VI. The impact of the economic crisis on human rights in Europe and the accountability of international institutions
Part 1: The impact of the economic crisis on human rights in Europe and the accountability of international institutions

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"Many countries in the west seem to be doing their best to go straight into the mouth of a fairly hefty snake [...] austerity measures in Europe are a spiralling catastrophe".¹

Introduction

The impact of the global financial and economic crisis of 2008 has been felt throughout the world in varying degrees. In Europe, and in particular in the Eurozone, it has taken on a particular form, with the 'debt crisis' dominating the news as the crisis continues to unfold in the region. The quest for instruments to address the sovereign debt crisis in Europe have led to a significant transformation of the EU constitutional order.² The resulting dynamics of debt conditionalities in the European Monetary Union have given rise to a thick web of institutions, pressures and conflicting legal obligations in which EU Member States are embroiled, while attempting to unravel their financial and macroeconomic policies. Most European States have thereby adopted austerity measures, often as a direct result of loan conditionalities imposed by international financial institutions.

The austerity measures adopted by European States have been criticized not only for being ineffective at stimulating economic growth,³ but also for their severe impact on a number of international human rights standards, particularly in the area of economic and social rights, while also affecting a number of civil and political rights. The human rights impact of austerity measures in affected European countries has been widely documented by international and regional bodies and by scholars working in the area.⁴ In particular the regressive implementation of social rights resulting from public spending cuts, and the disproportionate effects of the austerity measures on the most vulnerable and marginalized segments of the

¹ Amartya Sen, in 'Nobel economist blasts Europe’s austerity plans', FT 14 December 2011, available at http://www.ft.com/intl/cms/s/0/00a8b866-265c-11e1-85fb-00144feabde0.html#axzz3YpEn4ISQ
population, have compounded pre-existing patterns of discrimination in the political as well as the social and economic sphere.\textsuperscript{5}

The present paper will start by documenting the impact of austerity measures adopted by European states on human rights standards, with a particular emphasis on the cases of those Eurozone States in bailouts. It will then turn to the debates about the effectiveness of austerity measures as a policy for economic recovery in Europe as well as a tool for human rights protection. The second part of the paper will investigate the role of international institutions in the austerity measures in Europe, and the institutional framework underlying the bail-out measures in the Eurozone, with a particular emphasis on the European Stability Mechanism (ESM), now established as a permanent crisis resolution mechanism. In this context the paper will expose a number of problems linked to the absence of accountability of the ESM, including its democratic deficit, technocratic rule and lack of transparency. At the heart of the paper lies the question of the degree of autonomy left to states in the context of austerity measures and whether a certain degree of responsibility for the human rights violations resulting from the measures may be attributed directly to the institutions driving the conditionality agenda. The question of the accountability of the international institutions under European human rights law will only be raised in Part 2. The main legal framework will be international law, both international human rights law, as well as international institutional law, which is still lagging behind in terms of direct accountability of international organizations for human rights violations, but remains a rich and useful field from which to derive a number of conclusions about the human rights responsibility of international institutions. The paper will conclude with a number of recommendations aimed directly at the international institutions in their imposition of austerity measures.

\textbf{Austerity measures in the Eurozone}

\textit{Europeans are living through the deepest economic recession since the Second World War. What began as a meltdown of the global financial system in 2008 has been transformed into a new political reality of austerity which threatens over six decades of social solidarity and expanding human rights protection across Council of Europe member states.}\textsuperscript{6}

The global financial crisis hit the world in 2008 with the well-known story of the collapse of the US sub-prime mortgage market, bank bailouts and mass unemployment. What


resulted in Europe was also a deep and in many ways unprecedented economic crisis, which after 2010 took on the particular form of the ‘debt crisis’. The sovereign debt crisis began in Greece and then rapidly spread to other Eurozone economies, as the factual interdependence of the participating economies in the monetary union triggered a domino effect in the Eurozone.\(^7\)

In the second stage of the financial crisis, European States started to implement austerity measures to combat their budget deficits which had increased dramatically as a result of the earlier stage of the crisis and the policy response to it, including financial sector bailouts.\(^8\)

Austerity measures adopted by European States as a result of the crisis have generally included severe cuts in public social spending, social security benefits and social protection programs including pension schemes and labour market reforms and deregulation.\(^9\) Coupled with selective tax increases and the privatization of public services, these measures have been seen as the only answer to boosting competitiveness and increased revenue generation.\(^10\) While the range and impact of the austerity measures has differed across Europe,\(^11\) their scale has been unprecedented and has affected a wide sector of the European population.\(^12\)

If the trend towards fiscal austerity is today global,\(^13\) in a number of Eurozone states it has taken on a particular form, as strict conditionality in return for financial assistance. In fact, the most sweeping austerity measures have been introduced in those European countries most enmeshed in the Eurozone debt crisis, which received emergency loans and financial 'bail-outs' subject to strict conditionality by the creditor States and institutions. As O’Cinneide put it, comparing post crisis austerity measures with those already present in pre-crisis Europe:

"In Greece, Spain and the other States which have been forced to introduce sweeping austerity measures in return for receiving support from the IMF and other European governments, the impact of

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\(^7\) Anastasia Poulou, ‘Austerity and European Social Rights’, 1145.


\(^12\) As noted by Colin Crouch: "[...] the continuing destabilising influence of European policies on national welfare states are leaving middle income and lower-income families exposed to a new intensification of uncertainty. The search for flexicurity has been blown off course.", ‘Entrenching Neo-liberalism’, in Nicola Countouris and Mark Freedland (Eds.), Resocialising Europe in a Time of Crisis, (Cambridge University Press 2013), 41.

\(^13\) Isabel Ortiz, Jingqin Chai and Matthew Cummins, Austerity Measures Threaten Children and Poor Households: Recent Evidence in Public Expenditures from 128 Developing Countries, United Nations Children’s Fund (UNICEF) (New York, 2011).
these measures has been devastating: substantial damage has been caused to the socio-economic fabric of these States, and their systems of social protection have come under unprecedented pressure.14

Greece's sovereign debt and its near financial collapse in 2010, led to a number measures for financial support agreed by the Eurozone member States in collaboration with the International Monetary Fund (IMF). Immediately after Greece received the first Eurozone sovereign debt assistance,15 EU member States decided to set up two temporary assistance mechanisms to provide future loans: the European Financial Stability Mechanism (EFSM) and the European Financial Stability Facility (EFSF).16 While the EFSM was set up under EU law by a European Council regulation,17 the EFSF was set up as an international agreement between Eurozone States, outside the EU legal framework. Similarly the ESM - the permanent crisis resolution mechanism that has now replaced both previous schemes and remains as the sole mechanism to provide financial assistance to Eurozone member States - was also set up as an international agreement outside the EU legal framework.

A number of countries aside from Greece have received 'bail-outs' or different forms of loan assistance under these mechanisms, including Cyprus, Hungary, Ireland, Latvia, Portugal, Romania and Spain.18 Common to all financial assistance programmes was the imposition of strict conditionality, by which loans were made dependent on the recipient State meeting a number of economic targets regarding public spending. Austerity measures and structural reform were implemented on the basis of detailed Memoranda of Understanding (MoUs), containing specific timetables to which the States had to adhere in order to receive the agreed credit tranches.19 While the drivers of austerity remained EU member States, the MoUs were agreed with the recipient State by the so called 'Troika', made up of the European Commission, the European Central Bank and the IMF. The economic targets prescribed by the MoUs have generally focused on cuts to public spending, accompanied by fairly detailed prescriptions on how to implement them.20 As explained by Ioannidis, while their "intrusiveness and the number of their conditions vary, they generally do not only require fiscal consolidation, but also

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14 Colm O’Cinneide, 'Austerity and the faded dream of a social Europe', 185.
15 80 billion Euro from a number of Eurozone States and 30 billion Euro from the IMF. See http://ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/index_en.htm
16 See http://ec.europa.eu/economy_finance/eu_borrower/efsm/index_en.htm
18 See http://ec.europa.eu/economy_finance/assistance_eu_ms/index_en.htm
19 Andreas Fischer-Lescano, Human Rights in Times of Austerity Policy: The EU institutions and the conclusion of Memoranda of Understanding. Legal opinion commissioned by the Chamber of Labour, Vienna 2014. Other key documents also detailed conditionality, including ‘secret letters’.
structural reforms of public administration, pension, education, and tax systems."^{21} Measures have ranged from wage moderation and the decentralization of collective bargaining, to cuts in social security benefits and reforms in public healthcare. By way of example, the Portuguese and the second Greek adjustment programmes went as far as to prescribe the reduction of pharmaceutical spending and the reallocation of human resources in the healthcare sector.^{22}

Loan conditionalities have thereby given the EU bodies (and other organizations) an unprecedented opportunity to interfere in the financial and macroeconomic policies of Member States. Also, it is well known that such measures have been far reaching and had a profound effect on the social fabric of member states. It is therefore not surprising that austerity measures have had such a broad human rights impact. As recognised by the Managing Director of the ESM, Klaus Regling in January 2015, in an address about Portugal:

"I do know that for many Portuguese the past years were painful. Salaries and pensions were cut, public expenditure was reduced, and many lost their jobs. I am fully aware that this was a traumatic period for Portugal and that many still feel it today."^{23}

**The human rights implications of the austerity measures in Europe**

The human rights impact of the 2008 global financial crisis was visible from its very first stages, with 27 million jobs estimated to have been lost due to the crisis by 2012,^{24} and the undermining of the right to work affecting disproportionately the most vulnerable sectors of the population: women, youth, minorities, migrants and people with disabilities.^{25}

Another wave of human rights impacts deriving from the global financial crisis can be attributable directly to government policies in the form of fiscal austerity, as well as the conditionality set by creditor institutions, a global trend that as we have seen has taken on a particular form in the Eurozone area as a result of the regional sovereign debt crisis.^{26} The human rights impact of austerity measures in Europe has now been widely documented by

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^{22} Anastasia Poulou, 'Austerity and European Social Rights', 1147.

^{23} “Let me recall”, he continues, "that our financial assistance actually helped to ease the pain.” What have we learned from the global crisis?”, Klaus Regling, "What have we learned from the crisis?", *Diario Economico Conference*, Lisbon 12 January 2015.


^{25} Sally-Anne Way, Nicholas Luisiani, and Ignacio Saiz, ‘Economic and Social Rights in the Great Recession’.

^{26} Ibid., 89.
European institutions and human rights mechanisms, UN human rights bodies and mechanisms, and legal scholars. Austerity measures have also been subject to legal challenges in domestic and regional courts. While social and economic rights are the most obvious category to have suffered setbacks as a result of austerity measures, there is no doubt that the most vulnerable sections of the population have suffered disproportionately as a result of the budget cuts and a number of civil and political rights have also been affected. As is well known, Eurozone States are subject to a variety of human rights obligations, deriving from their membership in EU and the Council of Europe, as well as their obligations under international human rights law. While the findings about the human rights impact of the crisis presented below apply to numerous European countries post 2010, particular attention is paid to countries which received financial assistance subject to conditionality, and the reaction they received from UN human rights mechanisms.

