

# The impact of the economic crisis on human rights in Europe and the accountability of international institutions

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**Abstract:** *The impact of austerity measures in Europe on human rights has now been widely documented by international and regional bodies and scholars working in the area. The article begins its investigation by briefly examining the impact of austerity measures adopted by European states on human rights standards, with a particular emphasis on the cases of those Eurozone states in bail-outs. The second part of the article investigates the role of international institutions in the austerity measures in Europe, and the institutional framework underlying the bailout measures in the Eurozone. It places a particular emphasis on the European Stability Mechanism (ESM), now established as a permanent crisis resolution mechanism. In this context, the article exposes a number of problems linked to the absence of accountability of the ESM, including its democratic deficit, technocratic rule and lack of transparency. At the heart of the article are questions around the degree of autonomy left to states in the context of austerity measures, and whether a certain degree of responsibility for the human rights violations resulting from these measures may be attributed directly to the institutions driving the conditionality agenda. The main legal framework will be international law, both international human rights law and international institutional law, which is still lagging behind in terms of direct accountability of international organisations for human rights violations, but remains a rich and useful field from which to derive a number of conclusions about the human rights responsibility of international institutions. The article concludes with a number of recommendations aimed directly at the international institutions in their imposition of austerity measures.*

**Key words:** *bailout; Eurozone; human rights; austerity measures; accountability; European Stability Mechanism*

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Many countries in the west seem to be doing their best to go straight into the mouth of a fairly hefty snake ... austerity measures in Europe are a spiralling catastrophe (Sen 2011).

## 1 Introduction

The impact of the global financial and economic crisis of 2008 has been felt throughout the world to varying degrees. In Europe, and in particular in the Eurozone, it has taken on a particular form, with the 'debt crisis' dominating the news as the crisis continues to unfold in the region. The quest for instruments to address the sovereign debt crisis in Europe has led to a significant transformation of the European Union (EU) constitutional order (Poulou 2014: 1145). The resulting dynamics of debt conditionalities in the European Monetary Union have given rise to a thick web of institutions, pressures and conflicting legal obligations in which EU member states have been embroiled while attempting to unravel their financial and macro-economic policies. Most European states have thereby adopted austerity measures, often as a direct result of loan conditionalities imposed by international financial institutions.

The austerity measures adopted by European states have been criticised, not only for being ineffective at stimulating economic growth (Krugman 2013), but also for their severe impact on a number of international human rights standards. This has particularly affected the area of economic and social rights, and a number of civil and political rights. The impact of austerity measures on human rights in affected European countries has been widely documented by international and regional bodies and scholars working in the area (European Union Agency for Fundamental Rights 2013; Kilpatrick & De Witte 2014). Particularly, the regressive implementation of social rights resulting from public spending cuts, and the disproportionate effects of the austerity measures on the most vulnerable and marginalised segments of the population, have compounded pre-existing patterns of discrimination in the political as well as the social and economic spheres (Council of Europe 2013: 7).

The article begins its investigation by documenting the impact of austerity measures adopted by European states on human rights standards, with a particular emphasis on the cases of those Eurozone states in bailouts. The second part of the article investigates the role of international institutions in the austerity measures in Europe. It also looks at the institutional framework underlying the bailout measures in the Eurozone, with a particular emphasis on the European Stability Mechanism (ESM), now established as a permanent crisis resolution mechanism. In this context, the article exposes a number of problems linked to the absence of accountability of the ESM, including its democratic deficit, technocratic rule and lack of transparency. At the heart of the article are questions around the autonomy given to states in the context of austerity measures, and whether a certain degree of responsibility for the human rights violations resulting from the measures may be attributed directly to the institutions driving the conditionality agenda. The main legal framework drawn on by the article is international law, both international human rights law and international institutional law, which is still lagging behind in terms of direct accountability of international organisations for human rights violations, but remains a rich and useful field from which to derive a

number of conclusions about the human rights responsibility of international institutions. The article concludes with a number of recommendations aimed directly at the international institutions in their imposition of austerity measures.

## 2 Austerity measures in the Eurozone

The global financial crisis hit the world in 2008 with the collapse of the United States of America (USA) sub-prime mortgage market, bank bailouts and mass unemployment. What resulted in Europe was also a deep, and, in many ways, unprecedented economic crisis, which after 2010 took on the particular form of the 'debt crisis'. The sovereign debt crisis began in Greece and then rapidly spread to other Eurozone economies, as the factual interdependence of the participating economies in the monetary union triggered a domino effect in the Eurozone (Poulou 2014: 1145). During the second stage of the financial crisis, European states started to implement austerity measures to combat their budget deficits, which had increased dramatically as a result of the earlier stage of the crisis and the policy response to it, including financial sector bailouts (OHCHR 2013; Council of Europe Parliamentary Assembly 2012).

Austerity measures adopted by European states as a result of the crisis generally included severe cuts in public social spending, social security benefits and social protection programmes, including pension schemes and labour market reforms and deregulation (O'Conneide 2014). Coupled with selective tax increases and the privatisation of public services, these measures were seen as the only answer to boosting competitiveness and increased revenue generation (Wau et al 2014: 89). While the range and impact of the austerity measures have differed across Europe (Hemerijck 2012), their scale has been unprecedented and has affected a wide sector of the European population (Crouch 2013: 41).<sup>1</sup>

If the trend towards fiscal austerity today is global (Ortiz et al 2011), it has taken on a particular form in a number of Eurozone states: that is, strict conditionality in return for financial assistance. In fact, the most sweeping austerity measures were introduced in those European countries most enmeshed in the Eurozone debt crisis, countries that received emergency loans and financial bailouts subject to strict conditionality by creditor states and institutions. O'Conneide (2014: 185) described the impact of this situation when comparing post-crisis austerity measures with those already present in pre-crisis Europe:

In Greece, Spain and the other states which have been forced to introduce sweeping austerity measures in return for receiving support from the IMF and other European governments, the impact of these measures has been devastating: substantial damage has been caused to the socio-economic fabric of these states, and their systems of social protection have come under unprecedented pressure.

