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VIOLATIONS OF SOCIO-ECONOMIC RIGHTS IN CONTEXTS OF SOVEREIGN DEBT CRISIS

AN INTERNATIONAL LAW PERSPECTIVE IN THE AFTERMATH OF THE EUROZONE TURMOIL

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Table of contents

Introduction and structure of the thesis

During the last decades, the idea that economic and social rights (socio-economic rights, ES rights) are judicially enforceable has gained support thanks to the establishment of specific binding instruments and their relative supervisory mechanisms in the international legal order, alongside the growing body of national case-law relying upon ES rights.[1] However, the justiciability of ES rights remains a tricky matter on a practical level. Cases on austerity legislation adopted in the context of the Eurozone sovereign debt crisis provide a sample of this shortcoming.

Sovereign debt crisis is not a novelty. States have been at risk of economic default several times in the past, starting from ancient Greece. Over the last decades of the past century, a misconception arose: only developing Countries could suffer from problems of budgetary imbalance.[2] This economic and financial crisis of 2008 brutally tore down the veil of Maya.

The 2007 bursting of the US housing market bubble turned into a sovereign debt crisis that affected, among other countries, European Union (the Union, EU) Member States. Five Eurozone States – namely Cyprus, Greece, Ireland, Portugal and Spain – requested loans to face their balance of payment problems. As a condition to receive such aid, beneficiaries had to implement austerity measures at the national level.[3] These domestic policies included the liberalization of labour markets and drastic decreases of public expenditure towards welfare services (e.g. social security systems, health-care facilities) alongside the cutting of salaries and pensions of public personnel. Simultaneously, they entailed tax hikes.[4]

Such reforms, which were aimed at restoring the economic soundness of the borrowing State, encroached on various socio-economic rights,[5] such as the right to work, the right to a fair wage and the right to a remuneration which provides a decent living for workers and their families, the guarantees stemming from collective bargaining, the right to social security, the right to be protected against poverty and social exclusion, the right to adequate housing, and the right to health.[6] Victims of these violations lodged complaints before national judicial

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[1] See e.g. Aoife Nolan, Bruce Porter, Malcolm Langford, *The Justiciability of Social and Economic Rights: An Updated Appraisal*, CHRGJ Working Paper No. 15 (August 2007), available at: www.socialrightscura.ca; Malcolm Langford, 'Judicial Review in National Courts. Recognition and Responsiveness', in Gilles Giacca, Christophe Golay, Eibe Riedel (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (2014), 417-447 [Langford, 'Judicial Review'].

[2] Jeannette Abel, *The Resolution of Sovereign Debt Crises: Instruments, Inefficiencies and Options for the Way Forward* (2019), 23-24.

[3] Kaarlo Tuori, Klaus Tuori, *The Eurozone Crisis. A Constitutional Analysis* (2014), 236-241; Alberto Monteverdi, 'From Washington Consensus to Brussels Consensus', in Elena Sciso (eds), *Accountability, Transparency and Democracy in the Functioning of Bretton Woods Institutions* (2017), 73-90.

[4] On the rescue packages toward Eurozone States see e.g. Tuori, Tuori, *cit.*, 80-116, 236-241; Claire Kilpatrick, Bruno De Witte (eds), *Social rights in times of crisis in the Eurozone: The role of fundamental rights' challenges. EUI Department of Law Research Paper 2014/05* (2014) [Kilpatrick, De Witte (eds), *Social rights in times of crisis*].

[5] See e.g. Giovanna Adinolfi, 'Aggiustamento economico e tutela dei diritti umani: un conflitto inesistente per le istituzioni finanziarie internazionali?' (2014) 8(2) *Diritti umani e diritto internazionale* 319; Human Rights Committee, Res. 40/8, 21 March 2019, which adopted the *Guiding principles on human rights impact assessments of economic reforms* (A/HRC/40/57).

[6] For an overview of the documents supporting such violations, see e.g. Juan Pablo Bohoslavsky, Franz Christian Ebert, 'Debt Crises, Economic Adjustment and Labour Standards', in Ilias Bantekas, Cephas Lumina (*eds*) *Sovereign Debt* and *Human Rights* (2018), 284. Another critical issue is the balance of powers between States

organs, the Court of Justice of the European Union (ECJ), international committees and the European Court of Human Rights (ECtHR). Hence, the multilevel system of protection characterizing Europe resulted in a copious case-law on austerity measures.

Such a wealth of pronouncements was the result of the multi-level governance of the crisis, which produced an intricate web of duty-bearers and instruments establishing obligations upon them.[7] Indeed, each assistance mechanism set up to grant loans to Eurozone States (except one) presented a *hybrid nature*: despite being framed under international or private law, the mechanisms were tied to the EU legal regime.[8] In particular, the European Commission and the European Central Bank (ECB) played a significant role in the assessment of the requirements to accord loans, in the negotiation and signature of the Memorandum of Understanding (MoU) between the receiving State and the assistance mechanism, and in monitoring compliance of the national policies with the loan conditions attached to the MoU.[9] Such loan conditions had a two-fold legal basis. The first was the MoU signed by the lender and the borrowing State, which is an international instrument that details the conditions attached to the assistance facility. The second legal basis of conditionality lies within the EU framework. Since the first rescue package to Greece in 2010, the most important elements of all the borrower-lender agreements have been reiterated in Council decisions addressed to the recipient State. These unilateral, legally binding acts represent the vehicle through which the fiscal consolidation programmes set forth in the MoUs fall under the scope of EU secondary law.[10]

The convoluted normative and institutional frameworks characterising the response to the Eurozone sovereign debt crisis represent a unique scenario of enquiry. Although alleged violations of socio-economic rights caused by lending conditionality are far from being a novelty, it is possible to identify at the very least two main aspects that differentiate the management of this turmoil from previous situations of public budgetary imbalances. The first aspect is the above recalled multi-level governance of the crisis, which typified the responses to the financial difficulties of Eurozone States alone. EU Member States not adopting the euro as currency might (and still may) require assistance from the Union, whilst

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and the other actor(s) involved in the assistance programme, since the conditionality attached to the rescue packages could result in a restriction of the borrowing Country's fiscal and economic sovereignty. See Tuori, Tuori, *cit.*, 188-192; Michael Ioannidis, 'EU Financial Assistance Conditionality after "Two Pack"' (2014), 74 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 61, 91-100.

[7] For a general overview of the subjects bound to respect human rights obligations, as well as of the sources of those obligations, see Andreas Fischer-Lescano, *Human Rights in Times of Austerity Policy. The EU Institutions and the Conclusion of Memoranda of Understanding* (2014).

[8] Angelos Dimopoulos, 'The Use of International Law as a Tool for Enhancing Governance in the Eurozone and its Impact on EU Institutional Integrity', in Maurice Adams, Federico Fabbrini, Pierre Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (2014), 41; Ioannidis, *cit.*, 64-65; Anastasia Poulou, 'Financial Assistance Conditionality and Human Rights Protection: What is the Role of the EU Charter of Fundamental Rights?' (2017) 54 *Common Market Law Review* 991, 995-1003 [Poulou, 'Financial Assistance'].