The right to work is the first and most obvious victim of the economic crisis and the austerity policies in Europe. Following the introduction of austerity measures, unemployment levels in the Eurozone reached record levels, with the highest unemployment levels as of February 2015 persisting in Greece (26.0 % in December 2014) and Spain (23.2 %). This has had a disproportionate effect on vulnerable sectors of the population. As noted by the UN CESCR in 2012 with regard to Spain:

"The Committee is concerned, particularly in the context of the economic and financial crisis, about the constant rise in unemployment rates, which negatively affects a large proportion of the population of the State party, especially young persons, immigrants, gypsies and persons with disabilities, and increases their vulnerability (art. 2, para. 2 and art 6)."

Tied in with the right to work are a series of labour rights, including the rights to fair remuneration, to collective bargaining and to safe and healthy working conditions, which were often central targets of austerity measures. The principle aim was to deregulate the labour

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28 Inter alia, the Office of the High Commissioner for Human Rights, a number of Special Procedures mandate holders, and a number of UN Treaty Bodies.
29 Claire Kilpatrick and Bruno De Witte (Eds.) Social Rights in Times of Crisis in the Eurozone; see also annex on Council of Europe jurisprudence.
30 See also, ILO, World of Work Report 2013: Repairing the economic and social fabric: European Union Snapshot, 2013
32 Spain, UN Doc. E/C.12/ESP/CO/5 (6 June 2012)
market, with a range of measures and changes in legislation actively promoted by the Troika in a number of countries, including the reduction in notification period for dismissal and its compensation, collective redundancies, flexible forms of employment and short-term contracts for young workers.34

Similarly, linked to 'Troika-led' fiscal consolidation restrictions on social security benefits and cuts to health and education provisions,35 numerous other ESC rights were affected. These have included the right to social security, to an adequate standard of living, food, water and housing. While in Ireland fees for domestic water use were introduced as a condition for financial assistance, homelessness has increased significantly in a number of countries affected by the crisis.36 In 2011, the UN independent expert on the question of human rights and extreme poverty, after her country visit to Ireland expressed concern about many of the recovery measures proposed and pursued in successive budgets and recovery plans, as a direct result of loan conditionalities.37 Her recommendations are stern and clear:

"While human rights do not dictate exactly what policy and budgetary measures States should pursue, such measures must comply with States’ international human rights obligations. Human rights are not a policy option, dispensable during times of economic hardship".38

Similarly in 2014 the CESCIR expressed its concern in relation to Portugal:

"The Committee is concerned that the benefits that are based on the social support index (‘Indexante de Apoios Sociais’), which was frozen in recent years as part of austerity measures, as well as the minimum amount of sickness benefit, are not sufficient to provide recipients and their families with a decent standard of living, affecting in particular the most disadvantaged individuals and groups".39

The right to health and education have also suffered significantly as a result of the austerity measures, in which loan conditionalities often explicitly recommended spending cuts in these areas. By way of example in 2014 the UN independent expert on foreign debt found that since the adoption of the stabilization programme, in the Latvian education sector the student/teacher ratio had worsened and the number of available institutions in the education

36 Council of Europe, Safeguarding Human Rights in Times of Economic Crisis, 19.
37 UN Doc. A/HRC/17/34/Add.2, 7.
38 Ibid.
sector had decreased.\textsuperscript{40} With respect to the right to health it may suffice to note here that there is a growing concern in the field of health care social policy regarding the implications of austerity measures on health care systems in bailout countries:\textsuperscript{41}

"An overambitious language characterises the bailout agreements and the successive revision documents. The set targets range from very detailed measures concerning, among other things, budgetary and staffing cuts, hospital closures, system governance and price regulation of pharmaceutical markets, to rather vague objectives, such as modernising healthcare."\textsuperscript{42}

Moreover, a number of civil and political rights have also suffered as a result of austerity measures, including the right to participate in public affairs, with a clear lack of avenues for participation in national-level decision making, and compounded by the clear lack of transparency through the provision of timely, accessible and relevant information.\textsuperscript{43} The issues of democratic deficit and lack of transparency will be returned to below in relation to the ESM mechanisms, but there is no doubt that regular channels for participation have been sidestepped under the current economic climate. This in turn has given rise to waves of demonstrations, particularly in Spain, Greece and Portugal, as well as a number of disproportionate reactions to them, which in turn limited the right to freedom of expression and assembly.\textsuperscript{44} Media freedoms have also suffered setbacks in a number of countries, especially in Greece where the shutdown of the public broadcaster in the name of austerity measures poses a number of challenges for freedom of speech and media pluralism, leaving Greek citizens dependent on the private media sector for the provision of information, entertainment and education.\textsuperscript{45}

Finally when looking at the human rights impact of austerity measures in these years, one cannot ignore the disproportionate effects on vulnerable sectors including women, children, older persons, migrants, minorities, persons with disabilities and many more. This bears an increased risk of social marginalisation and exclusion of groups already at risk.\textsuperscript{46} For instance, in 2012 the UN High Commissioner for Human Rights noted that:

"There is growing evidence that budget cuts are affecting persons with disabilities in a particularly harsh way. [I]t would be a tragic irony if the ratification of the CRPD [Convention on the

\begin{itemize}
  \item \textsuperscript{40} A/HRC/23/37/Add.1, 16.
  \item \textsuperscript{42} Maria Petmesidou, Emmanuele Pavolini and Ana Guillén, 'South European Healthcare Systems under Harsh Austerity: A Progress–Regression Mix?', in \textit{South European Society and Politics}, Volume 19(3), 2014.
  \item \textsuperscript{43} Council of Europe, \textit{Safeguarding Human Rights in Times of Economic Crisis}, 21.
  \item \textsuperscript{44} Ibid.
  \item \textsuperscript{45} Petros Iosifidis and Irini Katsirea, 'Public Service Broadcasting in Greece in the Era of Austerity', EUI RSCAS 2014/42, 1.
  \item \textsuperscript{46} European Union Agency for Fundamental Rights, \textit{The European Union as a Community of values}, 11.
\end{itemize}
rights of persons with disabilities] by EU Member States were to coincide with a dramatic decrease of the enjoyment of rights laid down in that very Convention.”

The 'ideology' and effectiveness of austerity measures

When discussing the human rights impact of austerity measures, the standard response is straightforward and undoubtedly one that begs the question: put in very simple terms, proponents of austerity measures argue that when faced with the current crisis, the only viable option is austerity and the situation would be worse if austerity measures were not in place. As put by Klaus Regling, managing director of the ESM, in response to a question about the human rights impact of his organization:

"It is quite common to criticise the impact that these adjustment programmes have on the population. But I am convinced that without these programmes and without our financing, the pain would have been worse because what we do with our financing in Europe - like the IMF internationally - is to ease the pain. The pain comes from the fact that economic policies went in the wrong direction before. That created a crisis and in response to the crisis some things had to be adjusted and that created a painful process. If the EFSF or the ESM or the IMF did not provide emergency financing at a time when a government loses access to the markets, the pain would have been worse and the adjustment would have been brutal and much faster.”

Thus, the argument in favour of austerity is simple: austerity will stabilise the economy. It is a form of voluntary deflation, through cutting the State’s budget debt and deficits that will boost competitiveness, and will restore the confidence of businesses. Similarly, the common view is that economic success will depend on the willingness of policy-makers to expose labour to market forces, and on "the 'crowding in' of private investment as government spending falls.” There is no doubt that in Europe the belief that budget consolidation is more likely to succeed through spending cuts, as opposed to increases in revenues, appears unshakable.

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50 Colin Crouch, ‘Entrenching Neo-liberalism’, 44.
52 Ibid. Similarly Mary Dowell-Jones notes: "The choice facing industrialized countries now is not human rights versus austerity, but austerity that can hopefully be implemented in such a way as to minimize the inevitable negative social, human rights, and economic impacts”. In The Sovereign Bond Markets and Socio-Economic Rights, in Eibe Riedel, Gilles Giacca and Christophe Golay (Eds.) Economic, Social, and Cultural Rights in International Law, (Oxford University Press 2014), 64.
In relation to human rights, this implies a utilitarian argument, which is not new in the field of economic social and cultural rights, and infers that cutting back on some economic and social rights and the rights of some will be better for everyone in the long run. Failing to do so would lead to further deficit and debts, and potentially to another crisis in which economic and social rights are denied and infringed even more severely.\textsuperscript{53} Another more nuanced argument put forward by some commentators, regards inter-generational rights and the sustainability of socio-economic rights protection. Dowell-Jones argues that States may in fact have breached their obligations under ICESCR and, by going beyond their 'maximum available resources' - prescribed in Article 2(1) - to fund their welfare states:

"[...] in persistently using the sovereign bond markets to fund growing public sector spending on services linked to the rights guaranteed by the ICESCR and extending future claims without an adequate plan for funding them, state parties have potentially breached Article 2(1) by going beyond the 'maximum available resources'. In doing so they have effectively mortgaged the rights of future generations to enjoy their socio-economic rights in order to satisfy the socio-economic rights of the current generation, as the debt will have to be repaid by future taxpayers."\textsuperscript{54}

Such an argument, of course, is counterintuitive to, and contradicts, the underlying policy goals and values expressly guaranteed in the ICESCR. Also, “maximum resources” is a mechanism, not a right, so its definition can never constitute an infringement or violation of the Covenant.

While austerity arguments are presented as unavoidable, critics of austerity measures in Europe come from different circles, and commentators putting forward different points of view are on the increase.\textsuperscript{55} The first line of argument is, of course, the complete and categorical disregard of entrenched social and economic rights, and the idea of a 'social Europe'.\textsuperscript{56} Closely related is the second widespread criticism of austerity measures as representing a specific approach to political economy, and ultimately being a reflection of neoliberal ideology, favouring free markets and a limited role for the State. O'Connell takes this further by arguing that the undermining of social and economic rights resulting from austerity is not an exception.

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\textsuperscript{54} Ibid.
\textsuperscript{56} Margot Solomon, ‘Of Austerity, Human Rights and International Institutions’, European Law Journal 4 (2015, forthcoming), LSE Law, Society and Economy Working Papers 2/2015, 25; Colm O’Cinneide, ‘Austerity and the faded dream of a social Europe’, 186 (Although he emphasises that austerity is best understood as a continuation with exiting policy trends of the last few decades that have gradually been eating away at Europe’s welfare state).
\end{flushright}
but the rule in the current socio-economic order. The denial of economic and social rights, is in his view, inherent in the current forms of neoliberal capitalism, and the current age of austerity is just one step further in the neoliberal entrenchment on which "the alleged fiscal profligacy is used as a device to further strengthen the position of global economic elites and immiserate the poor and working classes of the world." There is no doubt that the ideology of free markets and neo-liberal capitalism remains dominant in Europe, despite the economic crisis having exposed, at least for some, "the bankruptcy of values by which we have chosen to order our societies." Linked to this is a third argument criticising, within the framework of austerity, one of the general narratives that is emerging in the context of the crisis, a narrative that we have reached this stage due to irresponsible government fiscal policy, rather than the consequences of unregulated financial markets. This may be true for some countries where high levels of debt pre-dated the crisis (Greece and to a smaller degree Portugal), but not for all European countries implementing austerity policies. One must not forget that current austerity policies are most often the result of debt incurred from bank bail-outs and from injecting liquidity into the financial system, as well as, of course, an indirect cause of the broader financial crisis, which in turn has its own set of well-known causes. As a result of what Krugman calls Europe's "Big Delusion", the European crisis is often "couched in moral terms: nations are in trouble because they have sinned, and they must redeem themselves through suffering".