1 As noted by Crouch: '[T]he continuing destabilising influence of European policies on national welfare states are leaving middle-income and lower-income families exposed to a new intensification of uncertainty. The search for flexicurity has been blown off course.'

In particular, Greece's sovereign debt and its near financial collapse in 2010 led to a number of measures for financial support agreed by the Eurozone member states in collaboration with the International Monetary Fund (IMF). Immediately after Greece received the first Eurozone sovereign debt assistance package,<sup>2</sup> EU member states decided to set up two temporary assistance mechanisms to provide future loans: the European Financial Stability Mechanism (EFSM) and the European Financial Stability Facility (EFSF).<sup>3</sup> While the EFSM was set up under EU law by a European Council regulation,<sup>4</sup> the EFSF was set up as an international agreement between Eurozone states, outside the EU legal framework. Similarly, the ESM was set up as an international agreement outside the EU legal framework. This permanent crisis resolution mechanism has now replaced both previous schemes and remains as the sole mechanism to provide financial assistance to Eurozone member states.

A number of other countries including Cyprus, Hungary, Ireland, Latvia, Portugal, Romania and Spain have also received bailouts, or different forms of loan assistance, under these mechanisms.<sup>5</sup> Common to every financial assistance programme was the imposition of strict conditionality, by which loans depended on the recipient state meeting a number of economic targets regarding public spending. Austerity measures and structural reforms were implemented on the basis of detailed Memoranda of Understanding (MoUs) that included specific timetables to which states had to adhere to receive the agreed credit tranches (Fischer-Lescano 2014).<sup>6</sup> While the drivers of austerity remained the EU member states, the MoUs were agreed with the recipient state by the so-called 'Troika': the European Commission, the European Central Bank and the IMF. The economic targets prescribed by the MoUs generally focused on cuts in public spending, accompanied by fairly detailed prescriptions for implementation (Poulou 2014: 1147). As explained by Ioannidis (2015), while the 'intrusiveness and the number of their conditions vary, they generally do not only require fiscal consolidation, but also structural reforms of public administration, pension, education, and tax systems'. Measures have ranged from wage moderation and the decentralisation of collective bargaining to cuts in social security benefits and reforms in public healthcare. By way of example, the Portuguese and the second Greek adjustment programmes went so far as to prescribe the reduction of pharmaceutical spending and the reallocation of human resources in the healthcare sector (Poulou 2014: 1147).

Loan conditionalities have thereby given the EU bodies (and other organisations) an unprecedented opportunity to interfere in the financial and macro-economic policies of member states. It is also well known that such measures have been far-reaching and have had a profound effect on the social fabric of member states. It is, therefore, not surprising that austerity measures have had such a broad human rights impact. This is

2 Namely, 80 billion Euro from a number of Eurozone states and 30 billion Euro from the IMF. See [http://ec.europa.eu/economy\\_finance/assistance\\_eu\\_ms/greek\\_loan\\_facility/index\\_en.htm](http://ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/index_en.htm) (last visited 30 May 2016).

3 See [http://ec.europa.eu/economy\\_finance/eu\\_borrower/efsm/index\\_en.htm](http://ec.europa.eu/economy_finance/eu_borrower/efsm/index_en.htm) (last visited 30 May 2016).

4 Council Regulation (EU) No 407/2010, 11 May 2010.

5 See [http://ec.europa.eu/economy\\_finance/assistance\\_eu\\_ms/index\\_en.htm](http://ec.europa.eu/economy_finance/assistance_eu_ms/index_en.htm) (last visited 30 May 2016).

6 Other key documents also detailed conditionality, including 'secret letters'.

recognised by the managing director of the ESM, Klaus Regling, in January 2015, in an address about Portugal:

I do know that for many Portuguese the past years were painful. Salaries and pensions were cut, public expenditure was reduced, and many lost their jobs. I am fully aware that this was a traumatic period for Portugal and that many still feel it today.<sup>7</sup>

### 3 Human rights implications of austerity measures in Europe

The negative impact of the 2008 global financial crisis on human rights was evident from the outset. By 2012, 27 million jobs were estimated as lost due to the crisis (ILO 2012), while the undermining of the right to work disproportionately affected the most vulnerable sectors of the population, namely, women, young people, minorities, migrants and people with disabilities (Way et al 2014). Another wave of human rights impacts may be directly attributable to government policies around fiscal austerity, as well as the conditionalities set by creditor institutions. This global trend, we have seen, has taken on a particular form in the Eurozone area as a result of the regional sovereign debt crisis (Way et al 2014: 89).

The impact of European austerity measures on human rights has now been widely documented by European institutions and human rights mechanisms such as the European Union Agency for Fundamental Rights (2013) and the Council of Europe Steering Committee for Human Rights (2014). UN human rights bodies and mechanisms<sup>8</sup> and legal scholars have also documented their implications. Austerity measures have been subject to legal challenges in domestic and regional courts (Kilpatrick & De Witte 2014).

