



# Of Austerity, Human Rights and International Institutions

Margot E. Salomon

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Law Department

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## Of Austerity, Human Rights and International Institutions

Margot E. Salomon<sup>\*</sup>

**Abstract:** Austerity measures in many European countries have led to the violation of social rights and widespread socio-economic malaise. In the case of countries subjected to conditionality imposed by external institutions for the receipt of loans, the resultant harms have highlighted responsibility gaps across a range of international institutions. Two recent legal developments come together to expose these gaps: Greece's argument in a series of cases under the European Social Charter that it was not responsible for the impact on the right to social security brought about by austerity measures since it was only giving effect to its other international obligations as agreed with the European Commission, the European Central Bank and the International Monetary Fund (the Troika), and the concern to emerge from the *Pringle* case before the European Court of Justice that European Union institutions could do outside of the EU that which they could not do within the EU – disregard the Charter of Fundamental Rights in the exercise of their tasks. That the Commission and ECB were in time answerable to international organisations set up to provide financial support adds an additional layer of responsibility to consider. Taking Greece as a case study and drawing on EU law, international human rights law, and the law on the international responsibility of states and of international organisations, this article looks to what we can expect in legal terms and as a matter of contemporary societal expectation when it comes to having international institutions respect human rights.

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<sup>\*</sup> Director, Centre for the Study of Human Rights (Acting), London School of Economics and Political Science; Director, Laboratory for Advanced Research on the Global Economy, Centre for the Study of Human Rights; and Associate Professor, Law Department. [m.e.salomon@lse.ac.uk](mailto:m.e.salomon@lse.ac.uk).

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## I INTRODUCTION

The 2008 global financial and economic crisis rolled out across the world revealing systemic flaws in national and international monetary and financial architecture. It was accompanied by massive social harms that have by now been well-documented, although far from resolved.<sup>1</sup> The impacts of the crisis have affected countries in all regions of the world, but for a variety of reasons certain countries weathered the upheaval of their economies better than others.<sup>2</sup> While economists may take different views on what the best course of action is under conditions of recession, from 2010 the advocates of austerity were most influential in determining the measures taken as a response to economic difficulties as seen, for example, in the United States and the United Kingdom, as well as in the eurozone countries of Portugal, Spain, Greece and Italy. In the developing world, the International Labour Organization (ILO) reports of ‘pre-emptive’ austerity measures having been taken.<sup>3</sup> Austerity as a response to recession has been widely criticized by economists, a point to which we return at the end of the paper. Austerity measures have also had devastating effects on the exercise of human rights in Europe, including notably social rights.

Using Greece as a case study, this paper advances two central arguments. First, that the governance of the crises in the European Union (EU) has led to massive violations of human rights. Second, that the way in which the crises have been governed has exposed a series of black holes when it comes to accountability for the violation of human rights. The way the crises have been governed challenges not only the substantive content of human rights law constitutionally, supranationally and internationally, but notably the very idea that there should be a clear line of responsibility when it comes to the protection of human rights. The legal implications of this can be illustrated by reference to the litigation before the Council of Europe’s European Committee of Social Rights regarding the

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<sup>1</sup> ‘The financial crisis, which began in the United States, then spread to Europe, has now become global. [...] It is important to recognize that what began as a crisis in the financial sector has now become an economic crisis. But, it is not only an economic crisis, it is also a social crisis.’ *Report of Commission of Experts of the President of the General Assembly on Reforms of the International Monetary and Financial Systems* (Stiglitz Report) (21 Sept. 2009) 12; see further, *ILO’s Global Employment Trends 2014; Risks of Jobless Recovery* (International Labour Organization, 21 Jan. 2014).

<sup>2</sup> Krugman citing the work of Belgian economist Paul DeGrauwe suggests in general that ‘the crucial difference [...] seemed to be whether countries had their own currencies. Such countries can’t run out of money because they can print it if needed, and absent the risk of a cash squeeze, advanced nations are evidently able to carry quite high levels of debt without crisis.’ P. Krugman, *How the Case for Austerity has Crumbled* Vol LX, No 10, *New York Review of Books* (6 June 2013) 67, at 72. As for developing countries, the Stiglitz Report remarks: ‘While developed countries have the fiscal flexibility to respond, to stimulate their economies, to shore up failing financial institutions, to provide credit, and to strengthen social protections, most developing countries have tighter budget constraints, and resources directed towards offsetting the impact of the crisis must be diverted from development purposes’. *Report of Commission of Experts of the President of the General, supra* n. 1, 13. Greece, the subject of this article, seems to have suffered from both sets of constraints, a point addressed subsequently herein.

<sup>3</sup> ILO, *World of Work Report 2012: Better Jobs for a Better Economy* (ILO/International Institute for Labour Studies, 2012) viii.

violations of social rights in Greece. The conditionality imposed on Greece by the European Commission (Commission or EC), the European Central Bank (ECB) and the International Monetary Fund (IMF) – the so-called Troika – for receipt of loans, challenges conventional wisdom as to the role and capacity of the state. The disregard not only of substantive rights protection but of the very idea of state responsibility: of the state as the institution through which rights are protected and of the state as the entity that is liable for a failure to perform its human rights duties, are key stories to emerge from the response to the crisis in Greece. The extraterritorial obligations of eurozone states to the people of Greece is another story to emerge from the austerity crisis. And at the pinnacle of this account sits the absence of international legal responsibility of international institutions including the European Commission, the ECB, the European Stability Mechanism (ESM), and the IMF – so deeply implicated in the human rights harms that have come to pass in the name of saving Greece.

This article proceeds as follows: Part II provides an overview of the initial financial assistance mechanisms put in place for Greece and the concerns and impact of the conditionality measures tied to the assistance. Part III considers the case against Greece before the Social Rights Committee and the nature and content of the conditionality. In this section, links and lessons are drawn to the economic conditionality required by international financial institutions over the past decades in other parts of the world and queries the IMF's alleged turn to country 'ownership' and social impact assessment. Part IV looks to EU law to explore the legal issues around whether the EU institutions – the European Commission and the ECB – can be bound by the Charter of Fundamental Rights in relation to their conduct under the ESM, an international organisation established outside of the EU legal order. Part V looks to international law to consider the human rights obligations and legal responsibility of the ESM itself, the IMF and their respective Member States, including their extraterritorial obligations under the United Nations (UN) International Covenant on Economic, Social and Cultural Rights. In considering the issues of jurisdiction and international responsibility a range of different rights and relevant international sources are highlighted – in particular the right to social security under the European Social Charter ('social rights'); the protection of collective bargaining, fair and just working conditions, the entitlement to social security and social assistance, and access to health care, as well as the protection of human dignity and the right to life under the EU Charter of Fundamental Rights ('fundamental rights'); and a number of 'human rights' provided for in the International Covenant on Economic, Social and Cultural Rights, including the rights to work, to housing and to health. Drawing inspiration from central human rights doctrines to have emerged from the latter source, Part VI addresses what international institutions influencing the terms of conditionality in recipient countries should be expected to take on board in order to seek to avoid human rights harms in the exercise of their tasks. Part VII highlights how austerity has been widely condemned on its own terms as a response to recession, and indicates moreover

that securing socio-economic rights (however named) offers a stronger foundation for macro-economic performance as well as for the sharing of its gains. Part VIII offers some concluding remarks, including by drawing attention to some legal questions that lie ahead in this area.

## II 'SAVING' GREECE<sup>4</sup>

Greece was at the forefront of an early austerity intervention back in 2010 in order to address its sovereign debt which had been masked for years by the previous government (including with the help of Goldman Sachs<sup>5</sup>) and was exposed as part of the wider crisis.<sup>6</sup> Due to its near financial collapse, its status as a eurozone country and the concern over contagion that could affect other eurozone economies, since May 2010 the eurozone Member States and the IMF have been providing financial support that would 'save' Greece.<sup>7</sup>

A joint mission to Athens by the Troika took place from 21 April to 3 May 2010 following a request for international financial assistance from Greece.<sup>8</sup> The financial assistance agreed by eurozone Member States was part of a joint package along with the IMF.<sup>9</sup> This financial rescue operation for Greece was launched immediately prior to the adoption of two temporary assistance facilities – the European Financial Stabilization Mechanism (EFSM) and the European Financial

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<sup>4</sup> I borrow this tongue in cheek expression from the revolutionary work of J. McMurtry, 'The 2008—2013 Crisis as Metastasis. A Preview of the 2nd edition of *The Cancer Stage of Capitalism* by Pluto Press', 8 *Nordicum-Mediterraneum* 1 (2013).

<sup>5</sup> See the account by Michael Lewis: In 2001 'Goldman Sachs [...] engaged in a series of apparently legal but nonetheless repellent deals designed to hide the Greek government's true level of indebtedness. For these trades Goldman Sachs – which, in effect, handed Greece a \$1 billion loan – carved out a reported \$300 million in fees. The machine that enabled Greece to borrow and spend at will was analogous to the machine created to launder the credit of the American subprime borrower – and the role of the American investment banker in the machine was the same'. M. Lewis, *Boomerang* (Penguin, 2012) 62-63.

<sup>6</sup> 'Cheap credit rolled across the planet between 2002 and 2007 – entire countries were told the lights are out, do what you want, no one will know.' *ibid.*, 42.

<sup>7</sup> 'On 2 May [2010] the [EC/ECB/IMF] mission concluded a staff level agreement for a joint euro area / IMF financing package of EUR 110 billion and supporting economic policies. On the same day the Eurogroup agreed to activate stability support to Greece via bilateral loans centrally pooled by the European Commission. On 9 May the IMF executive board approved a Stand-By Arrangement. On 18 May 2010, the euro area Member States disbursed their first instalment of EUR 14.5 bn of a pooled loan to Greece, following a disbursement of EUR 5.5 bn from the IMF.' *European Economy, The Economic Adjustment Programme for Greece*, European Commission Occasional Papers 61/May 2010, 1.

<sup>8</sup> *ibid.*

<sup>9</sup> European Commission, Economic and Financial Affairs: Greece, available at: [http://ec.europa.eu/economy\\_finance/eu/countries/greece\\_en.htm](http://ec.europa.eu/economy_finance/eu/countries/greece_en.htm). 'As reflected in Council conclusions and the inter-creditor agreement of the 15 lending euro area Member States, signed on 9 May 2010, the Commission will coordinate and implement the programme on behalf and under the instruction of the euro area Member States and provide the support, including negotiation and signing with Greece, of a Loan Facility Agreement and Memorandum of Understanding regarding policy conditionality.' *European Economy, The Economic Adjustment Programme for Greece*, *supra* n. 7, 26. IMF approval comes by way of its Executive Board. *ibid.*, 9.

