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Evelyne Schmid

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[More information](#)

1

Introduction

Hans Frank, a leading Nazi lawyer and the Governor-General of occupied Poland during World War II, was aware of the close relationship between economic, social and cultural wrongdoing and the commission of international crimes: ‘We must annihilate the Jews, wherever we find them and wherever it is possible . . . We cannot shoot or poison those 3,500,000 Jews, but we shall nevertheless be able to take measures, which will lead, somehow, to their annihilation.’¹ In September 1941, Dr Walbaum, head of public health of the Nazi administration in Poland, provided the following calculation to Frank: ‘During the last week alone 1000 new spotted fever cases have been officially recorded . . . If the food rations were to be diminished again, an enormous increase of the number of illnesses could be predicted.’² Despite his knowledge about the prevalence of disease and starvation, Frank ‘approved a new plan which called for much larger contributions of foodstuffs to Germany at the expense of the non-German population’³ in Poland: ‘The new demand will be fulfilled exclusively at the expense of the foreign population. It must be done cold-bloodedly and without pity’,⁴ he reported in his diary.

In his diary, Hans Frank also describes the extensive paralysation of cultural life,⁵ the curtailment of the influence of the Catholic

¹ *Prosecutor v. Frank, in Nazi Conspiracy and Aggression (Red Series): Documentary Evidence, 1946, IV TWC 1, IMT, 892, 2233-D-PS, Diary entry of 16 December 1941.*

² *Ibid.*, 909, 2233-P-PS, Diary entry of 9 September 1941.

³ *Prosecutor v. Frank, in Nazi Conspiracy and Aggression (Red Series): Documentary Evidence, 1946, II TWC 1, IMT, 637–8 (emphasis omitted).*

⁴ *Ibid.*

⁵ The International Military Tribunal at Nuremberg (IMT) only translated parts of Frank’s diary. The original version in German contains many more passages on the socio-economic and cultural well-being of the affected population. On the right to education and participation in cultural life, Frank for instance wrote: ‘We must only provide the Poles with those educational opportunities that show them the hopelessness of their ethnic [*völkisch*] destiny. Only poor movies, or movies visualising the greatness and strength of the German Empire

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Excerpt

[More information](#)

Church,⁶ the closure of educational institutions to prevent the growth of the Polish intelligentsia⁷ and how he used starvation as a method of recruiting forced labourers.⁸ Frank anticipated that public attention to these abuses would not be significant: ‘That we sentence 1.2 million Jews to die of hunger should be noted only marginally.’⁹

Seven decades later, contemporary human rights law qualifies such practices as violations of economic, social and cultural rights (ESCR). These rights include the right to health, water, and work or the right to take part in cultural life and to protect dignity, freedom and well-being. Hans Frank was one of the twenty-four defendants who faced the International Military Tribunal at Nuremberg. The tribunal found him guilty of war crimes and crimes against humanity and sentenced him to death, based on evidence that he introduced the deportation of Polish slave labourers and persecuted the Jews by forcing them into ghettos, subjecting them to discriminatory laws and depriving them of the food necessary to avoid starvation.¹⁰ Frank’s case is one of the precedents that suggest that conduct amounting to an international crime can sometimes simultaneously be understood as violations of ESCR.

could thus come into question.’ Werner Präg and Wolfgang Jacobmeyer (eds.), *Das Diensttagebuch* (Deutsche Verlagsanstalt, 1975), 53 (translation by the author).

⁶ *Prosecutor v. Frank*, in *Nazi Conspiracy and Aggression (Red Series): Documentary Evidence, 1946, III TWC 1*, IMT, 397, 437-PS, report of Hans Frank to Hitler re Situation in Poland, 19 June 1943. See further Präg and Jacobmeyer (eds.), *Das Diensttagebuch*, 55, ‘The Governor-General [Frank] explained that the higher schools were already closed. As a matter of principle, seminaries . . . would be closed, as they merely constitute breeding grounds of Germanophobia’ (translation by the author).

⁷ *Prosecutor v. Frank*, in *Nazi Conspiracy and Aggression (Red Series): Documentary Evidence, 1946, VII TWC 1*, IMT, 420, EC-344 16–17.