While social and economic rights are the most obvious category to have suffered setbacks as a result of austerity measures, there is no doubt that the most vulnerable sections of the population have suffered disproportionately as a result of budget cuts, and so a number of civil and political rights have also been affected. As is well known, Eurozone states are subject to a variety of human rights obligations deriving from their membership of the EU and the Council of Europe, as well as their obligations under international human rights law. Selected findings about the human rights impact of the crisis post-2010 are presented below, with particular attention paid to countries that received financial assistance subject to conditionality, and the reaction they received from UN human rights mechanisms.

#### 3.1 Social and economic rights

The right to employment was the first and most obvious victim of the economic crisis and the austerity policies in Europe. Following the introduction of austerity measures, unemployment levels in the Eurozone reached record levels (ILO 2013), with the highest unemployment levels, as of February 2015, persisting in Greece (26 per cent in December 2014)

7 'Let me recall', he continues, 'that our financial assistance actually helped to ease the pain.' 'What have we learned from the global crisis?'

8 Inter alia, the Office of the High Commissioner for Human Rights, a number of special procedures mandate holders, and a number of UN treaty bodies.

and Spain (23.2 per cent).<sup>9</sup> This disproportionately affected vulnerable sectors of the population. As noted by the UN Committee on Economic, Social and Cultural Rights (ESCR Committee) in 2012 with regard to Spain:

The Committee is concerned, particularly in the context of the economic and financial crisis, about the constant rise in unemployment rates, which negatively affects a large proportion of the population of the state party, especially young persons, immigrants, gypsies and persons with disabilities, and increases their vulnerability.<sup>10</sup>

Tied in with the right to employment are a series of labour rights that are often central targets of austerity measures. These include the rights to fair remuneration, collective bargaining and safe and healthy working conditions (Council of Europe 2013: 18; European Commission 2012). It has been suggested that the principle aim of austerity measures was to deregulate the labour market, with a range of measures and changes in legislation actively promoted by the Troika in a number of countries. These changes included a reduction in the notification period for dismissal and its compensation, collective redundancies, flexible forms of employment and short-term contracts for young workers (Deakin & Koukiadaki 2013: 178).

Similarly, numerous other economic, social and cultural rights were affected due to Troika-led fiscal consolidation restrictions on social security benefits and cuts to health and education provisions (Deakin & Koukiadaki 2013: 163). These included the right to social security, the right to an adequate standard of living and the rights to food, water and housing. These impacts have been noted and critiqued. The Council of Europe, for example, says that broadly homelessness has increased significantly in a number of countries affected by the crisis (Council of Europe 2013: 19). Locally, conditions for financial assistance have included the introduction of fees for domestic water use in Ireland. In 2011, the UN independent expert on the question of human rights and extreme poverty, after her country visit to Ireland, expressed concern about this and many of the recovery measures proposed and pursued as a direct result of loan conditionalities. Her recommendations are stern and clear:<sup>11</sup>

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

Similarly, in 2014 the ESCR Committee expressed its concern in relation to Portugal:<sup>12</sup>

The Committee is concerned that the benefits that are based on the social support index (*Indexante de Apoios Sociais*), which was frozen in recent years as part of austerity measures, as well as the minimum amount of sickness benefit, are not sufficient to provide recipients and their families with a

9 See [http://ec.europa.eu/eurostat/statistics-explained/index.php/Unemployment\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/Unemployment_statistics) (last visited 30 May 2016).

10 Spain, UN Doc E/C.12/ESP/CO/5 (6 June 2012) art 2, para 2 and art 6.

11 UN Doc A/HRC/17/34/Add.2, 7.

12 UN Doc E/C.12/PRT/CO/4, 5.

decent standard of living, affecting in particular the most disadvantaged individuals and groups.

The rights to health and education have also suffered significantly as a result of loan conditionalities, which often explicitly recommended spending cuts in these areas. By way of example, in 2014 the UN independent expert on foreign debt found that since the adoption of the stabilisation programme in Latvia, the student to teacher ratio had worsened and the number of available institutions in the education sector had decreased.<sup>13</sup> With regard to the right to health, it will suffice to note that there is a growing concern in the field of health care social policy regarding the implications of austerity measures on health care systems in bailout countries. This is expressed well by Stamati and Baeten (2014); Petmesidou et al (2014: 331).<sup>14</sup>

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

### 3.2 Civil and political rights

Moreover, a number of civil and political rights have suffered as a result of austerity measures. These include the right to participate in public affairs, with a clear lack of avenues for participation in national level decision making compounded by the clear lack of transparency by the provision of timely, accessible and relevant information (Council of Europe 2013: 21). The issues of democratic deficit and lack of transparency will be returned to below in relation to the ESM mechanisms, but there is no doubt that regular channels for participation have been sidestepped in the current economic climate. This in turn gave rise to waves of demonstrations, particularly in Spain, Greece and Portugal, as well as a number of disproportionate reactions to these demonstrations, which in turn limited the right to freedom of expression and assembly (Council of Europe 2013: 21). Although not novel, police violence and repression against peaceful protests in Greece, for example, were found to go hand in hand with austerity measures:

Police violence and brutal repression against protesters was a sad trend in Greek modern history long before the economic crisis started. However, with a rise in demonstrations across the country as more austerity measures are imposed on the population to meet the draconian targets set by Greece's international lenders, protest has again been met with a brutal state response (FIDH/Hellenic League for Human Rights 2014: 39).

Media freedom has also suffered setbacks in a number of countries. This is especially so in Greece, where the shutdown of the public broadcaster in the name of austerity measures continues to pose a number of challenges for freedom of speech and media pluralism. Namely, Greek citizens are now dependent on the private media sector for the provision of information, entertainment and education (Iosifidis & Katsirea 2014: 1).