[9] Anastasia Poulou, 'Austerity and European Social Rights: How Can Courts Protect Europe's Lost Generation?' (2014), in 15 *German Law Journal* 6, 1145, 1156-1159 [Poulou, 'Austerity']; Jean-Victor Louis, 'Guest Editorial: The no-bailout clause and rescue packages' (2010) 47(4) *Common Market Law Review* 971, 972-974; Tuori, Tuori, *cit.*, 90-97; Ioannidis, cit., 70-89.

[10] Paul Dermine, 'The End of Impunity? The Legal Duties of "Borrowed" EU Institutions under the European Stability Mechanism Framework' (2017) 13 *European Constitutional Law Review* 369, 378-381; Paul Craig, 'Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications', in Adams, Fabbrini, Larouche (eds), *cit.*, 19, 25-26; Louis, *cit.*, 972; Tuori, Tuori, *cit.*, 90; Ioannidis, *cit.*, 72, 89, 93-94. See also Court of Justice of the European Union, *Mallis and Malli v Commission and ECB*, Joined Cases C-105/15 P to C-109/15 P, OJ 2016 C 419/17, Opinion of Advocate General Wathelet, delivered on 21 April 2016, para. 85.

non-EU Member States have received (and may still receive) aid from international financial institutions, such as the International Monetary Fund (IMF). The management of the Eurozone crisis is the sole occasion in which States obtained rescue packages from *hybrid mechanisms*. The second peculiar aspect is the *multi-level system of protection* of socio-economic rights, i.e. several overlapping legal systems which establish binding obligations upon (at least some of) the actors involved in rescue packages. These obligations are set forth in international conventions, EU law and domestic legal orders. The corresponding supervisory bodies (whether international committees, the European Court of Human Rights, the ECJ and national tribunals) have the competence to assess whether the actors subject to their *ratione personae* jurisdiction complied with the obligations covered by their *ratione materiae* jurisdiction. The conducts that may be subject to (quasi)judicial review include those performed by actors which granted the aid or participated in the different stages of the procedure to accord rescue packages. In scenarios different from that of the Eurozone sovereign debt crisis, the very same supervisory bodies do not have the power to evaluate whether institutions providing loans (or organs involved in the decision-making process) breach socio-economic rights. This lack of competence derives from two factors. The first is the uncertainty surrounding the international human rights obligations binding international financial institutions, such as the IMF, since these actors are not contracting parties of human rights treaties – a circumstance which also implies the impossibility to lodge complaints against them before the corresponding monitoring bodies.[11] The second is the jurisdictional immunities that international financial institutions enjoy before domestic courts.[12]

Against this background, the present dissertation aims to analyse and systematize, on the one hand, the doctrinal debate surrounding the obligations related to socio-economic rights in times of sovereign debt crisis and, on the other, the case-law of the multi-level

[11] As a means to partly fill this accountability gap, starting from 1993, international financial institutions created their own internal accountability mechanisms, which deals with complaints challenging the negative impacts of their policies on individuals' rights and interests. Each mechanism has its own mandate and rules of procedure. Notably, the IMF and the European Stability Mechanism do not have similar accountability mechanisms. On the accountability mechanisms for financial institutions, see e.g. Namita Wahi, 'Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and a Theory of Horizontal Accountability' (2006), 12 *UC Davis Journal of International Law & Policy* 331; Maartje Van Putten, 'Independent Accountability Mechanisms; How Multilateral Financial Institutions Can Be the Front Runners for Commercial Financial Institutions, in Elena Sciso (ed), *Accountability, Transparency and Democracy in the Functioning of Bretton Woods Institutions*, 137.

[12] In this regard, the recent development towards a restrictive (rather than absolute) immunity of international organizations (including international financial institutions) before domestic courts should be mentioned. See e.g. Supreme Court of the United States of America, Jam et al. v. International Finance Corporation, 586 US (2019), Certiorari Decision of 27 February 2019; Pierfrancesco Rossi, 'The International Law Significance of "Jam v. IFC": Some Implications for the Immunity of International Organizations' (2019), 13(2) *Diritti umani e diritto internazionale* 305; Annamaria Viterbo, Andrea Spagnolo, 'Of Immunity and Accountability of International Organizations: A Contextual Reading of "Jam v. IFC"'(2019), 13(2) *Diritti umani e diritto internazionale* 319; Fernando Lusa Bordin, 'To what immunities are international organizations entitled under general international law? Thoughts on Jam v IFC and the "default rules" of IO immunity', (2020), in 72 *Questions of International Law* 5; Yohei Okada, 'The immunity of international organizations before and after Jam v IFC: Is the functional necessity rationale still relevant?' (2020), in 72 *Questions of International Law* 29. See also the case-law of the ECtHR, according to which jurisdictional immunities of international organizations is compatible with Art. 6 of the ECHR only if the applicants have reasonable alternative means to effectively protect their rights under the Convention (e.g. through accountability mechanisms within the organization). See e.g. August Reinisch, Andreas Weber, 'In the Shadow of Waite and Kennedy: The Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement' (2004), 1 *International Organizations Law Review* 59.

system of protection which characterises the Eurozone. The thesis has *two ultimate goals*. The first is to assess whether one (or more) of these venues indicated adequate legal consequences of violations of socio-economic rights set forth in international treaties. The second is to test whether these mechanisms could have adopted different adjudicative approaches, and specifically a more human-rights oriented attitude with the view of enhancing the effectiveness of socio-economic rights enshrined in international treaties. Our inquiry looks at the Eurozone sovereign debt crisis as a case-study to develop wider considerations on the role that international treaties safeguarding socio-economic rights may play in putative future scenarios of public finance' imbalances, as those that the recent (and still ongoing) COVID-19 pandemic outbreak may cause.[13]

Two research hypotheses underpin this study. The first hypothesis concerns the parameters to assess the adequacy of legal consequences of violations of socio-economic rights in contexts of sovereign debt crisis. The investigation assumes that these standards are based both on the collective dimension of socio-economic rights and the general obligations set forth in international treaties. Namely, legal consequences should benefit the victimised class as a whole and should preserve the solvency of borrowing States. This dissertation attempts to root these assumptions in the normative framework and legal literature.

The second hypothesis relates to the scarce effectiveness of international mechanisms and to the reluctance of the Court of Justice of the European Union in ensuring protection to the victims of violations of socio-economic rights and, consequently, on the need to turn to national courts as the keystone for the protection of international human rights.

The thesis does not address the repercussions of the policies adopted by the European Central Bank (such as the Emergency Liquidity Assistance). The issue concerning the substantive obligations binding international financial institutions (namely, the European Stability Mechanisms and the IMF), their putative breach and the attribution of wrongful conducts are outside the scope of the dissertation as well. The study does not deal with the responsibility of Member States of international financial institutions acting within these organizations, nor does it address the inter-state complaint procedures due to the unlikelihood of such kind litigations.

