

# War Crimes Related to Violations of Economic, Social and Cultural Rights

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## Abstract

Armed conflicts severely affect the enjoyment and realization of economic, social and cultural rights (ESCR). Considerations on ESCR are, however, largely absent in strategies to deal with the legacy of armed conflicts, be it in criminal prosecutions, truth-seeking exercises or other measures of post-conflict justice. This lack of attention not only fails many victims of armed conflict, but is also legally unwarranted. The definitions of many war crimes, *de lege lata*, include violations of ESCR within their underlying constitutive elements. I analyse four groups of war crimes – war crimes against persons, war crimes against property, war crimes consisting in the use of prohibited methods, and war crimes consisting in the use of prohibited weapons – and find that the same facts can sometimes simultaneously constitute a violation of the right to food, housing, education or

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health under human rights law, and give rise to individual criminal responsibility under the accepted definitions of war crimes. There are therefore no legal reasons to conclude *a priori* that ESCR violations should not or cannot be addressed by attempts to deal with the legacy of war crimes.

## I. Introduction

The destruction of homes, the looting of crops or livestock, or the denial of humanitarian relief in the context of a deliberate policy to target civilians are all too familiar occurrences in times of armed conflicts. In Timor Leste, for instance, the Indonesian armed forces and local militias looted virtually all of the country's medical equipment and hundreds of thousands of civilians were rounded up and herded like cattle from their homes or places of shelter onto trucks and boats bound for West Timor.<sup>1</sup> Lack of access to water can prove more deadly than a massacre by firearms;<sup>2</sup> and the same is true for the wilful hindrance of humanitarian assistance.<sup>3</sup> In human rights language, such scenarios can often be understood as violations of ESCR, particularly where states fail to respect rights, such as by directly interfering with the enjoyment of people's access to housing, food, education or health, or where states fail to protect persons within their jurisdiction from abuses by non-state actors. The AjV workshop and this special issue engage with a variety of activities related to international cooperation concerned with post-conflict justice. Notwithstanding the severity of conflict-related ESCR violations, few attempts to deal with the legacy of armed conflicts have addressed questions of accountability for these human rights abuses. Traditionally, criminal proceedings or other processes to address an abusive past have tended to focus on a limited number of civil and political rights abuses, such as summary executions, arbitrary detention, disappearances, and more recently rape. Only very rarely are ESCR violations tackled by any of the available mechanisms of transitional justice,<sup>4</sup> and the constantly expanding literature on transitional justice and international criminal law has remained largely detached from the human rights literature on ESCR.

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<sup>1</sup> *Commission for Reception, Truth and Reconciliation in Timor-Leste*, Chega! Final Report (Dili: CAVR, 2005), ch. 7.3 and 7.9.

<sup>2</sup> A. Zemmali, The Protection of Water in Times of Armed Conflict, *Int'l Rev. of the Red Cross* 308 (1995), 550.

<sup>3</sup> For instance: A. de Waal, *Famine Crimes: Politics, and the Disaster Relief Industry in Africa*, International African Institute, 1997.

<sup>4</sup> L. Arbour, Economic and Social Justice for Societies in Transition, *N. Y. U. J. Int'l L. & Pol.* 40 (2007), 1 et seq.

The lack of attention paid to violations of ESCR is, however, legally unjustified, including from the perspective of international criminal law. This article examines under what circumstances the definitions of war crimes under international law, *de lege lata*, can encompass violations of ESCR. Rather than discussing an expansion of international criminal law, the article identifies circumstances under which severe ESCR abuses are already part of “the most serious crimes of concern to the international community as a whole”.<sup>5</sup> Therefore, prosecutors, lawyers and judges at international and national tribunals can legitimately deal with some of the abuses that human rights lawyers describe as violations of ESCR. Truth commissions, and a broad range of other actors engaged in post-conflict justice initiatives are encouraged to consider this analysis before concluding that abuses related to socio-economic or cultural rights do not belong to their sphere of activity. They have no reason to dismiss claims solely because the abuses relate to economic, social or cultural concerns.

Elsewhere, I explore how ESCR violations interrelate with other crimes, such as crimes against humanity.<sup>6</sup> Given this special issue’s emphasis on international cooperation and conflict, the focus here is limited to war crimes as the oldest rules of accountability for abuses committed during armed conflict. It must be stressed at the outset that only the most serious ESCR violations will meet the threshold of war crimes. The core of the article (section III) examines four groups of punishable acts which constitute war crimes and which can be committed by way of violating ESCR: i) war crimes against persons, ii) war crimes against property, iii) war crimes consisting in the use of prohibited methods, and iv) war crimes consisting in the use of prohibited means of warfare. Before we can embark on this analysis, a few preliminary steps (section II) are required.

## II. Preliminary Steps: Human Rights Law on ESCR and War Crimes

A given conduct may simultaneously amount to a violation of human rights law provisions concerned with ESCR as well as a war crime. This demonstration requires, first, to outline how to define violations of ESCR, particularly given that these rights are surrounded with controversies. Second, we need to verify that human rights law continues to apply in armed

<sup>5</sup> Preamble Rome Statute of the International Criminal Court.

<sup>6</sup> This article is part of the author’s doctoral research project on ESCR violations and international crimes. Completion is expected in 2012.

conflict. Third, the demonstration requires a brief note on the relationship between human rights law, international humanitarian law (IHL) and international criminal law.