⁸ *Prosecutor v. Frank*, in *Nazi Conspiracy and Aggression (Red Series): Documentary Evidence, 1946, IV TWC 1*, IMT, 914, 2233-Y-PS. Diary entry of 20 November 1942: ‘Starting 1 February 1942 the food ration cards should not be issued to the individual Pole or Ukrainian by the Nutrition Office, but to the establishments working for the German interest. 2,000,000 people would thus be eliminated from the non-German, normal ration-consuming contingent. Now, if those ration cards are only distributed by the factories, part of those people will naturally rush into the factories.’

⁹ *Ibid.*, 900, 2233-E-PS, Diary entry on the cabinet session of 24 August 1942. The later date of the diary entry and the fact that some should be spared to continue forced labour explain why Frank refers to a lower number of Jews than in the entry of 16 December 1941 (above note 1).

¹⁰ *United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics against Major War Criminals, Opinion and Judgment*, in *Nazi Conspiracy and Aggression (Red Series)*, 1 October 1946, IMT, 125–6.

Cambridge University Press

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Evelyne Schmid

Excerpt

[More information](#)

INTRODUCTION

3

Notwithstanding Frank's trial and the development of human rights law after World War II, Frank's assessment remains accurate: other atrocities attract much more attention than deliberately starving people, which is often noted only marginally. The same tends to be true with other ESCR violations. The mechanisms of international criminal law often marginalise or ignore those crimes that overlap with ESCR abuses. Consider, for example, the Cambodian communist regime from 1975 to 1979. The extremist policies of the Khmer Rouge resulted in the worst fabricated famine in recent history.¹¹ The first Khmer Rouge trial at the Extraordinary Chambers in the Courts of Cambodia (ECCC) has been criticised for focusing on executions and detention in the notorious Camp S-21, to the exclusion of starvation or other abuses related to ESCR.¹² Would it have been possible for prosecutors in the ECCC to press charges for starvation, which affected many more than those executed or detained? Could charges have been brought for policies abusing cultural rights, such as the prohibition to exercise religious practices or to disperse a disenfranchised minority, the Cham, with intent to destroy them as a community?¹³ Or for the destruction of entire libraries, the closing of schools and the prohibition against speaking any languages other than Khmer?¹⁴ Could any of the instruments aiming at the suppression of certain criminal conduct in states' domestic jurisdictions, such as the United Nations (UN) Convention against Transnational Organized Crime, be invoked to address some of the ESCR abuses that continue to plague today's post-conflict Cambodia?

As another example, consider a woman living in one of the almost 140 Sudanese villages visited by the International Commission of Inquiry on Darfur. Her name could be Zeinab. While she is a fiction, the International Commission of Inquiry collected evidence on a pattern of rape followed by looting in Darfur conflict:¹⁵ 'deliberate aggressions against women and girls, including gang rapes, occurred during the attacks on the villages ... In most of the cases, the involvement of

¹¹ Randle DeFalco, 'Accounting for Famine' (2011) 5 *International Journal of Transitional Justice*, 1, 142–58: 143 (in terms of the percentage of the total affected population killed).

¹² Ibid. ¹³ Ben Kiernan, *The Pol Pot Regime* (Yale University Press, 1996), 262–8.

¹⁴ Ibid., 8, 9, 39.

¹⁵ Report of the International Commission of Inquiry on Darfur to the SG, Pursuant to SC Resolution 1564 of 18 September 2004, 25 January 2005, para. 548, see also, for instance, para. 339 for an account of a rape followed by looting.

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Excerpt

[More information](#)

Janjaweed [Sudanese militiamen] was reported. In many cases, the involvement of soldiers was also alleged.¹⁶

After Zeinab was raped by militia members, who allegedly acted under the authority of the Sudanese state authorities, the perpetrators stole her household items and her livestock.