Stability Facility (EFSF), with the latter then constituting the financial assistance facility for Greece from 2012. The EFSM was established by a European Council Regulation in May 2010, with the EFSF established outside the EU legal framework as a public limited liability company governed by the laws of Luxembourg, but with the same essential functions and purpose as the EFSM and with eurozone Member States as shareholders constituting the Board of Directors.<sup>10</sup> Both have been replaced by the European Stability Mechanism, the permanent crisis resolution mechanism for the countries of the euro. While the EFSF will remain active in financing the ongoing programmes for Portugal, Ireland and Greece, as of 1 July 2013 the EFSF may no longer engage in new financing programmes or enter into new loan facility agreements and as of 1 July 2013 the activities of the EFSF will be carried out by the ESM staff.<sup>11</sup> The ESM will be the sole and permanent mechanism for responding to new requests for financial assistance by eurozone Member States.<sup>12</sup> Significantly, the governance of the EFSF, like the ESM, is a Board of Directors comprised now of the 18 eurozone States.<sup>13</sup> Like the ESM, the Commission and ECB attend as observers. This article focuses largely on the ESM, which was at the centre of the first European Court of Justice (ECJ) case on the debt crisis and its consideration exposes a range of legal gaps when it comes to the human rights issues that underpin this article. By way of note, the legal arguments presented as per the ESM and its Member States would also apply at a minimum to the eurozone Member States implicated in the establishment and governance of the EFSF.

The proclaimed aims of the financial assistance an ‘adjustment’ were to redress imbalances in public finances, reduce Greece’s external debt, and restore

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<sup>10</sup> EFSF Consolidated Articles of Association: ‘The object of the company will be to facilitate or provide financing to Member States of the European Union in financial difficulties whose currency in the Euro and which have entered into a memorandum of understanding with the European Commission containing policy conditionality’ (Art. 3). ‘The Company is managed by a Board of Directors consisting of as many Directors as there are shareholders’ (Art. 10.1). The European Commission and European Central Bank are each entitled to appoint an observer who may take part in the meetings of the Board of Directors but do not have the power to vote (Art. 11.11), available at: <http://www.efsf.europa.eu/attachments/EFSFStatusCoordonnes%2023AVRL2014.pdf>; and see the EFSF Framework Agreement between the ‘euro-area Member States’ or ‘EFSF shareholders’ and the European Financial Stability Facility”, available at: [http://www.efsf.europa.eu/attachments/20111019\\_efsf\\_framework\\_agreement\\_en.pdf](http://www.efsf.europa.eu/attachments/20111019_efsf_framework_agreement_en.pdf); see further, B. de Witte and T. Beukers, ‘The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order’ 50 *Common Market Law Review* (2013) 805.

<sup>11</sup> See online at: <http://www.efsf.europa.eu/>.

<sup>12</sup> ESM Treaty, preambular para. 1: ‘[...] This European Stability Mechanism (“ESM”) will assume the tasks currently fulfilled by the European Financial Stability Facility (“EFSF”) and the European Financial Stabilisation Mechanism (“EFSM”) in providing, where needed, financial assistance to euro area Member States.’ Treaty Establishing the European Stability Mechanism Between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland, 2 Feb. 2012 *European Communication* DOC/12/3, available at: [http://www.esm.europa.eu/pdf/esm\\_treaty\\_en.pdf](http://www.esm.europa.eu/pdf/esm_treaty_en.pdf) [hereinafter ESM Treaty].

<sup>13</sup> Latvia adopted the euro in January 2014 and became the 18th Member of the ESM on 13 Mar. 2014.

Greece's competitiveness.<sup>14</sup> These measures, shaped by austerity economics, were meant to serve a higher good – the *public* interest – by preventing economic collapse and restoring the economy. The Troika pursued reforms even if the approach taken to strengthening the economy and meeting their range of stated objectives have been widely challenged on their own terms. What occurred alongside the adjustments is, and remains, widespread social malaise including for the most socially and economically vulnerable in Greece. By its own estimation, the IMF concluded in its report of May 2013 on Greece that ‘the burden of adjustment was not shared evenly across society’.<sup>15</sup>

Support for Greece from the Troika has been conditional on what two authors sum up as reductions in public spending, drastic labour market reform, and ‘a welfare state retrenchment unprecedented in the post-war period’.<sup>16</sup> The impact of the measures on jobs, pay, conditions and services has been extensive.<sup>17</sup> Early research on austerity measures and labour market reform in Greece highlighted that the structural reforms imposed had ‘severely weakened the role of trade unions and social policy institutions, resulting in an almost full commodification of labour’.<sup>18</sup> Recent findings indicate that unemployment rose sharply, from 6.6 per cent in May 2008 to 27.6 per cent in April 2013, with young women facing massive unemployment at 50.2 per cent and young men faring little better at 43.5 per cent.<sup>19</sup> In the informal sectors of construction, agriculture and tourism earnings will have declined even more.<sup>20</sup> By 2012 both poverty and inequality had increased significantly driven primarily by the rise in unemployment, with 58 per cent of the unemployed living on incomes below the 2009 poverty line.<sup>21</sup> In line with the loan requirements to reduce the budget deficit, measures

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<sup>14</sup> ‘The government is fully committed to the policies stipulated in this document and its attachments, to frame tight budgets in the coming years with the aim to reduce the fiscal deficit to below 3 percent in 2014 and achieve a downward trajectory in the public debt-GDP ratio beginning in 2013, to safeguard the stability of the Greek financial system, and to implement structural reforms to boost competitiveness and the economy’s capacity to produce, save, and export.’ IMF, Greece: Memorandum of Economic and Financial Policies (3 May 2010); IMF, Greece: Letter of Intent, Memorandum of Economic and Financial Policies (15 Mar. 2012); see also, the Government in *Pensioners’ Union of the Agricultural Bank of Greece (ATE) v Greece*, European Committee of Social Rights, Complaint, Complaint No. 80/2012 16 Jan. 2012, para. 62.

<sup>15</sup> *Greece: Ex Post Evaluation of Exceptional Access under the 2010 Stand-By Arrangement*, IMF Country Report No. 13/156 (May 2013) para. 47.

<sup>16</sup> A. Koukiadaki and L. Kretsos, ‘Opening Pandora’s Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece’ 41 *Industrial Law Journal* 3 (2012) 276, at 276-277.

<sup>17</sup> D. Hall, ‘Greece’ *Cuts Watch Brief*, Business School, University of Greenwich (Nov. 2011), available at: <http://www.psir.org/sites/default/files/greece-cwbrief-Nov2011.pdf>; D. Stuckler and S. Basu, *The Body Economic: Eight Experiments in Economic Recovery from Iceland to Greece* (Penguin Books, 2013) 77-94.

<sup>18</sup> See Koukiadaki and Kretsos, *supra* n. 16, 277. Measures consistent with the neoliberal hostility to trade unions understood as posing an interference with the smooth operation of the labour market. C. Crouch, *The Strange Non-death of Neo-liberalism* (Polity Press, 2011) 18.

<sup>19</sup> M. Matsaganis, *The Greek Crisis: Social Impact and Policy Responses*, Friedrich Ebert Stiftung (Nov. 2013) 5.

<sup>20</sup> *ibid.*, 9.

<sup>21</sup> *ibid.*, 12-13; ‘In numerical terms, there were 2.5 million people living in poverty in 2012, an increase of nearly 190,000 people in one year.’ A. Leahy, S. Healy and M. Murphy, *The European Crisis and its Human Cost*, Crisis Monitoring Report 2014 (Caritas Europa, 2014), 32.

included ‘an increase in VAT and pension reforms, a cut in public sector wages, a 30% cut in special bonuses (e.g. holiday and Christmas bonus), a reduction in overtime pay and the suspension of recruitment of new workers’.<sup>22</sup> By 2013 only one in five unemployed person received unemployment benefits.<sup>23</sup> Cuts to spending on medication and outpatient pharmaceuticals were also requirements.<sup>24</sup> Access to basic health services was curtailed including by the introduction of user-fees<sup>25</sup> with a report of 2013 citing the collapse of public health programmes because of austerity.<sup>26</sup> Findings published in 2014 conclude that the inability to obtain care increased most for older people<sup>27</sup> and link a rise in depression and attempted suicide to the economic hardship in Greece.<sup>28</sup> Notably, privatisation of public sector operations as part of the fundraising drive is a core aspect of the measures required. The list of those operations to be partly or wholly privatized in Greece includes: water services, rail, gas, mobile telecoms, airports, motorways and the state electricity company,<sup>29</sup> policies characterised by one commentator as a providing a ‘massive transfer of wealth from the public to the private sector through privatizations of public enterprises’.<sup>30</sup> The IMF offers the following corroboration:

To restore competitiveness and growth, we will accelerate implementation of far reaching structural reforms in the labor, product, and service markets. [...]

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<sup>22</sup> Hall, *supra* n. 17.

<sup>23</sup> Matsaganis, *supra* n. 19, 34.

<sup>24</sup> Stuckler and Basu, *supra* n. 17, 84: ‘The IMF’s agreement with the Greek government specifically called for a “target to reduce public spending on outpatient pharmaceuticals from 1.9 to 1 and 1/3 percent of GDP”’. A. Kentikelenis, M. Karanikolos, I. Papanicolas, S. Basu, M. McKee and D. Stuckler, ‘Health and the Financial Crisis in Greece — Authors’ Reply’, 379 *The Lancet* 3 (17 Mar. 2012) 1002: ‘[R]esearchers at the National School of Public Health reported that “spending by Greeks on health is falling 36 percent” in 2011, from €25 billion to about €16 billion. Signs of further cuts are ahead, since the International Monetary Fund attributed Greece’s recent failure to reach deficit reduction targets partly on the inability to reduce hospital expenditures.’

<sup>25</sup> ‘In 2011, user fees were increased from €3 to €5 for outpatient visits (with some exemptions for vulnerable groups), and co-payments for certain medicines have increased by 10% or more dependent on the disease.’ A. Kentikelenis, M. Karanikolos, A. Reeves, M. McKee and D. Stuckler ‘Greece’s Health Crisis: From Austerity to Denialism’ 389 *The Lancet* (2014) 748, at 749; and further, Report of the United Nations 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, Mission to Greece (22-27 April 2013), UN Doc. A/HRC/25/50/Add.1, paras. 40-83.

<sup>26</sup> Stuckler and Basu, *supra* n. 17, 86.

<sup>27</sup> Kentikelenis et al., *supra* n. 25, 749.

<sup>28</sup> ‘Findings from population surveys suggest a 2.5 times increased prevalence of major depression, from 3.3% in 2008 to 8.2% in 2011, with economic hardship being a major risk factor. Investigators of another study reported a 36% increase between 2009 and 2011 in the number of people attempting suicide in the month before the survey, with a higher likelihood for those experiencing substantial economic distress.’(Footnotes removed). *ibid.*, 750.

