specific individuals in the Maduro government until 2017. It is bizarre to attribute the rise in child mortality to asset freezes and visa bans on a handful of government officials. In fact, the same graph offered in the Annex shows that coinciding with when the broader sectoral sanctions were put in place in 2017, the child mortality rate *decreased*. The maternal mortality rate follows the same trend: an increase between 2013 and 2016 (which is literally impossible to attribute to individual sanctions), and then a decrease after 2017. To

145. INT’L CRIM. CT., ELEMENTS OF CRIMES 5 n.7 (2011), <https://adsdatabase.ohchr.org/IssueLibrary/ICC%20-%20ELEMENTS%20OF%20CRIMES.pdf> [<https://perma.cc/473E-KWYT>] [hereinafter ELEMENTS OF CRIMES].

146. Bemba Decision on the Charges, *supra* note 22, ¶ 132.

147. Bangladesh/Myanmar Authorization Decision, *supra* note 98, ¶ 50.

148. Bemba Decision on the Charges, *supra* note 22, ¶ 133.

149. Annex, *supra* note 4, ¶ 90 (citations omitted).

150. *Id.* ¶ 34.



be sure, this does not mean that sectoral sanctions and decrease in mortality are in any way related, but that is precisely the point. In other words, Venezuela cannot establish any correlation, let alone substantial causation. Aside from this data, the Annex alludes to deaths with vague and unsupported references such as “deaths of kidney patients have been recorded due to shortages in medicines and supplies necessary for dialysis since 2017.”<sup>151</sup>

The actus reus of murder requires proving “the causal link between the act of murder and the victim’s death.”<sup>152</sup> In *Bemba*, the Chamber found no clear evidence of a causal link between the rape of a woman and the death of her baby, when those under the defendant’s command raped the woman, she contracted an infection, she could not breast-feed her baby properly, and the baby died as a result.<sup>153</sup> In *Krnojelac*, a Trial Chamber of the ICTY essentially found that the victim’s suicide interrupted the chain of causation.<sup>154</sup> As noted in Section III.B.2, it is virtually unknowable to what extent sanctions contributed to the deaths of any Venezuelans, especially when the available data suggests that the mortality rate was steadily increasing in the years preceding the measures. Thus, were the ICC to employ the “substantial cause” standard it endorsed in *Bemba* and *Katanga*, it would be extremely hard to prove that sanctions were a substantial cause of the deaths—if a legal cause at all. Even the Annex’s language, “attributable at least in part,”<sup>155</sup> suggests causation is tenuous. Like in *Bemba* and *Krnojelac*, here there would be dozens of other intervening factors, including, most importantly and as highlighted by the OHCHR Report, the failure of the regime itself to do everything in its power to address the mounting economic and humanitarian crisis.<sup>156</sup>

Compounding the difficulty of establishing the actus reus is the difficulty of establishing the mens rea. In conformity with Articles 30 and 7(1), murder must be committed with intent and knowledge, as well as with knowledge that it is part of a widespread and systematic attack directed against the civilian population.<sup>157</sup> In relation to the conduct, it is undisputable that those responsible for the sanctions intended to impose sanctions. In relation to the consequences, however, under Article 30, the OTP would have to prove that those responsible meant to cause the deaths that allegedly resulted or had virtual certainty that they would result. This is an incredibly high standard and one that is probably too exigent for economic sanctions generally, since facially sanctions almost always have political goals. Again, the Annex’s own language regarding the purpose of the sanctions cuts against a possible finding of intent to kill: the claim of murder attributes the deaths at least in part to the “deliberate attempts to

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151. *Id.* ¶ 35.

152. *Bemba* Decision on the Charges, *supra* note 22, ¶ 132.

153. *Id.* ¶¶ 153–55.

154. *See Krnojelac* Judgment, *supra* note 112, ¶ 342.

155. Annex, *supra* note 4, ¶ 90.

156. *See generally* OHCHR Report, *supra* note 36.

157. *See Bemba* Decision on the Charges, *supra* note 22, ¶ 138.

disrupt and destroy the economy of Venezuela,”<sup>158</sup> but disrupting the economy is a far cry from intent to kill civilians. Similarly, it seems unlikely that the OTP would ever be able to demonstrate that the decisionmakers who imposed the economic sanctions on individuals and on state entities knew that they would positively produce deaths. Admittedly, those responsible for the sanctions could have thought it was possible that deaths in Venezuela would continue to occur, but they could not have envisaged that deaths would *certainly* occur *because of* the sanctions—since that is extremely hard to determine *ex post*, it would be even harder to know *ex ante*.