13 A/HRC/23/37/Add.1, 16.

14 See also Health and Financial Crisis Monitor, <http://www.hfcm.eu/> (last visited 30 May 2016).

Further, judicial rights were impacted negatively in a number of countries, which included delays in the execution of judgments and a lack of access to free legal assistance (Council of Europe Steering Committee for Human Rights 2014: 10). The disproportionate impact of austerity measures on vulnerable groups, as described below, made non-discriminatory access to justice and remedies essential in this context (Council of Europe (2013). However, as explained by the Council of Europe Steering Committee for Human Rights (2014: 10):

In October 2014, the European Commission for the Efficiency of Justice (CEPEJ) concluded in its evaluation report that, while in half of the states evaluated justice seems to have been shielded in budgetary terms from the effects of the crisis, the latter had a clear impact on the development of the budgets in other states, where human resources are often affected.

Similar budget cuts appear to have affected national human rights structures in a number of countries (Council of Europe Steering Committee for Human Rights 2014: 17).

Finally, when looking at the human rights impact of austerity measures in these years, one cannot ignore the disproportionate effects on vulnerable sectors including women, children, older persons, migrants, minorities, persons with disabilities and many more. This constitutes an increased risk of social marginalisation and exclusion of groups already at risk (European Union Agency for Fundamental Rights 2013: 11). For instance, in 2012 the UN High Commissioner for Human Rights noted (Pillay 2012):

There is growing evidence that budget cuts are affecting persons with disabilities in a particularly harsh way. [I]t would be a tragic irony if the ratification of the CRPD [Convention on the Rights of Persons with Disabilities] by EU member states were to coincide with a dramatic decrease of the enjoyment of rights laid down in that very Convention.

#### 4 Relevant legal framework

As detailed above, there is no doubt that the existing norms, processes and regulatory frameworks among the Eurozone countries subject to austerity measures have failed to facilitate, and have at times even frustrated, the protection and promotion of human rights norms. The financial and sovereign debt crises also raised serious legal issues. Different areas of law – from international and regional human rights norms, EU law, constitutional law, financial regulation, taxation law, and more – have come face to face with each other, raising a series of unprecedented legal questions. While the complexity and fragmentation of these competing obligations have come to the surface, what has resulted is often a clear picture of the inadequacy of the international legal framework. Ringe and Huber (2014: 4) explain:

[T]he financial crisis has dramatically demonstrated the limits of legal rules. Countries are bailed out despite strong constitutional concerns. The ECB is forced to bow to economic pressure despite observing its strict legal mandate. Sovereign countries contractually promise to limit their own possibility to raise debt and subject themselves to external court control to that end,



although we expect that this will be a political test rather than the strict legal standard.<sup>15</sup>

In this context, five different legal mechanisms have been created to provide financial assistance to EU member states: the balance of payment loans for non-Eurozone states; bilateral loans between states; the EFSM; the EFSF; and the ESM (Kilpatrick 2015: 12). These mechanisms were combined with 'a general overhaul of EU macro-economic governance' enacted through the 2012 Fiscal Compact Treaty, and the Six-Pack and successive Two-Pack of EU legislation (Kilpatrick 2015: 13). The following section will focus exclusively on the bailout measures for Eurozone states that go beyond bilateral agreements. These measures have been highly problematic for their human rights implications, and have raised very complex legal questions, including in the realm of international institutional law. The central argument will focus on the ESM, as the only remaining permanent bailout mechanism.

#### 4.1 European Stability Mechanism

The creation of the EFSF, the EFSM and the ESM has raised complex legal questions under international and EU law. As mentioned in the previous section, the EFSM was created under EU law in 2010 by a European Council Regulation<sup>16</sup> as an emergency funding programme, guaranteed by the European Commission and backed by all EU member states.<sup>17</sup> This differs from the EFSF and the ESM, which were created as autonomous international organisations. The EFSF was also created as a temporary crisis resolution mechanism in 2010, but this time only by the Eurozone area member states.<sup>18</sup> Both mechanisms have now been substituted by the ESM, which was created in 2012 as a permanent crisis resolution mechanism for countries in the Eurozone area. The ESM also stands as a separate international organisation, whose shareholders are the 19 Eurozone area member states. It is based in Luxembourg and has approximately 140 members of staff.<sup>19</sup> The ESM is, therefore, not a body of the EU, and is to provide stability support under strict conditionality of a macro-economic adjustment programme or meet the obligation continuously to respect pre-established eligibility conditions.<sup>20</sup> Leaving behind the complex legal question of whether the establishment of the ESM was compatible with EU law,<sup>21</sup> its establishment raises several questions under international and EU law. What is the legal accountability of the ESM as an international organisation dictating macro-economic policy that has serious implications for international human rights standards? What is the role played, in this regard, by the Troika in negotiating with the concerned ESM members the relevant MoUs detailing

15 They continue: 'And finally, bank resolution attempts above all introduce a 'credible' legal framework for dealing with large banks, knowing that many legal rules only exist in the books and fail to be applied in practice.'

16 Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism.

17 See [http://ec.europa.eu/economy\\_finance/eu\\_borrower/efsm/index\\_en.htm](http://ec.europa.eu/economy_finance/eu_borrower/efsm/index_en.htm) (last visited 30 May 2016).

18 <http://www.efsf.europa.eu/about/index.htm> (last visited 30 May 2016).

19 <http://www.esm.europa.eu/index.htm> (last visited 30 May 2016).

20 Treaty Establishing the European Stability Mechanism (ESMT), 2 February 2012.

21 See Case C-370/12 *Pringle v Ireland*, Judgment (Full Court) of 27 November 2012 (AG Kokott).

the conditionality attached to the financial assistance? If the recently established ESM is to take decisions on policy with human rights implications, a brief excursus into its functioning and decision-making powers is essential in order to attribute responsibility and establish accountability for its impact on human rights.