<sup>29</sup> Hall, *supra* n. 17. ‘The process is being managed by a specially created private company overseen by EU appointees, with quarterly targets for the amounts to be sold. The proceeds are expected to be used to pay off the west European banks who hold Greek bonds.’ *ibid.* On the approach of neoliberal policy to privatisation including ‘natural monopolies’ such as the supply of electricity, gas and water, broadcasting and railways, see, Crouch, *supra* n. 18, 18-21.

<sup>30</sup> G. Katrougalos, ‘The Greek Austerity Measures: Violations of Socio-Economic Rights’, *International Journal of Constitutional Law Blog*, 29 Jan. 2013, available at: <http://www.iconnectblog.com/2013/01/the-greek-austerity-measures-violations-of-socio-economic-rights>.



To bring the fiscal deficit to a sustainable position, we will implement bold structural spending and revenue reforms. The adjustment will be achieved through permanent expenditure reductions, and measures to this end have already been implemented as prior actions. [...] We remain committed to our ambitious privatization plans.<sup>31</sup>

The human distress experienced within the country has been widely documented and the impact of the austerity measures have formed the basis of a series of complaints against Greece decided on by the Council of Europe's European Committee of Social Rights whose task it is to judge that states party comply, in law and in practice, with the provisions of the European Social Charter.

### III CONDITIONALITY AND THE LESSONS OF HISTORY

In a resulting set of decisions against Greece under the 1961 European Social Charter<sup>32</sup> Greece was found to have violated the right to social security due to its austerity measures, as alleged by the complainant.<sup>33</sup> In its defence, Greece argued, *inter alia*, that, 'the modifications of the pensioners social protection [...] result from the Government's *other international obligations*, namely those deriving from a financial support mechanism agreed upon by the Government together with the European Commission, the European Central Bank and the International Monetary Fund ("the Troika") in 2010'.<sup>34</sup>

The European Committee of Social Rights properly rejects this argument in its introductory remarks on the merits. To the Government's argument that 'the rights safeguarded under the 1961 Charter have been restricted pursuant to [its] other international obligations, namely those it has under the loan agreement with the EU institutions and the International Monetary Fund' the Committee replies 'that the fact the contested provisions of domestic law seek to fulfil the requirements of other legal obligations does not remove them from the ambit of

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<sup>31</sup> IMF, Greece: Letter of Intent, Memorandum of Economic and Financial Policies (15 Mar. 2012), *supra* n. 14.

<sup>32</sup> The complaint is part of a series of collective complaints concerning the same facts, registered as Nos. 76/2012 to 80/2012 and on which the European Social Rights Committee provided the same assessment and rendered the same decision.

<sup>33</sup> 'The Committee concludes that the Government has not established, as is required by article 12(3) [of the European Social Charter], that efforts have been made to maintain a sufficient level of protection for the benefit of the most vulnerable members of society, even though the effects of the adopted measures risk bringing about large scale pauperisation of a significant segment of the population [...]. The Committee holds, [...] that due to the cumulative effect of the restrictive measures and the procedures adopted to put them in place, they constitute a violation of the Article 12(3) of the 1961 Charter.' *Federation of Employed Pensioners of Greece (IKA-ETAM) v Greece*, European Committee of Social Rights, Decision on the Merits, Complaint No. 76/2012, paras. 81 and 83.

<sup>34</sup> *ibid.*, para. 10.

the Charter'.<sup>35</sup> Drawing on its earlier decision in the case of *CGT v France*, the Committee further notes that '[...] both when preparing the text in question [pertaining to binding measures] and when implementing it into national law – [state parties should] take full account of the commitments they have taken upon ratifying the European Social Charter.<sup>36</sup> Greece's subsequent argument was that any rights restrictions were the result of the fiscal and structural measures undertaken with the purpose of enhancing the competitiveness of the Greek economy and the operation of the labour market were laid down in a programme 'the observance of which is a prerequisite for the loan instalments as provided by the agreement with the Troika'.<sup>37</sup>

It may be questioned as to whether it is the external conditionality *itself* that requires measures that violate certain social rights, or whether it is the way they are being implemented nationally in particular policy areas. Of course the prospect that it is both is also possible. The IMF explains that its conditionality covers both the design of IMF-supported programs—that is, the macroeconomic and structural policies—and the specific tools used to monitor progress toward the goals outlined by the country in cooperation with the IMF.<sup>38</sup> According to the IMF, 'the member country has primary responsibility for selecting, designing, and implementing the policies that will make the IMF-supported program successful'.<sup>39</sup> The recent move by the IMF to national 'ownership' is not, however, easily reconciled with the 'specific' terms and requirements provided for in the Memoranda with Greece which are categorical on the extent of Troika oversight and explicit in their substantive prescriptions: 'The [Greek] authorities commit to consult with the European Commission, the ECB and the IMF on adoption of policies that are not consistent with this memorandum'; 'Actions for review' include the adoption of reform by Parliament (of the pension system to ensure its medium- and long-term sustainability); '[...] reform will be designed in close

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<sup>35</sup> *ibid.*, para. 50. The European Court of Human Rights makes a similar point in *Capital Bank AD v Bulgaria*, judgment of 24 Nov. 2005, no.49429/99: 'Furthermore, the Government's reliance on the alleged demands by the IMF to limit the courts' involvement in the closing of ailing banks was misplaced, because Bulgaria could not avoid its obligations under the Convention under the guise of complying with the recommendations of an international organisation.' A comparable argument in the *Latvia Pensions Case* was rejected by the Constitutional Court of Latvia, Decision of 21 Dec. 2009, Case no. 2009-43-01, see, ESCR-Justice, Monthly Caselaw Update, Issue 12, June 2010, available at: [http://www.escri-net.org/usr\\_doc/ESCR-JUSTICE\\_Issue\\_12\\_-\\_June\\_2010.pdf](http://www.escri-net.org/usr_doc/ESCR-JUSTICE_Issue_12_-_June_2010.pdf). 'Finally, the Court determined that the international creditors had not explicitly stipulated reductions in pension funds, and that these conditions had been proposed by Cabinet Ministers, but even if the conditions had been imposed by the creditors, the Court stated that conditions "cannot replace the rights established by the Constitution," and refused to recognize loan conditions as a valid argument in support of the law's reduction of pensions.'

<sup>36</sup> *Federation of Employed Pensioners of Greece (IKA-ETAM) v Greece*, *supra* n. 33, para. 51. Notably, the Committee points out that the consolidation of public finances doesn't by definition violate the right to social security, if 'necessary to ensure the maintenance of a given system of social security and did not prevent members of society from continuing to enjoy effective protection against social and economic risks'. *ibid.*, para. 71.

<sup>37</sup> *ibid.*, para. 66.

<sup>38</sup> Factsheet, *IMF Conditionality*, 31 Mar. 2014, available at: <http://www.imf.org/external/np/exr/facts/conditio.htm>.

<sup>39</sup> *ibid.*

consultation with European Commission, IMF and ECB staff, and its estimated impact on long-term sustainability will be validated by the EU Economic Policy Committee'.<sup>40</sup> The 2012 Memorandum of Understanding provides that 'Greece commits to consult with the European Commission, the ECB and the IMF staff on the adoption of policies falling within the scope of this Memorandum allowing sufficient time for review' and further: 'Disbursement are subject to quarterly reviews of conditionality for the duration of the arrangement.'<sup>41</sup> Substantive prescriptions include requirements to: 'Eliminate pension bonuses'; 'Adopt a comprehensive pension reform that reduces the projected increase in public spending on pensions'; 'Prepare a privatization plan for the divestment of state assets and enterprises', and; 'Public investment reduction'.<sup>42</sup> It is under these dubious terms that the IMF commitment to 'national ownership' is advanced.<sup>43</sup> Moreover, these terms and conditions come after 'prior action' policy, that is measures that a country agrees to take *before* the IMF's Executive Board approves financing or completes a review.<sup>44</sup> It is indicative that in considering the admissibility of a case against Greece for the impact on the right to property of austerity measures in the areas of wages and pensions, the European Court of Human Rights draws directly on the 2010 Memorandum for information on the measures at issue.<sup>45</sup>

Protests against the Troika plans in May 2010 had Greek protestors call for a nationwide referendum on the pending agreements, but the austerity package went into effect in May 2010 without a vote, as was the case with a subsequent attempt.<sup>46</sup> As Katrougalos concludes, 'The Memoranda imply that the Troika has decision-making power for defining and implementing economic, financial and social policies, which are innately contrary to the fundamental principle of a social state [...] [putting] the Greek government and parliament under direct political

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<sup>40</sup> Greece: Memorandum of Economic and Financial Policies (Memorandum of Understanding on Specific Economic Policy Conditionality), (2010) *supra* n. 14, 47 *et seq.*

<sup>41</sup> Greece: Memorandum of Economic and Financial Policies (Memorandum of Understanding on Specific Economic Policy Conditionality), (2012) *supra* n. 14, 51 *et seq.*

<sup>42</sup> Greece: Letter of Intent, Memorandum of Economic and Financial Policies (2010), *supra* n. 14.

<sup>43</sup> 'In line with the conclusions of the euro-area summit of 26 October 2011, the Government will fully cooperate with the Commission, the ECB and the IMF staff teams to strengthen the monitoring of programme implementation, and will provide the staff teams with access to all relevant data and other information in the Greek administration. However the ownership of the programme and all executive responsibilities in the programme implementation remain with the Greek Government.' Greece: Letter of Intent, Memorandum of Economic and Financial Policies (2012), *supra* n. 14.

<sup>44</sup> Factsheet, *IMF Conditionality*, *supra* n. 38.

<sup>45</sup> ECtHR, *Koufaki and Adedy v Greece*, Appl. Nos. 57665/12 57657/12, Admissibility Decision of 7 May 2013, para. 47.

<sup>46</sup> Stuckler and Basu, *supra* n. 17, 82-83, as compared to Iceland, *ibid.*, 57-75. When the Greek Prime Minister Papandreou announced a referendum in November 2011 on a second round of austerity measures from the Troika and despite the fact that 'it was plainly apparent to the Greek public that the austerity programme was not working' with budget cuts as well as rising government debt, 'under pressure from the troika and other European political leaders to pay back German and other investors quickly, Papandreou was forced to call the referendum off.' *ibid.*, 88 and further 92.

control of their debtors [...]'.<sup>47</sup> That the Troika was confronted with the legacy of rampant mismanagement and corruption in the public financial system may have rendered its job more complex, but hardly justifies the degree of economic and social control it exercised in constant violation of the *Rechtstaat*.