The present dissertation has the following *structure*. Chapter I sets the scene. It describes the external and internal factors that contributed to the Eurozone sovereign debt crisis by taking into account the manifold regulatory, financial and normative aspects (Section 1). Subsequently, it outlines the responses to the crisis and clarifies the functioning of the four assistance mechanisms that were set up to manage the turmoil, alongside providing a brief survey of the conditions attached to the rescue packages towards Cyprus, Greece, Ireland, Portugal and Spain (Section 2). Then, Chapter I delineates the negative impact of austerity measures on socio-economic rights, as documented by reports on international organizations (Section 3). Lastly, it identifies the relevant subjects upon which human rights regimes establish obligations and their sources, alongside the corresponding supervisory mechanisms (Section 4).

[13] According to the IMF, the pandemic outbreak "has caused dramatic loss of life and major damage to the European economy." International Monetary Fund, Regional economic outlook - Europe. Whatever it takes: Europe's response to COVID-19 (October 2020), available at: www.imf.org.

Chapter II focuses on socio-economic rights in contexts of sovereign debt crisis. First, the chapter points out the peculiarities of this category of rights (Section 1) and the general obligations binding upon Contracting Parties of international treaties safeguarding them, including rules governing legitimate limitations (Section 2). Both issues are pivotal in the determination of adequate legal consequences in case of violations of socio-economic rights in situations of imbalance of public finances, which is addressed in light of international norms on State responsibility (Section 3). Lastly, Chapter II suggests the parameters to assess the adequateness of the legal consequences following the acknowledgment of violations of ES rights in contexts of sovereign debt crisis (Section 4). These proposed criteria represent the standards to evaluate the outcome of the dispute-settlements during the Eurozone turmoil.

Chapter III addresses crisis-litigation at the international level. The chapter briefly recalls the rules of procedure before the relevant judicial and quasi-judicial bodies (Section 1). Then, it analyses the views of the UN Committee on Economic, Social and Cultural Rights, the reports of the International Labour Organization's Committee on Freedom of Association and the decisions of the European Committee on Social Rights (Section 2). Subsequently, Chapter III turns to the case-law of the European Court of Human Rights (Section 3) and attempts to verify the existence of approaches which could enhance the protection of socio-economic rights before such Court, either through other adjudicative stances or by different strategic litigations (Section 4). Lastly, Chapter III briefly addresses the consequences of the overlap between the fields under the jurisdiction of these judicial and quasi-judicial bodies (Section 5).

Chapter IV deals with crisis-litigation at the EU level. Before moving to the ECJ's case-law, it clarifies the scope of application of the Charter of Fundamental Rights of the European Union (Section 1). The chapter covers the following proceedings: i) the action for compensation for non-contractual liability of the Union (Section 2); ii) the action for annulment in case of violations of ES rights under EU law (Section 3); iii) preliminary rulings (Section 4). Lastly, Chapter IV attempts to clarify the stance of the ECJ towards austerity-driven procedure in light of the broader relationship between socio-economic rights under international treaty law and the EU legal system, with specific regard to the famous "Laval Quartet" (Section 5).

Chapter V addresses the crisis-related litigation before domestic constitutional courts. Following brief preliminary remarks on the role of national courts *vis-à-vis* international human rights law (Section 1), the Chapter scrutinises the jurisprudence of the Greek Council of State and the Greek lower courts, the Portuguese Constitutional Court, and of the Spanish Constitutional Court (Section 2). The last section briefly recalls the key features governing the relationship between international human rights law and domestic legal systems and suggests alternative approaches that national constitutional courts could adopt in order to enhance the effectiveness of socio-economic rights at the municipal level (Section 3).

Finally, brief concluding remarks recap the preliminary findings of each chapter and weigh them against the two above-outlined research hypotheses.

Each Chapter delineates the relevant normative framework. The dissertation draws upon the works of high qualified scholars to provide a comprehensive understanding of the complex issues surrounding the management of sovereign debt crisis, the obligations related to socio-economic rights, the relationship between general international law governing legal consequences of States' internationally wrongful acts and the specific (but not self-contained)

human rights regime. Works of scholars constitute also the basis for the examination of the pronouncements of international treaty mechanisms, whether judicial or quasi-judicial, which represent a meaningful tool to shape the scope of application of socio-economic rights. The detailed analysis of the austerity-related case-law in the context of the Eurozone sovereign debt crisis and the comparison among the different adjudicative approaches that emerged during crisis-litigations is a central element of the present dissertation, which arose from the need to provide a comprehensive study on the matter – which so far is missing.

CHAPTER I

SETTING THE SCENE OF THE EUROZONE SOVEREIGN DEBT CRISIS: CAUSES, RESPONSES AND CONSEQUENT VIOLATIONS OF SOCIO-ECONOMIC RIGHTS

SUMMARY 1. Causes of the crisis 1.1. External causes: the bursting of the U.S. housing market bubble 1.2. Internal causes: public interventions towards privately owned institutions and the architecture of the European Economic and Monetary Union 2. Responses to the crisis 2.1. Crisis prevention 2.2 Crisis resolution 2.2.1 The first rescue package towards Greece: the so-called Greek Loan Facility 2.2.2 The European Financial Stabilization Mechanism: the minor role of an EU tool for EU Member States 2.2.3. The European Financial Stability Facility: a temporary Special Purpose Vehicle 2.2.4. The European Stability Mechanism: a permanent international financial institution with a regional mandate 3. Conditionality measures and their negative impact on socio-economic rights: a general overview 3.1 Some hints on the involvement of the private sector 4. The multi-layered system of assistance towards Eurozone States and the multi-level protection of fundamental rights in Europe

1. Causes of the crisis

Starting from 2008, several European Union (the Union, EU) Member States faced a severe sovereign debt crisis.[1] This budgetary turmoil was the result of manifold regulatory, financial and economic factors.[2] Albeit strictly connected to each other, these aspects may be sorted into two categories: external and internal causes. The former refers to the 2007 bursting of the U.S. housing market bubble.[3] The latter embraces public interventions to save major European privately owned banks from default and excessive national indebtedness, alongside the characteristics of the European Economic and Monetary Union (EMU).[4]

[1] The crisis is deemed to have come to an end on the 20th of August 2018: on this date, Greece successfully concluded the third and last rescue programme. Due to continuing economic and financial vulnerabilities, upon the expiration of the assistance Greece was subject to enhanced surveillance under Article 2(1) Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability [2013] OJ L 140/1. Enhanced surveillance of Greece is still ongoing. See: European Commission, Compliance Report ESM Stability Support Programme for Greece - Fourth Review, July 2018; European Commission, Commission Implementing Decision (EU) 2018/1192 of 11 July 2018 on the activation of enhanced surveillance for Greece [2018] OJ L 211/1. On rescue aid packages to Eurozone Countries, see Section 2 below.

[2] Douglas W. Arner, 'The Global Credit Crisis of 2008: Causes and Consequences' (2009) 43(1) *International Lawyer* 91, 92 [Arner, 'The Global Credit Crisis of 2008']; Kaarlo Tuori, Klaus Tuori, *The Eurozone Crisis. A Constitutional Analysis* (2014), 61.