First, defining violations of ESCR is no easy matter. While many aspects of ESCR are still discussed controversially,<sup>7</sup> there is a considerable area of human rights law relating to ESCR which is sufficiently accepted to merit a detailed analysis of how it relates to the international criminal law provisions on war crimes. This begs the question how clear violations of ESCR can be identified. We must assess whether an actor responsible under international law fails to comply with a human rights obligation pertaining to ESCR. The actors bound by international human rights treaties are states. Only conduct attributable to states can therefore give rise to ESCR violations. As a result, abuses committed by non-state actors cannot strictly-speaking be labelled violations of ESCR provisions contained in international treaties.<sup>8</sup> Whether there is or has been a breach of an obligation depends on the precise terms of the obligation, its interpretation and application, taking into account its object and purpose and the facts of the case.<sup>9</sup>

Art. 2(1) of the main treaty source of ESCR on the international level, the International Covenant on Economic, Social and Cultural Rights (ICESCR), contains the general framework of obligations incumbent upon states. It stipulates that each state undertakes “to take steps, individually and through international assistance [...], to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”.<sup>10</sup> In contrast to other human rights instruments, the ICESCR indicates that the full realisation of ESCR is achieved progressively. But some obligations of the ICESCR are of immediate effect, namely the obligations of non-discrimination, non-retrogression and the duty to respect, the obligation to take special measures on behalf of children and young persons, certain minimum core obliga-

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<sup>7</sup> For the view that ESCR are fundamentally different from civil and political rights, the most well-known article of the last decade is *M. J. Dennis/D. P. Stewart*, Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?, *AJIL* 98 (2004), 462. However, almost two thousand judgments and decisions demonstrate that differences between ESCR and other human rights tend to be overstated. See for instance *M. Langford* (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, 2008.

<sup>8</sup> But see *A. Clapham*, Human Rights Obligations of Non-State Actors in Conflict Situations, *Int'l Rev. of the Red Cross* 863 (2006), 491.

<sup>9</sup> ILC Draft Articles on State Responsibility, 2001, Commentary to Art. 12.

<sup>10</sup> Art. 2(1) ICESCR.

tions, as well as the general obligation to “take steps without delay”.<sup>11</sup> States can violate ESCR by failing to respect, protect or fulfil ESCR. A violation of the obligation to respect means that the state unlawfully interfered with existing access and enjoyment of the rights. A violation of the duty to protect implies that a state failed to ensure that other actors do not interfere with rights. Lastly, a violation of the obligation to fulfil entails that the state failed to take sufficient steps to progressively realise the rights.<sup>12</sup> Note that ESCR are not the exclusive matter of the ICESCR. Each of the major human rights instruments, as well as International Labour Organization (ILO) and United Nations Educational, Scientific and Cultural Organization (UNESCO) Conventions, protects some aspects of ESCR. A state can therefore violate ESCR even if it has not ratified the ICESCR or a regional instrument specifically dealing with ESCR. Many of the straightforward examples of ESCR violations analysed in this article concern violations based on a failure to respect ESCR, such as unlawful interference with people’s health, access to housing, food, water or education. The ways in which ESCR can be violated are innumerable and the examples provided here do not claim to be exhaustive.<sup>13</sup> As an example of an ESCR violation, suffice it to mention the first instance in which the Committee on Economic, Social and Cultural Rights (CESCR) explicitly found that a state party, the Dominican Republic, had violated the ICESCR. In the late 1980s, the government forcibly evicted more than 15,000 families from their homes. The “deplorable conditions in which the families had had to live, and the conditions in which the expulsions had taken place” were deemed sufficiently serious for the CESCR to consider that the Dominican Republic failed to respect the existing enjoyment of housing as a component of the right to an adequate standard of living.<sup>14</sup> The CESCR has subsequently defined forced

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<sup>11</sup> The idea that these obligations are of immediate effect follows from the ordinary wording of the ICESCR and the object and purpose of the treaty. General Comments have specifically named obligations of immediate effect. See in particular *CESCR*, General Comment 3 on The Nature of States Parties’ Obligations, 14.12.1990, E/1991/23, para. 2, 3, 9, 10. *CESCR*, General Comment 9 on The Domestic Application of the Covenant, 3.12.1998, E/C.12/1998/24, para. 10. For further references, see *M. Sepúlveda*, *The Nature of the Obligations under the International Covenant on Economic, Social, and Cultural Rights*, 2003, 134.

<sup>12</sup> This tripartite typology of interdependent duties was developed by *Henry Shue* and inspired the jurisprudence of various human rights supervisory bodies. See e.g. *CESCR*, General Comment 12 on the Right to Adequate Food, 12.5.1999, E/C.12/1999/5, para. 15.

<sup>13</sup> For national, regional and international cases identifying violations of ESCR, see *M. Langford* (note 7).

<sup>14</sup> *CESCR*, Concluding Observations, Dominican Republic, 11.12.1990, E/1991/23, para. 249.

evictions as a “the (...) removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection”.<sup>15</sup> Today, the definition of forced evictions as housing rights violations is uncontroversial.

Second, human rights law continues to apply in situations of armed conflict and occupation. This position is widely accepted. It not only follows from the ordinary wording of derogation clauses in human rights law, but has also been confirmed on three different occasions before the International Court of Justice (ICJ) as well as by the Permanent Court of Arbitration,<sup>16</sup> and it is shared by highly qualified publicists.<sup>17</sup> In the *Wall Advisory Opinion*, the ICJ specifically held that the main treaty source of ESCR on the global level, the ICESCR, continues to apply in armed conflict.<sup>18</sup> This conclusion is also supported by the International Law Commission (ILC)’s work on the effect of armed conflict on treaties.<sup>19</sup> Moreover, where there is no discrepancy between the respective norms of human rights law and IHL, we do not have to dismiss the relevance of one of the two bodies of law by reference to the principle of *lex specialis*.<sup>20</sup> Rather, the questions studied in this article are what the ICJ termed “matters of both these branches of international law”,<sup>21</sup> human rights law and IHL. The relevant provisions re-

<sup>15</sup> CESCR, General Comment 7 on the Right to Adequate Housing: Forced Evictions, 13.12.1997, E/1997/4, para. 3.