In a recent review of its general guidelines on conditionality as well as the design and effects of IMF-supported programmes during the period 2002-2011, the IMF's own findings highlight that 'further strengthening implementation of underlying policies might be required', as challenges remained in 'considering macro-social issues in IMF-supported programs [and] enhancing program ownership and transparency'.<sup>48</sup> While the IMF review concludes that 'Fund-supported programs are increasingly emphasizing social aspects' and '[s]ocial spending has been largely safeguarded under most Fund-supported programs', it notes some exceptions, including that of Greece, stating: 'in certain programs, successful crisis resolution has required significant cuts in expenditures, including in social sectors, and in real wages (the Greece program is a leading example)'.<sup>49</sup>

Greece claimed to have relinquished its sovereignty to the alleged authority of the external actors and in doing so sought to relieve itself of responsibility for the austerity policies linked to the conditionality that accompanied financial support. This is familiar terrain if we reflect on the impacts that the World Bank and IMF as international financial institutions have had on developing country governance over the past decades. This problem has been widely identified in the development literature and was summed up in a 2005 UK Policy Paper review on conditionality, which highlighted the negative impact both bilateral and multilateral donors have had on democratic governance in recipient countries as a result of developing countries being answerable to their donors rather than to their constituents.<sup>50</sup> One corollary is that national policy-makers can escape (or seek to escape) responsibility for their actions by attributing unpopular policies that were shaped on the basis of lender conditions to the international financial institutions or other agencies. Indeed, the International Labour Organization reports that Greece explained to a 2011 High Level ILO mission that despite the fact that 20 per cent of the population was facing the risk of poverty, 'it did not *have the opportunity* in meeting with the Troika, to discuss the impact of social security reforms on the spread of poverty, particularly for persons of small means and the social security benefits to withstand any such trends. It also *did not have the opportunity* to discuss the impact that policies in the areas of taxation, wages and employment would have on the sustainability of the social security system'.<sup>51</sup> Moreover, in an alarming sign of the governments' impotence vis-à-vis the Troika, the ILO mission reports that: 'The Government was encouraged by the fact that these issues were on the

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<sup>47</sup> Katrougalos, *supra* n. 30.

<sup>48</sup> IMF, *Survey Magazine: Policy*, 17 Sept. 2012, available at: <http://www.imf.org/external/pubs/ft/survey/so/2012/POL091712A.htm>.

<sup>49</sup> IMF, *Review of Conditionality*, 19 June 2012, available at: <http://www.imf.org/external/np/pp/eng/2012/061912a.pdf>.

<sup>50</sup> *Partnerships for Poverty Reduction: Rethinking Conditionality*, UK Policy Paper (Mar. 2005).

<sup>51</sup> *IKA-ETAM v Greece*, *supra* n. 33, para. 36. Emphasis added.

agenda of an international organisation [the ILO] and hoped that the ILO would be in a position to convey these issues to the Troika'.<sup>52</sup>

While the Greek government has itself been deemed to have failed to undertake even a minimum assessment of the impact of measures on vulnerable groups,<sup>53</sup> the IMF – by its own admission – does not consistently conduct prior social impact assessment. Between 2006 and 2010, nine of the 18 countries in an IMF case study sample were subject to programme conditionality affecting the prices of products consumed by the poor.<sup>54</sup> IMF economists have also been accused of assuming – without the hard data to back up their assumptions – that government spending would shrink economies and that all forms of government spending were the same. A recalculation of IMF estimates by Stuckler and Basu from real data (not mathematical models) and disaggregated by different types of government programmes over a period of ten years and across 27 industrialised countries, found that the IMF both underestimated austerity's economic harms and overlooked the damage that resulted from cutting public health budgets. According to Stuckler and Basu's peer-reviewed findings, it is health and education that offer the 'greatest fiscal multipliers'<sup>55</sup> (where every \$1 invested in these programmes returns \$3 back in economic growth and thus increased fiscal revenue to the State<sup>56</sup>). To this it might be added that human rights also benefit *directly* from social investment. The findings above point to a disregard by external actors of the requirement to undertake ex ante and ex post social impact assessment that forms a basic expectation of human rights law including guarantees of consultation by persons likely to be affected by the policies and access to information and transparency regarding public access to the results of assessments.<sup>57</sup>

There is a long and sordid history of the negative impacts on socio-economic rights as well as political rights based on the interventions of international financial

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<sup>52</sup> *ibid.*, para. 36; *Report on the High Level Mission to Greece* (Athens, 19-23 Sept. 2011), International Labour Office, para. 88.

<sup>53</sup> '[T]he Committee [...] considers that the Government has not conducted the minimum level of research and analysis into the effects of such far-reaching measures that is necessary to assess in a meaningful manner their full impact on vulnerable groups in society.' *Pensioners' Union of the Agricultural Bank of Greece (ATE) v Greece*, European Committee of Social Rights, Complaint, Complaint No. 80/2012 16 Jan. 2012, para. 75.

<sup>54</sup> IMF, *Review of Conditionality*, *supra* n. 49, para. 26.

<sup>55</sup> Stuckler and Basu, *supra* n. 17, 65

<sup>56</sup> *ibid.*, xii.

<sup>57</sup> UN Committee on the Elimination of Discrimination against Women, Concluding Observations: Greece, UN Doc. CEDAW/C/GRC/CO/7, paras. 13(c), 33(b), 40; *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights* (2011), Principle 14, available at: <http://www.maastrichtuniversity.nl/web/Institutes/MaastrichtCentreForHumanRights/MaastrichtETOPrinciples.htm>;

O. De Schutter, A. Eide, A. Khalfan, M. Orellana, M.E. Salomon and I. Seiderman, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights' 34 *Human Rights Quarterly* (2012) 1084, at 1115-1119.

institutions in developing countries<sup>58</sup> whereby human rights-holders were left to direct claims to their enfeebled governments as the traditional state duty-bearers under the relevant human rights treaties, while the international financial institutions, wearing their ‘non-state’ actor hats have been able to claim that they possess no legal obligations in the area of human rights.<sup>59</sup> It is not surprising to hear comparisons between the infamous period of structural adjustment in Africa as elsewhere a few decades ago and austerity-driven conditionality in Europe today. A former World Bank vice president is explicit in his recent comparison remarking that ‘[l]essons have not been learned’ and ‘SAPS’ being imposed on Europe now by the IMF *are very similar* to those that were being pushed on developing countries in the 70s and 80s by the World Bank and IMF’.<sup>60</sup> What we see in the case of Greece (as elsewhere<sup>61</sup>) is a comparable accountability gap when it comes to the IMF as Troika member.

#### IV CONDITIONALITY, FUNDAMENTAL RIGHTS, JURISDICTION AND EU LAW

In so far as the IMF has remained beyond the reach of international human rights law, a point to which we will return below in Part V, one might assume a better outcome when it comes to addressing the fundamental rights obligations of the EC and ECB as EU institutions, bound as they are under the EU Charter of Fundamental Rights to ‘respect the rights, observe the principles and promote the application [of the Charter] in accordance with their respective powers’,<sup>62</sup> but this has not been the case. The Charter provides for rights concerning collective

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<sup>58</sup> See the findings of Abouharb and Cingranelli: ‘Based on an analysis of outcomes in 131 developing countries between 1981-2003, we show that, on average, structural adjustment has led to less respect for economic and social rights, and worker rights.’ M.R. Abouharb and D. Cingranelli, *Human Rights and Structural Adjustment* (Cambridge University Press, 2007) 4 *et seq.*

<sup>59</sup> See further, M.E. Salomon, ‘International Economic Governance and Human Rights Accountability’ in M.E. Salomon, A. Tostensen and W. Vandenhoele (eds), *Casting the Net Wider: Human Rights, Development and New Duty-Bearers* (Intersentia, 2007) 153; F. Gianviti, ‘Economic, Social and Cultural Rights and the International Monetary Fund’ in P. Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press, 2005) 113.

<sup>60</sup> I. Goldin, *Divided Nations: Why Global Governance is Failing and What We Can Do About It*, LSE Public Lecture (20 Mar. 2013), available at: <http://www.lse.ac.uk/publicEvents/events/2013/03/20130320t1830vHKT.aspx>. Harvey remarks: ‘in 1984 the World Bank, for the first time in its history, granted a loan to a country in return for structural neoliberal reforms. De la Madrid then opened Mexico to the global economy by joining GATT and implementing an austerity programme. The effects were wrenching [...]’. D. Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005) 100.

<sup>61</sup> K. Chrysostomides, ‘Cyprus bailout: the test of illegality’, *Cyprus Mail* (Online), 7 Sept. 2013.

<sup>62</sup> Art. 51(1), Charter of Fundamental Rights of the European Union, 2000: ‘The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.’

bargaining, fair and just working conditions, the entitlement to social security and social assistance, and access to health care, as well as the protection of human dignity and the right to life; all rights impacted by the austerity measures in Greece.<sup>63</sup> The Charter also provides for equality between men and woman in all areas, including employment, work and pay but, as Ewing highlights; ‘far from ensuring the pain [of the Troika’s bailout terms] is endured equally between men and women, crucially the burden is falling disproportionately on the latter. This is true especially in terms of the impact of the growing levels of unemployment, and the move to part-time and rotation contracts, with women suffering additional problems of discrimination in trying to enforce maternity rights’.<sup>64</sup> Procedural fairness is also protected by the Charter’s ‘right to good administration’, inviting social impact assessment aimed at limiting negative repercussions on the most vulnerable segments of society, in reconciling competing interests,<sup>65</sup> and in upholding the requirements on EU institutions of broad consultation and transparency with concerned parties.<sup>66</sup>

As is familiar by now, the European Court of Justice in its first judgment addressing the legal consequences of the sovereign debt crisis and sitting as Full Court, ruled in the *Pringle* case on whether the ESM – an international organisation constituted by the then 17 euro currency EU Member States under a non-EU intergovernmental treaty – was legally constituted. The ESM is a permanent crisis resolution mechanism for the countries of the eurozone with a mandate to issue debt instruments in order to finance loans and other forms of financial assistance to eurozone Members States.<sup>67</sup> It is a mechanism through which eurozone Member States can pool their resources to assist individual Member States experiencing financial difficulty. The basis for establishing the ESM as a separate international organisation rather than an EU agency is in part due to the unwillingness of the non-euro Member States of the EU to contribute financially and to bear the risks of assisting eurozone countries,<sup>68</sup> but also notably due to the

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<sup>63</sup> For a helpful and systematic list of Charter rights subject to MoU conditionality see the recently released report by A. 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), available at: [http://www.etuc.org/sites/www.etuc.org/files/press-release/files/legal\\_opinion\\_human\\_rights\\_in\\_times\\_of\\_austerity\\_policy\\_final.pdf](http://www.etuc.org/sites/www.etuc.org/files/press-release/files/legal_opinion_human_rights_in_times_of_austerity_policy_final.pdf).