[3] Tuori, Tuori, *cit.*, 71-77; Mark Blyth, *Austerity. The history of a dangerous idea* (2013), 5-7, 51-54; 84-87; Jeannette Abel, *The Resolution of Sovereign Debt Crises: Instruments, Inefficiencies and Options for the Way Forward* (2019), 26-27.

[4] Tuori, Tuori, *cit.*, 78-80; Blyth, *cit.*, 62-71; Abel, *cit.*, 25-26.

1.1. External causes: the bursting of the U.S. housing market bubble

In 2007 the U.S. experienced a crisis of the private and banking sectors which rapidly spread worldwide and negatively affected other economies, including European ones. Remarkably, it was the distinctive features of the U.S. sector of residential mortgages that generated such turmoil. Three main factors are noteworthy: the rise and evolution of the originate-to-distribute model together with the use of sophisticated financial instruments, the grant of subprime mortgages to low creditworthiness borrowers, and the lack of transparency and asymmetry of information in the secondary market. These aspects leaned on the watering down of the regulation of the activities of institutions operating in the financial market.[5]

In greater detail, mortgages are contracts through which financial institutions (mortgagees) lend money to borrowers (mortgagors) for the purchase of housing or other real estate. The mortgagors pledge to repay the debt via a predetermined series of payments covering both principal and interest components of the loan. The underlying property (e.g. the house) represents the collateral to secure the credit in case of default: if the mortgagor does not pay back the loan, the mortgagee has the right to foreclose and sell such asset.[6] Prior to the 1980, banks which issued residential mortgages adopted the originate-to-hold model: these institutions granted loans and held them on their balance sheet until their maturity.[7] Two consequences arise where mortgagees retain the credit risk: first, they adopt stringent screening standards which limit the conferral of loans solely to qualified borrowers who show sufficient documents attesting their ability to repay the debt;[8] second, they profit by charging a high note rate – i.e. the rate of interest acting as fees for the lending service.[9] In the 1980s, the lending practice shifted from the originate-to-hold model to the originate-to-distribute one. Generally speaking, this approach allows institutions originating the loans to sell them to third parties and, hence, to transfer the credit risk from their balance sheet to the purchasers.[10] This scheme bears two main effects. First, the proceeds resulting from the sale fund further loans, which are sold as well, fuelling the cycle. Secondly, originators profit by trading credits and note rate, hence they no longer charge elevated service fees, and borrowers benefit from paying lower interest. So far, the originate-to-distribute method is a win-win situation for both lending institutions and debtors. Yet, this approach may also give rise to abuses: due to the default-risk transfer to third parties, lending institutions are no longer interested in the ability of the putative borrowers to repay, which leads to a looser evaluation of their creditworthiness.[11]

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[5] Arner, 'The Global Credit Crisis of 2008', *cit.*, 98, 104; Colin Crouch, *Il potere dei giganti. Perché la crisi non ha sconfitto il neoliberismo* (2011), 116-121.

[6] Bill Berliner, Adam Quinones, and Anand Bhattacharya, 'Mortgage Loans to Mortgage-Backed Securities', in Frank J. Fabozzi (ed), *The Handbook of Mortgage-Backed Securities* (2016, 7th Edition), 3, 5-6.

[7] Vitaly M. Bord and João A. C. Santos, 'The Rise of the Originate-to-Distribute Model and the Role of Banks in Financial Intermediation' (2012) 18(2) *Economic Policy Review*, 21, 25.

[8] Amiyatosh Purnanandam, 'Originate-to-distribute Model and the Subprime Mortgage Crisis' (2011) 24(6) *The Review of Financial Studies* 1181, 1182.

[9] Blyth, *cit.*, 24.

[10] Purnanandam, *cit.*, 1182; Blyth, *cit.*, 24; Douglas W. Arner, 'Emerging Market Economies and Government Promotion of Securitization' (2002) 12(2) *Duke Journal of Comparative & International Law* 505, 506 [Arner, 'Emerging Market Economies']; Arner, 'The Global Credit Crisis of 2008', *cit.*, 92.

[11] Purnanandam, *cit.*, 1182; Blyth, *cit.*, 24; Arner, 'The Global Credit Crisis of 2008', *cit.*, 92, 104-105.

During the 1980s banks issuing mortgages adopted the originate-to-distribute model as well. The model further developed and became more intricate due to the securitization of residential loans and the consequent utilization of sophisticated instruments on the secondary market, namely collateralized mortgage obligations and credit default swaps. Originators began selling mortgages to Special Purpose Vehicles (SPVs).[12] These structures turned the pool of loans into a mortgage-backed security (MBS), which is a bond-like asset that profits from mortgages – whose collateral are the assets of the borrowers (e.g. the house), as mentioned above.[13] The process of transforming a package of loans into a financial instrument is called securitization.[14] Following this conversion, MBSs may pursue two paths. In the first scenario (so-called "pass-through"), MBSs are directly sold to investors: mortgages payments are collected by the SPV and transferred to (*viz.* passed through) purchasers.[15] The second alternative appeared in the late 1990s and was further developed at the beginning of 2000s. It is more complicated than the "pass-through" since it requires the creation of collateralized mortgage obligations (CMOs). A CMO is a complex financial structure composed of thousands of MBSs.[16] The SPV divides the CMO into several classes of MBSs (called "tranches"). Each tranche has a different level of exposure to the risk of default of the underlying assets – i.e. ultimately, the degree of probability that borrowers of residential mortgages do not repay their debt.[17] Credit rating agencies (e.g. Standards & Poor's, Moody's, Fitch) assign an investment-grade rating to each tranche: the rating should reflect the default risk of that specific class of MBSs.[18]

Broadly speaking, a CMO is usually composed of three main classes of MBSs: senior tranches, mezzanine tranches and junior tranches (also known as equity tranches). Senior tranches embrace the MBSs with the highest rating – i.e. the least risky, the ones that have the lesser level of exposure to default. On the other hand, junior tranches entail the MBSs with the lowest rating – *viz.* the riskiest, the ones with the uppermost probability of non-payment by mortgagors.[19] Slicing a CMO in tranches allows the distribution of losses via subordination: losses are primarily allocated to the junior tranches up to their notional exposure and, later, to mezzanine tranches; at the same time, purchasers of senior tranches receive their payments first. In other words, loss absorption by junior and mezzanine tranches

[12] A Special Purpose Vehicle is a separate legal entity, specifically a bankruptcy-remote trust. This trust is a key element of credit risk transfer: it protects both investors from bankruptcy of the originator and mortgagees from losses on loans. See Arner, 'The Global Credit Crisis of 2008', *cit.*, 92, 107; Adam B. Ashcraft and Til Schuermann, 'Understanding the Securitization of Subprime Mortgage Credit' (2008) Staff Report No. 318, Federal Reserve Bank of New York, 5-7.

[13] This is the most common process to move from primary mortgage market to secondary mortgage market. However, at least two other scenarios are possible: i) institutions may both originate loans and issue MBSs (i.e. bonds) on their own, or ii) investment banks (e.g. Goldman Sachs) may purchase mortgages from originators and issue their own MBSs, which are later sold to SPVs – i.e. the investment bank acts as an intermediary between the originator and the SPV. See Ashcraft, Schuermann, *cit.*, 5.