<sup>16</sup> *Nuclear Weapons Advisory Opinion*, ICJ Reports 1996, 240. *Armed Activities Case (DRC v. Uganda)*, Jurisdiction, ICJ Reports 2003, para. 220. *Wall Advisory Opinion*, ICJ Reports 2004, 178. *Eritrea Ethiopia Claims Commission, Partial Award, Civilians Claims, Ethiopia’s Claim 5*, 17.12.2004, para. 26 et seq.

<sup>17</sup> T. Meron, Human Rights in Time of Peace and in Time of Armed Strife, in: T. Buergenthal (ed.), *Contemporary Issues in International Law*, 1984, 1 et seq.; L. Doswald-Beck/S. Vité, *International Humanitarian Law and Human Rights Law*, Int’l Rev. of the Red Cross 293 (1993), 94. The United States and Israel are the only states fundamentally rejecting this position. For an excellent summary of this view, see M. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, AJIL 99 (2005), 119.

<sup>18</sup> *Wall Advisory Opinion* (note 16), para. 112.

<sup>19</sup> *International Law Commission*, Report of the ILC, 59<sup>th</sup> Session, Suppl. No. 10 (A/62/10), 166.

<sup>20</sup> *Armed Activities Case* (note 16), para. 178, where the Court suggests assessing the lawfulness of the Ugandan conduct against both, the laws of military occupation and international human rights law.

<sup>21</sup> *Wall Advisory Opinion* (note 16), para. 106. Cited affirmatively in *Armed Activities Case* (note 16), para. 216.

lated to ESCR and IHL do not stand in conflict with each other,<sup>22</sup> and we can therefore examine both bodies of law.

In situations of international armed conflict (IAC), the question also arises to what extent the ICESCR applies extraterritorially.<sup>23</sup> The CESCR has interpreted that “all individuals within [a state’s] territory *or* under its jurisdiction” fall under the scope of the ICESCR,<sup>24</sup> and the ICJ concluded twice that the obligations of an occupying power extend to occupied territories.<sup>25</sup> Because human rights law continues to apply in armed conflict to the territory or a person under the jurisdiction of the controlling state, states continue to be bound by obligations related to ESCR, and consequently, such obligations can be violated.

In the third and last preliminary step, it is necessary to consider how a situation amounting to a human rights violation may simultaneously amount to a war crime. It cannot be stressed enough that by far not every violation of human rights is an international crime. To constitute a war crime, a certain conduct must violate a rule of IHL, and violating this rule of IHL must have been criminalised as a war crime.<sup>26</sup> Our starting point for determining what constitutes a war crime are therefore those IHL rules which protect concepts similar to the ones under human rights law related to ESCR. In times of armed conflict, the destruction of homes for instance is covered by rules of IHL (such as the rules protecting civilian buildings or the prohibition of population transfers), as well as by human rights law on ESCR (which prohibits forced evictions).

Moreover, it must be noted that some conduct constitutes a war crime in IAC alone, some in non-international armed conflict (NIAC) alone, and some in all conflicts. With the adoption of Art. 8 of the Rome Statute, the International Criminal Court (ICC) has been granted jurisdiction over a long list of war crimes. Since the list of war crimes included in the Rome Statute is difficult to handle, this article regroups war crimes so that similar or identical crimes can be discussed together. For example, “wilful killing” and “murder” are separate crimes in the Rome Statute but will be discussed

<sup>22</sup> S. Vité, *The Interrelation of the Law of Occupation and Economic, Social and Cultural Rights*, Int’l Rev. of the Red Cross 871 (2008), 629 (651).

<sup>23</sup> M. Langford *et al.*, *Global Justice, State Duties: The Extra-Territorial Scope of Economic, Social and Cultural Rights in International Law*, 2011. E. Mottershaw, *Economic, Social and Cultural Rights in Armed Conflict*, International Journal of Human Rights 12 (2008), 449.

<sup>24</sup> CESCR, General Comment 1 on Reporting by States Parties, 24.2.1989, E/1989/22, para. 3 (emphasis added).

<sup>25</sup> *Wall Advisory Opinion* (note 16), para. 112. Cited affirmatively in *Armed Activities Case* (note 16), para. 216.

<sup>26</sup> Y. Dinstein/M. Tabory, *War Crimes in International Law*, 1996, 2.

together here.<sup>27</sup> Readers should bear in mind that each of the four categories of war crimes under the Rome Statute has specific thresholds pertaining to the nature of the conflict and the scope of the prohibition to certain categories of victims.

The general requirements for all war crimes are the existence of a situation of armed conflict,<sup>28</sup> and a nexus between the conduct of the alleged perpetrator and such conflict.<sup>29</sup> The perpetrator must have been aware of factual circumstances that established the existence of an armed conflict,<sup>30</sup> and the victim or the property must have been protected under IHL. Protected persons, and thus potential victims of war crimes, are those individuals who are protected under one or more of the Geneva Conventions of 1949 or their 1977 Additional Protocols (AP I and AP II), namely the wounded and sick, prisoners of war and civilians who do not or no longer directly take part in hostilities. Not all civilians are automatically protected persons, but victims must be neutral or linked to the other side of the conflict.<sup>31</sup> For grave breaches, victims must be “in the hands of” the party that is committing the grave breach.<sup>32</sup>

<sup>27</sup> This classification of war crimes is similar to the way the German Code of Crimes against International Law regroups war crimes. For a discussion of possibilities to categorise the numerous war crimes, see *M. Cottier et al.* (note 28), 296 et seq.