<sup>64</sup> K. Ewing, *Troika Imposes Illegal Terms on Greece*, The Institute of Employment Rights (12 May 2012), available at: <http://www.ier.org.uk/news/troika-imposing-illegal-terms-greece>; ‘The Committee notes with concern that the current financial and economic crisis and measures taken by the State party to address it within the framework of the policies designed in cooperation with the European Union institutions and the International Monetary Fund (IMF) are having detrimental effects on women in all spheres of life. CEDAW, Concluding Observations: Greece, *supra* n. 57, para. 6.

<sup>65</sup> On the requirements and benefits of the procedural approach including in properly balancing competing interests: D. O’Donovan *The Insulation of Austerity: The Charter of Fundamental Rights and European Union Institutions* (2013), available at: <http://humanrights.ie/uncategorized/the-insulation-of-austerity-the-charter-of-fundamental-rights-and-european-union-institutions/>; and see C. Barnard, *The Charter, the Court and the Crisis*, University of Cambridge Legal Studies Research Series, Paper No. 18/2013.

<sup>66</sup> Arts. 11(2) and (3) TFEU, see further: O’Donovan, *supra* n. 65.

<sup>67</sup> European Stability Mechanism, available at: <http://www.esm.europa.eu/index.htm>.

<sup>68</sup> See, de Witte and Beukers, *supra* n. 10, 813.

‘no bailout clause’ at Article 125 of the Treaty on the Functioning of the European Union (TFEU) that prohibits the Union or its Member States from becoming liable or assuming commitments of other Member States. In *Pringle* the ECJ held that the establishment of the ESM was legal on procedural and substantive grounds.<sup>69</sup>

The ESM is not a Union body and the Member States party to it are not implementing Union law, as such the Charter would seem to bind neither of them. In the *Pringle* case the national court observed, referring to an argument put forward by the applicant, that the establishment of the ESM outside of the EU legal order may have the consequence that the ESM is removed from the scope of the Charter rendering the establishment of the ESM in breach of Article 47 of the Charter which guarantees to all the right to an effective remedy.<sup>70</sup> The issue raised was that the conditions the ESM attach to stability support could have an adverse effect on the social rights in the Charter. The ECJ rejected the claim, concluding that the Union had no competence itself to establish such a mechanism within the EU and that the (resulting) ESM is removed from the scope of the Charter as are the Member States on the basis of Charter Articles 51(1) (Member States are not implementing Union law) and 51(2) (the Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new powers or tasks for the Union or modify powers and tasks as defined in the Treaties).<sup>71</sup>

One unresolved issue of key importance is the possibility that EU institutions could do outside of the EU that which they could not do within the EU – disregard the Charter of Fundamental Rights in the exercise of their tasks. The Court, for its part, left open whether the EU *institutions* – the European Commission and the ECB – can be bound by the Charter in relation to their conduct under the ESM.<sup>72</sup> Advocate-General Kokott’s position, correct on a teleological reading of Article 51(1), was that an EU institution was bound by the full extent of EU law including the Charter, also when acting outside of the EU.<sup>73</sup> Peers reaches the same conclusion but on a textual reading, making the astute observation that the Article 51(1) requirement to abide by the Charter ‘only when implementing Union law’, is best understood as *directed solely* to Member States and

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<sup>69</sup> Article 136 TFEU was amended to authorise euro Member States to establish a permanent stability mechanism. The ESM entered into force prior to the entry into force of the European Council Decision providing the authorisation and this has been the basis of a number of legal challenges, including in the *Pringle* case. Second was the compatibility of the ESM with a number of substantive provisions of the treaty most notably the prohibition on bailouts in Article 125 TFEU.

<sup>70</sup> Case C-370/12 *Pringle v Ireland*, Judgment (Full Court) of 27 Nov. 2012, para. 178 and further elaborated at para. 192 (AG Kokott).

<sup>71</sup> *ibid.*, paras. 178-181. Cf., *ibid.*, paras. 193-194 (AG Kokott).

<sup>72</sup> See, P. Craig, ‘Pringle and Use of EU Institutions outside of the EU Legal Framework: Foundations, Procedures and Substance’ 9 *European Constitutional Law Review* 2 (2013) 263, at 281-282.

<sup>73</sup> *Pringle v Ireland*, *supra* n. 70, para. 176 (AG Kokott); ‘[...] The 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.’ Craig remarks that Kokott’s position is ‘normatively desirable and legally sustainable’ on the wording of article 51(1), albeit strained on the basis of the second sentence of 51(1). Craig, *ibid.*, 282.



not to the EU institutions and bodies of the Union.<sup>74</sup> As such Article 51(1) provides in fact that the EU institutions and bodies are bound by the Charter whether they are implementing EU law or not. Article 51 states that the EU institutions are bound by the Charter without delineating any specific context; there is no basis upon which to conclude that fundamental rights obligations can be circumvented on the pretext of a delegation of functions.<sup>75</sup> Consistent with this view that now enjoys widespread support among legal commentators, the Committee on Constitutional Affairs of the European Parliament concludes that ‘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.’<sup>76</sup> That the Member States ‘borrowed’ the EU institutions for use by the ESM, and that, according to the Court, the extra tasks should ‘not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties’,<sup>77</sup> only reinforces the argument that EU institutions should not be able to carry out duties consistent with their usual duties when acting within the EU, as required, *but* without the usual checks and balances when it comes to obligations under the Charter.<sup>78</sup> As we shall soon see, there is a further complication that cannot be skirted over: while the Commission and ECB *negotiate* economic policy conditionality with recipient countries – which as argued above would require they do so in a manner compliant with their duties under the Charter of Fundamental Rights – they do so on *behalf* of the ESM.<sup>79</sup>

## V CONDITIONALITY, HUMAN RIGHTS AND INTERNATIONAL RESPONSIBILITY

As is clear, where the ESM provides stability support, conditionality is a requirement: ‘Such conditionality may range from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions.’<sup>80</sup> In the *Pringle* case, the ECJ recalls that in order to comply with EU law any financial

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<sup>74</sup> S. Peers, ‘Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework’ 9 *European Constitutional Law Review* 1 (2013) 37, at 51-52.

<sup>75</sup> Fischer-Lescano, *supra* n. 63, 9.

<sup>76</sup> Committee on Constitutional Affairs, Opinion, 11 Feb. 2014, 2013/2277(INI) para. 11.

<sup>77</sup> *Pringle v Ireland*, *supra* n. 70, para. 158.

<sup>78</sup> See generally, J. Tomkin, ‘Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy’, 14 *German Law Journal* 1 (2013) 169, at 174.

<sup>79</sup> Peers speculates as to whether the ECJ left open the question of whether the EU institutions can be bound by the Charter in relation to their conduct under the ESM because the Court had taken the view that those institutions could not adopt binding acts pursuant to the ESM Treaty. Peers, *supra* n. 74, 52.

<sup>80</sup> ESM Treaty, *supra* n. 12, Art. 12(1).

assistance provided under a stability mechanism created by Member States ‘will be made subject to strict conditionality’.<sup>81</sup>

Through these eyes conditionality offers only benefits; its aim is to secure investments directed at stabilising the economy. From the point of view of the recipient state, or more specifically the people impacted by the conditionality, the measures can have egregious impacts on the exercise of socio-economic rights. As reported by the UN Special Rapporteur on foreign debt and human rights following a mission to Greece in 2013, information which is now common knowledge, socio-economic rights are under threat or being undermined by austerity measures that the Greek Government has been required to implement since May 2010 in return for the bailouts. Rights that preoccupy the Special Rapporteur include: the rights to work and the ‘unprecedented rise in unemployment’ between 2008-2013; the right to social security whereby he argues that the priority has been ‘fiscal consolidation at the expense of the welfare of the people in Greece’; and the right to housing, highlighting that there has been an estimated 25 per cent increase in the country’s homeless population since 2009. When it comes to the right to health and healthcare, the Special Rapporteur remarks on the drop in expenditure and inaccessibility by the poor due to the introduction of fees,<sup>82</sup> with other findings pointing to a 200 per cent rise in the incidence of HIV/AIDS in Greece,<sup>83</sup> the return of mother-to-child transmission of HIV (routine screens are no longer conducted on pregnant women),<sup>84</sup> and the return of malaria.<sup>85</sup> The Special Rapporteur also notes his concern as to the exacerbation of poverty and inequality, along with the negative impact of privatisation on access to essential services.<sup>86</sup> What we have seen so far, and in significant ways what the Social Rights Committee cases against Greece highlights, is a disregard for the human rights implications of structural adjustment policies and a series of unresolved issues on the attribution of international legal responsibility for the harms incurred.

The governance structure of the ESM is comparable to that of the IMF with a Board of Governors and a Board of Directors having full decision-making powers.<sup>87</sup> The voting rights of each ESM Member is exercised by its appointee or by the latter's representative on the Board of Governors or Board of Directors.<sup>88</sup> Each ESM Member appoints a Governor who is member of the government of

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<sup>81</sup> *Pringle v Ireland*, *supra* n. 70, para. 72.

<sup>82</sup> United Nations 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, Mission to Greece, 22-26 April 2013, *End of Mission Statement*, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13272&LangID=E>

<sup>83</sup> Stuckler and Basu, *supra*. n. 17, xiv.

<sup>84</sup> *ibid.*, 91.

<sup>85</sup> *ibid.*, xiv.

<sup>86</sup> UN Independent Expert on the effects of foreign debt, *End of Mission Statement*, *supra*. n. 82 .

<sup>87</sup> ESM Treaty, *supra* n. 12, Arts. 4-6, and elsewhere.

<sup>88</sup> *ibid.*, Art. 4(7): ‘The voting rights of each ESM Member, as exercised by its appointee or by the latter's representative on the Board of Governors or Board of Directors, shall be equal to the number of shares allocated to it in the authorised capital stock of the ESM as set out in Annex II.’

that ESM Member with responsibility for finance.<sup>89</sup> The ESM treaty anticipates various delegated tasks to the European Commission and the ECB. This includes a mandate from the Board of Governors to the EC to negotiate, in liaison with the ECB, the economic policy conditionality attached to each financial assistance in accordance with Article 13(3)<sup>90</sup> which has the Board of Governors entrusting the EC – again 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 detailing the conditionality attached to the financial assistance facility, as well as monitoring compliance with the conditionality attached to the financial assistance.<sup>91</sup> Notably, the ESM is to cooperate very closely with the IMF in providing stability support and furthermore a eurozone Member State requesting financial assistance from the ESM is expected to address, wherever possible, a similar request to the IMF.<sup>92</sup> The EC signs the Memoranda on behalf of the ESM, subject ultimately to approval by the Board of Governors.<sup>93</sup> In the *Pringle* case, the Court notes that ‘the duties conferred on the Commission and ECB within the ESM Treaty, important as they are, do not entail any power to make decisions of their own. Further, the activities pursued by those two institutions within the ESM Treaty solely commit the ESM.’<sup>94</sup>

So the ESM treaty confers decision-making power on the Board of Governors or Board of Directors and it should be uncontroversial that as representatives of their state on the Board of Governors or Board of Directors each is bound to comply with their international human rights obligations in the policies they pursue that impact on the exercise of those rights in recipient countries, the approval vote cast by their representative constituting a state act and thus subject to human rights law and the general law on state responsibility. The international legal personality of the ESM<sup>95</sup> does not imply that decisions adopted by the organs of the international organisation can be attributed to the organisation but not to the states that participated in the organs: This argument fails to distinguish between the act of the state and the act of the international organisation. As the Centre for International Environmental Law has pointed out in a comparable context, the question is not one of attribution of the international organisation’s act to the state, but rather of the responsibility of the state for its own act. Further, the argument that there can be no state responsibility where there is international personality creates a ‘legal limbo’, one where states control the international organisation but are immune from legal responsibility for the consequences of such control. It appears that the better approach is to recognise

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<sup>89</sup> *ibid.*, Art. 5(1).