[14] Sharon Brown-Hruska, Georgi Tsvetkov, and Trevor Wagener, 'New Regulations for Securitizations and Asset-Backed Securities', in Fabozzi (ed), *cit.*, 104, 105-106; Arner, 'Emerging Market Economies', *cit.*, 505.

[15] Frank J. Fabozzi, 'Agency Collateralized Mortgage Obligations', in Fabozzi (ed), *cit.*, 273.

[16] Fabozzi, 'Agency Collateralized Mortgage Obligations', *cit.*, 275.

[17] Francis A. Longstaff, Arvind Rajan, 'An Empirical Analysis of the Pricing of Collateralized Debt Obligations' (2008) 63(2) *The Journal of Finance* 529, 534.

[18] Arner, 'The Global Credit Crisis of 2008', *cit.*, 107; Ashcraft, Schuermann, *cit.*, 37.

[19] Ashcraft, Schuermann, *cit.*, 29-30; Tobias Adrian, 'Risk management and regulation' (2018) International Monetary Fund - Departmental paper series No. 18/13, 20-21 available at: www.imf.org.

shields senior tranches. As a counterbalance, purchasers of junior tranches receive higher rates of interest than those obtained by holders of senior tranches.[20]

The SPV sells these tranches (i.e. the different classes of MBSs composing the same CMO) to investors – e.g. other banks, pension funds.[21] Purchasers choose the specific tranche to buy depending on their preferences concerning returns and investment risks. The choice heavily relies on the evaluation performed by credit rating agencies – i.e. on the rating that these agencies attribute to the tranches of a CMO.[22]

This scheme has become even more complex due to the introduction of credit default swaps (CDSs). Differently from the originators of mortgages (i.e. banks), neither holders of MBSs nor purchasers of tranches of CMOs have rights on the underlying asset (namely, the house). Thus, in case of default (*viz.* non-payment by mortgagors), investors do not have a collateral to foreclose and sell as means of compensation. Against this backdrop, a CDS works as an insurance policy: one party buys protection against a credit event concerning the underlying obligation (e.g. a default of mortgages).[23] This party pays a fixed periodic fee to its counterparty for a set length of time. If the credit event occurs during that period, the protection seller pays the full value of the underlying assets to the purchaser of the CDS.[24] Although credit default swaps operate similarly to contracts of insurance, these two are not identical: in particular, CDSs have at least two remarkable features. First and foremost, CDS are sold both to holders of securities (whether MBSs or tranches of CMOs) and to third parties without "insurable interest" – *viz.* investors that do not own MBSs or tranches of CMOs.[25] These latter purchasers speculate on credit risk and receive returns solely if the underlying reference obligations default (i.e. if the borrowers do not repay the debt).[26] Secondly, firms issuing CDSs have no obligation to establish capital reserves to cover the

[20] Longstaff, Rajan, *cit.*, 532-535; Darrell Duffie and Nicolae Gârleanu, 'Risk and Valuation of Collateralized Debt Obligations' (2001) 57(1) *Financial Analysts Journal* 41; John Kiff et al, 'Restarting Securitization Markets: Policy Proposals and Pitfalls' in International Monetary Fund, *Global Financial Stability Report. Navigating the Financial Challenges Ahead* (2009), 77, 80-81.

[21] In other words, a CMO is "a securitization of securitizations": see Arner, 'The Global Credit Crisis of 2008', *cit.*, 94. The Author uses this expression to describe collateralized debt obligations (CDOs), but it also suits CMOs. CDO is an umbrella term which embraces a variety of structured finance instruments, including CMOs. Generally speaking, a CDO is the securitization of a variety of assets (e.g. corporate bonds, bank loans, and also MBSs), while a CMO is the securitization solely of MBSs. Before the 2007 crisis, CDOs were mainly composed of MBSs as well. See Yongheng Deng, Stuart A. Gabriel, Anthony B. Sanders, 'CDO market implosion and the pricing of subprime mortgage-backed securities' (2011) 20 *Journal of Housing Economics*, 68, 69; Longstaff, Rajan, *cit.*; Joseph R. Mason, Joshua Rosner, 'How Resilient Are Mortgage Backed Securities to Collateralized Debt Obligation Market Disruptions?' (2007), 23, available at: www.ssrn.com. In view of the purpose of the present Chapter, so-called CDO-squared and synthetic CDOs are not taken into account. On this issue, see Longstaff, Rajan, *cit.*, 535.

[22] Randall Dodd and Paul Mills, 'Outbreak: U.S. Subprime Contagion' (2008) 45(2) *Finance and Development* 14, 15.

[23] Tranching of CMOs and CDSs are respectively internal and external forms of credit support (so-called credit enhancement). See Berliner, Quinones and Bhattacharya, *cit.*, 20. For the purpose of the present Chapter, other forms of credit enhancements (e.g. excess spread, shifting interest, performance triggers) are not taken into account. On this issue, see Ashcraft, Schuermann, *cit.*, 29-36.

[24] Arner, 'The Global Credit Crisis of 2008', *cit.*, 94; Chudozie Okongwu et al, 'Credit Derivatives and Mortgage-Backed Securities', in Fabozzi (ed), *cit.*, 733, 734 – 737; Longstaff, Rajan, *cit.*, 535.

[25] In other words, it is like taking out an insurance policy against theft and fire on someone else's car: the protection buyer receives the agreed sum if and when the owner of the car suffers a theft.

[26] Arner, 'The Global Credit Crisis of 2008', *cit.*, 94; Okongwu, *cit.*, 735.

payment of claims, which means that protection buyers bear the risk of not receiving the agreed sum if and when the credit event occurs.[27]

The transfer of credit risk via the originate-to-distribute model and the allocation of possible losses through CMOs, alongside the insurance provided by CDSs, led to a change in the composition of the underlying securities. Initially, MBSs had encompassed solely mortgages conferred to qualified borrowers. In the late 1990s banks started to grant loans to less creditworthy parties: since the chances of default were no longer on their balance sheet, lending institutions gradually lowered their minimum standards to grant residential loans until they ceased to verify the ability of the borrowers to repay their debt.[28] The greater availability of credit influenced house prices, which began to rise.[29] This period witnessed a rapid expansion of subprime mortgages issued to debtors with low or no credit quality.[30] Banks also granted so-called NINJA loans (no income, no job, no asset),[31] the majority of which were adjustable-rate mortgages: the interest rate was fixed and relatively low for the initial period (usually two years), then it rose significantly.[32] Unqualified borrowers usually could not afford the mortgage payment once the note rate increased, so they cleared their residential loans before their maturity by either selling the house or through a second mortgage to keep up with the payments on the first loan. Both these scenarios relied on the constant appreciation of house prices: in the first case, this circumstance resulted in borrowers profiting from the trade; in the second case, originators granted the second loans because, in case of default of the mortgagor, they could foreclosed and sell the house at a higher cost.[33]

Moreover, as mentioned above, subprime residential loans (including NINJAs) pursued the same path as prime mortgages under the originate-to-distribute model: they were sold to SPVs, packed into MBSs, repacked into CMOs and purchased in tranches according to the level of default risk assigned by rating agencies.[34] As pointed out above, MBSs and CMOs are complex financial structures whose risk estimation is difficult to assess. The length of the conversion and intermediation chain fostered asymmetry of information concerning the creditworthiness of mortgagors: originators knew (or ought to have known) whether the loan was granted to a high or to a low qualified borrower, while ultimate investors had no clue on the type of residential mortgages backing MBSs and, consequently, tranches of CMOs.[35] In order to overcome this problem and understand the value of the instrument they intended to buy, purchasers relied on the determinations of credit rating agencies rather than exercising their own due diligence.[36] However, since subprime mortgages were a relatively novel form

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[27] William H. Janeway, 'Doing Capitalism in the Innovation Economy: Markets, Speculation and the State' (2012), 164; Blyth, *cit.*, 26-27.