<sup>28</sup> For an overview of the definition of an armed conflict for the purpose of the Rome Statute, see *M. Cottier et al.*, Article 8, in: O. Triffterer/K. Ambos (eds.), *Commentary on the Rome Statute of the International Criminal Court*, 2008, 290.

<sup>29</sup> Art. 8(2)a(i), para. 4, *ICC Assembly of States Parties to the Rome Statute*, Elements of Crimes, 9.9.2002, ICC-ASP/1/3. This element is repeated for all war crimes. The armed conflict must have played a substantial part in the perpetrator’s ability to commit it, his or her decision to commit it, the manner in which it was committed or the purpose for which it was committed. *Prosecutor v. Kunarac, Kovac and Vukovic*, IT-96-23-A, 12.6.2002, para. 58. *Prosecutor v. Katanga and Chui*, Decision on the Confirmation of Charges, ICC-01/04-01/07, 30.9.2008, Pre-Trial Chamber I, para. 381.

<sup>30</sup> Knowledge of armed conflict does not imply a requirement for a legal evaluation by the perpetrator. Art. 8 (introduction) ICC Elements of Crimes (note 29).

<sup>31</sup> Art. 8(2)c(1)-1, para. 2 ICC Elements of Crimes (note 29). *K. Dörmann et al.*, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, 2003, 19.

<sup>32</sup> The expression “in the hands of” is used broadly and is not restricted to a physical sense. *J. Pictet et al.*, *The Geneva Conventions of 12 August 1949: Commentary* (Geneva: ICRC, 1994), 47. Art. 4 of the Fourth Geneva Convention defines protected persons as “those who ... find themselves ... in the hands of a Party to the conflict or Occupying Power of which they are not nationals”. In a teleological but controversial approach, the ICTY held that allegiance to a party to the conflict was the critical test (rather than nationality). *Prosecutor v. Tadić*, IT-94-1-A, 15.7.1999, para. 166.

### III. Particular War Crimes Offenses and ESCR Violations

After having briefly surveyed how violations of ESCR are identified, how human rights law on ESCR applies during conflict, and what the basic requirements of war crimes are, I will now examine how four groups of war crimes offenses relate to ESCR violations.

#### 1. War Crimes Against Persons

##### a) Wilful Killing

Murder or wilful killing is a war crime in both IAC and NIAC.<sup>33</sup> The elements of this war crime are that the perpetrator caused the death of a protected person, that the death resulted from an act or omission contrary to the law of armed conflicts, and that the perpetrator acted wilfully. The term “killing” is equivalent to the term “causing death”.<sup>34</sup> That this crime can be committed either by act or by omission has been confirmed by multiple authorities.<sup>35</sup>

*Hart* and *Honoré*, writing on causation, explain: “The notion of causing death is not of course confined to crude cases where the actor initiates changes in the victim’s body by introducing some foreign element; it also extends to cases where the actor shortens the victim’s life by depriving him of something needed by his organism for survival.”<sup>36</sup> Similarly, *Bassiouni* writes that state practice views murder as including the creation of life-endangering conditions highly likely to result in death.<sup>37</sup>

The CESCR has held that “[t]he denial of access to food to particular individuals or groups [...], the prevention of access to humanitarian food aid in internal conflicts or other emergency situations” constitute violations of the right to food.<sup>38</sup> If such conduct is attributable to a state, if it causes death and if causality can be established, the unlawful denial of humanitari-

<sup>33</sup> Art. 8(2)(a)(i) and Art. 8(2)(c)(i) Rome Statute. Art. 50/51/130/147 and Common Article 3 Geneva Conventions and Art. 4.2(a) AP II.

<sup>34</sup> *M. Cottier et al.* (note 28), 305.

<sup>35</sup> *Prosecutor v. Delalic*, IT-96-21-T, 16.11.1998, para. 424. *Prosecutor v. Akayesu*, ICTR-96-4-T, 2.9.1998, para. 589. *Prosecutor v. Katanga and Chui*, Decision on the Confirmation of Charges, ICC-01/04-01/07, 30.9.2008, Pre-Trial Chamber I, para. 287. *J. Pictet et al.* (note 32), 597.

<sup>36</sup> *H. Hart/T. Honoré*, *Causation in the Law*, 2<sup>nd</sup> ed, 1985, 240.

<sup>37</sup> *C. Bassiouni*, *Crimes against Humanity in International Criminal Law*, 1999, 301 et seq.

<sup>38</sup> CESCR, General Comment 12 (note 12), para. 19.

an relief can constitute the war crime of wilful killing or murder.<sup>39</sup> In this scenario, the same facts give rise to an ESCR violation as well as a war crime. The denial of access to food, health care or drinking water for instance can cause the death of protected persons and may therefore constitute the war crime of wilful killing. Of course, these examples equally constitute violations of the right to life, and hence violations of the International Covenant on Civil and Political Rights (ICCPR).<sup>40</sup> The same is true for other examples mentioned in this article. However, deaths without bloodshed tend to be overlooked, especially if they relate to socio-economic conditions. Although very similar from a legal standpoint, a massacre by firearms or machetes is more likely to attract the attention of international criminal lawyers than the slow deaths of those wilfully deprived of food, water, or medicine.