<sup>90</sup> *ibid.*, Art. 5(6)(g).

<sup>91</sup> *ibid.*, Art. 13(7).

<sup>92</sup> *ibid.*, preambular para. 8.

<sup>93</sup> *ibid.*, Art.13( 4).

<sup>94</sup> *Pringle v Ireland*, *supra* n. 70, para. 161.

<sup>95</sup> ESM Treaty, *supra* n. 12, Art. 32.

the possibility of both the responsibility of the state for the acts of its organ, such as an executive director that votes to approve a project, as well as the responsibility of the organisation for the acts of its organs, for example, a board of directors that approves a project.<sup>96</sup> As the Articles on the Responsibility of International Organizations point out:

A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.<sup>97</sup>

Moreover, while it could be argued that a state would not incur international responsibility when aiding and abetting an international organisation of which it is a member when it acts *in accordance with the rules of the organisation*, this does not imply that the state is free to ignore its other international obligations, for example in the area of human rights, and it would incur responsibility for a breach of those obligations as part of the law on state responsibility.<sup>98</sup> There are also strong arguments to suggest that Member States of international organisations are precluded from making decisions within the international organisation that are contrary to the human rights obligations to which the Member States have *all* subscribed or to which the shareholders with majority voting rights have subscribed where a system of weighted voting is used, as in the ESM and IMF.<sup>99</sup> Finally, it might also be noted that like all eurozone states, Greece is a member of the ESM and the IMF and is equally required to ensure compliance with its international human rights obligations when acting under the auspices of those organisations.

While it is clear that the Memoranda *require* economic conditionality and, as highlighted earlier, that their terms outline economic policies in some detail including many that are likely to impact on the exercise of socio-economic rights, and further that some degree of domestic discretion may be engaged in the implementation of economic policy,<sup>100</sup> a form of joint responsibility among the

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<sup>96</sup> *International Financial Institutions and Human Rights Law*, Legal Analysis by the Centre for International Environmental Law, Public Hearing, Inter-American Commission on Human Rights (127<sup>th</sup> Regular Period of Sessions) (1 Mar. 2007) 4; see also Salomon, *supra* n. 59, 153.

<sup>97</sup> International Law Commission, *Draft Articles on the Responsibility of International Organizations*, 2011 (A/66/10) [hereinafter ARIO], Art. 61.

<sup>98</sup> See, International Law Commission, *Draft Articles on the Responsibility of International Organizations with Commentaries* 2011 (A/66/10) Art. 58(2) at 91, para. 5. See similarly, ARIO, Art. 59(2).

<sup>99</sup> R. Hennessy, 'Defining States' International Legal Obligations to Cooperate for the Achievement of Human Development: One Aspect of Operationalising a Human Rights-Based Approach to Development' in M. Scheinin and M. Suksi (eds) *Human Rights in Development, Yearbook 2002* (Brill, 2002) 71.

<sup>100</sup> 'The Greek Parliament votes to accept a series of policy measures included in the programme of economic and financial policies, including an increase in VAT and excises, as well as further reductions in

various multi-level legal persons might be warranted.<sup>101</sup> On this model, joint responsibility could be attributed to the ESM Member States and to the ESM in so far as the ESM can be said to have general human rights obligations to respect the principles and rules concerning the basic rights of the human person,<sup>102</sup> and on the basis of the common human rights obligations of its Member States – all of which have ratified the International Covenant on Economic, Social and Cultural Rights, and to the Greek government for any influence it might be expected to have exercised over the domestic implementation of the policies. On the same reasoning, the IMF could also be liable – contrary to arguments that suggest it should escape legal responsibility – in so far as it remains subject to some debate as to whether it possesses human rights obligations.<sup>103</sup> Like the ESM, the IMF could be said to have obligations to respect the basic rights of the human person and, moreover, the human rights obligations common to its Member States. Both international organisations would also be required to refrain from steps that would undermine the possibility of the recipient state complying with its national and international human rights obligations.<sup>104</sup> Separate from any responsibility of the IMF qua the IMF, as above the IMF Member States are required to comply with their existing human rights obligations including when acting under the auspices of an international organisation. Finally, while the Commission and ECB would remain bound by the Charter of Fundamental Rights if we concur with the seemingly unanimous views of legal commentators on the *Pringle* case, one commentator further suggests that the EU itself should be held jointly liable, ‘since EU institutions were involved in the negotiation of the MoUs with the Commission and the ECB in accordance with Article 13 of the ESM Treaty, through a specific form of delegation of functions in which responsibility was not fully transferred’.<sup>105</sup>

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public sector wages and pensions.’ *European Economy, The Economic Adjustment Programme for Greece, supra. n. 7, 9.*

<sup>101</sup> As O’Donovan points out: ‘Isolating the international element can be difficult in the case work.’ O’Donovan, *supra* n. 65.

<sup>102</sup> See, M.W. Mutua and R. Howse, ‘Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization’ *Rights & Democracy* (2000); M.E. Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law*, (Oxford University Press, 2007) 160-179.

<sup>103</sup> See, Gianviti, *supra* n. 59; and cf. Salomon, *supra* n. 59; and P. Sands and P. Klein, *Bowett’s Law of International Institutions* (5th edn, Sweet & Maxwell Ltd, 2001) 459: ‘It has been suggested that, for example, the World Bank is not subject to general international norms for the protection of fundamental human rights. In our view that conclusion is without merit, on legal or policy grounds.’

<sup>104</sup> On the matter of accountability Wouters and Odermatt point out that ‘ARIO [Articles on the Responsibility of International Organizations] do not address the real obstacles preventing individuals from bringing IOs to account, such as the lack of available judicial forums or procedural obstacles such as the immunity of IOs before domestic courts’. J. Wouters and J. Odermatt, ‘Are All International Organizations Created Equal?’ 9 *International Organizations Law Review* 1 (2012) 8, at 10, and see; A. Reinisch and J. Wurm, ‘International Financial Institutions before National Courts’ in D.D. Bradlow and D. Hunter (eds), *International Financial Institutions and International Law* (Kluwer, 2010) 103 and S. Herz, ‘Rethinking International Financial Institution Immunity’, *ibid.*, 137.

<sup>105</sup> Fischer-Lescano, *supra* n. 63, 7 and 15-16. Cf., On developments as well as limits to social rights as ‘general principles’ of EU law see, I. de Jesús Butler, *The European Union and International Human Rights Law* (OHCHR Regional Office for Europe, 2011).

On the matter of protecting human rights and guaranteeing the right to a remedy when states transfer competences to international organisations, the European Court of Human Rights has repeatedly held that while obligations under the European Convention on Human Rights do not preclude states cooperating in certain fields of activity, that the obligations of Contracting states continue even after the transfer of competences.<sup>106</sup> Moreover, state action taken in compliance with such legal obligations is only justified as long as the relevant organisation is considered to protect the fundamental rights that bind the states in question (in this case under the European Convention on Human 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.<sup>107</sup>

There is an additional point to highlight here on the nature of obligations of States party to the International Covenant on Economic, Social and Cultural Rights, all of which are also ESM Member States. Under that human rights treaty, there is a requirement that the obligations to respect the rights provided for in the Covenant are complied with, including when acting internationally.<sup>108</sup> States have an obligation to refrain from conduct which nullifies or impairs the exercise of socio-economic rights of persons outside of their territories, also when acting collectively.<sup>109</sup> As mentioned above, they are also required to refrain from any conduct that indirectly impairs the ability of another state to comply with its obligations in the area of socio-economic rights, or to aid, assist, direct or control another state in that regard.<sup>110</sup> The UN Committee on Economic, Social and Cultural Rights (CESCR) mandated to monitor compliance with the Covenant, has repeatedly taken the position that States parties to the Covenant as members of international financial institutions should pay greater attention to the protection of Covenant rights, including as regards the rights to work and social security ‘in influencing the lending policies, credit agreements, structural adjustment programmes and international measures of these institutions. The strategies, programmes and policies adopted by States parties under structural adjustment programmes should not interfere with their core obligations [...]’ and impact

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<sup>106</sup> ECtHR, *Mathews v United Kingdom*, Appl. No. 24833/94, Grand Chamber Judgment of 18 Feb. 1999, paras. 29, 32 and 34; ECtHR, *Waite and Kennedy v Germany*, Appl. No. 26083/94, Grand Chamber Judgment of 18 Feb. 1999, para. 67; ECtHR, *Bosphorus Hava Yollary Turizm ve Ticaret Anonim Sirketi v Ireland*, Appl. No. 45036/98, Grand Chamber Judgment of 30 June 2005, paras. 152–156. See also, *The Maastricht Principles*, *supra* n. 57, Principle 15.

<sup>107</sup> *Bosphorus Airways v Ireland*, *ibid.*, para. 155; ECtHR, *Gasparini v l'Italie et la Belgique*, Requête No. 10750/03, Deuxieme Section, Decision de 12 mai 2009. While this article focuses on the ESM and its Member States it raises comparable issues related to the role of eurozone Member States and the lending decisions of the EFSF in the period prior to 2013.

<sup>108</sup> ICESCR, Art. 2(1): ‘1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.’ See, *Maastricht Principles*, *supra* n. 57, Principles 8-9.

<sup>109</sup> *ibid.*, Principles 19-20.

<sup>110</sup> *ibid.*, Principle 21; O. De Schutter, et al., *supra* n. 57, 1128-1131.

negatively on Covenant rights.<sup>111</sup> The jurisprudential work of the CESCR points clearly towards an appreciation of the very considerable influence on the exercise of socio-economic rights generated by external actors, including the decisions with extraterritorial effect taken under the auspices of the influential states and the institutions they direct. The position of the Committee underscores the expectation that human rights will be integral to decision-making where those decisions may impact on them, and moreover, that they give rise to corresponding obligations to act collectively towards meeting Covenant obligations.<sup>112</sup> The parties to the ESM treaty may have side-stepped their obligations under the Charter of Fundamental Rights, but not under ICESCR,<sup>113</sup> for which they may incur responsibility.