To continue this discussion, we must look deeper. The ESM is governed by a board of governors and a board of directors who have full decision-making powers and also appoint a managing director.<sup>22</sup> The board of governors is formally the main decision-making body of the ESM and is composed of governors appointed by each member state. These governors must be members of the government with responsibility for finance<sup>23</sup> and, in practice, coincide with the ministers of finance of each Eurozone state. The voting rights of each ESM member are equal to the number of shares allocated to it,<sup>24</sup> in practice giving three states (Germany, France and Italy) the right to veto (Schwarz 2014). A few commentators have written in detail about the lack of democratic legitimacy of the ESM decision-making structure and its accountability in the domestic political realm (Schwarz 2014: 402). Serious questions have been raised regarding confidentiality clauses and far-reaching immunity provisions in the ESM treaty, which 'make for an additional obstacle to national parliamentary control and hamper public control by civil society, the media and academia' (Schwarz 2014: 402).<sup>25</sup> With regard to a state requesting financial assistance, while all states, in theory, have a right to vote under the ESM treaty, in practice its power of political self-determination may be significantly limited as a result of having its 'back against the wall' when requesting financial assistance (Schwarz 2014: 392). A lack of transparency and accountability poses even greater risks in the case of the delegation of decision-making powers to the ESM board of directors.<sup>26</sup> As put by Schwarz (2014: 404):

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

Finally, examining the delegation of power from the ESM to other international organisations and bodies raises a number of questions about legitimacy, accountability and democratic control. As is well known, and was true also of the previous temporary intergovernmental assistance mechanisms, significant elements of the ESM's power are delegated to the Troika. First, the board of governors is to:<sup>27</sup>

22 The managing director of the ESM is appointed by the board of governors for a term of five years. The current managing director of the ESM is Klaus Regling. See <http://www.esm.europa.eu/about/governance/index.htm> (last visited 30 May 2016).

23 ESMT, art 5(1)

24 ESMT, art 4(7). Shares are allocated on the basis of contributions; see <http://www.esm.europa.eu/about/governance/shareholders/index.htm> (last visited 30 May 2016).

25 See also 32(3) ESMT immunity clauses; and German case FCC, judgment of 12 September 2012, paras. 241 & 254–260, available at [http://www.bundesverfassungsgericht.de/entscheidungen/rs20120912\\_2bvr139012en.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20120912_2bvr139012en.html) (last visited 30 May 2016).

26 The possibility of handing over all decision-making powers is envisaged in the ESMT (art 5(6)).

27 ESMT, art 13(3).

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

The European Commission is then tasked with signing the MoU on behalf of the ESM<sup>28</sup> and then, in liaison with the ECB and, wherever possible, together with the IMF,<sup>29</sup> it is to monitor compliance with the conditionality attached to the financial assistance facility. As introduced above, given the detailed nature of the MoUs and the breadth of implications they have caused, these are by no means small tasks. In the eyes of critics, the delegation of such far-reaching power to the European Commission, an independent EU body, as primary negotiator of the MoUs, in collaboration with the ECB and the IMF, constitutes just another step away from democratic accountability. It is instead a step towards the delegation of authorship to a network of institutions, the diffusion of responsibility and 'technocratic rule' (Schwarz 2014: 394; Maduro 2012).<sup>30</sup>

## 5 Problems relating to ESM accountability

When looking at the ESM accountability through the lens of the rule of law and democratic governance, three interrelated problems emerge: firstly, its delegation of authorship to a network of organisations; secondly, its delegation to 'experts'; and thirdly its lack of transparency and accessibility.

First, although unprecedented key decisions are being taken about state macro-economic policy through the 'backdoor of economic governance' (Poulou 2014: 1150)<sup>31</sup> and, for the first time in the history of European integration, externally-dictated policies are having a massive impact on the lives of European citizens and their human rights (Scharpf 2012; Schwarz 2014: 400), the responsibility for taking these decisions is so diffuse that it is difficult to impute accountability. The question as to whether the board of governors, the directors, the Troika or the state should be held accountable for setting the conditions for policies is key with regard to both international human rights law as well as democratic accountability. And the diffusion of responsibility to a network of institutions does not help to answer it. A problem already noted more broadly in relation to the EU, and which is certainly relevant here, is that political authority is too diffuse in Europe. If it has evolved top-down, as is the case with the ESM, there may be a democratic problem, just as excessive concentration would be an issue (Maduro 2012: 6). Not only are the citizens who are directly

28 ESMT, art 13(4).

29 ESMT, art 13(7).

30 'The tasks of the ESM are indeed carried out by a broad institutional network comprising a multitude of supranational, international and national actors, which raises numerous questions concerning the substantive authorship of acts formally attributed to the ESM as an independent legal body and, correspondingly, the political accountability for such actions.'