Moreover, tracing the history of austerity back to ancient Greece, Schui has argued that contrary to conventional wisdom, debates about austerity do not evolve mainly on economic rationales. While the above brief excursus is a case in point, there is no doubt that the most powerful arguments against austerity measures are ones addressing the effectiveness of austerity policies from an economic perspective. Krugman, Nobel Prize Winner in economics, is one of the advocates of this position, arguing that austerity measures have drastically failed and had disastrous effects throughout the world. Similarly, the Commission of Experts on

57 Paul O'Connell, 'Let Them Eat Cake: Socio-Economic Rights in an Age of Austerity', in Aoife Nolan, Rory O'Connell and Colin Harvey (Eds.), Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights, 70.
58 Paul O'Connell, 'Let Them Eat Cake', 72.
60 See Paul Krugman, End This Depression Now!, Norton 2010.
61 Sally-Anne Way, Nicholas Luisiani, and Ignacio Saiz, 'Economic and Social Rights in the Great Recession', 89.
62 Which he counterposes to the 'Big Lie' about America's crisis, see Paul Krugman, End This Depression Now!, 177.
63 Ibid., 179.
65 Paul Krugman, End This Depression Now!
Reforms of the International Monetary and Financial System, created by the UN General Assembly and chaired by Nobel Prize Winner Joseph Stiglitz, came to similar conclusions and predictions. In 2012 the London based National Institute of Economic and Social Research found that the fiscal consolidation policies pursued by EU countries "have had perverse and damaging effects". Their findings suggested that the measures had not only resulted in a substantially larger negative impact on growth than expected, but that they had actually raised debt to GDP ratios. In other words, had the policies not been introduced, they argue, growth would have been higher and debt lower. "It is ironic" — they conclude — "that, given that the EU was set up in part to avoid coordination failures in economic policy, it should deliver the exact opposite". And in 2013 a Research Paper published by the IMF found that "in advanced economies, stronger planned fiscal consolidation has been associated with lower growth than expected, with the relation being particularly strong, both statistically and economically, early in the crisis". While these are complex economic debates which go beyond the scope of this paper, it is important to note that the evidence from economics, too, is not one-sided and the ranks in favour of austerity may be breaking. This goes against the view that "[t]he proponents of austerity are often cast as hard-nosed economic experts who advocate unpleasant but necessary measures […]. Opponents of austerity, on the other hand, are often perceived as well meaning but ultimately naïve". While it may sound like textbook economics to say that austerity policies that deprive citizens of even basic level of economic rights can be counterproductive because they deprive the economy of the "floor of dynamism it needs to function", some commentators remain adamant that austerity is "not working".

The relevant legal framework

There is no doubt that in the Eurozone countries subject to austerity measures the existing norms, processes and regulatory framework have failed to facilitate, and have at times frustrated, the protection and promotion of human rights norms, as detailed above. The financial crisis and the sovereign debt crisis have also raised serious legal issues, with different areas of

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68 Ibid., 9.
70 Florian Schui, Austerity, 4.
71 Dowell-Jones, 'The Sovereign Bond Markets and Socio-Economic Rights', 82.
72 Mark Blyth, Austerity, 4.
law - from international and regional human rights norms, EU law, constitutional law, financial
regulation, taxation law, and more - coming face to face with each other and raising a series of
unprecedented legal questions. While the complexity and fragmentation of the competing
obligations have come to surface, often the inadequacy of the international legal framework has
also emerged as a result. As Ringe and Huber put it:

"[...] the financial crisis has dramatically demonstrated the limits of legal rules. Countries are bailed
out despite strong constitutional concerns. The ECB is forced to bow to economic pressure despite
observing its strict legal mandate. Sovereign countries contractually promise to limit their own
possibility to raise debt and subject themselves to external court control to that end, although we expect
that this will be a political test rather than the strict legal standard."

In this context five different legal mechanisms have been created to provide financial
assistance to EU Member States (i.e. balance of payments loans for non-Eurozone states;
bilateral loans between states; the EFSM; the EFSF; and the ESM), combined with a 'general
overhaul of EU macro-economic governance', through the 2012 Fiscal Compact Treaty, and the
Six-Pack and successive Two-Pack of EU legislation. The following section will focus
exclusively on the bailout measures for Eurozone states that go beyond bilateral agreements, as
they have been highly problematic for their human rights implications, as well as raising very
complex legal questions, including in the realm of international institutional law. The central
argument will focus on the ESM, as the only remaining permanent bailout mechanism.

The creation of the EFSF, the EFSM and the ESM have raised complex legal questions
under international and EU law. As mentioned above, the EFSM was created under EU law in
2010 by a European Council Regulation, as an emergency funding program, guaranteed by
the European Commission and backed by all EU Member States. This is different from the
EFSF and the ESM, which were created as autonomous international organizations. The EFSF
was also created as a temporary crisis resolution mechanism in 2010, but this time only by the
Euro area Member States. Both mechanisms have now been substituted by the ESM, created

73 They continue, "And finally, bank resolution attempts above all introduce a 'credible' legal framework for
dealing with large banks, knowing that many legal rules only exist in the books and fail to be applied in practice".
Wolf-Georg Ringe and Peter M Huber, Legal Challenges in the Global Financial Crisis: Bail-outs, the Euro and
Regulation, (Hart 2014), 4.
74 Namely balance of payments loans for non-Eurozone states; bilateral loans between states; the EFSM; the
EFSF; and the ESM, which are further explained below. See Claire Kilpatrick, 'On the Rule of Law and
Studies (2015), 12.
75 Ibid., 13.
mechanism.
77 See http://ec.europa.eu/economy_finance/eu_borrower/efsm/index_en.htm
78 http://www.esf.europa.eu/about/index.htm
in 2012 as a permanent crisis resolution mechanism for the countries of the Euro area, which also stands as a separate international organization, whose shareholders are the 19 Euro area Member States, based in Luxembourg and with approximately 140 members of staff.\textsuperscript{79} The ESM is therefore not a body of the European Union, and is to provide stability support under strict conditionality of a macroeconomic adjustment programme or the obligation continuously to respect pre-established eligibility conditions.\textsuperscript{80} Leaving aside for the time being the complex legal question of whether the establishment of the ESM was compatible with EU law,\textsuperscript{81} several questions arise under international and EU law about the legal accountability of the ESM as an international organization dictating macro-economic policy with serious implications for international human rights standards, and the role played in this regard by the ‘Troika’ in negotiating with the concerned ESM member the relevant MoUs detailing the conditionality attached to the financial assistance. If the recently established ESM is to take decisions on policy with human rights implications, a brief excursus into its functioning and decision making is essential in order to attribute responsibility and draw out accountability for its human rights impact.

The ESM is governed by a Board of Governors and a Board of Directors, who have full decision making powers and also appoint a Managing Director.\textsuperscript{82} The Board of Governors, is formally the main decision-making body of the ESM, composed of Governors appointed by each Member State, who must be members of the government with responsibility for finance,\textsuperscript{83} and in practice coincide with the Ministers of Finance of each Eurozone state. The voting rights of each ESM Member are equal to the number of shares allocated to it,\textsuperscript{84} in practice giving three States the right to veto (Germany, France, Italy).\textsuperscript{85} A few commentators have written in detail about the lack of democratic legitimacy of the ESM decision making structure and its accountability in the domestic political realm.\textsuperscript{86} Serious questions have been raised due to confidentiality clauses and far-reaching immunity provisions in the ESM Treaty, which ”make for an additional obstacle to national parliamentary control and hamper public control by civil

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\textsuperscript{79} http://www.esm.europa.eu/index.htm
\textsuperscript{80} Treaty Establishing the European Stability Mechanism (ESMT), 2 February 2012.
\textsuperscript{81} This question is returned to in Part 2. See also Case C-370/12 Pringle v Ireland, Judgment (Full Court) of 27 Nov. 2012. (AG Kokott)
\textsuperscript{82} The Managing Director of the ESM is appointed by the Board of Governors for a term of 5 years. The current ESM Managing Director is Klaus Regling, see http://www.esm.europa.eu/about/governance/index.htm.
\textsuperscript{83} ESMT, Article 5(1)
\textsuperscript{84} ESMT, Article 4.7. Shares are allocated on the basis of contributions, see http://www.esm.europa.eu/about/governance/shareholders/index.htm
\textsuperscript{86} Ibid., 402.
society, the media and academia."\(^{87}\) With regard to the State requesting financial assistance, while all States have a right to vote under the ESM Treaty, in practice its power of political self-determination may be significantly limited as a result of having its "back against the wall", \(^{88}\) when requesting financial assistance. And the lack of transparency and accountability poses even greater risks in the case of delegation of decision-making powers to the ESM Board of Directors.\(^{89}\) As put again eloquently by Schwarz:

"In this, democratically speaking, worst case scenario, the strand of input legitimacy continues to shrivel until there is nothing left but a single thread and we must ask ourselves if what’s left will be durable enough to hold the sword of Damocles dangling over Europe’s citizens".\(^{90}\)

Finally, comes the question of delegation of power to other international organizations and bodies which in itself raises a number of questions about legitimacy, accountability and democratic control. As is well known, and was true also of the previous temporary intergovernmental assistance mechanisms, significant power under the ESM is delegated to the 'Troika'. First, the Board of Governors is to:

"entrust the European Commission – in liaison with the ECB and, wherever possible, together with the IMF – with the task of negotiating, with the ESM Member concerned, a memorandum of understanding (an "MoU") detailing the conditionality attached to the financial assistance facility".\(^{91}\)

The European Commission is then tasked with signing the MoU on behalf of the ESM,\(^{92}\) and then "in liaison with the ECB and, wherever possible, together with the IMF",\(^{93}\) it is to monitor compliance with the conditionality attached to the financial assistance facility. As introduced above, given the detailed nature of the MoUs, and the breadth of implications they have caused, these are by no means small tasks. In the eyes of the critics the delegation of such far-reaching power to the European Commission, an independent EU body, as primary negotiator of the MoUs in collaboration with the ECB and the IMF, constitutes just another step away from democratic accountability, towards delegation of authorship to a network of institutions, diffusion of responsibility and 'technocratic rule'.\(^{94}\)

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\(^{87}\) Ibid., 402. See also 32(3) ESMT immunity clauses; and German case FCC, judgment of 12 Sept. 2012, paras. 241, 254–260, available at <www.bundesverfassungsgericht.de/entscheidungen/rs20120912_2bvr139012en.html>

\(^{88}\) Michael Schwarz, 'A Memorandum of Misunderstanding', 392.

\(^{89}\) The possibility of handing over all decision-making powers is envisaged in the ESMT (Article 5(6)).

\(^{90}\) Michael Schwarz, 'A Memorandum of Misunderstanding', 404.

\(^{91}\) ESMT, Article 13.3.

\(^{92}\) ESMT, Article 13.4.

\(^{93}\) ESMT, Article 13.7.