### 3. Extermination

The Elements of Crimes describes the *actus reus* of extermination as the killing, directly or indirectly, of one or more persons, including by inflicting conditions of life—such as deprivation of access to food and medicine—“calculated to bring about the destruction of part of a population.”<sup>159</sup> Because extermination is murder on a large scale,<sup>160</sup> the killing must have been part of a “mass killing of members of a civilian population.”<sup>161</sup> According to Bassiouni, extermination not only occurs when a perpetrator “fir[es] a rifle or wield[s] a knife which directly results in the killing of another,” but also includes “the death of persons arising out of conditions constituting the proximate cause of death of such victims, which is a form of criminal homicide akin to ‘murder’ in every legal system of the world.”<sup>162</sup>

Situations of extermination through deprivation of access to food and medicine do not seem to have been addressed by the ICC yet. In *Prosecutor v. Kayishema*, the ICTR suggested a few examples of infliction of conditions of life leading to mass killing: “Imprisoning a large number of people and withholding the necessities of life which results in mass death; introducing a deadly virus into a population and preventing medical care which results in mass death.”<sup>163</sup> Clearly, none of these is a good conceptual fit for economic sanctions that are imposed against a state’s officials, companies, or banks. Moreover, Bassiouni’s focus on the conditions being the *proximate cause* of death also signals a demanding causation requirement that sanctions, as perhaps just one contributing factor to economic deterioration, are unlikely to satisfy.

In terms of *mens rea*, the mental element for the killing element of extermination is the same as for murder, and thus suffers from the same problems. Additionally, when the killing is done indirectly through the creation of conditions leading to mass killing, the modifier “calculated” sig-

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158. Annex, *supra* note 4, ¶ 90.

159. ELEMENTS OF CRIMES, *supra* note 145, at 6.

160. See BASSIOUNI, *supra* note 110, at 365.

161. ELEMENTS OF CRIMES, *supra* note 145, at 6.

162. BASSIOUNI, *supra* note 110, at 372–73.

163. *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Judgment, ¶ 146 (May 21, 1999).

nals a heightened mens rea requirement, akin to intent.<sup>164</sup>

In this case, the Annex repeats almost verbatim the claim about the increased death rates, adding “food” to the list of deprivations, and stating: “Under the circumstances, those who imposed the measures knew that death on a large scale was a likely consequence.”<sup>165</sup> Largely for the same reasons as for the murder charge, however, this claim is implausible: neither the causation requirement nor the mens rea can be satisfied. In addition, Venezuela’s concession that the sanctions were calculated to achieve goals—economic disruption and regime change—other than the destruction of part of the population, cuts against finding the heightened mens rea that the crime of extermination requires when the killings are done through the infliction of conditions of life.

#### 4. *Deportation*

Article 7(2)(d) defines deportation as the “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.”<sup>166</sup> The Elements of Crimes 7(1)(d)(1) elaborates: “The term ‘forcibly’ is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.”<sup>167</sup> According to the ICTY, “the essential element is that the displacement be involuntary in nature, where the relevant persons had no real choice.”<sup>168</sup> In the *Situation in Bangladesh/Myanmar*, the Pre-Trial Chamber III found that the acts that constituted the coercive environment leading to deportation were killings, arbitrary arrests, infliction of pain and injuries, sexual violence, and destruction of houses and other buildings.<sup>169</sup> One witness described the situation by testifying: “We lost our family members. We survive with [gunshot] wounds. We lost our property, our houses, our lands and cattle[,] and everything. Kicked out from our motherland and made us refugee. Destroyed our everything.”<sup>170</sup> Further, in *Ruto et al.*, the Pre-Trial Chamber II explained that there must be a link between “the conduct and the resulting effect of forcing the victim to leave the area to another State” such that the perpetrator’s act “produced the effect to deport” the victim.<sup>171</sup> In that case, the link was satisfied because the burning, looting, and destruction of houses coerced civilians to flee the area.<sup>172</sup>

In the Annex, Venezuela argues:

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164. See Randle C. DeFalco, *Conceptualizing Famine as a Subject of International Criminal Justice: Towards a Modality-Based Approach*, 38 U. PA. J. INT’L L. 1113, 1164 (2017).