## b) Unlawful Deportation or Transfer

Forcibly moving a civilian population for reasons related to a conflict can constitute a war crime; and this prohibition extends to NIAC.<sup>41</sup> Forcible population movements frequently go hand in hand with ESCR violations, such as forced evictions. The unlawful deportation or transfer of a civilian population constitute a group of complex war crimes which differ according to the type of conflict. These differences need not be discussed here in detail.<sup>42</sup> The point here is that a range of violations of ESCR can be related to forcible transfers.

The criminal offenses for forcible population displacements do not require that the displacement came about by physical force. Rather, it is the absence of genuine choice by the individuals displaced that makes displacement forcible.<sup>43</sup> The disruption of access to supplies and services, education, food or land often constitutes the underlying factor that makes the transfer involuntary and forced. While it is not enough that the transfers result as a side-effect of other conduct, deprivations of ESCR which are deliberately inflicted to provoke the displacement of civilians are likely to be covered.

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<sup>39</sup> C. Rottensteiner, *The Denial of Humanitarian Assistance as a Crime under International Law*, Int'l Rev. of the Red Cross 835 (1999), 555.

<sup>40</sup> Art. 6 ICCPR.

<sup>41</sup> Art. 8(2)(viii) Rome Statute. Art. 85(4)a. AP I.

<sup>42</sup> See *M. Cottier et al.* (note 28), 362 et seq. and 497 et seq. *K. Dörmann* (note 31), 208 et seq. and 472 et seq. *T. Meron*, *Deportation of Civilians as a War Crime under Customary Law*, in: D. Gomien/A. Eide (eds.), *Broadening the Frontiers of Human Rights*, 1993, 201.

<sup>43</sup> *J. Pictet et al.* (note 32), 278.

That the creation of severe living conditions can constitute the underlying conduct of forcible transfer has been confirmed by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Krajisnik* judgment. The tribunal found that discriminatory dismissals from employment and the cutting off of water or electricity were aimed at, and succeeded in, making it practically impossible for most Muslims and Croats to remain in municipalities controlled by Serb forces.<sup>44</sup> The Trial Chamber found that the individuals, who were not taking active part in the hostilities at the relevant time, were displaced against their will.<sup>45</sup> State failure to prevent and correct discriminatory dismissals from employment constitutes a violation of the right to work;<sup>46</sup> the cutting off of water has been interpreted as a violation of the right to water,<sup>47</sup> and electricity has so far been interpreted to be part of the right of everyone to an adequate standard of living in 22 concluding observations of the CESCR.<sup>48</sup> In sum, ESCR violations can sometimes be aimed at forcibly transferring protected persons in armed conflict or occupation, in which case they can simultaneously constitute a war crime. Contrary to the examples mentioned for the war crime of wilful killing, the abuses described here could not be qualified as violations of civil and political rights. The creation of severe living conditions aimed at the forcible relocation of civilians is therefore an illustration of wrongdoings that constitute violations of ESCR, but not civil and political rights violations. Attention to violations of ESCR within the framework of international criminal law accordingly helps ensure that those who kill, mistreat, or otherwise victimise people by hindering their access to food, water, health care or humanitarian relief, for instance, do not go unnoticed and unpunished.

### c) Collective Punishment

The Hague Regulations, the Geneva Conventions, AP I and AP II and customary international law prohibit collective punishments in both types of armed conflict.<sup>49</sup> The ICC has not been given jurisdiction over this pro-

<sup>44</sup> *Prosecutor v. Krajisnik*, IT-00-39-T, 27.9.2006, para. 729.

<sup>45</sup> *Prosecutor v. Krajisnik* (note 44), para. 732.

<sup>46</sup> Art. 6(1) and Art. 2(2) ICESCR.

<sup>47</sup> CESCR, General Comment 15 on the Right to Water, 20.1.2003, E/C.12/2002/11, para. 21, 42.

<sup>48</sup> For the latest example (as of the 45<sup>th</sup> CESCR session), see CESCR, Concluding Observations, Afghanistan, 7.6.2010, E/C.12/Afg/CO/2-4, para. 35.

<sup>49</sup> Art. 50 Convention (IV) Respecting the Laws and Customs of War on Land and Regulations, The Hague, 18.10.1907. Art. 87 Third Geneva Convention. Art. 33 Fourth Geneva

hibition, but this does not affect the status of collective punishment as a war crime in general international law.<sup>50</sup> The commentary of the International Committee of the Red Cross (ICRC) clarifies that the offense refers to “penalties of any kind inflicted on persons or entire groups of persons [...] for acts that [they] have not committed.”<sup>51</sup> Such collective penalties may simultaneously constitute violations of ESCR and *vice versa*.

In the *Delalić* case, the ICTY stated that assigned residence under Art. 78 of the Fourth Geneva Convention is a measure that may never be taken on a collective basis.<sup>52</sup> State actors who collectively assign residence during an armed conflict will in most cases forcibly evict people from their homes, and hence violate the right to housing.<sup>53</sup> Collective evictions related to an armed conflict may hence constitute the war crime of collective punishment. The Special Court for Sierra Leone (SCSL) convicted the accused in the *CDF* case of collective punishment, inter alia, because they commanded the burning of homes and the pillage of food, livestock and medical drugs to punish the population for their support to, or failure to actively resist, opposing forces.<sup>54</sup> Since at least some of this conduct is attributable to the state of Sierra Leone,<sup>55</sup> some of the same behavior can also be described as an ESCR violation. The link between the crime of collective punishment and violations of ESCR is also made by the CESCR. General Comment 14 holds that limiting access to health services as a punitive measure during armed conflict constitutes both a violation of the right to health, as well as a violation of IHL.<sup>56</sup>

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Convention. Art. 75(2)d AP I. Art. 4(2)b AP II. Art. 20(f)ii ILC Draft Code of Crimes against the Peace and Security of Mankind, 1996.

