

Evelyne Schmid. ***Taking Economic, Social and Cultural Rights Seriously in International Criminal Law***. Cambridge: Cambridge University Press, 2015. Pp. 359. £75. ISBN: 9781107063969.

The history of armed conflict is rife with examples of invading and occupying forces razing homes, destroying crops and poisoning water sources. Insofar as these actions purposefully target civilian populations, or are motivated by an intent to destroy peoples, or constitute inhumane, disproportionate treatment, they are likely to fall under the set of wrongs prohibited by international criminal law. Yet such actions are also often violations of rights – and of social, economic and cultural rights (ESCR) in particular.

The traditional view on the legal nature of ESCR is that they are inherently vague or that they are mere ‘aspirational goals’ that states are to realize progressively, making them unsuitable for judicial application.<sup>1</sup> For this reason, some authors claim that only violations of civil and political rights can ground the international crimes set out in the Rome Statute.<sup>2</sup> International criminal proceedings have tended to treat ESCR violations, even widespread violations, only as a background for violations against civil and political rights, rather than as independent, actionable wrongs.<sup>3</sup> Tellingly, however, the last decade has seen both international and national tribunals recognize the relationship between the violation of economic, social and cultural rights and international crimes. This recent case law, along with the practice of various transitional justice mechanisms (truth commissions and the like) has opened the door to the qualification of ESCR violations as crimes against humanity, war crimes, genocide or other international crimes. Yet rigorous research into the interplay between the two fields remains scarce.<sup>4</sup>

Evelyne Schmid’s new book, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law*, aims to provide a bridge between developing practice and existing knowledge. At the heart of her book lies the question of how, or to what extent, violations of ESCR are addressed in international criminal proceedings and transitional justice mechanisms. She criticizes the current marginalization of ESCR abuses in scholarship on international criminal law and bemoans the reality that ‘efforts to address the legacy of widespread human rights abuses display a bias towards civil and political rights’ (at 10). While some have argued for an expansion of international criminal law to account more directly for violations of ESCR,<sup>5</sup> Schmid claims such an expansion is unnecessary; in her view, such violations already fall within the scope of international crimes (at 331).

The book is divided into nine chapters, which can be roughly divided into three parts. Schmid uses the first two chapters following the introduction (2–3) to develop a theoretical framework for reading ESCR into international criminal law, to unsettle the idea that international criminal law is limited to civil and political rights and to elaborate on both key concepts and international legal obligations of ESCR as a legal field. The next four chapters (4–7) apply the resulting theoretical apparatus to particular areas of international law. The last two chapters (8–9) seek to

<sup>1</sup> See, e.g., Dennis and Stewart, ‘Justiciability of ESCR’, 98(3) *American Journal of International Law* (2004) 462.

<sup>2</sup> Ocheje, ‘Refocusing International Law on the Quest for Accountability in Africa: the Case against “Other” Impunity’, 15(4) *Leiden Journal of International Law* (2002) 749. Rome Statute on the International Criminal Court 1998, 2187 UNTS 90.

<sup>3</sup> S. Leckie and C. Huggins, *Conflict and Housing, Land and Property Rights* (2011), at 237; Miller, ‘Effects of Invisibility’, 2 *International Journal of Transitional Justice* (2008) 266; Roht-Arriaza, ‘Reparations and Economic and Social Rights’, in D. Sharp (ed.), *Justice and Economic Violence in Transition* (2013) 109.

<sup>4</sup> One of the few exceptions is G. Giacca, *Economic, Social and Cultural Rights in Armed Conflict* (2014).

<sup>5</sup> Skogly, ‘Crimes against Humanity – Revisited: Is There a Role for Economic and Social Rights?’, 5(1) *International Journal for Human Rights* (2001) 58.

connect these interpretations to broader questions in international law and international legal research.

Schmid's thesis is grounded in opposition to the traditional view that ascribes ESCR a relatively orphaned role in human rights law. She begins the substantive analysis, in Chapter 2, by revisiting the evidence against this view. For one, she points out how national and international case law and practice of transitional justice mechanisms have all clarified the normative content of ESC rights and the importance of all international obligations contained in human rights law instruments. The growing importance of ESCR, however, is also a result of the development of international criminal law itself.