[28] Janeway, *cit.*, 164-165; Andrew S. Carron, Anne Gron, and Thomas Schopflocher, 'Impact of the Credit Crisis on Mortgage-Backed Securities', in Fabozzi (ed), *cit.*, 131, 151.

[29] Philip Lowe, 'State Aid Policy in the context of the financial crisis' (2009) 2 *Competition Policy Newsletter* 3, 3-4.

[30] Douglas W. Arner, Paul Lejot and Lotte Schou-Zibell, 'The global credit crisis and securitization in East Asia' (2008) 3(3) *Capital Markets Law Journal* 291, 311.

[31] Arner, 'The Global Credit Crisis of 2008', *cit.*, 107; Dodd, Mills, *cit.*, 14.

[32] Frank J. Fabozzi, 'Cash Flow Mathematics for Agency Mortgage-Backed Securities', in Fabozzi (ed), *cit.*, 87, 90.

[33] Dodd, Mills, *cit.*, 15; Adrian, *cit.*, 23; Ashcraft, Schuermann, *cit.*, 15.

[34] Deng, *cit.*, 68-69; Brown-Hruska, Tsvetkov, Wagener, *cit.*, 106-109.

[35] Arner, Lejot, Schou-Zibell, *cit.*, 312; Ashcraft, Schuermann, *cit.*, 3, 6, 10; Brown-Hruska, Tsvetkov, Wagener, *cit.*, 106-107.

[36] International Monetary Fund, *Global Financial Stability Report. Containing Systemic Risks and Restoring*

of residential loans, there was limited information concerning their prior performance, which could have helped in foreseeing their chance of default due to non-payment of the borrowers.[37] Besides, credit rating agencies faced a serious conflict of interest: an increasing amount of their income came from the issuers of the securities they were required to rate.[38] These two circumstances led to the overestimation of the quality of MBSs and CMOs backed by subprime mortgages, which received top ratings.[39]

To sum up, at the beginning of 2000s, the U.S. sector of residential mortgages was based on three pillars: i) the constant appreciation of house prices, which enabled subprime borrowers to repay their debts; ii) the distribution of losses through a complex sequence of financial operations – starting from the securitization of assets and ending with the selling of tranches of CMOs to ultimate investors and the issuance of CDSs; iii) the overreliance on the risk estimation performed by credit rating agency. The 2006 slowdown of the cost of real estate generated a domino effect. The first consequence was an increasing subprime delinquency: mortgagors, whose interest rate was raised, were no longer able to repay the loan and defaulted, since neither the option for anticipated clearing of mortgages nor that of refinancing were available due to the little or no profit for mortgagors or the banks.[40] The escalation of defaulting affected MBSs and the pyramidal structure of CMOs up to senior (*viz.* less risky) tranches. When investors (including institutions such as banks and pension funds) stopped collecting returns, rating agencies downgraded securities backed by subprime mortgages and companies issuing CDSs received claims for payment by protection buyers – both holders of financial instruments and those speculating on market risk.[41] Originators of subprime loans and firms which sold CDSs were insufficiently capitalized and were unable to obtain liquidity: the intricate chain of securitization and intermediation resulted in uncertainty on the risk exposure of market participants, which ultimately caused the halting of interbank credit lines.[42] Between 2007 and 2008 the bursting of the U.S. house bubble turned into a crisis of the banking sector.

The U.S. government and the Federal Reserve Bank adopted several measures to avoid the default of insurance companies and financial institutions – with the remarkable exception of Lehman Brothers, which went bankrupt in September 2008.[43] The involvement of the public sector and the use of the national budget to recapitalize and save the banking and insurance systems was based on the belief that they were "too big to fail": due to the strict correlation among market participants all over the world, if these institutions had collapsed, then the entire global financial system and economy would have followed.[44] Despite such initiatives, some institutions began to fail and triggered the contagion towards Europe, where

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Financial Soundness (2008), 80. Some Authors pointed out that investors decided not to exercise due diligence due to the cost and time of performing their own risk analysis. See e.g. Brown-Hruska, Tsvetkov, Wagener, *cit.*, 106-107.

[37] Dodd, Mills, *cit.*, 15; International Monetary Fund, *Global Financial Stability Report. Containing Systemic Risks and Restoring Financial Soundness* (2008), 62.

[38] Arner, 'The Global Credit Crisis of 2008', *cit.*, 108; Ashcraft, Schuermann, *cit.*, 10.

[39] Dodd, Mills, *cit.*, 15; International Monetary Fund, *Global Financial Stability Report. Containing Systemic Risks and Restoring Financial Soundness* (2008), 62.

[40] Dodd, Mills, *cit.*, 16; Deng, *cit.*, 69; Adrian, *cit.*, 21-22.

[41] Arner, Lejot, Schou-Zibell, *cit.*, 308-309; Arner, 'The Global Credit Crisis of 2008', *cit.*, 114.

[42] Dodd, Mills, *cit.*, 17; Adrian, *cit.*, 24-25.

[43] For a detailed description of those actions, see: Arner, 'The Global Credit Crisis of 2008', *cit.*, 113-117.

[44] Blyth, *cit.*, 47-50; Arner, 'The Global Credit Crisis of 2008', *cit.*, 96-97, 114-117.

banks and insurance companies had invested into securities issued by U.S. institutions which failed or were on the verge of failing.[45]

1.2. Internal causes: public interventions towards privately owned institutions and the architecture of the European Economic and Monetary Union

The consequences of the bursting of the U.S. housing market bubble reached Europe already in 2007. Major European banks started running into financial difficulties either as a consequence of their previous investment in U.S. subprime markets or because of their residential mortgage lending policy, which was similar to that adopted by U.S. institutions (*viz.* originate-to-distribute model together with securitization of loans and the use of complex financial tools).[46] The cross-border euro area capital flow is another pivotal factor, as in previous years credit entities in Eurozone Countries had financed private and public sectors with – at the very least – controversial creditworthiness (e.g. the Greek public debt).[47] Both forms of financing were considered low-risky activities. Yet, once the crisis hit Europe, these credit institutions found themselves exposed to the default of both private borrowers and States.[48]

Private financial entities in economic distress could not resort to interbank lending to cover their serious losses due to the freezing of credit lines, so governments adopted a variety of measures meant to save those institutions from collapsing.[49] As a sample of the first situation, it is sufficient to recall that between 2007 and 2008 Germany provided state support measures in favour of two *Landesbanken*, namely IKB and Sachsen LB, both exposed to the U.S. subprime crisis.[50] Still as a means of example, the second scenario characterised Irish privately owned banks, which shared the same fate as that of the U.S. institutions granting

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[45] Adrian, *cit.*, 24; Arner, 'The Global Credit Crisis of 2008', *cit.*, 116-117.