<sup>50</sup> Art. 10 Rome Statute. Military Tribunal of Rome, *Priebke Case*, Judgment, 22.7.1997, affirming the customary nature of the offense. *J.-M. Henckaerts et al.*, Customary International Humanitarian Law: Vol. I, Rules, 2007, rule 103. For a thorough but critical analysis of the status of collective punishment as an international crime, see also *S. Darcy*, Prosecuting the War Crime of Collective Punishment, *Journal of International Criminal Justice* 8 (2010), 29.

<sup>51</sup> *Y. Sandoz et al.*, Commentary on the Additional Protocols of 8 June 1977, 1987, 874.

<sup>52</sup> *Delalić* Trial Judgment (note 35), para. 578.

<sup>53</sup> CESCR, General Comment 7 (note 15), para. 3.

<sup>54</sup> *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T, 2.8.2007, para. 176 et seq.

<sup>55</sup> One of the accused, *Norman*, was the former Defence Minister of Sierra Leone. Art. 4 and 11, ILC Draft Articles on State Responsibility.

<sup>56</sup> CESCR, General Comment 14 on the Right to the Highest Attainable Standard of Health, 11.8.2000, E/CN.12/2000/4, para. 34.

#### d) Other War Crimes Against Persons

Other war crimes against persons could be analysed in a similar way. For instance, the overlapping war crimes of torture, inhumane treatment, physical mutilation or outrages upon personal dignity all encompass conduct which touches upon ESCR, such as the right to health. The right to health in article 12 of the ICESCR encompasses the right to be free from interference such as non-consensual medical treatment and “all health facilities, goods and services must be respectful of medical ethics”.<sup>57</sup> Medical personnel providing assistance in torturous interrogation or medical experiments related to an armed conflict is involved in the commission of torture, inhumane treatment or other war crimes.

In addition, the crime of wilfully causing great suffering or serious injury to body or health can be committed by way of depriving protected persons of adequate food, sanitation, clothing or health care.<sup>58</sup> Moreover, serious conflict-related violations of the right to freely choose or accept one’s work<sup>59</sup> may sometimes be qualified as sexual crimes, such as sexual slavery and enforced prostitution, or as the war crime of compelling service in hostile forces. Examining such abuses from the perspective of international criminal law helps avoid that such violations are overlooked.

## 2. War Crimes Against Property

Violations of ESCR can also go hand in hand with war crimes related to the destruction and appropriation of property.

#### a) Pillage

Pillage is one of the oldest war crimes and it has identical elements both in IAC and in NIAC.<sup>60</sup> For the purposes of the Rome Statute, the ICC Elements of Crimes require that i) the perpetrator appropriated certain

<sup>57</sup> CESCR, General Comment 14 (note 56), para. 8, 12.

<sup>58</sup> *Prosecutor v. Delalić*, IT-96-21-A, 20.2.2001, para. 744. The four surviving members of the Khmer Rouge Central Committee stand trial for similar war crimes. *ECCC, Closing Order, Case 002*, 15.9.2010, para. 1502 et seq.

<sup>59</sup> Art. 6 of the ICESCR recognises the right of everyone to freely choose or accept one’s work. Art. 7 safeguards against abusive conditions of work.

<sup>60</sup> Art. 8(2)b(xvi) and 8(2)e(v) Rome Statute. The pillage of cultural property is further criminalised by the second protocol to the 1954 Hague Convention on Cultural Property.

property; ii) he or she intended to deprive the owner of the property and to appropriate it for private or personal use; and iii) the owner did not consent to the appropriation.<sup>61</sup> Outside the ICC, the war crime of pillage is not restricted to personal or private purposes. The majority of WW II prosecutions which condemned acts of pillage precisely concerned property appropriated to further the *Axis* war effort.<sup>62</sup> Tribunals adjudicating pillage charges under customary international law or national law may not have to follow this purpose restriction. Rather, the Hague Regulations delineate the scope of a belligerent's right of lawful requisition and seizure.<sup>63</sup>

There are important links between pillage and violations of ESCR. Pillage is likely to be qualified as violating various ESCR if the pillage is, for instance, perpetrated by the armed forces of the government who interfere with people's access to ESCR, or if the state fails to protect civilians from the deprivation of access to adequate food, work or other rights by other individuals, such as members of paramilitary groups. In the *Armed Activities* case, the ICJ concluded that Uganda had not taken the necessary measures to prevent pillage in the Democratic Republic of the Congo (DRC). As the occupying power, Uganda should have taken action to stop the pillage not only by members of its armed forces, but also private persons in the region.<sup>64</sup> The recent UN report on abuses in the DRC illustrates how the pillage of natural resources went hand in hand with violations of ESCR.<sup>65</sup>

## b) Destruction and Appropriation of Property

Excessive and unlawful destruction and appropriation of protected property not justified by military necessity is a war crime in any armed conflict.<sup>66</sup> Although a full discussion of the elements of this crime would re-

<sup>61</sup> Art. 8(2)(b)(xvi) 8(2)(e)(v) ICC Elements of Crimes (note 29).

<sup>62</sup> *H. M. Maschke*, *Das Krupp-Urteil und das Problem der Plünderung*, 1951. The ICTY did not restrict the offense to appropriations for private or personal use. *Prosecutor v. Hadžihasanović*, IT-01-47-T, 15.3.2006, para. 52. The SCSL concluded that the ICC restriction to personal private purposes did not reflect customary international law. *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T, 20.7.2007, para. 754. *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T, 2.8.2007, para. 160.