\(^{94}\) Michael Schwarz, 'A Memorandum of Misunderstanding', "the tasks of the ESM are indeed carried out by a broad institutional network comprising a multitude of supranational, international and national actors, which raises numerous questions concerning the substantive authorship of acts formally attributed to the ESM as an
ESM accountability problems

When looking at the ESM through the lenses of the rule of law and democratic governance three interrelated problems emerge: its delegation of authorship to a network of organizations, its delegation to 'experts', and its lack of transparency and accessibility. First, although unprecedented key decisions are being taken about State macro-economic policy through the "backdoor of economic governance",\(^{95}\) and for the first time in the history of European integration, externally dictated policies are having a massive impact on the lives of European citizens and their human rights,\(^{96}\) the responsibility for taking these decisions is so diffuse that it is difficult to impute accountability. Whether the Board of Governors, the Directors, the Troika or the State should be held accountable for setting the conditions for the policies is a key question from the perspective of international human rights law as well as democratic accountability, and the diffusion of responsibility to a network of institutions does not help answer it. A problem already noted in relation to the EU more broadly, and is certainly relevant to this context, is that political authority is too diffuse in Europe, and - if it has evolved top-down as in the present case - this may amount to a democratic problem, just like excessive concentration would.\(^{97}\) Not only are the citizens directly affected by the economic policy decisions unable to participate in any meaningful way, it is difficult for them to even know where the decisions are being taken and by whom. The bailout measures present serious problems for the attribution of responsibility given their complex institutional set up, including the extent of their EU pedigree, given the key role played by EU institutions despite the ESM existing as a separate international organization.\(^{98}\) Even attributing responsibility solely to the Board of Directors, which would overlook the considerable power delegated to the other bodies

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\(^{95}\) Anastasia Poulou, 'Austerity and European Social Rights': "Nevertheless, at this point in the history of European integration, the EU is undertaking a paradigm shift in the field of social policy. Without any formal change of its competences the EU has begun to intrude upon salient areas of domestic social policy, portraying its intervention as an inevitable part of financial condition-setting", 1150.


\(^{98}\) Claire Kilpatrick, 'On the Rule of Law and Economic Emergency'.

including the Troika in negotiating the MoUs, problems would remain. As Elefteriadis has noted with respect to the ESM:

"It is only accountable in a fragmented way. Its decision makers decide for the Eurozone as a whole, but are accountable only to a part of it. So a German minister is accountable to German voters alone, even when they are taking a decision that affects profoundly the future of other nations. This inter-governmental arrangement meets the tests of representation only partially. It represents the voices of one party only, whereas the decisions it reaches affect everyone. For the same reason the ESM may fail the tests of accountability".  

Second, the theme of technocratic rule in EU institutions is one that has been covered extensively in the literature concerning the EU and its lack of democratic accountability, even before the crisis hit. However, especially in the handling of the current crisis, the move away from elected officials to 'the experts', now taking key decisions relating to state budgets, is under attack from many circles: from scholars to civil society. Most recently Habermas has been outspoken about the tensions between democratic self-determination and technocracy in the monetary union's crisis. The delegation of extensive powers to set the macro-economic policy of states to the Troika is the most visible example of this trend. As noted by Schui:

"the quintessential 'austerian' is the technocrat [...] the experts of the European Commission, the European Central Bank, the International Monetary Fund (IMF), and others who land in a nation's capital to save it from the brink of financial collapse. The considerable power which these experts wield rests primarily on their claim to superior knowledge and understanding of economic matters".

However, the governance structures of the ESM are also a clear case in point. Similarly, the requirement for the Directors who sit on the Board is to be selected from among people of high competence in economic and financial matters, making it clear that expertise over political representation dominates its governance structures. The introductory/advertising video on the ESM careers webpage also sends a troubling message, in its final words, ESM Secretary General Kalin Anev states: "There are very few places in the World, where with a very small

99 Regling when asked about human rights stated: "The ESM was not given the task to design adjustment programmes. That was done by the Troika and we provide the financing. As an economist I fully support these programmes", EFSF CEO Klaus Regling in interview with The Irish Examiner.  
100 Pavlos Elefteriadis, 'Democracy in the Eurozone', in Wolf-Georg Ringe and Peter Huber (Eds.), Legal Challenges in the Global Financial Crisis: Bail-outs, the Euro and Regulation, (Hart 2014), 51.  
101 Eg see also Bo Strath, 'A Second Great Transformation in Europe: The Rise and Fall of the Technocrats', in Juncture 21(4), also demonstrated by the creation of the organization ‘Troikawatch’, see http://www.troikawatch.net/  
103 Florian Schui, Austerity, 4.  
104 Article 6(1), ESMT.
amount of people, you can have such a large financial, societal and personal impact, and... this is ESM.”¹⁰⁵ Not only are all 140 ESM staff, and the hundreds involved in the Troika institutions devoid of all democratic accountability and secured by immunities, but often it is hard to even find out who they are. Greater attention to the technocratic elite driving the political and social reality of the Eurozone is urgently needed.¹⁰⁶ From a human rights and rule of law perspective, resort to technocratic rule raises a number of questions about democratic participation, accessibility, transparency and accountability, which become very difficult to answer in the absence of clear structures of responsibility for policy decisions affecting a wide range of human rights standards. In this vein "the rationality of technocracy is given a further air of impregnability by virtue of its claim to be a 'regulatory enterprise' rather than a process of deregulation."¹⁰⁷

Related to both these problems is the third glaring problem emerging from the ESM governance structures and working methods, and more generally those underlying other bailout mechanisms: their lack of transparency and accessibility. All phases of the adjustment programme-drafting are currently being negotiated behind closed doors, with many relevant actors being completely marginalised, including parliaments, unions and the European Parliament itself.¹⁰⁸ While the MoUs in which the conditions of financial assistance are set are publicly available, it is becoming increasingly evident that many of the conditions are set in other fora, including bilateral meetings, email exchanges or even 'secret letters'.¹⁰⁹ The shift towards informal governance is especially worrying when the stakes are so high. In line with this, Kilpatrick has tested the bailout measures and mechanisms on the basis of Fuller's criteria for the 'rule of law', and has rightly found them seriously deficient due to their complexity, inaccessibility and incomprehensibility. In fact, untangling the legal sources of each bailout instrument presents serious challenges due to the intricate, lengthy and interconnected chains of sources entailed in any particular bailout, their unavailability on official websites (including that of the European Commission), the lack of availability of key sources in bailout countries'
language, and the well known fact that some of the bailout conditions are being shaped by sources which are not public. She concludes that:

"It is very difficult for even a specialised lawyer or national court to reconstruct the legal map of bailout measures so as properly to frame questions of constitutionality or fundamental rights’ compliance. It is nigh on impossible for an EU citizen to find the legal sources having a major impact on his/her life." 110

However, the task of human rights law is to try and pull these chains of accountability back together and to attempt to analyse where the responsibility lies, to overcome the above exposed black holes of legal accountability.111

Human rights accountability of international institutions

"The economic crisis has highlighted the extent to which sovereignty of individual states over economic policy is increasingly being encroached upon by non-state and supra-state actors which carry significant weight in the design, implementation, and monitoring of national economic policies".112

The European Commission recently reasserted that the human rights responsibility for bailout measures ultimately rests with States, as they negotiate them with the Troika, sign the bailout measures and are responsible for their implementation.113 While there is no question under international human rights law that the State shares the responsibility and cannot escape all accountability by attributing policies that violate human rights to international organizations,114 the question of the degree of autonomy of the State requesting financial assistance and in particular the responsibility of the international organizations setting the conditionality must be asked. As we have seen the MoUs have included wide-ranging substantive prescriptions, including significant cuts in very specific social expenditures, and several commentators115 and some States have today questioned the degree of discretion States actually have in setting the measures, with the recent attempts by Greece being a case in point.116 The current argument is based on the understanding that (at least some) of the conditionality

110 Ibid., 18.
111 See also Margot Solomon, ‘Of Austerity, Human Rights and International Institutions’.
113 Commission Response to Question 5 of ‘Questionnaire supporting the own initiative report evaluating the structure, the role and operations of the “troika” (Commission, ECB and the IMF) actions in euro area programme countries’ (Brussels 2013) 5.
116 See Federation of Employed Pensioners of Greece (IKA-ETAM) v Greece, European Committee of Social Rights, Complaint No. 76/2012.
measures imposed by international institutions in return for financial assistance have been specific enough in their substantive prescriptions and oversight to make them (at least in part) also directly responsible for the human rights impact they had. As acknowledged also by the UN independent expert on foreign debt:

"In Greece, the European Union, the European Central Bank and IMF play an important role in the design and monitoring of the measures under the country’s adjustment programme [...] It may therefore be contended that these institutions have a duty to respect the human rights of that country’s population by ensuring that the programme does not undermine the capacity of the Government to establish and maintain the conditions for the realization of human rights, including by assuring equitable access to basic public services".117

This situation invokes the realm of international institutional law, and in particular the question of the accountability of international organizations for human rights violations. The complex architecture of the ESM, as an international organization collaborating with other international organizations, sits squarely in the current climate of increasing governance by international organizations (IOs). With the steady proliferation of IOs and the widening scope of their activities, situations in which human rights may be at risk through their operations or policies have also multiplied.118 In this context the question of whether IOs are bound by international human rights standards has gained increasing attention in legal circles.119 As Reinisch put it:

"[...] it is exactly the increased direct involvement of international organizations in aspects of global governance through ‘quasi’ or immediate legislative, administrative, and judicial tasks that has turned the tables and led to situations where international organizations may violate fundamental rights of individuals and where the ancient query of quis custodiet ipsos custodes (who guards the guardians?) demands renewed attention."120

This question is not new; the accountability of IOs was taken up by the International Law Association in 1996, when it established a Committee to "consider what measures (legal, administrative or otherwise) should be adopted to ensure the accountability of public international Organizations to their members and to third parties, and of members and third

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117 UN Doc. A/HRC/25/50/Add.1, 16.
119 E.g. see Jan Wouters, Eva Brems, Stefaan Smis and Pierre Schmitt (Eds.) Accountability for Human Rights Violations by International Organisations.
Parties to such Organizations," 121 In its final report published in 2004, it was clear in its conclusion that IOs should comply with basic human rights obligations. 122 There appears to be some consensus today that IOs vested with international legal personality have an obligation to respect those human rights which have attained the status of customary international law and/or general principles of law, and may be held responsible for breaches of those standards. 123 However controversies remain with regard to the sources and scope of their obligation to respect human rights standards. 124

A number of approaches address the problem of whether the ESM (and collaborating organizations) are bound by international human rights law, and they are not mutually exclusive. The first approach sees IOs as bound by those human rights standards which have become part of customary international law. Some authors have taken this approach to argue that the UDHR has become part of customary international law and as such binds IOs. 125 However, the scope of customary human rights norms, especially in the field of ESC rights, remains fairly small and controversial. 126 Nonetheless in its General Comment No 8, CESCR confirmed that international organizations should do everything possible to protect at least the core content of economic, social and cultural rights. 127 As such, the ESM, the IMF, the European Commission and the ECB should be considered bound to respect the core content of ESC rights. This is in line with the Guiding principles on foreign debt and human rights which explicitly state that international financial organizations and private corporations have an obligation to respect international human rights based on the 'Ruggie principles'. 128 In particular, “[t]his implies a duty to refrain from formulating, adopting, funding and implementing policies and programmes which directly or indirectly contravene the enjoyment