With that perspective developed, Chapters 4 to 6 take up the task of re-reading three international crimes in light of ESCR: crimes against humanity, war crimes and genocide. In Chapter 4, Schmid uses a number of judgments from international tribunals to illustrate how violations of ESCR may constitute crimes against humanity. Typical of the approach is her analysis of a 2014 judgment of the Extraordinary Chamber in the Courts of Cambodia (ECCC). In this case, the Trial Chamber convicted the accused for forcibly transferring at least two million people, of which between 2,000 and 20,000 died due to food shortages, absence of water, medical care, accommodation and transportation (at 109). The Chamber rejected the defence's argument that a prohibition of forced transfer did not form part of customary international law at the time of the events between 1975 and 1979 and discarded the argument that food shortages and economic conditions in Phnom Penh justified forcible transfer.

Another illustration of the possible overlaps between the violations of ESCR and the crimes against humanity is provided by the allegations concerning Myanmar. Numerous reports submitted by non-governmental organizations (NGOs) documented that economic and social rights of the Rohingyas, a minority in Myanmar, were being grossly violated, especially rights related to just and favourable conditions of work. In 2006, the International Labour Organization's Governing Body recommended that the UN Security Council refer the situation to the International Criminal Court, on the basis of a preliminary conclusion that crimes against humanity had been committed (at 113). In the case of North Korea, the UN Inquiry Commission extensively documented the deliberate starvation and deprivation of detainees in political prison camps and concluded that these amounted to torture as a crime against humanity (at 158).<sup>6</sup> A final example worth mentioning is the UN Fact-Finding Mission on the Gaza Conflict, which concluded that 'the series of acts that deprive Palestinians in the Gaza Strip of their means of sustenance ... and water could lead a competent court to find that the crime of persecution, a crime against humanity, has been committed' (at 125).<sup>7</sup> This practice supports an important point made by Schmid, namely that transitional justice mechanisms such as inquiry commissions can find that an international crime has occurred, without identifying individual perpetrators and without examining specific requirements such as the criteria of the *mens rea*.

In Chapter 5, Schmid focuses on the ways in which violations of ESCR can ground war crimes.<sup>8</sup> The case of crimes against property illustrates the strength of her analysis (at 189–198). Excessive destruction and appropriation of protected property not justified by military

<sup>6</sup> North Korea Inquiry Commission, Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, Doc. A/HRC/25/CRP.1, 7 February 2014, para.1053.

<sup>7</sup> Final Report of the UN Fact Finding Mission on the Gaza Conflict, Doc. A/HRC/12/248, 15 September 2009, para. 1733.

<sup>8</sup> Schmid considers four groups of war crimes: war crimes against persons, war crimes against property, war crimes consisting in the use of prohibited methods of warfare, and war crimes consisting in the use of prohibited means of warfare.

necessity is a war crime both in international and non-international armed conflict. In an occupied territory, Geneva Convention IV also prohibits destruction of property belonging to private or public authorities (Articles 53 and 147).<sup>9</sup> Moreover, the Hague Regulations of 1907 require occupying authorities to exercise their powers in the interest, including the socio-economic well-being, of the population living in the territory (Article 43).<sup>10</sup> Failure to comply with this rule can lead to a conviction for war crimes. The destruction and appropriation of civilian property has serious consequences for the enjoyment of ESCR and may be related to the violation of ESCR rights such as the right to an adequate standard of living, including the right to housing. An illustration is provided by the UN Fact-Finding Mission in Gaza, which reported on the destruction of water installations, sewage treatment, housing and other properties without military justification. The Mission concluded that the destruction amounted to war crimes and simultaneously violated human rights provisions such as the right to an adequate standard of living and housing rights (at 195–196).

Chapter 6 deals with genocide and its connection with violations of ESCR. As Schmid emphasizes, genocide need not be perpetrated through acts of direct violence or ‘immediate physical destruction’: the deprivation of food, water, clothing, proper housing or hygiene or the imposition of excessive work may each constitute a genocidal policy. There is no doubt that such deprivations can constitute the *actus reus* of the crime of genocide. The International Criminal Court (ICC) has confirmed, for example, that serious violations of the right to water through the contamination and destruction of water pumps can fall within the genocide definition.<sup>11</sup> The more difficult question addressed by Schmid is the degree to which ESCR violations can provide evidence of genocidal intent. A finding of genocide requires the inference that actions have been undertaken as part of a policy aimed at the annihilation of a specific group of people.