<sup>63</sup> Art. 52-55 Hague Regulations. See also *J. Stewart*, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources*, 2010.

<sup>64</sup> *Armed Activities Case* (note 16), para. 248.

<sup>65</sup> *OHCHR*, *Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and IHL Committed within the Territory of the DRC between March 1993 and June 2003*, 2010, para. 726 et seq.

<sup>66</sup> Art. 8(2)(a)(iv), 8(2)(b)(xiii) and 8(2)(e)(xii) Rome Statute.

quire more space than what is available here, it is apparent that the criminalised conduct not only has serious consequences for the population's enjoyment of ESCR, but can itself be a violation of ESCR, such as a violation of the right to an adequate standard of living, including the right to housing.<sup>67</sup>

### c) Attacking Cultural Property

Intentionally attacking cultural property is another war crime relevant for the present analysis.<sup>68</sup> The destruction of cultural property by actors attributable to a state could violate the right to take part in cultural life.<sup>69</sup> The Rome Statute also includes buildings dedicated to education in the scope of the war crime of intentionally directing attacks against cultural property.<sup>70</sup> Unlawfully directing attacks against educational buildings may therefore constitute a war crime;<sup>71</sup> and the commission thereof will often simultaneously hamper the right to education.

## 3. War Crimes Consisting in the Use of Prohibited Methods of Warfare

Intentionally starving civilians is prohibited in both types of armed conflict.<sup>72</sup> Intentional starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including by wilfully

<sup>67</sup> CESCR, Concluding Observations, Israel, 26.6.2003, E/C.12/1/Add.90, para. 26, mentioning that to the extent that expropriations are incompatible with IHL, they may give rise to individual criminal responsibility.

<sup>68</sup> Directing attacks against cultural property has been ranged here within the category of war crimes against property. It should be noted that this war crime could also be categorised as an offense consisting in the use of prohibited methods of warfare because the underlying norms not only protect property, but are also concerned with the limitation of the use of methods relating to the conduct of hostilities (Hague law).

<sup>69</sup> Art. 15(1)a ICESCR.

<sup>70</sup> Art. 8(2)b(ix) and e(iv) Rome Statute. For the drafting history, see *W. Schabas*, *The International Criminal Court: A Commentary on the Rome Statute*, 2010, 236 et seq.

<sup>71</sup> In cases where schools are not covered by the protection of cultural property, they are *prima facie* protected by the prohibition of attacking civilian objects and unlawfully destroying enemy property. *Prosecutor v. Kordic, Cerkez*, IT-95-14/2-A, 17.12.2004, para. 92.

<sup>72</sup> Art. 54 AP I. Art. 53 AP II. Custom proscribes "any attack upon means of subsistence which serves solely the civilian population". *A. Cassese*, *The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law*, *UCLA Pacific Basin Law Journal* 3 (1984), 55 (91).

impeding relief, is also a war crime in IAC under the Rome Statute,<sup>73</sup> and it constitutes a war crime in any armed conflict under the legislation of several states.<sup>74</sup>

Historically, starvation was considered a lawful way of forcing surrender.<sup>75</sup> Despite the development of commonly accepted rules of war in the Hague Regulations, a US military court after WWII condoned the Nazi siege of Leningrad that resulted in the deaths of more than one million Russians.<sup>76</sup> Today, this position is clearly outlawed. AP I prohibits attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population for the purpose of denying them for their sustenance value to the population, whether in order to starve out civilians, to cause them to move away, or for any other motive.<sup>77</sup> Art. 14 of AP II prohibits starvation in NIAC. The ICRC commentary to AP II notes that no measure of military necessity justifies the starvation of civilians.<sup>78</sup> Starvation is however only a war crime if used as a method of warfare. This excludes starvation as a result of unintended mismanagement.<sup>79</sup>

The right to an adequate standard of living can be violated in such a way as to constitute the war crime of starvation. The most basic content of the right to an adequate standard of living is the right to be free from hunger.<sup>80</sup> Moreover, the definition of starvation applies not only to the deprivation of food and water, but also to other essential objects. Art. 54 of AP I lists agricultural areas for the production of food-stuffs, crops, livestock, drinking

<sup>73</sup> Art. 8(2)b(xxv) Rome Statute. A proposal to include the same crime in the Rome Statute provisions applicable to NIAC was not retained. *Preparatory Committee*, Draft Statute, A/CONF.183/2/Add.1, 14.4.1998, 21.

<sup>74</sup> *J.-M. Henckaerts et al.* (note 50), Vol. 2, Practice Relating to Rule 53.

<sup>75</sup> Art. 17 Lieber Code, U.S. War Department, General Orders No. 100, 24.4.1863.

<sup>76</sup> *Van Leeb and Others (the High Command Case) XII LRTWC 1*, 563. The tribunal's conclusion seems somewhat doubtful since the conduct could already at that time have been said to violate the principle of distinction contained in the Hague Regulations. The 1919 Report of the Commission on Responsibility set up after WWI listed deliberate starvation of civilians as a violation of the laws and customs of war subject to criminal prosecution.

<sup>77</sup> Art. 54 AP I. *Y. Dinstein*, *Siege Warfare and the Starvation of Civilians*, in: A. Delissen/G. Tanja (ed.), *Humanitarian Law of Armed Conflict: Essays in Honour of F. Kalshoven*, 1991, 145.