[46] Blyth, *cit.*, 53, 85; David Gwynn Morgan, 'The Constitution and the financial crisis in Ireland', in Xenophon Contiades (ed), *Constitution in the Global Financial Crisis. A Comparative Analysis* (2013), 63, 84; Michael C. Burda, 'The European Debt Crisis: How Did We Get into this Mess? How Can We Get Out of it?', in Cristoph G. Paulus (ed), *A Debt Restructuring Mechanism for Sovereigns. Do we need a legal procedure?* (2014), 21, 30.

[47] E.g. the two largest Cypriot banks (the Bank of Cyprus and the Cypriot Popular Bank, also known as Laiki) were severely exposed to the Greek sovereign debt. European Commission, European Economy – The Economic Adjustment Programme for Cyprus, Occasional Papers 149 (May 2013), at 11 (para. 5), 14 (paras. 8-10), 15 (para. 14). The document is available at: www.ec.europa.eu.

[48] Blyth, *cit.*, 78-84; Jeffry Frieden, Stefanie Walter, 'Understanding the Political Economy of the Eurozone Crisis' (2017) 20 *Annual Review of Political Science* 371, 374; Gerard Conway, *EU Law* (2015), 620; Tuori, Tuori, *cit.*, 65-66, 75-76, 182; Christoph G. Paulus, 'The Interrelationship of Sovereign Debt and Distressed Banks: A European Perspective' (2014) 49(2) *Texas International Law Journal* 201, 208-210.

[49] These measures encompassed e.g. state guarantees to cover the borrowings of the relevant institutions, bailing out, nationalization and/or restructuring of banks. See Arner, 'The Global Credit Crisis of 2008', *cit.*, 116-117; Burda, *cit.*; Ignacio Tirado, 'Reflections on Subnational Debt and the Sovereign Crisis in Spain', in Contiades (ed), *cit.*, 75, 79-82, 88. For the list of such measures, see: European Commission, State aid: Overview of national rescue measures and deposit guarantee schemes, 14th October 2008, MEMO/08/619, available at: www.ec.europa.eu. On the tension between these initiatives and European Union competition law (which falls outside the scope of the present dissertation) see: Lowe, *cit.*; Emily Adler, James Kavanagh, Alexander Ugryumov, 'State Aid to Banks in the Financial Crisis: The Past and the Future' (2010) 1(1) *Journal of European Competition Law & Practice* 66; Phedon Nicolaides, Ioana Eleonora Rusu, 'The financial crisis and state aid' (2010) 55(4) *The Antitrust Bulletin* 759; Lucchini et al, 'State Aid and the banking system in the financial crisis. From bail-out to bail-in' (2017) 8(2) *Journal of European Competition Law & Practice*, 88.

[50] Commission Decision of 4 June 2008 on State aid C 9/08 (ex NN 8/08, CP 244/07) implemented by Germany for Sachsen LB, OJ L 104/34; Commission Decision of 21 October 2008 on State aid measure C 10/08 (ex NN 7/08) implemented by Germany for the restructuring of IKB Deutsche Industriebank AG, OJ L 278/32;

mortgages to low quality borrowers. In order to ensure the ability of lending banks to repay their own debts, in September 2008 the Irish Government issued a blanket guarantee on all liabilities of the banking sector.[51]

These reactions were driven by the concern that a domestic bank crisis could have led to economic disruptions both in single countries hosting the debtor institutions and in the Eurozone as a whole, this latter due to the linkage between creditor entities, private borrowers and national debt.[52] The involvement of governments turned a private sector turmoil into a sovereign debt crisis: national budgets acted as "shock absorbers" for the banking and financial systems – either directly assuming private debt or guaranteeing its liability.[53]

Greece was the exception to this pattern related to interbank lending, investments in government bonds and interdependence between financial institutions and States' public budget.[54] Between the end of 2009 and through the entirety of 2010 the figures concerning the Greek debt and deficit ratio were revised to reveal that the level of indebtedness of the Country was drastically higher than previously reported.[55] Thus, the Greek budgetary crisis was neither a direct nor an indirect effect of the bursting of the U.S. real estate market bubble, as it was caused by excessive (and undisclosed) government debt.[56]

However, a disproportionate deficit affected not only Greece – although no other European State held a similarly high amount of public debt. As is well-known, at the outset of the crisis the level of indebtedness varied (as it still does) from one country to another.[57] Hence, Governments with higher public deficits did not have enough economic resources to bear the losses of domestic private institutions and, at the same time, to service their own public debt.[58] Notably, excessive indebtedness contrasted with the EU regime on budgetary and fiscal discipline, which is a central element of the Economic and Monetary Union (EMU).

Generally speaking, the EMU – a further step of European integration through the incremental method – culminated with the adoption of the euro as a single currency.[59] This

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[51] Blyth, *cit.*, 65; Burda, *cit.*, 30; Christophe Galand, Minke Gort, 'The Resolution of Anglo Irish Bank and Irish Nationwide Building Society' (2011) 3 *Competition Policy Newsletter* 31; Conway, *cit.*, 633-634. European Commission, 'Commission Staff Working Paper - The effects of temporary State aid rules adopted in the context of the financial and economic crisis', 5 October 2011, SEC(2011) 1126 final, 9, 48, 55, available at: www.ec.europa.eu.

[52] Frieden, Walter, *cit.*, 377.

[53] Blyth, *cit.*, 7; Frieden, Walter, *cit.*, 376-377.

[54] Blyth, *cit.*, 5-7, 62-64; Paulus, *cit.*, 207; Allen & Overy - Global Law Intelligence Unit, 'How the Greek debt reorganisation of 2012 changed the rules of sovereign insolvency' (2012), 6, available at: www.allenovery.com.

[55] According to the European Commission, "the Greek authorities also revised the planned deficit ratio for 2009 from 3.7% of GDP (the figure reported in spring) to 12.5% of GDP". See European Commission, 'Report on Greek Government Deficit and Debt Statistics', Brussels, 8 January 2010, COM(2010) 1 final, 3, available at: www.ec.europa.eu. Following investigations, Eurostat revised such figure twice: the first time in April 2010 (deficit at 13.6% GDP) and the second time in November 2010 (deficit at 15.4% of the GDP). See respectively: Eurostat, Provision of deficit and debt data for 2009 - first notification, 22 April 2010, available at: www.ec.europa.eu/eurostat; Eurostat, Provision of deficit and debt data for 2009 - Second notification, 15 November 2010, available at: www.ec.europa.eu/eurostat.