Many of the villages were reportedly completely destroyed by deliberate demolition of structures and more frequently by burning down the whole village. Straw-roofs of the traditional circular houses were torched, as well as all other inflammable material, and vegetation inside and in the immediate vicinity of the village was destroyed by burning . . . During the attacks Janjaweed are reported to have destroyed utensils, equipment for processing food, water containers and other household items essential for the survival of the inhabitants. Wells were reportedly poisoned by dropping the carcasses of cattle into the wells. In addition . . . , the destruction seems to have been consistently combined with looting of personal valuables, cash and, above all, live-stock.¹⁷

If the conduct of the militia members is attributable to the state of Sudan, the perpetrators would have violated the woman's ESCR, in particular by interfering with her access to food and water. Alternatively, if state attribution cannot be established, the state of Sudan should face the allegation that it failed to protect Zeinab's ESCR by letting the militia act without hindrance.¹⁸

If a situation like Zeinab's is discussed in a process concerned with international crimes, the conventional reaction would usually be to classify her as a victim of sexual violence. The theft or destruction of her property is likely to be relegated to the background, considered merely to give context to the rape: past mechanisms as well as the literature have tended to conceptualise economic and social abuses as the landscape against which abuses of civil and political rights are committed.¹⁹ Yet, Zeinab should not 'only' be considered as a victim of rape, but also of pillage and, hence, as a victim of a war crime which overlaps with ESCR violations. Her property may at first sight seem of marginal importance, but what if Zeinab desperately needs her household utensils to carry drinking water from the well? What if the theft of her livestock has deprived her of her only sources of protein and income? As the commission of inquiry emphasised, noting

¹⁶ Ibid., paras. 334–5. ¹⁷ Ibid., para. 305.

¹⁸ On the alleged relationship between the government of Sudan and the Janjaweed militia, see *ibid.*, para. 99.

¹⁹ On this tendency, see particularly Zinaida Miller, 'Effects of Invisibility' (2008) 2 *International Journal of Transitional Justice*, 266–91.

Cambridge University Press

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Evelyne Schmid

Excerpt

[More information](#)

1.1 THE RESEARCH PROBLEM & WHY IT NEEDS TO BE SOLVED 5

that property can be essential for the survival of victims, theft or destruction of belongings can severely affect victims' access to socio-economic rights' enjoyment.²⁰

And what about Zeinab's neighbour Jamal, whose home was set on fire by soldiers to force him to leave the village? Should he 'merely' be directed to seek help from an organisation that provides reconstruction assistance? Housing rights are not usually considered relevant to determinations based on international criminal law, but perhaps he should also be acknowledged as the victim of a crime, and his testimony collected by a truth commission that examines widespread evictions as a crime against humanity. The most recently adopted African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa expressly requires that state parties 'declare as offenses punishable by law acts of arbitrary displacement that amount to genocide, war crimes or crimes against humanity'.²¹ How can such acts be identified? We must know under what circumstances the human rights violation most prominently associated with arbitrary displacement – forced evictions – relate to the definitions of crimes such as genocide, war crimes and crimes against humanity.

1.1 The research problem and why it needs to be solved

At the core of this study are the legal aspects of the questions asked above. Can violations of ESCR – such as the ones Frank described in his diary – be addressed in processes dealing with international crimes and, if so, to what extent? International crimes denote conduct that is outlawed by international law or conduct that states deem must be prevented and repressed by international cooperation, or both. The *research question* central to the study is whether or not international criminal law is capable of accommodating claims related to conduct qualified by human rights lawyers as violations of international or regional treaties protecting ESCR. The *hypothesis* is that current definitions of international crimes (leading to criminal responsibility) can overlap with violations of ESCR (giving raise to state responsibility for internationally wrongful acts).

²⁰ Report of the International Commission of Inquiry on Darfur to the SG, Pursuant to SC Resolution 1564 of 18 September 2004, 25 January 2005, para. 305.

²¹ AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa, Kampala, 23 October 2009 (entered into force 6 December 2012), Art. 4(6).

Cambridge University Press

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Evelyne Schmid

Excerpt

[More information](#)

The exclusion of considerations related to the rights to food, health or education poses significant legal, ethical and political questions. How should criminal tribunals deal with claims that they should convict alleged perpetrators of conduct that human rights lawyers qualify as violations of ESCR? May truth commissions with a mandate over international crimes collect testimonies on abuses of the right to non-discrimination, food, housing, education or partaking in cultural life, or do they overstep their mandates by doing so? Could instruments aiming at the suppression of criminal conduct in states' domestic jurisdictions, such as treaties against transnational organised crime, assist us in addressing ESCR abuses?