165. Annex, *supra* note 4, ¶ 94.

166. Rome Statute, *supra* note 17, at art. 7(2)(d).

167. ELEMENTS OF CRIMES, *supra* note 145, at 6 n.12.

168. Krnojelac Judgment, *supra* note 112, ¶ 475.

169. Bangladesh/Myanmar Authorization Decision, *supra* note 98, ¶¶ 28–33.

170. *Id.* ¶ 28 (alteration in original).

171. Ruto et al. Decision on the Charges, *supra* note 22, ¶ 245.

172. See *id.* ¶¶ 248–51.

There is considerable evidence of massive population flows of individuals from Venezuela that have been provoked by the deterioration of the economy, the decline in availability of essential public services, shortages of food and medicines. There is a reasonable basis to believe that unilateral coercive measures contributed to these massive population flows, and that those who imposed the measures knew that the population flows would be a consequence of them.<sup>173</sup>

Economic sanctions do not amount to deportation for a number of reasons. First, individual sanctions, like visa restrictions, do the opposite to forcible deportation—they restrict movement. Second, broader sanctions may have an impact on the economy, but they do not directly forcibly deport individuals or produce the effect, in causal terms, of coercing them to leave. To be sure, the main drivers of migration are violations of the rights to food and to health.<sup>174</sup> But so far, no court has equated a situation of shortages or scarcity with coercion. Doing so would face both an insurmountable causation burden—proving that sanctions were the substantial cause of the deprivation, which was in turn the substantial cause of migration—and an insurmountable mens rea burden—proving that it was virtually certain for those imposing the sanctions that people would migrate as a result. On the other hand, the only evidence that some Venezuelans were coerced to leave refers to those who sought political asylum due to persecution from the Maduro regime.<sup>175</sup>

## 5. Persecution

Article 7(1)(h) covers persecution against

the identity of a group or collectivity . . . on political, racial, national . . . or other grounds that are universally recognized as impermissible under international law . . . in connection with any act referred to in [this paragraph] or any crime within the jurisdiction of the Court.<sup>176</sup>

Article 7(2)(h) further defines persecution as the “intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”<sup>177</sup> Thus, persecution requires not only intent and knowledge under Article 30, but also discriminatory intent in the targeting of a particular group and a nexus to other acts or crimes.

But crucially, Venezuela seems to ignore that persecution must be connected to other acts, and only alleges stand-alone violations of the rights to self-determination, life, work, food, health and medical care, education, property, and the rights of the child.<sup>178</sup> To be sure, all of those rights are fundamental, and under the proper facts, their discriminatory deprivation in connection with other acts in Article 7(1) or other crimes may constitute

173. Annex, *supra* note 4, ¶ 100.

174. See OHCHR Report, *supra* note 36, ¶ 70.

175. See *id.*

176. ELEMENTS OF CRIMES, *supra* note 145, at 10.

177. Annex, *supra* note 4, ¶ 101.

178. *Id.* ¶ 107.

persecution. But sanctions are not the proper facts: insofar as economic sanctions cannot amount to any of the other acts described in Sections III.C.2–4 above and Section III.C.6 below, or other crimes in the Statute, the claim of persecution also fails as a matter of law.<sup>179</sup>

Moreover, arguing that the sanctions amount to persecution by virtue of the consequences they produce runs into the widely discussed causation and *mens rea* problems. But arguing that sanctions are persecution because of whom they are imposed on is likewise problematic. It first requires proving that sanctions were imposed in a way that satisfies the discrimination requirement. This would only apply to individual sanctions, as there is no indication in the Rome Statute that “group or collectivity” in Article 7(1)(h) and “persons” deprived of fundamental rights in the Elements of Crimes includes legal persons.

Venezuela first alleges persecution on political grounds because “the purpose of the attack is to destroy the country’s economy and to promote ‘regime change.’”<sup>180</sup> While it is true that most of the subjects of individual sanctions share a political identity, they are not targeted *by reason of* that identity, which is what Article 7(1)(h) requires. Rather, they are targeted by virtue of their conduct—undermining democracy, committing human rights violations, or engaging in corruption.<sup>181</sup> Conduct is not recognized as an impermissible basis for persecution under international law.