## VI WHAT SHOULD BE EXPECTED OF EXTERNAL ACTORS?

In the decisions against Greece by the Social Rights Committee, the Committee outlines what is required of the state to ensure individual rights are not infringed, in this case as regards cuts to pension entitlements and the right to social security. For our purposes, it seems wholly reasonable to suppose that the institutions constituting the Troika, and any other external actor influencing the terms of conditionality in recipient countries and thus human rights, should also be expected to take on board a range of precautionary steps to avoid human rights harms in the exercise of their tasks. If we were to draw on the Social Rights Committee views and apply them to international institutions, the decisions of international institutions would need better to reconcile measures in the ‘general interest’ with human rights, including ‘the legitimate expectations that individuals may have in respect of the stability of rules’ as the cases against Greece highlight.<sup>114</sup> This is a variation on the international human rights law principle of

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<sup>111</sup> CESCR, General Comment No. 18, The Right to Work (art 6), (35<sup>th</sup> session, 2005) UN Doc. E/C12/GC/18 (2005), para. 30; CESCR, General Comment No. 19, The Right to Social Security (Art. 9), (39<sup>th</sup> session, 2008) UN Doc. E/C.12/GC/19, para. 58 ‘States parties should ensure that their actions as members of international organizations take due account of the right to social security. Accordingly, States parties that are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should take steps to ensure that the right to social security is taken into account in their lending policies, credit agreements and other international measures. States parties should ensure that the policies and practices of international and regional financial institutions, in particular those concerning their role in structural adjustment and in the design and implementation of social security systems, promote and do not interfere with the right to social security.’

<sup>112</sup> See, Salomon, *supra* n. 102, 59-60.

<sup>113</sup> For an argument that eurozone states that have also accepted the jurisdiction of the Social Rights Committee to receive collective complaints could be the target of complaints regarding their shared responsibility for the violation of social rights in Greece, see, M. Sant’Ana, ‘Enforcing Extraterritorial Social Rights in the Eurozone Crisis’, in M. Gibney and W. Vandenhoele (eds), *Litigating Transnational Human Rights Obligations: Alternative Judgements* (Routledge, 2014) 302.

<sup>114</sup> *IKA-ETAM v Greece*, *supra* n. 33, para. 82.

non-retrogression and an analogy can be made with the work of CESCR in that there is a strong presumption that retrogressive measures on the part of a state are not permitted.<sup>115</sup> International institutions should seek to respect those presumptions. Potentially retrogressive measures could include cuts to expenditures on public services that are essential for the realisation of socio-economic rights, or cuts to taxes that are critical to funding those services.<sup>116</sup> Should a state use resource constraints as a justification for any steps that lead to a retrogression in rights, CESCR has indicated that in order not to fall foul of the Covenant a number of factors would need to be considered, such as the severity of the alleged breach, including whether the situation concerned the enjoyment of the minimum essential level of a right; and whether the state party had sought to identify low-cost options.<sup>117</sup> If any deliberately retrogressive measures are taken, CESCR has determined that the state party has the burden of proving that they have been introduced after the most careful consideration of all alternatives,<sup>118</sup> and that economic policy choices should always be those that least restrict rights.<sup>119</sup> To be clear, the principle of non-retrogression properly applied should not unduly circumscribe the flexibility of a state to respond to economic crises, but what it does do is signal the primacy of human rights, force a government to justify rights reductions, and foreground the requirement that no one fall below a certain standard.

Other requirements that the Social Rights Committee concluded the Government of Greece would have had to have met in order not to have been in violation of the right to social security under the Social Rights Charter, which should surely form part of the package required of international financial institutions, are that 'restrictive measures' must not deprive 'one segment of the population of a very substantial portion of their means of subsistence'.<sup>120</sup> 'Adjustments' (in this case to social security entitlements of pensioners) should be implemented in a manner that 'takes due account of their vulnerability, settled financial expectations and ultimately their right to enjoy access to social protection and social security'.<sup>121</sup> Greece, the Social Rights Committee concluded,

had not established, as is required by Article 12(3) of the European Social Charter, that efforts have been made to maintain a sufficient level of protection for the benefit of the most vulnerable members of society, even

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<sup>115</sup> CESCR, General Comment No. 19, The Right to Social Security, *supra* n. 111, para. 42, as elsewhere.

<sup>116</sup> See, R. Balakrishnan and D. Elson, 'Auditing Economic Policy in the Light of Obligations on Economic and Social Rights', 1 *Essex Human Rights Law Review* (2008) 1, at 6.

<sup>117</sup> CESCR, Statement on an Evaluation of the Obligations to Take Steps to the 'Maximum Available Resources' under an Optional Protocol to the Covenant, UN Doc. E/C12/2007/1, para. 10.

<sup>118</sup> CESCR, General Comment No. 3, The Nature of States Parties' Obligations (Art. 2(1)), (1990), UN Doc. E/1991/23 (1990), annex III, para. 9; CESCR, General Comment No. 19, The Right to Social Security, *supra* n. 111, para. 42.

<sup>119</sup> CESCR, *Letter to States Parties to the International Covenant on Economic, Social and Cultural Rights*, 16 May 2012, Ref: CESCR/48<sup>th</sup>/SP/MAB/SW.

<sup>120</sup> *KA-ETAM v Greece*, *supra* n. 33, para. 82.

<sup>121</sup> *ibid.*



though the effects of the adopted measures risk bringing about a large scale pauperisation of a significant segment of the population [...].<sup>122</sup>

To be sure, the Troika institutions and their masters have not made every effort either.

In sum, international organisations that impact on the exercise of human rights by virtue of that power should by now have their relevant human rights duties clearly spelled out. The ‘political prohibition’ in the IMF’s Articles of Agreement whereby ‘only economic considerations shall be relevant to their decisions’ does not on any contemporary account entail a prohibition of human rights considerations. At a minimum, and as highlighted analogously by the former World Bank General Counsel: there are a host of factors including social, environmental and political elements that may affect economic growth and thus require proper consideration in the crafting of policies.<sup>123</sup> While we wait for international law to catch up with the exercise of power traditionally assumed to be largely that of national authorities, far more should be required of the ‘rescuers’ than an attempt to ensure financial stability.

## VII AUSTERITY AND ITS CONTESTANTS

Capitalism's modern variant of the past 40 years has been underpinned by deregulation, privatisation, free trade and investment, and the withdrawal of the state from many areas of social provision. On this account, human well-being is best satisfied by the market and the role of the state is to guarantee the conditions that best allow the markets to function, including through the creation of new areas for commodification, such as water, education, and healthcare. The embrace of neoliberalism in political-economic thinking and practice has been, and remains, ubiquitous<sup>124</sup> and in significant ways is so entrenched as to be 'beyond ideology'.<sup>125</sup>

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<sup>122</sup> *ibid.*, para. 81.

<sup>123</sup> *Legal Opinion on Human Rights and the Work of the World Bank*, Senior Vice President and General Counsel (R. Danino), 27 Jan. 2006; see further, D.D. Bradlow, ‘The World Bank, the IMF and Human Rights’, 49 *Transnational Law and Contemporary Problems* 6 (1996) 47.

<sup>124</sup> Harvey explains: ‘there has everywhere been an emphatic turn towards neoliberalism in political-economic practice and thinking since the 1970s. [...] Almost all states, from those newly minted after the collapse of the Soviet Union to old style social democracies and welfare states such as New Zealand and Sweden, have embraced, sometime voluntarily and in other instances in response to coercive pressures, some version of neoliberal theory [...]’. Post-apartheid South Africa quickly embraced neoliberalism, and even contemporary China [...]. Furthermore, the advocates of the neoliberal way now occupy positions of considerable influence in education [...], the media, in corporate boardrooms and financial institutions, in key state institutions (treasury department, central banks), and also in those international institutions, such as the International Monetary Fund, the World Bank, and the World Trade Organization [...].’ Harvey, *supra*. n. 60, 2-3.

<sup>125</sup> T. Frank, *Pity the Billionaire* (Vintage, 2012) 28.

Austerity offers an economic policy akin to neoliberalism; it is a form of ‘voluntary deflation in which the economy adjusts through the reduction of wages, prices and public spending to restore competitiveness, which is supposedly best achieved by cutting the state’s budget, debts, and deficits’.<sup>126</sup> According to the advocates of austerity this will inspire the confidence of business.<sup>127</sup> Many commentators have questioned the economic soundness of austerity as a response to recession as well as the social implications of austerity. Many have also highlighted their deep anxiety over the dominance and hold of austerity orthodoxy and the silencing of alternative voices.<sup>128</sup> This unease is also significant for our purposes, since it points to a categorical disregard of human rights, most notably but by no means exclusively socio-economic rights,<sup>129</sup> by the international institutions that share in the responsibility of having brought austerity so violently to bear. This seeming disregard after over half a century of formally entrenching socio-economic rights – whether borne of wilful neglect, reveries of institutional and disciplinary supremacy, or myopia – invites alarm.

Austerity has received extensive criticism as a policy response evaluated *on its own terms* – for taking the wrong approach to promoting growth and investment. Paul Krugman argued in 2011 that ‘in the face of the current crisis, austerity has been a failure everywhere it has been tried’<sup>130</sup> and in 2013, that the results of the turn to austerity ‘were disastrous – just about as one would have predicted from textbook macroeconomics’.<sup>131</sup> In an open letter hundreds of US economists argued that austerity measures ‘threatened its recovery’ and that it was ‘dangerous’.<sup>132</sup> Using Britain, Ireland, Spain and Greece as examples, they highlighted, like Krugman, that ‘inflicting austerity on a weak economy leads to deeper recession, rising unemployment and increasing misery’.<sup>133</sup> The UK National Institute of Economic and Social Research and the ILO are among those institutions whose recent findings on Europe indicate the failure of austerity measures to address the economic woes across the continent,<sup>134</sup> with the work of Stuckler and Basu showing the benefits of stimulus to the economy and human well-being in both eurozone countries and countries with their own currencies,

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<sup>126</sup> M. Blyth, *Austerity: The History of a Dangerous Idea* (Oxford University Press, 2013) 2.

<sup>127</sup> *ibid.*

<sup>128</sup> See, among others, Krugman, *supra* n. 2; J. McMurtry, *supra* n. 4; Frank, *supra* n. 125.

<sup>129</sup> For an overview of the range of human rights impacted by austerity, including access to justice, freedom of expression and the rights to participation and transparency see, N. Lusiani and I. Saiz, *Safeguarding Human Rights in Times of Economic Crisis*, Commissioner for Human Rights, Council of Europe Issue Paper (Nov. 2013).