The abuses committed by the Nazis, the Khmer Rouge or the perpetrators in Darfur are illustrations of the types of claims that can be, and are being made today when societies and international actors are trying to deal with the legacies of international crimes. The examples of Nazi practices, the story of Zeinab and Jamal and the policies of the Khmer Rouge all illustrate the problems inherent in the position that certain abuses fall outside the scope of international criminal law because their underlying factual conduct primarily affects people's access to ESCR rather than civil and political rights. They raise serious and contentious questions about the scope of current international law. They also suggest that there is need for analysis and discussion: does international law accommodate claims that such abuses can amount to international crimes? If this study provokes and stimulates nuanced discussions about the unavoidable choices prosecutors, lawyers and advocates make in selecting cases, and the way lawyers determine whether or not someone is a victim of an international crime, then it will have successfully achieved its goal.

It must be stated at the outset that most violations of ESCR will not ever be relevant in a discussion of international criminal law. Nevertheless, the hypothesis represents the view that, between the complete exclusion of ESCR and the claim to consider every kind of socio-economic denial as a crime, there is an area that merits further analysis. The potential for development in this area has been recognised in recent literature, most notably by Louise Arbour and the Secretary-General of the United Nations. Arbour urged that '[t]here are still other examples [of prosecutions by domestic, hybrid and international tribunals dealing with ESCR], and the use of statutes of existing international and national courts to adjudicate economic, social, and cultural violations as international crimes should thus be further

Cambridge University Press

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Evelyne Schmid

Excerpt

[More information](#)

1.1 THE RESEARCH PROBLEM & WHY IT NEEDS TO BE SOLVED 7

explored'.²² The Secretary-General emphasised that '[i]nvestigating and prosecuting crimes under national or international law where the conduct involves violations of [ESCR] as well as civil and political rights' was part of the UN approach to transitional justice.²³ Today, developments at the international level suggest that overlap between ESCR violations and international crimes is considered a possibility: in 2014, the Office of the High Commissioner for Human Rights (OHCHR) published the outcome of its exploration of the potential, challenges and limitations of transitional justice processes addressing violations of ESCR – finding that 'a number of international crimes involve or might involve infringements of ESCR'.²⁴ A groundbreaking UN report on the human rights situation in the Democratic People's Republic of Korea released in spring 2014 moreover extensively analysed unprecedented violations of ESCR and argued that these, in many instances, constitute crimes against humanity.²⁵

1.1.1 *The current marginalisation of ESCR abuses*

Despite Hans Frank's conviction – and, as this study shows, significant other jurisprudence – the conventional position has been to assume that violations of ESCR are beyond the scope of international criminal law. The destruction of homes, cutting off water sources, excluding certain groups from education or cultural life and forcing people to work under inhumane conditions have been commonplace throughout history, particularly in situations of armed conflict. Rarely, however, have such violations been addressed through legal processes relying on international criminal law. Indeed, international criminal lawyers have generally assumed that international crimes are confined to certain violations of civil and political rights to the exclusion of their

²² Louise Arbour, 'Economic and Social Justice for Societies in Transition' (2007) 40 *New York University Journal of International Law and Politics*, 1, 1–28: 15–16.

²³ Guidance Note of the Secretary-General on the United Nations Approach to Transitional Justice, March 2010, 10. Transitional justice denotes 'the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses.' *Ibid.*, 2.

²⁴ OHCHR, *Transitional Justice and Economic, Social and Cultural Rights*, HR/PUB/13/5, 2014, 24.

²⁵ Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, A/HRC/25/CRP.1, 7 February 2014, esp. paras. 1115–37 on violations of the right to freedom from hunger. Adopted by the HRC in Situation of Human Rights in the Democratic People's Republic of Korea, A/HRC/25/L.17, 26 March 2014.