Venezuela also sets forth nationality as a basis for persecution because the sanctions are “directed against the civilian population of Venezuela and nobody else.”<sup>182</sup> Admittedly, all institutions and people targeted by the sanctions are Venezuelans. But Venezuela’s Annex misapprehends the meaning of discriminatory intent when it states: “By their very nature, the unilateral coercive measures are discriminatory. They are directed against the civilian population of Venezuela and nobody else.”<sup>183</sup> Yet the sanctions would not be discriminatory on the basis of nationality because they do not target any other nations, they would be discriminatory on the basis of nationality because they castigate Venezuelans *by reason of* their nationality as opposed to their conduct, which they ostensibly do not. Further, that these sanctions only target Venezuela is unsurprising given that sanctions are expected to be tailored; that fact alone says nothing about *why* they do so.

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179. Because the facts do not support it, Venezuela does not raise the possibility that economic sanctions as a form of persecution are committed in connection with war crimes, genocide, or aggression. Economic sanctions applied in peacetime—the concern of this Note—would foreclose a finding of persecution in connection to war crimes or aggression. Economic sanctions could, in theory, be applied as part of a genocide effort, but in that case, even assuming that causation can be satisfied, a criminal defendant could not be convicted for both genocide and crimes against humanity for the same underlying conduct. Genocide, the most specific crime, would prevail. See *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, ¶ 685 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

180. *Id.* ¶ 102.

181. See CRS OVERVIEW, *supra* note 62.

182. Annex, *supra* note 4, ¶ 103.

183. *Id.*

## 6. Other Inhumane Acts

Article 7(1)(k) is the residual clause of Article 7, extending crimes against humanity to “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”<sup>184</sup> The Elements of Crimes explains that the actus reus is the infliction of great suffering or serious injury by an inhumane act of a similar character to any other act referred to in Article 7(1)(a)-(j). The Elements of Crimes further adds that “character” refers to the nature and gravity of the act.<sup>185</sup> At the Rome Conference, for example, it was thought that unlawful human experimentation and violent assaults were examples of acts that could fall in this category.<sup>186</sup> In *Bemba*, the Appeals Chamber reasoned:

Chambers should apply the *ejusdem generis* [“of the same kind”] principle when deciding whether certain conduct qualifies under article 7(1)(k). Given that the other crimes contained in article 7(1) are all crimes against the physical integrity or liberty of persons, property crimes are excluded from the purview of crimes against humanity. Article 7(1)(k) is a residual clause designed to capture conduct similar to the other crimes listed in article 7(1) that would otherwise fall through the cracks. It is not a clause to dramatically widen the scope of crimes against humanity. And in any event, the provisions of article 7 must be interpreted strictly (article 22(2)).<sup>187</sup>

This reasoning is persuasive for reasons also articulated by Bassiouni: if the application of *ejusdem generis* is not carefully circumscribed, it may give rise to a violation of the legality principle.<sup>188</sup> As a general matter, economic sanctions also seem to fall outside the purview of crimes against humanity, as they are acts of a different nature than those in Article 7(1). Unlike the acts in Article 7(1), sanctions target mainly property as opposed to physical integrity or liberty. To be sure, visa restrictions impact freedom of movement, but imposing them is a sovereign prerogative of states and there is no unlimited obligation for states to allow non-nationals into their territory.

In an effort to claim that sanctions are inhumane acts because they cause dire living conditions, Venezuela argues that the Pre-Trial Chamber in *Bangladesh/Myanmar* suggested that the “appalling conditions” the Roh-

184. *Id.* ¶ 109.

185. See ELEMENTS OF CRIMES, *supra* note 145, at 12 n.30.

186. See Robinson, *supra* note 15, at 56. Bassiouni documents other examples considered by the ICTY and ICTR: deliberate sniping and firing of shells at civilian areas; injury of prisoners of war during the course of their work; mutilation; beatings; acts of violence; being forced to run down a steep slope while being fired at; creation of brutal and deplorable living conditions for detainees including systematic beatings, killing members of the victim’s family before his eyes, and causing him severe burns by burning down his home with him in it; sexual violence to a dead woman’s body; sexual violence in multiple acts of rape, forced undressing, and public marching of a woman. BASSIOUNI, *supra* note 110, at 407 n.223 (citations omitted).

187. Prosecutor v. Bemba, ICC-01/05-01/08 A, Separate Opinion of Judge Van den Wyngaert and Judge Morrison, ¶ 63 (June 8, 2018).