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122 Ibid., 22.
125 E.g. Pierre Klein and Philippe Sands (Eds.), Bowett's Law of International Institutions (Thompson Reuters 2009), 463.
127 Committee on Economic, Social and Cultural Rights General Comment No. 8, (1997), para 7.
128 The UN Guiding Principles on Business and Human Rights were proposed by Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, and endorsed by the UN Human Rights Council in its resolution 17/4 of 16 June 2011.
of human rights.\textsuperscript{129} The fact that the ESM (and the Troika) do not respect this duty appears sufficiently noncontroversial. Additionally, it remains clear that there is a need to distinguish between negative obligations (to abstain from violations), from positive obligations (to protect and fulfil) which may call on IOs to take on a mandate which member states have not attributed to it.\textsuperscript{130}

A different approach is to consider IOs – or at least the decision making by their principal organs – to be bound by human rights norms because of the legal obligations of their member states, to the effect that states must not violate their human rights obligations when participating in decision-making in IOs.\textsuperscript{131} With respect to the ESM this means that the representatives of each State sitting both on the Board of Governors and the Board of Directors should be bound by the State's human rights obligations in their decision-making, which constitutes a state-act and as such is subject to human rights law.\textsuperscript{132} Regardless of whether ministers of finance or experts, board members should be seen as representing their States in the context of the ESM. As such, the ESM States would be bound to comply with their pre-existing human rights obligations in the formulation of their policies in recipient countries,\textsuperscript{133} and State decisions with an extraterritorial effect taken under the auspices of the ESM should not interfere with their core ESCR obligations under international law.\textsuperscript{134} Furthermore, there is an argument to be made that if all member states of an international organization share the same human rights obligations (by way of example the European Convention on Human Rights or the European Social Charter), then states are precluded from taking decisions within the organization which are contrary to those obligations.\textsuperscript{135} Similarly, although the ESM is a separate international organization from the EU, its membership and mechanisms remain too close for comfort.\textsuperscript{136}

Finally, some organizations may be bound by human rights law by virtue of the provisions included in their constituent instruments or further adopted documents.\textsuperscript{137} While there is clearly

\textsuperscript{129} Report of the independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephas Lumina, UN Doc. A/67/304 (13 August 2012), Principle 9.


\textsuperscript{132} See Art.61, Articles on the Responsibility of International Organizations, New York, 9 December 2011.


\textsuperscript{134} See Committee on Economic, Social and Cultural Rights General Comment No. 19.


\textsuperscript{136} See Case C-370/12 Pringle v Ireland, Judgment (Full Court) of 27 Nov. 2012.

\textsuperscript{137} Matteo Tondini, 'The “Italian job”', 191.
no mention of human rights anywhere in any of the ESM legal documents, the question is more complex concerning the organizations making up the Troika. Whether the EC and ECB when acting under the guises of the ESM are bound by the EU Charter on Fundamental Rights is a question that has been left partially open by the Pringle case, and will be addressed further in Part 2. With respect to the IMF the issue is more complex and concerns its relation to the UN,\textsuperscript{138} but will not be exhausted here.

**Human rights accountability of international institutions in practice**

Even if the accountability of IOs for human rights violations is recognized in principle, the lack of avenues in which claims can be brought against them, renders such accountability difficult to uphold in practice.\textsuperscript{139} The growing powers of IOs, including with respect to their increased effect on international human rights standards, has not been accompanied by the creation of a corresponding system of international legal responsibility.\textsuperscript{140} While there is currently no international court with jurisdiction over international organizations, the jurisdictional immunity traditionally granted to IOs before national courts, generally also makes this avenue impracticable.\textsuperscript{141} In December 2011, the UN General Assembly endorsed the International Law Commission's articles on the responsibility of international organizations (ARIO).\textsuperscript{142} Although the articles represent a step forward in establishing the responsibility of international organizations for their violations of human rights, ultimately, as some have argued, they still 'leave the individual in the cold'.\textsuperscript{143} In particular, although Article 4 which provides the elements for an internationally wrongful act may also be seen to apply to human rights obligations of IOs,\textsuperscript{144} the responsibility of IOs for human rights violations under the Articles can still only be invoked by states or other IOs.\textsuperscript{145} In fact, Article 33, which follows the approach taken in the Articles on States Responsibility, leaves individuals without any remedy for breaches of their rights by IOs, as no forum exists at the global or regional level, which

\textsuperscript{138} See Matthias Goldmann, 'Human Rights and Sovereign Debt Workouts', 92-94.

\textsuperscript{139} Jan Wouters, Eya Brems, Stefaan Smis and Pierre Schmitt Introductory Remarks', 11.


\textsuperscript{141} Although there has been an increasing tendency to bring cases before national courts. For an overview of the discussions on immunities see Emmanuel Gaillard and Isabelle Pingel-Lenuzza (2002), 'International Organizations and Immunity from Jurisdiction: To Restrict or to Bypass?', *International and Comparative Law Quarterly*, 51 2002. See also August Reinisch, *International Organizations Before National Courts*, (Cambridge University Press 2008).

\textsuperscript{142} GA Resolution 66/100, Articles on the Responsibility of International Organizations, New York, 9 December 2011.


\textsuperscript{144} Article 4, Articles on the Responsibility of International Organizations, New York, 9 December 2011.

\textsuperscript{145} Armin von Bogdandy and Mateja Steinbrück Platise, 'ARIO and Human Rights Protection', 74.
allows individuals to bring reparation claims against IOs, as is the case for states. As some concluded: "This places human rights violations by international organizations under the regime of diplomatic protection, with all its limits and shortcomings." Although it may be impossible for individuals whose rights have been violated as a result of ESM conditionality to bring a claim against the organization itself - and holding the implementing state to account may be the only available option to date - a number of concrete recommendations should guide the ESM and Troika in the formulation of its future bailout arrangements, while we wait for international law to catch up with the reality and growing effects of IOs on individual human rights holders.

Moving forward it is therefore essential to restore the human rights accountability of international institutions involved in the Eurozone bailouts. In particular the ESM, established as a separate international organization, retains a number of human rights obligations under international law, as do the other international organizations involved in the bailouts, namely those composing the Troika. First and foremost they must refrain from implementing policies that will likely have a negative impact on human rights. This implies that international institutions which are setting the specificities of the conditionality should always seek to avoid deliberately retrogressive measures, and in case of retrogressive measures, economic policy choices should always veer towards those that least restrict rights. In line with this lending institutions should ensure the introduction of safety nets to protect the poor and vulnerable. Furthermore, they should conduct Human Rights Impact Assessments (HRIA), as warranted under the Human Right Council’s endorsed Guiding Principles on Debt, to ensure their activities have the least possible effect of international human rights standards.

Second, clear divisions of responsibility and greater transparency will ensure greater accountability of the ESM and its cooperating organizations. A clear and transparent legal framework clarifying the roles of the specific institutions, and the decision-making power of each, will enable better oversight, as will the participation by relevant stakeholders, including civil society. As explained in the commentary by the Independent Expert:

"International financial institutions should periodically review their disclosure policies, enhance

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146 Ibid., 73.
147 Ibid., 74.
148 See Annex 3
148 CESCR Open Letter to State Parties, 16 May 2012, UN Doc. CESCR/48th/SP/MAB/SW
151 See Magdalena Sepúlveda Carmona, ‘Alternatives to Austerity’.
152 Report of the independent expert on the effects of foreign debt, UN Doc. A/67/304, Guiding Principles 40
153 Ibid., Guiding Principle 33
154 Ibid., Guiding principle 42. See also Magdalena Sepúlveda Carmona, ‘Alternatives to Austerity’, 29.
their external accountability by reviewing exceptions and improve internal procedures to protect and promote openness".  

Finally, the member states of the organizations involved, whether acting individually or collectively in the context of the ESM or IMF, have the obligation to respect, protect and fulfil human rights, including ESC rights in countries affected by their decision-making in the context of international financial institutions. Human rights should be integral to decision-making when such decision-making may have a human rights impact (as is clearly the case in the ESM financial assistance subject to conditionality). The onus to ensure that human rights are prioritized in policies and measures falls particularly on those states holding the greatest power of participation, voting and decision-making in those organizations, and for the ESM there is no hiding which they are. While international law continues to lag behind the need to hold international organizations accountable for the impact on international human rights standards, and presently only states may in practice be held accountable, the above principles should guide both states and international organizations in the formulation of new macro-economic policies and bailout measures in the context of the Eurozone crisis.

Part 2: Human rights responsibility under European Union (EU) law: The responsibility of the European Stability Mechanism (ESM), EU institutions, and the EU Member States under EU law for human rights violations resulting from the imposition of conditionality under the ESM

Carina Zehetmaier

The governance of the foreign debt crises in the EU has led to widespread violations of social and economic rights, as well as political and civil rights. The crises highlighted existing gaps when it comes to accountability for the violation of human rights resulting from the conditionality imposed by external institutions for the receipt of loans. Therefore, it is of

155 UN Doc., A/HRC/25/51, 8.
upmost importance to analyse the existing human rights law obligations under EU law and venues for holding the ESM, the institutions of the EU and the EU Member States accountable.

**Human Rights obligations under EU Law**

The European Union is based on “the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights...”\(^{160}\) Furthermore, Article 6(3) of the Treaty on European Union (TEU) establishes that “[fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.”\(^{161}\)

**The EU Charter of Fundamental Rights (EUCFR or the Charter)**

Since the entry into force of the Lisbon Treaty, the Union bound itself to the EU Fundamental Rights Charter,\(^{162}\) which has been accorded the same legal value as the founding Treaties of the EU, namely the TEU and the Treaty on the Functioning of the European Union (TFEU).\(^{163}\) The EUCFR is organised in seven chapters (dignity, freedoms, equality, solidarity, citizen’s rights, justice and general provisions) and protects Civil and Political Rights as well as Economic Social and Cultural Rights.\(^{164}\) Regarding the scope of the Charter, Article 51(1) states that “[t]he provisions of this Charter are addressed to the institutions and bodies of the Union ... and to the Member States only when they are implementing Union law.”\(^{165}\) Looking at the wording of the above quoted provision, the following needs to be acknowledged: When acting within the EU legal framework, both - the institutions and bodies of the Union and the Member States - are bound by the Charter, but not to the same extent. Whereas the institutions and bodies of the EU do always have a legal obligation to uphold the rights enshrined in the EUCFR, the Member States are only bound by the Charter when implementing Union law.\(^{166}\) The ESM, however, has been created as an international organisation outside the legal order instead of a Union body. This situation raises a fundamental question: Can the institutions of the EU and the Member States simply disregard EU law and especially the EU Charter through creating an

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\(^{160}\) TEU, Article 2.

\(^{161}\) TEU, Article 6(3).

\(^{162}\) EUCFR.

\(^{163}\) TEU, Article 6 (1).

\(^{164}\) EUCFR.

\(^{165}\) EUCFR, Article 51(1).

international organisation outside the EU legal framework? Or in other words: Is the Charter applicable even if the institutions of the Union and the Member States act outside the Union?