Cambridge University Press

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Evelyne Schmid

Excerpt

[More information](#)

socio-economic and cultural counterparts. Traditionally, criminal proceedings or other processes to address an abusive past have thus tended to focus on a limited number of civil and political rights abuses, such as summary executions, arbitrary detention, disappearances and, more recently, sexual violence. The constantly expanding literature on international criminal law and continuing efforts to redress the legacies of massive human rights abuses more broadly (sometimes referred to as transitional justice, post-conflict justice or 'dealing with the past') have remained detached from the human rights literature on ESCR.

The assumption that ESCR violations have no place in international criminal law has been evident in the workings of all the primary mechanisms employed to deal with the legacy of an abusive past, namely criminal proceedings, truth commissions and out-of-court reparation programmes. The mandates of such mechanisms frequently cover crimes against humanity, war crimes and other international crimes. As outlined below, and in more detail in the next chapter, most scholars, practitioners and commentators have assumed that the elements of such crimes comprised only abuses related to a narrow set of civil and political liberties. Truth commissions, particularly, demonstrate the tendency to simplistically assume that international crimes and ESCR violations do not overlap.²⁶ The South African Truth and Reconciliation Commission, for instance, was criticised for paying insufficient attention to violations of ESCR,²⁷ despite its relatively broad mandate.²⁸ Among the few exceptions to the pattern of excluding ESCR considerations is the Commission for Reception, Truth and Reconciliation in East Timor, which has analysed abuses of ESCR in relation to international crimes. The commission concluded that many of the examined ESCR abuses were part of a deliberate scorched earth policy that violated the laws of war seriously enough to qualify at least some of the abuses as war crimes.²⁹ The commission, however, set aside the practical relevance of this finding in

²⁶ Lisa Laplante, 'Addressing the Socioeconomic Roots of Violence' (2008) 2 *International Journal of Transitional Justice*, 3, 331–55: 335, noting how truth commissions have 'tended to interpret their mandates more narrowly, often limiting their study to crimes that constitute violations of civil and political human rights'.

²⁷ South African Community Law Centre et al., 'Submission to the TRC Concerning the Relevance of Economic, Social and Cultural Rights to the Commission's Mandate, 18 March 1997', www.justice.gov.za/trc/hrvtrans/submit/esc6.htm.

²⁸ Promotion of National Unity and Reconciliation Act 1995, Act 95–34, 26 July 1995, Section 3(1)a.

²⁹ Truth and Reconciliation in Timor-Leste Commission for Reception, *Chega!* (CAVR, 2005), Chapters 7.5 and 7.9.

Cambridge University Press

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Excerpt

[More information](#)

1.1 THE RESEARCH PROBLEM & WHY IT NEEDS TO BE SOLVED 9

a single sentence and recommended that ‘principles of feasibility and needs-based prioritisation’ should limit reparation programmes to victims of a small set of civil and political rights abuses and to certain categories of vulnerable populations such as widows, children and people with disabilities.³⁰ Despite the criticism this approach attracted from the UN Secretary-General,³¹ and despite calls that more attention should be paid to economic, cultural and social concerns in transitional justice in general,³² the imbalance in the treatment of ESCR has not been corrected by subsequent truth commissions.³³

In addition to the practice of tribunals and quasi-judicial mechanisms, scholars, policy-makers and non-governmental organisations have generally tended to accept the traditional view that the consideration of abuses of ESCR have little or no place in international criminal law. Most often, the exclusion of considerations related to food, health, education, work or culture by processes applying international criminal law is not explained, but taken as given. Amnesty International, for instance, contrasts war crimes or crimes against humanity with ‘mass abuses of ESCR’,³⁴ conveying the impression that there is no overlap

³⁰ Ibid., Chapter 12, 40.

³¹ Report of the SG on the Question of the Realization in All Countries of Economic, Social and Cultural Rights, A/HRC/4/62, 13 February 2007, para. 42.

³² Two recent edited volumes are most notable in this respect. Gaby Oré Aguilar and Felipe Gómez Isa (eds.), *Equality and Social Justice in Societies Emerging from Conflict* (Intersentia, 2011); Dustin Sharp (ed.), *Justice and Economic Violence in Transition* (Springer, 2013).