188. BASSIOUNI, *supra* note 110, at 406.

ingya were forced to endure in Bangladesh could fall under 7(1)(k).<sup>189</sup> However, this is a misrepresentation of the Pre-Trial Chamber's reasoning. The paragraph in question states:

The Chamber notes that, following their deportation, members of the Rohingya people allegedly live in appalling conditions in Bangladesh and that the authorities of Myanmar supposedly impede their return to Myanmar. If these allegations were to be established to the required threshold, preventing the return of members of the Rohingya people falls within article 7(1)(k) of the Statute.<sup>190</sup>

Thus, it is the intentional prohibition of returning to their own country that constitutes an inhumane act, and not the appalling conditions in the refugee camps.

Nevertheless, Venezuela seems to argue both ways and claims that “those who continue to attack the economy of Venezuela . . . not only create great distress for the civilian population inside the country but . . . also impede their return.”<sup>191</sup> The Annex explains that sanctions targeting Venezuelan airline CONVIASA have an impact on government repatriation programs, thus increasing the anguish of refugees and migrants abroad and constituting inhumane treatment.<sup>192</sup>

Unlike Rohingyas who are barred from returning to Myanmar, however, exiled Venezuelans may return to their homes. The Venezuelan government can arrange for repatriations utilizing other airlines not sanctioned by the U.S. government. Repatriations can also continue via land borders—as most migrants initially left through these borders. In fact, official Venezuelan data shows that by February 2020, 69% of repatriations happened by land.<sup>193</sup> So, the situation in Venezuela is not only different in character but also does not seem to rise to the level of “other inhumane treatment.” All Venezuela's Annex and the official information provided by the government allows us to infer is that repatriation programs face harder circumstances. But in fact, it may just be too early to tell. Airline sanctions were imposed on February 7, 2020—just six days before Venezuela filed its referral.<sup>194</sup> On February 12, with the sanctions in place, a repatriation flight from Peru arrived in Venezuela.<sup>195</sup> Since then, the Maduro government has been able to repatriate Venezuelans because of the

189. See Annex, *supra* note 4, ¶ 111.

190. Bangladesh/Myanmar Jurisdiction Decision, *supra* note 98, ¶ 77.

191. Annex, *supra* note 4, ¶ 112.

192. See *id.* ¶¶ 113–115.

193. *Plan Vuelta a la Patria [Plan to Return to the Homeland]*, MINISTERIO DEL PODER POPULAR PARA LAS RELACIONES EXTERIORES [MINISTRY OF FOREIGN RELATIONS] (Feb. 10, 2020), [http://mppre.gob.ve/wp-content/uploads/2020/02/2020-02-10\\_Bolet%C3%ADn\\_Vuelta\\_a\\_la\\_Patria.pdf](http://mppre.gob.ve/wp-content/uploads/2020/02/2020-02-10_Bolet%C3%ADn_Vuelta_a_la_Patria.pdf) [<https://perma.cc/LV2P-DD7A>].

194. Annex, *supra* note 4, ¶ 113.

195. See Simon Garcia, *250 More Nationals in a Conviasa Flight Return to the Homeland from Peru*, MINISTERIO DEL PODER POPULAR PARA LAS RELACIONES EXTERIORES [MINISTRY OF FOREIGN RELATIONS] (Feb. 13, 2020), <http://mppre.gob.ve/en/2020/02/13/250-nationals-conviasa-return-homeland-peru/> [<https://perma.cc/9J45-45YX>].

COVID-19 pandemic.<sup>196</sup> Thus, it appears that any injury that Venezuela claimed at the time of its referral was merely speculative.

#### D. Other Implications

Venezuela's referral should be seen in its broader context. Recall that in 2018, six states referred the situation in Venezuela to the OTP with respect to crimes committed by the Maduro regime.<sup>197</sup> As the crisis aggravates and the political stalemate endures, Venezuela may want to deflect attention away from the responsibility of its own government in the human rights violations of its people, documented extensively by the OHCHR and the Organization of American States.<sup>198</sup> As the positions of Maduro and Guaidó become more irreconcilable, the regime has little to lose in its attempt at dragging the ICC into the fray.