The legality of the ESM under EU law

In order to answer the above questions, first of all, the legality of the ESM under EU law will be briefly examined. For the purpose of legally establishing a permanent crisis mechanism to safeguard the financial stability of the euro area, the TFEU had to be amended. Article 48(6) TEU provides the legal basis for such amendments by authorising the European Council, acting by unanimity after consulting the European Parliament, the Commission and, in certain cases, the European Central Bank (ECB), to adopt a decision amending certain provisions of part III of the TFEU.\(^\text{167}\) In March 2011, the Council Decision 2011/199/EU was adopted, adding the following paragraph to Article 136 of the TFEU:

"The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality".\(^\text{168}\)

In the Pringle Case,\(^\text{169}\) the Court of Justice of the European Union (CJEU) was asked to deliver a preliminary ruling on the compatibility (1) of the above quoted Council Decision and (2) of the obligations under the ESM Treaty with the EU treaties and the general principles of EU Law.\(^\text{170}\) The applicant, Mr. Pringle claimed a violation of the following provisions: Articles 4(3) TEU and 13 TEU, Articles 2(3) TFEU, 3(1)(c) and (2) TFEU, 119 TFEU to 123 TFEU and 125 TFEU to 127 TFEU, and the general principles of Union law including the general principle of effective judicial protection and the right to an effective remedy as provided under Article 47 of the Charter and the general principle of legal certainty.\(^\text{171}\) Especially the compatibility with Article 125 of the TFEU, which contains a ‘no bailout clause’, was questioned, since it seems very likely that one reason for establishing the ESM as a separate international organisation outside the Union framework rather than an EU agency was in order to circumvent Article 125 of the TFEU, which prohibits the Union or its Member States from becoming liable or assuming

\(^{167}\) TEU; Article 48(6).
\(^{169}\) Case C-370/12 Pringle v Ireland, Judgment (Full Court) of 27 Nov. 2012.
\(^{171}\) Case C-370/12 Pringle v Ireland, Judgment (Full Court) of 27 Nov. 2012, § 28.

The ESM and the EU Charter

In the Pringle case, also human rights concerns were raised, especially whether acts under the ESM would remove the ESM, the institutions of the Union and the Member States from the scope of the Charter and thus from any accountability for human rights violations under EU law. Furthermore, if the Charter was found not to be applicable, the establishment of the ESM might lead to a violation of Article 47 of the Charter - the right to an effective remedy.\footnote{Case C-370/12 Pringle v Ireland. Judgment (Full Court) of 27 Nov. 2012, §§. 28, 178.} The Court rejected the claim that the conditions set out by the ESM in order to receive financial support could have an adverse effect on the social rights in the Charter and found that the ESM is removed from the scope of the Charter, since it is not a Union body. Also the EU Member States being a party to the ESM are not implementing Union law and thus are not bound by the Charter.\footnote{Case C-370/12 Pringle v Ireland. Judgment (Full Court) of 27 Nov. 2012, §§ 182, 185.} However, the Court did not provide any information on whether EU institutions - the ECB and the European Commission - can be held accountable under the Charter in relation to their conduct under the ESM. This question is of utmost importance: If the EC and the ECB were found not to be bound, this would have the consequence that if EU institutions want to circumvent the Charter or EU law in general, they could simply create international organisations outside the EU and thus avoid facing any consequences.\footnote{View of Advocate Kokott in Case C-370/12 [2012], § 176.} Although the Court did not clarify this issue, Advocate-General Kokott delivered a position finding that “[t]he Commission remains, even when it acts within the framework of the ESM, an institution of the Union and as such is bound by the full extent of European Union law, including the Charter of Fundamental Rights.”\footnote{View of Advocate Kokott in Case C-370/12 [2012], § 176.} Following this point of view also the Committee on Constitutional Affairs of the European Parliament expressed the following opinion:
"The EU institutions are fully bound by Union law and that within the Troika they are obliged to act in accordance with fundamental rights, which, under Article 51 of the Charter of Fundamental Rights of the European Union, apply at all times".\(^{178}\)

In line with the wording of Article 51(1) of the Charter, also Peers reaffirms that the requirement of "only when implementing Union law" is solely directed to the Member States,\(^{179}\) leading to the conclusion that the EU institutions and bodies are always bound by fundamental and human rights obligations under EU law even when they undertake tasks under the ESM. This finding is human rights coherent, since the fundamental rights obligations of the EU institutions cannot simply be circumvented by acting outside the EU legal framework.\(^{180}\)

It can be concluded that when it comes to responsibility for human rights violations occurring as a result of the imposition of conditionality for financial support under the ESM, an international organisation outside the EU legal framework, the applicability of the EU Charter must be differentiated depending on the actors involved. The CJEU found that since Article 51(1) of the ECFR only addresses institutions and bodies of the EU, neither the IMF nor the ESM can be held responsible under the Charter. Regarding the Member States, the Court ruled that they are only bound by the Charter, if they are implementing EU law, which is not the case when acting under the ESM. Thus, neither the ESM nor the Member States can be held responsible for human rights violations under the EU Charter. However, the Court did not provide any information on the human rights responsibility of the EU institutions – the EC and the ECB - acting under the ESM. In line with the findings of several legal scholars authors\(^{181}\) and the wording of Article 51 (1) it would only seem coherent to bind EU institutions to the EU Charter at all times, no matter whether they are acting within or outside the EU legal order. However, the suspicion that the ESM was created outside the EU specifically in order to circumvent and disregard the EU legal framework and the ECFR remains.

Annex 1: The Greek Case


\(^{181}\) E.g. A. Fisher – Lescano, J. Kokott, S. Peers.
Being an international frontpage story since 2009, the Greek crisis is still developing. The country has been through tremendous changes at a financial, political and social level. There are numerous articles and reports on the Greek crisis. From journalistic reviews to scientific studies, the Greek case has been a complicated, puzzling issue, still requiring effective solutions. Unfortunately, after six years of heavy austerity measures, the future is still obscure.

This short analysis will develop around four main axes: firstly, the nature and the substance of the international inspection body (Troika) and their main instrument for imposing austerity measures (Memoranda); secondly, the implications, in brief, of the above measures on human rights; thirdly, the implications of the austerity measures at a social level; and, fourthly, the question of accountability, addressed (or not) by the Greek courts and the recently founded, Truth Committee.

Troika and Memoranda

Probably the central topic around which the Greek crisis has been unfolding, are the two “Memoranda of Economic and Financial Policies” or “Economic Adjustment Programmes”, signed by the Greek government alone, in 2010 and 2012. The “Memoranda” are policy guidelines containing conditionality clauses that must be followed in order for Greece to receive each tranche of the loans by the Eurozone Member States and the IMF.182 Jurisprudence and legal theory have been divided over the binding nature of these agreements.183 Their implementation is supervised by an informal inspection body of representatives of the European Commission, the IMF and the European Central Bank (the so-called ‘Troika’).184

In order to be implemented, the Memoranda require to be followed, at the international level, by a treaty between Greece and its lenders (IMF and the States of the Eurozone) and at the domestic level, by executive legislation. It is worth noting that neither of the two Memoranda have been ratified by the Greek parliament, contrary to the explicit provision of the Greek

constitution, while both contain clauses seriously affecting national sovereignty.\textsuperscript{185} Besides, while drafting the executive laws, the government usually submitted a number of pre-vote amendments which were thematically irrelevant to the main act.\textsuperscript{186} There were concerns expressed that the general quality of law deteriorated in Greece through this period,\textsuperscript{187} while it was publicly admitted by Members of Parliament\textsuperscript{188} that the volume of measures adopted in every voting procedure, combined with the tight time-frames for adoption, did not practically allow them to fully process and comprehend the measures.\textsuperscript{189}

In substance, the measures requested horizontal reduction of all public expenses, primarily of social concern and most notably in the healthcare system.\textsuperscript{190} They also called for a vast deregulation of labour law legislation and widespread privatization of public enterprises.\textsuperscript{191}

**Implications on Human Rights**

As a result of its obligations towards its lenders, Greece has adopted a number of austerity bills, affecting directly a large number of human rights standards, protected both by the Greek Constitution and International and Regional Treaties. The catalogue of concerned human rights contains a number of civil and political rights as well as economic, social and cultural ones: the right to assembly and association, the right to freely express opinions and the freedom of the press, the right to an effective remedy, the right to participate in decision-making/democratic and regular elections, the right to property, the prohibition of racial discrimination, the right to work, the right to safe and healthy working conditions, the right to collective

\textsuperscript{185} George Katrougalos, “The Greek austerity measures: Violations of Socio-Economic Rights”.


\textsuperscript{188} The former Minister of Citizen Protection, Michalis Chrisohoides, admitted live on TV that he did not read the First Memorandum before signing it: \url{http://www.skai.gr/news/politics/article/192569/m-hrusohoidis-den-diavase-to-mmimonia/}.

\textsuperscript{189} Study for the LIBE Committee, ”Country Report on Greece”, p. 28.


\textsuperscript{191} For an analytical table of the measures contained in the two Economic Adjustment Programmes see Study for the LIBE Committee, ”Country Report on Greece”, p. 24-25.
bargaining, the right to social security, the right to health, the right to adequate living conditions and the right to education.\textsuperscript{192}

**Social Implications**

Unlike the impact on human rights, the social impact of the austerity measures had not been discussed analytically until recently. With the general unemployment rate continuously over 25\% and the youth unemployment over 50\% the last years,\textsuperscript{193} over 44\% of the Greek population had an income below the poverty line in 2013, according to the Public Policy Analysis Group of the Athens University of Economics and Business.\textsuperscript{194} Due to the prolonged unemployment, huge numbers of people have no access to health insurance,\textsuperscript{195} while the suicide rate, traditionally very low in Greece, has risen up to its highest level in 30 years.\textsuperscript{196} Almost in the middle of this period, in the summer of 2011, a mass social movement, the Indignant Greek People (“Aganaktismeni”), were met with severe and heavy police repression.\textsuperscript{197} Finally, an extremely alarming by-product of the economic crisis is the revival of the nationalistic, far-right and neo-nazi ideologies. The party representing them - the Golden Dawn - still remains fairly popular (around 6.5\%), although, after the assassination of a 28-years hip hop artist, Pavlos Fyssas, on September 2013, the party leader Nikolaos Michaloliakos and five other MPs were arrested on charges of money laundering and belonging to a criminal organisation. The party’s racist and xenophobic speech and practice, combined with increased migration flows into Greece.

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throughout the whole period, have created a hostile and dangerous environment for all people of different race or even ideology.\textsuperscript{198}

**Questions of accountability**

As stated above, the Greek legislation passed during the period of the crisis, has been almost directly dictated by the provisions of the Memoranda signed in advance. This is not to say that the Greek state is not the first to be held responsible for the numerous human rights violations. After all, the violations were produced under Greek national law provisions. While reviewed by regional and international bodies, certain austerity measures adopted through this period have already been considered incompatible with international instruments.\textsuperscript{199}

Regarding the domestic judicial order, Greece does not have a constitutional court as such. Both the Council of State and the ordinary courts have to date generally upheld the respective laws as constitutional, accepting that the measures are justified by the state of necessity faced by the Greek economy and the political margin of appreciation of the government.\textsuperscript{200} However, in late 2012, the Supreme Court of Audit (Cour des Comptes) has unanimously declared unconstitutional the last wave of pension reductions and the Court of Cassation shared the same view with respect to cuts in judges’ salaries.\textsuperscript{201} No question of legal accountability of any Greek politician has been set before the Greek courts, until today, although on April 2015, the first meeting of the Greek Debt Truth Commission was held, under the auspices of the Greek Parliament.\textsuperscript{202}

**Annex 2: The Spanish Case**

Sara Pastor Alonso

The Spanish recession, even though it shares some aspects with the case of Greece, presents some distinctive features both on the origin of the crisis and in its consequences. It also


\textsuperscript{200} Study for the LIBE Committee, “Country Report on Greece”, p. 77 and 101.