31 'Nevertheless, at this point in the history of European integration, the EU is undertaking a paradigm shift in the field of social policy. Without any formal change of its competences the EU has begun to intrude upon salient areas of domestic social policy, portraying its intervention as an inevitable part of financial condition-setting.'

affected by the ESM's economic policy decisions unable to participate in any meaningful way, it is also difficult for them to even know where decisions are being made and by whom. The bailout measures present serious problems for the attribution of responsibility, given their complex institutional set-up (including the extent of their EU pedigree) and given the continuing key role played by EU institutions, despite the ESM's status as a separate international organisation (Kilpatrick 2015). Problems would remain even if the considerable power delegated to other bodies, including the Troika is overlooked and responsibility in negotiating the MoUs is attributed solely to the board of directors.<sup>32</sup> As Eleftheriadis (2014: 51) has noted with respect to the ESM:

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

Second, the theme of technocratic rule in EU institutions is one that has been covered extensively in the literature concerning the EU and its lack of democratic accountability, even before the global financial crisis started. However, especially in the handling of the crisis, the move away from elected officials to 'the experts' who now make key decisions relating to state budgets, is under attack from groups ranging from scholars to civil society (Strath 2015).<sup>33</sup> Most recently Habermas has been outspoken about the tensions between democratic self-determination and technocracy in the monetary union's crisis.<sup>34</sup> The delegation of extensive powers to set the macro-economic policy of states to the Troika is the most visible example of this trend. As noted by Schui (2015: 4):

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

The governance structures of the ESM are also a clear case in point. The requirement that the directors who sit on the board are to be selected from among people of high competence in economic and financial matters<sup>35</sup> makes it clear that expertise over political representation dominates its governance structures. The introductory/advertising video on the 'ESM careers' webpage also sends a disturbing message. In his final words, ESM Secretary-General Kalin Anev states: 'There are very few places in the world where, with a very small amount of people, you can have such a

32 Regling, when asked about human rights, stated: 'The ESM was not given the task to design adjustment programmes. That was done by the Troika and we provide the financing. As an economist I fully support these programmes.' EFSF CEO Klaus Regling in an interview with *The Irish Examiner*.

33 Also demonstrated by the creation of the organisation Troikawatch; see <http://www.troikawatch.net/> (last visited 30 May 2016).

34 See <http://www.kuleuven.be/communicatie/evenementen/evenementen/jurgen-habermas/democracy-solidarity-and-the-european-crisis> (last visited 30 May 2016).

35 Art 6(1) ESM Treaty.

large financial, societal and personal impact, and ... this is ESM.<sup>36</sup> Not only are all 140 ESM staff members, and the hundreds involved in the Troika institutions, devoid of all democratic accountability and secured by immunities, it is often hard to even find out who they are. Greater attention to the technocratic elite driving the political and social reality of the Eurozone is urgently needed (Schwarz 2014: 401).<sup>37</sup> From a human rights and rule of law perspective, the move to technocratic rule raises a number of questions about democratic participation, accessibility, transparency and accountability. These questions become very difficult to answer in the absence of clear structures of responsibility for policy decisions affecting a wide range of human rights standards. In this vein, the rationality of technocracy is given a further air of impregnability by virtue of its claim to be a 'regulatory enterprise' rather than a process of deregulation (Everson 2014: 228).

A third related problem emerges from the governance structures and working methods of the ESM and, more generally, those underlying the bailout mechanisms: their lack of transparency and accessibility. All phases of the drafting of the adjustment programme are currently being negotiated behind closed doors, with many relevant actors being completely marginalised, including parliaments, unions and the European Parliament itself (Poulou 2014: 1153). While the MoUs in which the conditions of financial assistance are set out are publicly available, it is becoming increasingly evident that many of the conditions are being communicated in other forums such as bilateral meetings, e-mail exchanges or even 'secret letters' (Kilpatrick 2015: 20). The shift towards informal governance is especially disturbing when the stakes are so high. In line with this, Kilpatrick (2015) tested the bailout measures and mechanisms on the basis of Fuller's criteria for the 'rule of law', and found them seriously deficient due to their complexity, inaccessibility and incomprehensibility. In fact, untangling the legal sources of each bailout instrument presents serious challenges due to the intricate, lengthy and interconnected chains of sources entailed in any particular bailout, their unavailability on official websites (including that of the European Commission), the lack of availability of key sources in the language of bail-out countries, and the well-known fact that some of the bailout conditions are being shaped by sources which are not public. Kilpatrick (2015: 18) concludes:

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

However, the task of human rights law is to try and pull these chains of accountability back together and to attempt to analyse where the responsibility lies, to overcome the above exposed black holes of legal accountability (Solomon 2015).

36 See <http://www.esm.europa.eu/about/jobs/index.htm> (last visited 30 May 2016).

37 'In the wake of its reliance on non-representational expert knowledge and intergovernmentalism, it embodies yet another specimen of depoliticized technocratic governance with its strong inclination toward prioritizing the logic of the market over democratic values and surrendering some of the core constitutional standards of European integration to the siren calls of global market imperatives.'

## 6 Human rights accountability of international institutions

The European Commission recently reasserted that the human rights responsibility for bailout measures ultimately rests with states as they negotiate the measures with the Troika, sign the bailout measures and are responsible for their implementation.<sup>38</sup> While there is no question that under international human rights law the state shares the responsibility for this, and cannot escape all accountability by attributing policies that violate human rights to international organisations (Solomon 2015: 11), the question of the degree of autonomy of the state when requesting financial assistance and, in particular, the responsibility of the international organisations in setting the conditionality must be asked. As we have seen, MoUs have included wide-ranging and substantive prescriptions, including significant cuts in very specific social expenditures. Several commentators (Solomon 2015; Kilpatrick 2015) and some states have today questioned the degree of discretion states actually have in setting the measures, with the recent attempts by Greece being a case in point.<sup>39</sup> The current argument is based on the understanding that (at least some) of the conditionality measures imposed by international institutions in return for financial assistance have been specific enough in their substantive prescriptions and oversight to make them (at least in part) also directly responsible for the human rights impact they had. This is acknowledged by the UN independent expert on foreign debt, below:<sup>40</sup>

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

This situation invokes the realm of international institutional law and, in particular, the question of the accountability of international organisations for human rights violations. The complex architecture of the ESM, as an international organisation collaborating with other international organisations, sits squarely within the current trend of increasing governance by international organisations. With the steady proliferation of international organisations and the widening scope of their activities, situations where human rights may be at risk through their operations or policies have also multiplied (Wouters et al 2010: 3). In this context, the question of whether international organisations are bound by international human rights standards has gained increasing attention in legal circles (Wouters et al 2010). As Reinisch (2001: 132) says:

[I]t is exactly the increased direct involvement of international organisations in aspects of global governance through 'quasi' or immediate legislative, administrative, and judicial tasks that has turned the tables and led to

38 Commission Response to question 5 of 'Questionnaire supporting the own initiative report evaluating the structure, the role and operations of the 'troika' (Commission, ECB and the IMF) actions in euro area programme countries' (Brussels 2013) 5.