The ICC, however, does stand to lose if it joins it. Venezuela's conceptualization of economic sanctions as crimes against humanity risks tarnishing the ICC's legitimacy. As demonstrated above, Article 7 and Article 30's plain text, Article 22's mandate for strict construction, the Court's caselaw, and the legislative history of the Rome Statute all strongly suggest that crimes against humanity do not accommodate for economic sanctions applied in peacetime such as the sanctions the U.S. applied against Venezuela. Such an expansive view of Article 7 would require an exercise of judicial activism that could cast doubt on the ability of the ICC to apply the Statute fairly and impartially. To be sure, courts routinely apply the law to new facts, and no law can ever contemplate for the limitless imagination of human evil. As this Note has demonstrated, however, for Venezuela's interpretation to be successful, the causation, mental element, and legality requirements would have to be significantly relaxed, and the elements of crimes against humanity expanded to accommodate economic sanctions. But the due process rights of criminal defendants not to be punished for consequences they did not cause, did not intend, and could not have known were crimes, should not yield to the urge of finding guilty parties for the world's worst crises. If they were to yield, then the ICC would lose legitimacy as a forum for fairness and justice.

Perhaps Venezuela has a stronger case pursuing state responsibility as opposed to individual criminal responsibility.<sup>199</sup> More importantly, an

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196. Since February 12, 2020, at least 2,959 Venezuelans have returned to Venezuela in flights chartered by the government. See generally *Plan Vuelta a la Patria* [Plan to Return to the Homeland], MINISTERIO DEL PODER POPULAR PARA LAS RELACIONES EXTERIORES [MINISTRY OF FOREIGN RELATIONS] (last visited Mar. 9, 2021), <http://www.mppre.gob.ve/en/plan-vuelta-a-la-patria-in/> [<https://perma.cc/B877-LF7F>].

197. See Letter from the Republic of Argentina, Canada, the Republic of Colombia, the Republic of Chile, the Republic of Paraguay and the Republic of Peru, to the Prosecutor, *supra* note 83, ¶ 2.3.

198. See generally OHCHR Report, *supra* note 36; OAS WORKING GRP., ORG. AM. STATES, PRELIMINARY REPORT ON THE VENEZUELAN AND MIGRANT CRISIS IN THE REGION (2019).

199. *But see* Hofer, *supra* note 131, at 178 (arguing that a prohibition on unilateral coercive measures has not crystallized as a matter of customary international law yet).



amendment to the Rome Statute approved by the Assembly of State Parties may very well throw economic sanctions into the mix of Article 7. With well-defined—although presumably they would have to be dangerously low—thresholds for *actus reus*, *mens rea*, and causation, as well as redefined chapeau elements, unilateral coercive measures may one day become actionable in the ICC. This may pose another set of problems for criminal defendants who may be subject to lower culpability standards, for foreign policy that employs non-violent methods, and for diplomacy that relies on the pressure sanctions place on rogue actors, but at least criminalization will have been created legislatively and with State Parties' consent, not by judicial fiat.

In effect, Venezuela's referral and the project of construing economic sanctions as crimes against humanity serves to interrogate the international community about what it wants the international criminal law enterprise in general, and crimes against humanity in particular, to be and to do. At Nuremberg, it was decided that crimes against humanity could only be committed in connection to aggressive war. Many decades later, the war nexus was removed, but the ICTY and ICTR still disagreed on whether discrimination was required. Now, Venezuela demands the ICC to extend crimes against humanity to economic sanctions. This attempt begs crucial questions about the ontology of crimes against humanity, the nature of the Court's jurisdiction, and the kind of wrongdoing and accountability the Court can and should address. The text, caselaw, general principles of law, and legislative history of the Rome Statute compel the ICC to answer in the negative.

## Conclusion

Economic sanctions applied in peacetime are harmful. Using Venezuela's recent self-referral to the ICC as a starting point, this Note has demonstrated, however, that they should not be interpreted as crimes against humanity. The legislative history of the Rome Statute demonstrates as much. Four structural hurdles—jurisdiction, causation, mental element, and legality—vitiating any such interpretation. These problems also pervade an interpretation of Article 7 of the Rome Statute that encompasses economic sanctions. Simply put, economic sanctions applied in peacetime are unlikely to be an attack directed against a civilian population pursuant to a state policy and cannot form the basis for any of the predicate acts in Article 7(1). In addition, such an interpretation poses problems for the ICC's legitimacy and role in international justice.

Venezuela's self-referral misquotes or misreads precedent, is riddled with conclusory statements and information that contradicts its own positions, and fails to understand the nature of crimes against humanity. It also suggests that punishing American individuals for the sanctions imposed against Venezuela would advance peace and accountability. In fact, the opposite is true: were the ICC to heed Venezuela's pleading, it would set aside longstanding criminal standards of *actus reus* and *mens*

rea, disregard the Rome Statute's legislative history, upset our understanding of crimes against humanity, and ultimately do a disservice to international criminal law and the courts that apply it.