<sup>130</sup> P. Krugman, ‘Legends of the Fail’ *New York Times* (10 Nov. 2011).

<sup>131</sup> Krugman, *supra* n. 2, 72.

<sup>132</sup> ‘Jobs and Growth, not Austerity’, Open letter signed by US economists, Institute for America’s Future (Dec. 2012), available at: <http://jobsnotausterity.org/>.

<sup>133</sup> *ibid.*

<sup>134</sup> D. Holland and J. Portes, ‘Self-defeating Austerity?’, 222 *Journal of the National Institute Economic Review* 1, (Oct. 2012) 4, at 4: ‘[T]he current strategy being pursued by individual Member States, as well as the EU as a whole, is fundamentally flawed. Even on its own terms, it is making matters worse.’; ILO, *World of Work Report 2012*, *supra* n. 3.

such as Iceland.<sup>135</sup> From the perspective of human rights, austerity measures adopted in several European countries point to lacunae in EU law and in the laws on international responsibility.

There are arguments in fact that ‘market fanaticism [was] institutionalized in the common currency’<sup>136</sup> by removing the capacity of diverse societies to act and thereby exposing a particular form of democratic-deficit. No longer with the option to decide for themselves whether to devalue their currency and shield themselves from globalisation,<sup>137</sup> in important ways state sovereignty was qualified and with it democracy.<sup>138</sup> The various strands reflected in this article come together to suggest that Europe is quite acutely misaligned: the euro is a common currency but government debt is national; the European system is neither federal nor national; and international institutions are empowered to make many decisions that impact on well-being but are not systematically responsible for the human rights harms that ensue.<sup>139</sup>

A 2013 IMF Research Paper challenges austerity in finding that ‘fiscal consolidation [austerity] typically raises income inequality, raises long-term unemployment and lowers the share of wage income’.<sup>140</sup> There is anti-austerity agitation in Brussels, with talk of a ‘social progress pact’ and the need to invest in education and to provide a social protection floor.<sup>141</sup> The EU Justice Commissioner called for the Troika to be abolished focusing in particular on cutting out the IMF so as to move towards a ‘social market economy’ as the ‘EU Treaty requires’.<sup>142</sup> While seemingly pointing us in a humane direction, these developments leave a sentient observer cold.

It is untenable, except for the fact that it happened, that the elite failed to see the eurozone crisis, and the responses to it, not only as a financial and economic issue but also as a human one. They failed effectively to acknowledge that stabilising economies through austerity measures at best secures socio-economic rights only indirectly and tenuously and, at worst, violates them egregiously. Decades of experience from elsewhere in the world on the human costs of structural adjustment should inform decision-making, as should the experience of the impunity (and immunities) with which international organisations function when it comes to the human rights harms caused by their policies. Alongside these occurrences, there has been half a century of standard-setting in the area of socio-

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<sup>135</sup> Stuckler and Basu, *supra* n. 17.

<sup>136</sup> W. Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (Verso, 2014) 175.

<sup>137</sup> ‘It serves as a break for capitalist expansion and rationalization [...]. Countries able to devalue can decide for themselves whether and, at what speed, they wish to discard their pre-capitalist or anti-capitalist heritage, and in which direction they want to transform it.’ *ibid.*, 182.

<sup>138</sup> See, *ibid.*, 188.

<sup>139</sup> Thanks to Eero Kasanen for valuable exchanges and for some of the ideas captured here.

<sup>140</sup> See, R.H. Wade, ‘Capitalism and Democracy at Cross-Purposes’ 56 *Challenge* 6 (Nov./Dec. 2013). Wade explains, that ‘this is a working paper from the IMF research department, which is quite separate from IMF operations (in its operations the IMF continue to push fiscal consolidation in most cases)’.

<sup>141</sup> T. Barber, ‘Anti-Austerity Crusade Sends Mayday Signal across Europe’, *Financial Times*, 1 May 2013.

<sup>142</sup> ‘EU Commissioner Calls for Troika to be Abolished’, *Reuters*, 16 July 2013.

economic rights regionally and internationally enhanced by the normative development of their content. Why was all this accumulated knowledge and experience ignored? The people of Greece were treated as if there is no history.

Findings show that securing socio-economic rights is very good for the economy and the sharing of its gains.<sup>143</sup> Human rights provide an instrumental benefit in that they offer a strong foundation for macro-economic performance<sup>144</sup> and represent an intrinsic good in that people, their dignity and their well-being are valued. Europe proclaims its commitment to ‘human dignity, freedom, democracy, equality, the rule of law and respect for human rights’<sup>145</sup> but in the grip of institutionalised austerity these values have been very hard to find. The Treaty on the Functioning of the European Union provides that the Union and its Member States, in pursuing social policies, shall have in mind ‘fundamental social rights’ such as those set out in the European Social Charter of 1961 and the Community Charter of the Fundamental Social Rights of Workers of 1989,<sup>146</sup> but in establishing the support mechanisms and mandating the Troika social rights were not kept in mind. The negative impact of austerity on the people of Greece, and not only Greece, casts a long shadow over Europe and the idea that its institutions – and those institutions with which it is prepared to partner such as the IMF – are bound by human rights. Europe's claim to being a progressive force has been eroded.

## VIII CONCLUDING REMARKS

An important period lies ahead for the development of law and policy in this multi-faceted area. Looking ahead, questions of legal doctrine might include whether the ‘general or public interest’ should in fact be reducible to the broad objectives of the elimination of the budget deficit or the stability of public finances as the applicants queried in the recent case of *Koufaki and Adedy v Greece* before the European Court of Human Rights dealing with austerity-induced wage cuts and its interference with the applicants right to property;<sup>147</sup> all sorts of sins can be masked in the search for growth.<sup>148</sup> Second, it might be questioned as to whether it is right

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<sup>143</sup> See, S.A. Ramirez, ‘Taking Economic Human Rights Seriously After the Debt Crisis’, *Loyola University Chicago Law Journal* (2011) 713. See also, OHCHR Background Paper, *Promoting a Rights-based Approach to Economic, Stabilization, Recovery and Growth* (2013).

<sup>144</sup> See, Ramirez, *supra* n. 143, 724. Here findings are in relation to civil and political rights and equally that ‘human capital development more convincingly leads to growth, which in turn leads to more democratic and less autocratic institutions’. *ibid.*, fn 15 drawing on E. Glaeser et al., ‘Explaining Growth: Institutions, Human Capital, and Leaders’, *Brookings Panel on Economic Activity, Working Paper*, Mar. 2004; and note the work of Stuckler and Basu referred to earlier on ‘fiscal multipliers’, *supra* n. 17.

<sup>145</sup> Art. 2 TEU.

<sup>146</sup> Art. 151.

<sup>147</sup> *Koufaki and Adedy v Greece*, *supra* n.45, para. 23.

<sup>148</sup> See the discussion by Pils on the drive for rapid urbanisation in China and state orchestrated landgrabs whereby the ‘public interest’ is thought to be justified by reference to a general desire for GDP growth.

to conclude as the Court of Human Rights has, that human rights are in fact not implicated by reductions in means as long as a person is not reduced to barebones existence.<sup>149</sup> A third matter is whether the margin of appreciation is a suitable doctrine when it is not national authorities determining social policy<sup>150</sup> but external actors instead. Austerity in Europe should force a rethink across a range of areas.

As this article has shown, the Social Rights Committee held Greece responsible for a violation of the right to social security but Greece (not surprisingly) blamed its international creditors for the injurious policies. Borrowing states surely retain their human rights obligations despite the role and influence of external actors on domestic policy, but the idea that they are in a meaningful position to honour those obligations when entering into agreements is deeply questionable. The extensive influence of the European Commission, ECB, ESM and IMF on the creation of austerity policies in Greece is clear, but when we look to the international creditors for awareness as how to devise policies that are human rights compliant we find virtually nothing, with the ECJ for its part sidestepping pronouncing on the legal responsibility of the Commission and ECB for violations of the Charter of Fundamental Rights. As for the IMF, for all intents and purposes it continues to benefit from anachronistic legal protections when it comes to the human rights impacts of its conditionality and at the level of practice has done far too little to see socio-economic rights reflected in its design and oversight of national economic policy. Much the same can be said of the ESM. As for the Member States of the ESM and IMF, they retain their human rights obligations and this article has considered the current scope of their international responsibility in that regard.

While the economic crisis in Greece may have represented an emergency situation that demands the creation of ad hoc urgent mechanisms, this offers no justification for disregarding basic rights, democratic oversight, and assurances of legal responsibility for all involved; to the contrary, emergency situations should

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E. Pils, 'Voice, Reflexivity and Say: Governing Access to and Control of Land in China' in O. de Schutter and K. Pistor (eds), *Governing Access to Essential Resources* (Columbia University Press, forthcoming).

<sup>149</sup> 'The Court attaches particular weight to the reasons given by the Supreme Administrative Court [of Greece] which, in its judgment of 20 Feb. 2012, dismissed several arguments to the effect that the measures in question had breached the proportionality principle. More specifically, the Supreme Administrative Court held that the fact that the cuts in wages and pensions were not merely temporary was justified, since the legislature's aim had been not only to remedy the acute budgetary crisis at that time but also to consolidate the State's finances on a lasting basis [...]. It further observed that the applicants before it had not claimed specifically that their situation had worsened to the extent that they risked falling below the subsistence threshold.' *ibid.*, para. 44 'The Court considers that the extent of the reduction in the first applicant's salary was not such as to place her at risk of having insufficient means to live on and thus to constitute a breach of Article 1 of Protocol No. 1. In view of the foregoing and of the particular context of the crisis in which the interference in question occurred, the latter could not be said to have imposed an excessive burden on the applicant. *Koufaki and Adedy v Greece*, *supra* n. 45, para. 46; cf., M.E. Salomon, 'Why Should it Matter that Others Have More: Poverty, Inequality and the Potential of International Human Rights Law', 5 *Review of International Studies* 37 (2011) 2137.

<sup>150</sup> *Koufaki and Adedy v Greece*, *supra* n. 45, paras. 31 and 48.

summon human rights vigilance.<sup>151</sup> These may be unusual times but in important ways they are also deeply familiar times; and the future promises more not less supranational and international influence on the exercise of human rights. The policy responses to the economic crisis have foregrounded legal gaps when it comes to securing socio-economic rights protections across the various levels of external influence, surely now the time has come to see those gaps systematically closed.

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<sup>151</sup> See, G. Katrougalos, 'The Greek Austerity Measures: Remedies under International Law', *International Journal of Constitutional Law Blog*, 30 Jan. 2013, available at: <http://www.iconnectblog.com/2013/01/the-greek-austerity-measures-remedies-under-international-law/>.