\textsuperscript{201} idem, p. 78

\textsuperscript{202} For more information on the Truth Commission see http://greekdebttruthcommission.org/, accessed May 31, 2015
presents a very interesting picture where innovations in the exercise of political rights have played a fundamental role in claiming economic and social rights, and where the economic crisis has paved the way for a new understanding of democracy by society.

It is not the purpose –nor the scope- of this short paper to provide detailed information and rates on the impact of the crisis in Spain. In-depth reports made by IGOs\textsuperscript{203}, have exposed their concerns about how Spanish authorities have disregarded their international human rights obligations when adopting measures in the context of the crisis. From an even more critical approach, international NGOs have also thoroughly studied the case of Spain, giving rise to a number of reports and articles denouncing Spain’s non-compliance with its human rights obligations\textsuperscript{204}, especially in relation to ESCRs. The purpose of this paper is to contribute to the reflections on the impact that the economic crisis has had on human rights in Spain. A particular mention will be made to the undermining of democracy in the process of adopting austerity measures. Lastly, the paper will conclude with a brief insight into the emergence of new forms of social protest among civil society, to which the Government has responded with restrictions on civil and political rights.

The arrival of the crisis in the Spanish context

Looking at its origins, the Spanish crisis was characterized by the collapse of the housing bubble that had been fuelled by the Spanish banking system, which in turn was in line with the global spiral of excessive bank lending. As the Spanish economic system was very much based on the construction industry, when the recession started and the housing bubble exploded a huge number of people lost their jobs\textsuperscript{205}. The bank debts generated by the housing bubble were subsequently assumed by the State, transforming the financial crisis into a sovereign debt crisis. For the sake of reducing public debt, harsh austerity measures were adopted at the expenses of social welfare and social services\textsuperscript{206}. This has inevitably had an important impact on economic and social rights, but the scope of the crisis has also affected the sphere of civil and political rights, as will be explained below.

\textsuperscript{203} United Nations Committee on Economic, Social and Cultural Rights (UNCESCR), Concluding observations on Spain, 48th period of sessions, May 18, 2012; and Council of Europe Human Rights Commissioner’s Report on Spain (June 2013).

\textsuperscript{204} Center for Economic and Social Rights (CERSR), 2012: Fact Sheet Report on Spain; Human Rights Watch (HRW), 2014: Shattered Dreams: Impact of Spain’s Housing Crisis on Vulnerable Groups.

\textsuperscript{205} Instituto Nacional de Estadística, Encuesta de Población Activa (EPA), available at http://www.ine.es/prensa/epa_tabla.htm

\textsuperscript{206} CERSR, ibid.
Three reflections on the impact on human rights

The reports by IGOs and NGOs show unanimously that due to the economic recession there has been a great decrease in the standard of living, linked primarily to the unprecedented rise of unemployment rates\(^{207}\). The situation has been further worsened by the impact of great budgetary cuts, after which Spain has been criticised for its the non-compliance with several economic and social rights, namely rights to housing, health, education, and work, among others, as a consequence of austerity measures\(^ {208}\). Poverty rates have increased and are considerably higher than the average of EU-15\(^{209}\), and the ratio between top and bottom income quintiles is rising more than in any other European country\(^ {210}\).

I will particularly reflect on three aspects generated in the context of the Spanish crisis: a) The paradox of the crisis (responding to the rise of poverty with measures that generate more poverty); b) The gap between Government and citizenship (Government’s inability to develop a social answer to the crisis); c) Innovative social mobilization and the repression of political rights (the crisis has an eventual impact on civil and political rights).

a) The paradox of the crisis

The crisis gave place, since the beginning, to an increasing rate of unemployment that had a ripple effect on households’ capacity to face their debts. As the number of households with no income increased, the number of house evictions stepped up to unimagined levels\(^ {211}\). Consequently, the situation has given rise to increasing rates of extreme poverty and social exclusion\(^ {212}\). The political response to this increasing social alarm did not take as a priority the development of policies to mitigate the rise of poverty, nor the assessment of the factors leading to social exclusion. The political response was based, mainly, on an austerity plan drastically reducing the budget for social benefits, unemployment, disability, health and education\(^ {213}\). The groups that were already affected by the crisis itself (unemployed people, migrants, children,

\(^{207}\) CERSR, HRW, *ibid*.
\(^{208}\) UNCESCR, 2012, op.cit.
\(^{209}\) 15 Member States belonging to the EU as of December 31, 2003, before the new Member States joined the EU.
\(^{210}\) CERSR, op. cit., p.5.
\(^{212}\) UNCESCR, 2012.
\(^{213}\) CERSR, op.cit., p.6.
women with low incomes\textsuperscript{214}, and that were precisely in need of social aid, were the ones to suffer once more, due to the consequences of austerity measures.

It is a paradox that when social emergency increases, the most vulnerable groups are the first to suffer the consequences of “anti-crisis” measures. Whereas in times of crisis the UNCESR recognizes that States may be obliged to adopt difficult measures that negatively affect economic and social rights, this cannot be done under a total lack of human rights impact assessment\textsuperscript{215}, which in the case of Spain has been totally neglected.

\textbf{b) Breach of democratic bonds and lack of accountability}

The lack of transparency and democratic channels has been a common pattern in many of the countries when undertaking austerity measures. There has been a breach between those elected and their constituency, since people trusted a political programme with their vote, and such programme has been significantly reversed by the two Governments in power during the crisis. As a reflection of such a gap, the most controversial measure in Spain was passed in August 2011: in a context of social protest, and in the midst of demands for political change, President Zapatero (Socialist Party) announced a sudden constitutional reform that would prioritise the payment of the debt before any other social spending\textsuperscript{216}. The reform fuelled great social discontent and loss of confidence, both for its content and for the un-democratic expeditious process of reforming the Constitution (which had only been reformed once before in thirty years). The Government used as a justification the urgent requirements dictated at the European and international sphere. Such justification further exacerbated the political discrediting of elected institutions.

At this point, a reflection must be made on who is accountable for undertaking austerity measures and for the impact they have on society. Whereas Spain, as Greece, was bound by a Memorandum of Understanding (MoU)\textsuperscript{217} in the framework of the European Stability Mechanism as of 2012, the budgetary cuts had been taking place from May 2010. Moreover, the guidelines of the MoU in the case of Spain did not address where the budgetary cuts should be implemented. In this sense, it was in the hands of the Spanish Government to decide and develop the reforms with a greater or lesser negative impact on human rights.

\textsuperscript{214} Ibid.
\textsuperscript{216} Reform of art. 135 of the Spanish Constitution.
c) **Innovative social protest and repression of political rights**

The social unrest fuelled by the austerity measures and the loss of confidence in the political institutions as rights-guarantors led to an unprecedented social mobilization that started on 15 May 2011. An original and unexpected wave of civil society initiatives (the so-called 15M) aimed at tackling the injustices derived from the crisis emerged\(^\text{218}\). Unlike traditional protests led by social organisations and unions, these new movements were frequently spontaneous, non-scheduled, and involving pacific resistance (for instance, gatherings with the aim of impeding the eviction of a family from their house\(^\text{219}\)). Demonstrations surrounding the Parliament against austerity, spontaneous and artistic protest actions in bank offices, or hanging banners in public buildings, among others, were new strategies for protesting and raising awareness about the political injustice and about alternatives to austerity measures.

The authorities have not been responsive to these social demands. On the contrary, a new trend criminalizing social protest has emerged, which can be observed not only in the political discourse, but also in legislation\(^\text{220}\). Upon the arrival of the conservatives into power (Popular Party), legal and administrative attempts to hinder and to punish social protest have taken place. The last straw has been the approval of the Law for Citizen’s Security (the so-called “Gag Law”) and the new Criminal Code, which together penalize both at the administrative and at the criminal level many different forms of pacific protest, while posing serious restrictions to freedom of expression\(^\text{221}\). International concerns about this political “repressive” trend have already been raised, among others, by the CoE Human Rights Commissioner\(^\text{222}\) and by the Office for Democratic Institutions and Human Rights (OSCE)\(^\text{223}\).

Annex 3: Economic Crisis, Austerity Measures and the Council of Europe

Viktor Kundrák

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\(^{219}\) Organised by the platform “Stop desahucios”.


\(^{222}\) Council of Europe Human Rights Commissioner’s Report after his visit in Spain (June 2013).

Introduction

For human rights not to be mere political proclamations they have to be effective, enforceable. In other words, each individual affected by a state’s human rights violation should have the opportunity to avail him or herself of an effective remedy. Within the European region, like elsewhere, the economic crisis\(^\text{224}\) affected most significantly the most vulnerable ones. Whether it is migrants who have been returned to the other side of the Mediterranean without their refugee status being duly assessed,\(^\text{225}\) prisoners who have been subjected to inhuman or degrading detention conditions, members of minorities who have been systematically discriminated, lived on the edge of society and happened to be blamed for the cause of all the evil in the world or those uncountable ones who lost their jobs and with the “help” of states’ austerity measures in the field of social security found themselves, from one they to another, on (or under) the edge of poverty; for many of these, to claim effectively their basic rights is often an impossible goal. Within the Council of Europe (CoE), both political and monitoring bodies have in recent years tackled the issue of economic crisis, the resulting austerity measures adopted by the states, and their specific human rights implications.\(^\text{226}\) Two CoE authorities may decide on a particular human rights case and hold states responsible: the European Court of Human Rights (ECtHR, the Court) and European Committee on Social Rights (ECSR, the Committee). In the following contribution, I will focus on these two remedies in the context of austerity measures adopted as a consequence of economic crisis and discuss briefly their main differences and overall effectiveness.

European Court of Human Rights

\(^{224}\) Whether in relation to the global financial crisis of 2007-2008 or the so called European sovereign debt crisis which started in 2010.

\(^{225}\) Cf. for instance *Hirsi Jamaa and Others v. Italy*, no. 27765/09, judgment [GC] of 23 February 2012.