In the *Akayesu* case, it was accepted that such intent ‘can be inferred from a certain number of presumptions of facts’, as where ‘the general context of the perpetration of other culpable acts systematically directed against the same group, [or] the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups’.<sup>12</sup> Schmid admits that establishing genocidal intent will be easier where a population is targeted for execution than in cases where a perpetrator calculates to slowly inflict ESCR violations that will ultimately lead to a group’s destruction (at 225). Yet she quite rightly contends that, these evidentiary issues aside, violations of rights to food, water or health are not intrinsically less capable of expressing genocidal intent than more direct violations of the right to life.

Chapter 7 examines a number of other international crimes that may overlap with ESCR violations, considering not only the most familiar examples – slavery, torture and apartheid – but also a number of other wrongs that are defined as criminal by international law. For example, Schmid addresses the case of unlawful movements of hazardous waste (at 266–269), which is defined as criminal under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.<sup>13</sup> In 2006, the Dutch ship *Probo Koala* offloaded significant amounts of toxic waste in Côte d’Ivoire that resulted in 17 deaths and injuries to more than 30,000 others. A Dutch criminal court and an Ivorian court convicted the company and

<sup>9</sup> Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287.

<sup>10</sup> Hague Convention IV on Respecting the Laws and Customs of War on Land and its Annex: Regulation concerning the Laws and Customs of War on Land 1907, 187 CTS 227.

<sup>11</sup> Second Decision on the Prosecution’s Application for a Warrant of Arrest against Al Bashir, *Al Bashir* (ICC-02/05-01/09) Pre-Trial Chamber I, 12 July 2010, paras 34–38.

<sup>12</sup> ICTR, *Prosecutor against Akayesu* (ICTR-96-4-T), Trial Chamber 1, 2 September 1998, para. 523.

<sup>13</sup> Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal 1989, 1673 UNTS 126, Article 4.3.

two employees guilty of the involvement in the dumping of waste. While no court has yet dealt with the possible involvement of Ivorian authorities, in the case that Ivorian government were involved, Côte d'Ivoire would have violated the duty to respect the right to health and other ESCR (at 268).

Chapter 8 turns away from doctrinal questions of international law and toward what Schmid calls the 'corollaries' (or normative consequences) of qualifying ESCR violations as international crimes. In this chapter, the key claim she develops is that international crimes and, thus, violations of ESCR as well, can be prosecuted by a number of institutions, including the ICC, national courts, and truth commissions and that, as a consequence, victims can be afforded reparation. Schmid also explores the liability of non-state actors such as businesses and international organizations. The prohibitions of international criminal law apply to both state and non-state actors and both can through the application of international criminal law be held accountable for violations of ESCR. Finally, Chapter 9 draws the conclusions and points out some areas for further research. For example, Schmid identifies cultural rights as an area that remains marginalized even in the literature on ESCR (at 333).

The book successfully challenges the assumption that violations of ESCR do not have a place in international criminal law. Written with careful attention to the details of case law and practice of non- or quasi-judicial mechanisms, and informed by a strong position that ESCR violations properly fall within the ambit of international criminal law, the book weaves together a large amount of material in a very readable way, providing insight on both international criminal law and human rights law in the process. According to Schmid, despite their hesitation to consider ESCR violations in criminal proceedings, prosecutors, lawyers, NGOs and judges must address violations of ESCR in the same way they consider violations of civil and political rights.

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Lauri Mälksoo. **Russian Approaches to International Law**. Oxford: Oxford University Press, 2015. Pp. 240. £60. ISBN: 9780198723042.

Modern international law of the 21st century seems to be characterized by a farewell to the Westphalian understanding of state sovereignty, by the empowerment of the individual and by transnational solutions to common problems in a globalized world. This overview, however, is not true for Russian international law. The 'powerful idea of Russia's civilizational distinctness from the West' is underlying the post-Soviet practice in international law (at 190). This is the main thesis of Lauri Mälksoo's study on 'Russian approaches to international law'. Russia was different, Russia is different and Russia is proud of being different.

The author explains this thesis on the basis of a cultural–historical approach going back to the culture of late medieval Muscovy. Referring to the semiotician Yuri Lotman and the historian Richard Pipes, he takes up the idea that Russian culture 'was not contractual but instead was based on explicitly non-contractual values' and 'lacked the tradition of reciprocity' (at 33). He finds this line of reasoning confirmed by writings of present-day Russian internationalists such as Insur Farkhutdinov and quotes his sceptical remark: 'All national systems recognize the principle *pacta sunt servanda* as such but they recognize it differently'