39 See *Federation of Employed Pensioners of Greece (IKA-ETAM) v Greece*, European Committee of Social Rights, Complaint No 76/2012.

40 UN Doc A/HRC/25/50/Add.1, 16.

situations where international organisations may violate fundamental rights of individuals and where the ancient query of *quis custodiet ipsos custodes* (who guards the guardians?) demands renewed attention.

This question around accountability of international organisations is not novel. It was taken up by the International Law Association in 1996 when it established a committee to ‘consider what measures (legal, administrative or otherwise) should be adopted to ensure the accountability of public international organisations to their members and to third parties, and of members and third parties to such organisations’ (International Law Association 2004: 4). In its final report published in 2004, the Association made its conclusion clear: international organisations should comply with basic human rights obligations (International Law Association 2004: 22). There appears to be some consensus today that international organisations vested with an international legal personality have an obligation to respect those human rights which have attained the status of customary international law and/or general principles of law, and may be held responsible for breaches of those standards (Tondini 2010: 177; Klabbers 2005: xv). However, controversies remain with regard to the sources and scope of their obligation to respect human rights standards (Wouters et al 2010: 6).

A number of approaches address the problem of whether the ESM (and collaborating organisations) are bound by international human rights law, and these approaches are not mutually exclusive. The first approach sees international organisations as bound by those human rights standards that have become part of customary international law. Some authors have taken this approach to argue that the Universal Declaration of Human Rights has become part of customary international law and, as such, binds international organisations (Klein & Sands 2009: 463). However, the scope of customary human rights norms, especially in the field of economic, social and cultural rights, remains fairly small and controversial (Goldman 2014: 94). Nonetheless, in its General Comment 8, the ESCR Committee confirmed that international organisations should do everything possible to protect at least the core content of economic, social and cultural rights.<sup>41</sup> As such, the ESM, the IMF, the European Commission and the ECB should be considered bound to respect the core content of economic, social and cultural rights. This is in line with the Guiding Principles on Foreign Debt and Human Rights, which explicitly state that international financial organisations and private corporations have an obligation to respect international human rights based on the ‘Ruggie principles’.<sup>42</sup> In particular, ‘[t]his implies a duty to refrain from formulating, adopting, funding and implementing policies and programmes which directly or indirectly contravene the enjoyment of human rights’.<sup>43</sup> The fact that the ESM (and the Troika) do not respect this duty appears sufficiently non-controversial. Additionally, it remains

41 ESCR Committee General Comment 8 (1997) para 7.

42 The UN Guiding Principles on Business and Human Rights were proposed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, and endorsed by the UN Human Rights Council in its Resolution 17/4 of 16 June 2011.

43 Report of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of all Human Rights, particularly Economic, Social and Cultural Rights, Cephias Lumina, UN Doc A/67/304 (13 August 2012) Principle 9.

clear that there is a need to distinguish between negative obligations (to abstain from violations) and positive obligations (to protect and fulfil) which may call on international organisations to take on a mandate which member states have not attributed to it (De Schutter 2010:128).

A different approach is to consider international organisations – or at least the decision-making by their principal organs – to be bound by human rights norms because of the legal obligations of their member states. This is to the effect that states must not violate their human rights obligations when participating in decision-making in international organisations (Mégret & Hoffman 2003: 318; De Schutter 2010). With respect to the ESM, this means that the representatives of each state sitting both on the board of governors and the board of directors should be bound by the state's human rights obligations in their decision making, which constitutes a state act and, as such, is subject to human rights law.<sup>44</sup> Regardless of whether they are ministers of finance or experts, board members should be seen as representing their states in the context of the ESM. As such, the ESM states would be bound to comply with their pre-existing human rights obligations in the formulation of their policies in recipient countries (Solomon 2015: 18). State decisions, with an extraterritorial effect taken under the auspices of the ESM, should not interfere with their core economic, social and cultural rights obligations under international law (ESCR Committee General Comment 19). Furthermore, there is an argument to be made that if all member states of an international organisation share the same human rights obligations (by way of example the European Convention on Human Rights or the European Social Charter), then states are precluded from taking decisions within the organisation which are contrary to those obligations (Solomon 2015: 19). Similarly, although the ESM is a separate international organisation from the EU, its membership and mechanisms remain too close for comfort.<sup>45</sup>

Finally, some organisations may be bound by human rights law by virtue of the provisions included in their constituent instruments or further adopted documents (Tondini 2010: 191). While there is clearly no mention of human rights anywhere in any of the ESM legal documents, the question is more complex when the organisations making up the Troika are considered. Whether the EU Charter on Fundamental Rights binds the EC and ECB when they are acting under the guise of the ESM, is a question that has been partially left open in the *Pringle* case. With respect to the IMF, the issue is more complex and concerns its relationship to the UN (Goldman 2014: 92-94). It will not be exhausted here.