<sup>78</sup> *Y. Sandoz et al.* (note 51), 1457. *Croatia, District Court of Zadar, Perišić and Others*, Judgment, 24.4.1997.

<sup>79</sup> What *Marcus* terms "second-degree famine crimes" is not covered by the war crimes provisions. *D. Marcus*, *Famine Crimes in International Law*, *AJIL* 97 (2003), 245 (272). But note that the intentional deprivation of indispensable objects as a method of warfare suffices; death is not necessary.

<sup>80</sup> Art. 11(2) ICESCR.

water installations and irrigation works.<sup>81</sup> The term “such as” indicates that this list is illustrative. Other objects such as clothing, medical supplies or objects required to process food also appear to be covered.<sup>82</sup> The Office of the High Commissioner for Human Rights (OHCHR) concluded that stopping electricity sources may amount to the deprivation of objects indispensable for the survival of civilians, especially of hospital patients who die if electricity supplies are stopped for too long.<sup>83</sup> Further supporting the view that other objects than food and water are covered is the fact that “wilfully impeding relief supplies” is included in the crime and relief supplies are not limited to foodstuffs and drinking water, but may include a wide range of objects, from clothing, shelter, medical and sanitary supplies to tools.

The obstruction of humanitarian relief illustrates important links between ESCR and the war crime of starvation. The provision of assistance is subject to certain conditions.<sup>84</sup> But where impartial and non-discriminatory humanitarian relief is hampered as a method of war, the responsible individuals not only commit a war crime, but the state on whose account the individuals act, is likely to also violate the human rights obligation to take steps, or at least not to create obstacles to ensure that the population has access to essential goods and services.<sup>85</sup>

#### 4. War Crimes Consisting in the Use of Prohibited Means of Warfare

IHL prohibits the use of means of warfare that cause superfluous injury or unnecessary suffering or that are inherently indiscriminate.<sup>86</sup> Certain weapons are banned *per se*. The prohibition of poison or poisonous weapons is one of the oldest of such rules,<sup>87</sup> and it includes the poisoning of wa-

<sup>81</sup> *M. Cottier et al.* (note 28), 461, pointing out that dictionaries suggest that the meaning of “starvation” is not limited to the fact of having too little food, but more generally, to have insufficient supply of essential commodities or necessary things to live.

<sup>82</sup> *M. Cottier et al.* (note 28), 460.

<sup>83</sup> OHCHR (note 65), para. 330.

<sup>84</sup> The sole purpose of humanitarian assistance must be to prevent and alleviate human suffering. *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, ICJ Reports 1986, para. 243 (1986). The concerned government must consent to the assistance, but such consent must not be denied arbitrarily.

<sup>85</sup> *S. Vité* (note 22), 639.

<sup>86</sup> *J.-M. Henckaerts et al.* (note 50), Rules, 70 et seq.

<sup>87</sup> The prohibition of poison or poisonous weapons is a well-accepted norm of customary law. *Nuclear Weapons Advisory Opinion* (note 16), para. 80 et seq. States at the 2010 Review

ter or food supplies. There is no doubt that the use of prohibited means of warfare has extremely serious health impacts. Under the ICESCR, a government is under an obligation to respect the right to health, food or water of the population on the territory under its jurisdiction. For instance, if it mines a territory, or sprays a region with chemicals designed to kill or injure by the effect of such poison, it may well violate the ICESCR. Those who direct, command or plan the use of such weapons may also incur individual criminal liability for a war crime – which further illustrates that the same conduct can give rise to an ESCR violation and simultaneously fall within the ambit of international criminal law.

#### IV. Conclusion

This article tentatively explored a considerable area of overlap between the substantive definitions of ESCR violations, rooted in international human rights law, and the material elements of certain war crimes. As this article has shown, violations of the right to housing, food, education, work, health or other ESCR are not always beyond the realm of international criminal law. In times of armed conflict or occupation, the same factual conduct can give rise to a state's violation of ESCR as well as individual criminal responsibility for war crimes.

This finding has jurisdictional, remedial and other consequences. Tribunals such as the ICC or national courts have jurisdiction over a considerable range of war crimes. If the ESCR violations correlate with grave breaches, states even have an absolute obligation to prosecute or extradite alleged perpetrators of such abuses. Tribunals may consequently prosecute individuals alleged of criminal conduct which is at the same time part of an ESCR violation of the state to which the conduct of the individual is attributable. Further, courts may order reparations to victims of such crimes. In addition, the qualification of ESCR violations as war crimes implies a range of wider consequences. For instance, the mandates of various mechanisms, such as truth commissions or reparations programmes, frequently cover war crimes and other international crimes. However, to date, most transitional justice mechanisms have assumed that the elements of such crimes were confined to abuses related to civil and political liberties. Therefore, they have not ad-

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Conference of the ICC Statute considered that the prohibition was part of customary international law applicable in NIAC. See Eight preambular paragraph Amendments to Art. 8 of the Rome Statute, the Review Conference of the Rome Statute of the ICC, 10.6.2010, Rc/Res.5.

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dressed ESCR violations; believing that these were entirely beyond their mandate.<sup>88</sup>

How abuses should be prioritised in a post-conflict context is a difficult question in any transitional society and one that cannot be answered in the abstract. However, the main implication of the finding that some ESCR violations can constitute war crimes is first and foremost that there are no legal reasons to conclude *a priori* that ESCR violations should not or cannot be addressed by attempts to deal with a legacy of war crimes.

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<sup>88</sup> E. Schmid, Liberia's Truth Commission Report: Economic, Social and Cultural Rights in Transitional Justice, *Praxis – Fletcher Journal of Human Security* 24 (2009), 5.