³³ At the time of writing, the Kenyan Truth, Justice and Reconciliation Commission (TJRC) was the most recent example of a truth commission paying attention to ESCR. Although the TJRC made laudable efforts to address ESCR in some parts of the report, the report overall resembles those of earlier commissions insofar as it contains little to no specific legal analysis of ESCR violations. For further analysis of the treatment of ESCR by truth commissions, see Evelyne Schmid and Aoife Nolan, ‘Economic and Social Dimensions of Transitional Justice’ (2014) 8 *International Journal of Transitional Justice* 3, 362–82. Other truth commissions that have analysed (explicitly or implicitly) ESCR violations include those of Germany, Guatemala, Mauritius, Morocco, Peru and Sierra Leone. For profiles and the mandates of these commissions, see United States Institute of Peace, ‘Truth Commission Digital Collection’, www.usip.org/publications/truth-commission-digital-collection.

³⁴ Amnesty International, *The State of the World’s Human Rights 2010* (Amnesty International, 2010), xvii, ‘The obstacles to implementing accountability for mass atrocities in conflicts or political repression are real, but the debate at least has been won: no one denies the principle that war crimes or crimes against humanity or enforced disappearances should be punished. Yet when it comes to the mass abuses of economic, social and cultural rights, there is no comparable effort to bring law and accountability to bear.’

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Excerpt

[More information](#)

between the two. Others simply affirm that ‘most crimes referred to in the Rome Statute [of the International Criminal Court] pertain to violations of civil and political rights’.³⁵ Consider moreover the OHCHR publication on reparation programmes in post-conflict countries. While the document acknowledges that reparation programmes have tended to focus on civil and political rights and marginalised ESCR, the OHCHR states in this brochure that this focus ‘is not entirely unjustified’ because ‘arguably, it makes sense to concentrate on the most serious crimes’.³⁶ The problem with this statement is that it sustains views that only civil and political rights violations can constitute the most serious crimes.

In a groundbreaking lecture at the New York University School of Law in 2006, Louise Arbour asserted that efforts to address the legacy of widespread human rights abuses display a bias towards civil and political rights.³⁷ The former High Commissioner for Human Rights criticised the way these efforts exclude considerations of ESCR and are ‘predicated on accountability for past abuses of civil and political rights as a way to achieve peace and the rule of law’.³⁸ Arbour believes that this bias ‘reflects the hidden assumption that [ESCR] are not entitlements but aspirational expectations to be fulfilled by market-driven or political processes alone’.³⁹ Arbour’s speech was a timely invitation for international lawyers to reconsider some of the traditional assumptions about the relevance of socio-economic and cultural rights abuses to processes established to deal with the legacy of past crimes.

To date, Sigrun Skogly, David Marcus, Mark Drumbl and Larissa van den Herik are the authors of the four most significant legal articles that explicitly examine the relationship between ESCR and international crimes.⁴⁰ Advocating that more attention be given to ESCR, Skogly notes

³⁵ Elodie Aba and Michael Hammer, ‘Yes We Can? Options and Barriers to Broadening the Scope of the Responsibility to Protect to Include Economic, Social and Cultural Rights Abuse’, in *One World Trust Briefing Paper* (One World Trust, 2009), 9. See Section 2.2 for more evidence of such assumptions.

³⁶ Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Reparations Programmes* (United Nations, 2008), 19, 21 (drafted by Pablo de Greiff).

³⁷ Arbour, ‘Economic and Social Justice for Societies in Transition’, 9–10.

³⁸ *Ibid.*, note 26. ³⁹ *Ibid.*, 4.

⁴⁰ Earlier, in 1994, Tadeusz Jasudowicz observed that the ‘failure to implement [ESCR] can engage international responsibility and wilfully causing serious injury to body or health can constitute – according to its gravity and scale – genocide or some other crimes against humanity’. Tadeusz Jasudowicz, ‘The Legal Character of Social Rights’, in *Social Rights as Human Rights: A European Challenge*, ed. Krzysztof Drzewicki, Catarina Krause, and Allan Rosas (Åbo Akademi University, 1994), 34–9: 39.