The ECtHR with its seat in Strasbourg represents the highest judicial instance overseeing European states’ compliance with their human rights obligations. It decides on individual applications submitted by individuals falling under the jurisdiction of 47 member states of the CoE and in doing so it interprets and applies the European Convention on Protection of Fundamental Rights and Freedoms.227

Although the original text of the European Convention on Protection of Fundamental Rights and Freedoms (ECHR, the Convention) adopted in 1950 represented a classical civil and political rights catalogue, through adoption of additional protocols to the ECHR and the Court’s228 “evolutionary” (evolutive or dynamic) interpretation of the Convention,229 the current scope of protection covers at the present time a number of social, economic and cultural rights.230 Apart from the case law concerning, sometimes also in the context of states’ financial difficulties, poverty, housing rights, degrading or inhuman detention conditions,231 the Court has recently decided on a few cases concerning austerity measures adopted by the States as a direct consequence of the economic crisis. These related to measures in the area of social security and taxation and were dealt with on the basis of an established body of principles from earlier case law. The Court has traditionally adopted different approaches depending on what rights and freedoms were at stake. In contrast with “absolute” rights as, e.g. right not to be subjected to inhuman or degrading treatment,232 the interferences stemming from measures in the field of social security relate to property rights protected by Article 1 of the Protocol 1, hence rights that are subjectable to limitations. In the area of state budgetary issues such as relocation of resources

227 For more information, consult http://www.echr.coe.int/Pages/home.aspx?p=home.
228 Until the adoption of the Protocol no. 11 to the Convention 1998 also the European Commission on Human Rights.
229 Cf. Court’s doctrine according to which the Convention is to be interpreted “in the light of present-day conditions” (see, e.g. Tyrer v. the United Kingdom, no. 5856/72, judgment of 25 April 1978. § 183) and (the more general) doctrine of intertemporal rule in international law which enabling interpreting international treaties differently with the flow of time and with the change of circumstances: for a more in-depth study see Richard Gardiner, Treaty Interpretation (New York: Oxford University Press, 2011), 250-256 and George Letsas, “The ECHR as a Living Instrument: Its Meaning and Legitimacy”, Social Science Research Network (March 14, 2012), accessed 9 June 2015: 1-12.
232 Article 3 of the ECHR.
and complex social and economic policies in particular, States enjoy a wide margin of appreciation. In other words, it is upon their discretion when choosing the type or amount of benefits that they provide under social security schemes and they are even not a priori restrained to reduce social security entitlements. However, while it is not for the Court to say what is the best solution for dealing with any such particular problem, it usually verifies whether an individual right to derive benefits from the social security scheme has been infringed in a manner resulting in the impairment of the essence of that right.

Recent cases on austerity measures seem to reflect the Court’s benevolent position to these issues and its reluctance to interfere with sensitive financial issues of the states. A fine line of jurisprudence has nevertheless been developed, stressing the potentially serious impact of social security cuts on individuals. In Koufaki and ADEDY v. Greece, the Court declared the applications inadmissible giving decisive weight to the public interest in the Greek government’s conduct and the fact that the impugned measure had not placed the applicant at risk of having insufficient means to live. However, only a week later in N.K.M. v. Hungary, it stated that due to the taxation (of 98%) on dismissed civil servant’s severance payment imposed on the applicant only few weeks before her dismissal, the applicant had to bear an excessive individual burden. Although, it was probably mainly the striking scale of the taxation rate and the unforeseeable nature of the measure that lead the Court to find a violation of the applicant’s property rights, the ECtHR’s appeared to be fully aware of the injustice accompanying the austerity measures. It is to be noted, however, that in spite of the Court’s

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233 National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom, nos. 2131/93, judgment of 23 October 1997, § 80, and Stec and Others v. the United Kingdom, nos. 65731/01 and 65900/01, judgment [GC] of 12 April 2006, § 49. This margin, i.e. states’ discretion on how to implement their Convention obligations, is even wider when the issues involve an assessment of the priorities as to the allocation of limited state resources (cf. Penticova and Others v. Moldova, no. 14462/03, decision of 4 January 2005 or Huc v. Romania and Germany, no. 7269/05, decision of 1 December 2009, § 64).

234 Stec and Others v. the United Kingdom, see above, § 53.

235 Kuznetsova v. Russia, no. 67579/01, judgment of 7 June 2007, § 51.


238 Koufaki and ADEDY v. Greece, nos. 57665/12 and 57657/12, decision of 7 May 2013, concerned reductions in the remuneration, benefits, bonuses and retirement pensions of public servants, with a view to reducing public spending.

239 Ibid., §§ 39-41 and 46.


241 The Court noted that "the applicant, together with a group of dismissed civil servants (...), was made to bear an excessive and disproportionate burden, while other civil servants with comparable statutory and other benefits were apparently not required to contribute to a comparable extent to the public burden, even if they were in the position of leadership that enabled them to define certain contractual benefits potentially disapproved by the public (...) the specific measure in question, as applied to the applicant, even if meant to serve social justice, cannot be justified by the legitimate public interest relied on by the Government. It affected the applicant (...) being in good-faith standing and deprived her of the larger part of a statutorily guaranteed, acquired right serving the special social interest of reintegration (...) those who act in good faith on the basis of law should not be frustrated in their statute-based expectations without specific and compelling reasons.”; ibid., §§ 71-75.
case-by-case balancing between state’s (public) and individual interests, \textit{N.K.M.} still represents an exception in the Court’s jurisprudence: in three other recent austerity-measures-cases the applications were declared inadmissible.\footnote{See Conceição Mateus and Santos Januário \textit{v. Portugal}, nos. 62235/12 et al., decision of 8 October 2013, Savickas \textit{and Others} \textit{v. Lithuania}, nos. 66365/09 et al., decision of 15 October 2013 and Markovics \textit{and others} \textit{v. Hungary}, nos. 77575/11 et al., decision of 24 June 2014.}

\textbf{European Committee of Social Rights}

The ECSR’s role is to supervise whether States parties to the European Social Charter of 1961, eventually of its revised version of 1996, (ESC) act in compliance with the provisions of the mentioned treaties. It is composed of 15 independent experts and adopts conclusions based on national reports, and decisions based on collective complaints.\footnote{For more information, consult \url{http://www.coe.int/t/dghl/monitoring/socialcharter/ecsr/ecsrdefault_EN.asp}.} As for the scope of the rights, the ESC having been adopted as a sort of complementary treaty to the civil and political rights oriented ECHR (see above) it covers a whole range of social and economic rights.

The ECSR then represents, compared to the ECtHR, a rather stricter approach to the states’ responsibility in the field of economic and social rights. On an “abstract” level, it raised a critical voice about austerity measures adopted by states, in particular in relation to the curtailment of the scope of social security and health care.\footnote{European Committee of Social Rights, Conclusions XIX-2 (2009): General introduction, para. 15.} As for the collective complaints procedure, the Committee has dealt with several cases concerning austerity measures adopted by Greek government (these consisted for instance in dismissal employees with contracts of indefinite duration or reform of old-age pensions schemes) and found Greece to have violated several provisions of the European Social Charter.\footnote{See \textit{General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants’ Trade Unions (ADEDY)} \textit{v. Greece} (no. 65/2011), decision on the merits of 23 May 2012; \textit{General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants’ Trade Unions (ADEDY)} \textit{v. Greece} (no. 66/2011), decision on the merits of 23 May 2012; \textit{Federation of employed pensioners of Greece (IKA-ETAM)} \textit{v. Greece} (no. 76/2012); \textit{Panhellenic Federation of public service pensioners} \textit{v. Greece} (no. 77/2012); \textit{Pensioner’s Union of the Athens-Piraeus Electric Railways (I.S.A.P.)} \textit{v. Greece} (no. 78/2012); \textit{Panhellenic Federation of pensioners of the public electricity corporation (POS-DEI)} \textit{v. Greece} (no. 79/2012); and \textit{Pensioner’s Union of the Agricultural Bank of Greece (ATE)} \textit{v. Greece} (no. 80/2012). All decisions on the merits were rendered on 7 December 2012.} Worth noting is its response to the Greek government’s argument that the protection of certain rights guaranteed by the ESC was limited directly by the conditions of the loan arrangement with the European Commission, the European Central Bank and the International Monetary Fund (Troika). The Committee stressed
that the superior nature of the states’ obligations under the ECR (or its revised version) and noted that

“the fact that the contested provisions of domestic law seek to fulfill the requirements of other legal obligations does not remove them from the ambit of the [ESC]”. It concluded that “the economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter. (...) governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries most need the protection”. 246

Further, a delicate decision concerned Sweden in respect of measures which had been adopted as a result of a judgment of the Court of Justice of the European Union (CJEU) in the so called “Laval” case.247 The ECSR, here again, concluded on the superiority of states human rights obligations guaranteed by the ESC and found a breach of the right to bargain collectively and the right to strike.248 The collision between the two legal frameworks – the one of CoE (ESC) and the one of EU – is to be reconciled within the so-called „Turin process“ launched by CoE conferences in Turin (October 2014) and Brussels (February 2015). While the final document adopted at the latter high-level meeting249 calls for states’ acknowledgement of the “normative autonomy” of each legal sphere dealing with the protection of fundamental social rights, for strengthening (rather than lowering) the guarantee of that rights with respect to the plurality of legal instruments protecting them, for an integrated approach and a comprehensive interpretation of all such existing instruments, the decisive step is probably to be taken by the EU jurisdiction.250

Conclusion

To sum up, despite some positive elements, the effectiveness of the protection of individuals against austerity measures seems to be questionable. Although the extreme cases of “social injustice” will be subjected to a sensitive balancing, the ECtHR has been generally reluctant to interfere with states’ sovereignty in the field of complex budget issues or relocation

246 Confederation of Greek Civil Servants’ Trade Unions (ADEDY) v. Greece, see above, §§ 50 and 75.
248 See Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden (no. 85/2012), decision on admissibility and the merits of 3 July 2013.
250 The decisions adopted by ESCR are, in contrast to EU law, not legally binding. For more information on the Laval case before the ESCR see http://www.labourlawnetwork.eu/national_labour_law/national_legislation/legislative_developments/prm/109/v__detail/id__3827/category__1/index.html.
of resources. Such an approach may raise the question of whether situations of states’ financial difficulties are not de facto comparable to those of “war or other public emergency threatening the life of the nation”, i.e. exceptional situations where states may, under strict conditions, derogate from certain rights provided with by the Convention.\textsuperscript{251} The ESC mechanism, contrastingly, provides with more sanguine prospects. Its real impact on individual human rights violations is, nevertheless, limited as the complaints to the Committee are collective and the ESCR’s decisions are not legally binding. The latter aspect may then play a crucial role in cases when states, when implementing their international obligations, face a dilemma of collision between two different international legal frameworks. The question of who bears the responsibility for human rights violations caused by economic measures imposed by external, non-state actors? While from the point of view of Strasbourg jurisdiction(s)\textsuperscript{252} (and international law in general), the responsibility is clearly the one of states which at the end of the day adopt austerity measures at the domestic level,\textsuperscript{253} the situation is much more complex and the actual discretion of states in the decision-making process (which to a large extent does not even involve the “recipient” states the human rights protection of which is at stake) raises more doubts than certainty.\textsuperscript{254}

\textsuperscript{251} Cf. Article 15 of the ECHR.
\textsuperscript{252} Including the ECSR, being aware of its quasi-judicial nature.
\textsuperscript{253} As the ECtHR’s concluded in the famous case of Bosphorus Airlines, states are “responsible under (...) the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 [of the Convention] makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party’s “jurisdiction” from scrutiny under the Convention. (...)In (...) establishing the extent to which a State’s action can be justified by its compliance with obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty, the Court has recognised that absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention (...) State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides”; see Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland, no. 45036/98, judgment [GC] of 30 June 2005, § 153-155.
\textsuperscript{254} Cf. contribution to the Global Classroom 2015 project by Dr. Lisa Ginsborg.