What can be said is that if, in principle, international organisations are held accountable for human rights violations, in practice, the lack of avenues in which claims can be brought against them renders such accountability difficult to uphold (Wouters et al 2010: 11). The growing powers of international organisations, including with respect to their increased effect on international human rights standards, have not been accompanied by the creation of a corresponding system of international legal responsibility (Von Bogdandy & Steinbrück Platise 2012: 68). While

44 See art 61, Articles on the Responsibility of International Organizations, New York, 9 December 2011.

45 See Case C-370/12 *Pringle v Ireland*, Judgment (Full Court) of 27 November 2012.



there is currently no international court with jurisdiction over international organisations, the jurisdictional immunity traditionally granted to international organisations before national courts generally also makes this avenue impracticable (Gaillard & Pingel-Lenuzza 2002; Reinisch 2008).<sup>46</sup> In December 2011, the UN General Assembly endorsed the International Law Commission's Articles on the Responsibility of International Organisations (ARIO).<sup>47</sup> Although the articles represent a step forward in establishing the responsibility of international organisations for their violations of human rights, ultimately, as some have argued, they still 'leave the individual in the cold' (Von Bogdandy & Steinbrück Platise 2012). In particular, although article 4 provides the elements for an internationally-wrongful act, it may also be seen to apply to human rights obligations of international organisations.<sup>48</sup> However, the responsibility of international organisations for human rights violations under the articles can still only be invoked by states or other international organisations (Von Bogdandy & Steinbrück Platise 2012: 74). In fact, article 33, which follows the approach taken in the Articles on States' Responsibility, leaves individuals lacking a remedy for breaches of their rights by international organisations: there is no forum at the global or regional level to allow individuals to bring reparation claims against international organisations, as is the case for states (Von Bogdandy & Steinbrück Platise 2012: 73). As some concluded, '[t]his places human rights violations by international organisations under the regime of diplomatic protection, with all its limits and shortcomings' (Von Bogdandy & Steinbrück Platise 2012: 74). It may be impossible for individuals whose rights have been violated as a result of ESM conditionality to bring a claim against the organisation itself, and holding the implementing state to account may be the only available option to date. However, while we wait for international law to catch up with the reality and growing effects of international organisations on individual human rights holders, a number of concrete recommendations should guide the ESM and Troika in the formulation of its future bailout arrangements.

## 7 Conclusion

In conclusion, the austerity measures adopted by European states have had a severe impact on a number of international human rights standards, particularly in the area of economic and social rights, but also a number of civil and political rights. While there is no question under international human rights law that the state shares the responsibility for these impacts, the question of the degree of autonomy of the state when requesting financial assistance and, in particular, the responsibility of the international organisations in setting the conditionalities around this assistance cannot be ignored. Moving forward, it is essential to restore the accountability of international institutions involved in the Eurozone bailouts for the human rights of their citizenry. Particularly the ESM, which was established as a separate international organisation, retains a

46 Although there has been an increasing tendency to bring cases before national courts.

47 GA Resolution 66/100, Articles on the Responsibility of International Organizations, New York, 9 December 2011.

48 Art 4, Articles on the Responsibility of International Organizations, New York, 9 December 2011.

number of human rights obligations under international law, as do the other international organisations involved in the bailouts, namely, those composing the Troika. International law continues to lag behind in terms of holding international organisations accountable for the impact on international human rights standards, and presently only states may in practice be held accountable. Nevertheless, the principles below should guide both states and international organisations in the formulation of new macro-economic policies and bail-out measures in the context of the Eurozone crisis.

First and foremost, all groups should refrain from implementing policies that will be likely to have a negative impact on human rights. This implies that international institutions, when setting the specificities of the conditionality of assistance, should always seek to avoid deliberately-retrogressive measures (Solomon 2015: 23), and in the case of retrogressive measures, economic policy choices should always veer towards those that least restrict rights (ESCR Committee 2012). In line with this thinking, lending institutions should ensure the introduction of safety nets to protect the poor and vulnerable (Carmona 2014). Furthermore, they should conduct human rights impact assessments (HRIA), as warranted under the Human Right Council's endorsed Guiding Principles on Debt, to ensure that their activities have the least possible effect of international human rights standards (Guiding Principle 40).

Second, clear divisions of responsibility and greater transparency will ensure greater accountability of the ESM and its co-operating organisations. This article has discussed a number of interrelated rule of law/democratic governance deficits in the work of the ESM. These include its delegation of authorship to a network of organisations; its delegation to 'experts'; and its lack of transparency and accessibility. A clear and transparent legal framework clarifying the roles and decision-making powers of the specific institutions will enable better oversight (Guiding Principle 33), as will the participation by relevant stakeholders, including civil society (Guiding Principle 42; Carmona 2014: 29). As explained in the commentary by the Independent Expert: 'International financial institutions should periodically review their disclosure policies, enhance their external accountability by reviewing exceptions and improve internal procedures to protect and promote openness.'<sup>49</sup>

Finally, the member states of the organisations involved in austerity measures, whether acting individually or collectively in the context of the ESM or IMF, have the obligation to respect, protect and fulfil human rights. This includes economic, social and cultural rights in countries affected by their decision making in the context of international financial institutions (ESCR Committee 2012). Human rights should be integral to decision making where such decision making may have a human rights impact. This is clearly the case in the ESM financial assistance subject to conditionality. The onus to ensure that human rights are prioritised in policies and measures falls particularly on those states holding the greatest power of participation, voting and decision making in those organisations (Carmona 2014: 55). For the ESM there is no hiding which they are.<sup>50</sup>

49 UN Doc A/HRC/25/51, 8.

50 See distribution of shares, available at <http://www.esm.europa.eu/about/governance/shareholders/index.htm> (last visited 30 May 2016).

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