[56] Abel, *cit.*, 25-26; Allen & Over – Global Law Intelligence Unit, *cit.*, 6.

[57] See e.g. EUROSTAT, General government gross debt, available at: www. ec.europa.eu/eurostat.

[58] Abel, *cit.*, 24-25; Conway, *cit.*, 620. As pointed out by Blyth, while in the U.S. private institutions were deemed "too big to fail", in Europe those entities became "too big to bail" (Blyth, *cit.*, 78-87).

[59] Conway, *cit.*, 614.For a description of the landmark stages that led to the development of the EMU until the adoption of the euro as a single currency, see Rosa M. Lastra, Jean-Victor Louis, 'European Economic and Monetary Union: History, Trends, and Prospects' (2013) 32(1) *Yearbook of European Law* 57, 63-71. For a comprehensive analysis of the legal regime governing the European Economic and Monetary Union, see Fabian

governance is characterized by variable geometry and constitutional imbalance. As for the former, there is a substantive and institutional differentiation between EU Member States. Although each of them participates in the EMU, some of its norms only apply to euro area Countries.[60] This is a peculiar feature of the incremental method of integration, which allows for the establishment of specific regimes of enhanced cooperation among some of the Member States of the Union which pursue a common objective.[61] As for the constitutional imbalance, the EU has exclusive competence in the area of monetary policy for Member States whose currency is the euro.[62] On the contrary, economic and fiscal policy remains in the exclusive domain of EU Member States – including those adopting the single currency, which shall simply coordinate their strategies. To this end, the Council adopts soft-law measures – in particular, broad guidelines – in order to nurture economic convergence among all EU Member States.[63]

This asymmetry notwithstanding, monetary and economic policy are strictly related: fiscal sustainability and budgetary soundness are decisive for maintaining price stability, which is the primary objective of the EU monetary strategy.[64] This is also the principal task of the European Central Bank (ECB) that, together with the national central banks of the Eurozone Member States, conducts the monetary policy of the Union.[65] The strict relationship among these two fields constituted the basis for the restriction of EU Member States' sovereignty upon fiscal and budgetary policies. Besides coordinating functions, the European Union provides strict rules safeguarding fiscal discipline.[66] This legal framework pursues the aim of preventing sovereign debt turmoil.[67]

Amtenbrink, Christoph Herrmann (eds), *EU Law of Economic & Monetary Union* (2020).

[60] Conway, *cit.*, 615; De Witte, 'EMU as Constitutional Law', in Amtenbrink, Herrmann (eds), *cit.*, 278, 280-281; Lastra, Louis, *cit.*, 62.

[61] Some Authors define this phenomenon as "multi-speed" or "two-speed Europe". See e.g. Jean-Claude Piris, *The Future of Europe: Towards a Two-Speed EU?* (2012).

[62] Consolidated version of the Treaty on the Functioning of the European Union, 26 October 2012, OJ L 326/47 [hereinafter: TFEU], Arts. 3 and 127-133. As it is well-known, the distribution of power between the EU and its Member States is based on the principles of conferral, subsidiarity and proportionality, all set forth in Art. 5 of the consolidated version of the Treaty on the European Union, 26 October 2012, OJ L 326/01 [hereinafter: TEU]. This norm shall be read together with Arts. 2-6 TFEU, which – among others – provide: an exhaustive list of the categories and areas of exclusive EU competence (Art. 3); a non-exhaustive list of shared competences between the EU and its Member States (Art. 4); a list of areas of supporting, coordinating and supplementing competences (Art. 5). On this issue, see: Conway, *cit.*, 257-285; Alina Kaczorowska-Ireland, *European Union Law* (2016), 174-212.

[63] TFEU, Arts. 2(3), 5 and 119 to 126. Contrarily to Authors which emphasize the centrality of soft-law instruments in the governance of economic policy (see e.g. Alexandre de Streel, 'The Evolution of the EU Economic Governance since the Treaty of Maastricht: an Unfinished Task' (2013) 20(3) *Maastricht Journal of European and Comparative Law* 336, 337-339), de Witte points out that economic policy is "a very complex competence domain, where most legal bases provide for coordination activities, but some legal bases provide for true law-making activities of the EU. Therefore, some parts of economic policy fall within the domain of shared rather than supplementary competences". See de Witte, *cit.*, 283-284.

[64] Conway, *cit.*, 614; Charles Proctor, 'Substantive Legal Obligations for Euro area Member States', in Amtenbrink, Herrmann (eds), *cit.*, 259, 265-266, Lastra, Louis, *cit.*, 94. Due to the intertwining between the two areas of competence, Art. 121(1) TFEU establishes that Member States "shall regard their economic policies as a matter of common concern".

[65] Art. 282 TFEU. The same provision clarifies that "The European Central Bank, together with the national central banks, shall constitute the European System of Central Banks (ESCB)". The primary objective of the ESCB is to maintain the price stability as well.

[66] Tuori, Tuori, *cit.*, 181.

[67] Abel, *cit.*, 95.

At the outset of the crisis, primary EU law established that national debt and deficit could not exceed the 3% and 60% of the government domestic product (GDP), respectively.[68] For the purpose of ensuring the respect of these parameters, the Treaty on the Functioning of the European Union (TFEU) and the Stability and Growth Pact set forth both a preventive and a corrective mechanism.[69] The first was a multilateral surveillance procedure which was meant to control whether Member States complied with the above-mentioned criteria on budgetary discipline.[70] The violation of these standards triggered the excessive deficit procedure (EDP) under Art. 126 TFEU, which aimed at correcting those deviations.[71]

Art. 126 TFEU also provided for a system of sanctions in case of breach of budgetary and fiscal requirements.[72] However, this corrective mechanism proved quite ineffective mostly because the sanctions against offender States were decided by the Council upon a non-binding recommendation of the European Commission. Since the Council is composed by government ministers from each EU Country, the procedure was "prone to political bargaining".[73] Consequently, the system never resulted in the imposition of sanctions,[74] which led Member States not to respect the EU regime on budgetary and fiscal discipline. Ultimately, the system proved its ineffectiveness in preventing sovereign debt crisis and it even aggravated States' struggle in responding to the 2008 turmoil due to the lack of available liquidity.

Notably, Eurozone States' efforts in the management of their balance of payments while supporting distressed entities encountered also a number of normative limits, again rooted in their membership of a currency union and on the related functioning of the EMU.[75] The architecture of the Economic and Monetary Union constrained the interventions of the EU as well, since the relevant legal framework provided for very limited measures to manage a sovereign debt crisis.[76]

On the decentralised level, Eurozone States could neither supply currency nor modify interest rates. The former generates monetary devaluation and, hence, fosters a Country's competitiveness – *viz.* the lowering of production costs and good prices nurtures foreign investments and exports.[77] The latter affects the inverse relationship between savings and borrowings: raising interest rates makes it more convenient for people to set aside money

[68] TFEU, protocol (no 12) on the excessive deficit procedure, Art. 1.
[69] Originally, the Stability and Growth Pact consisted in three acts: Regulation 1466/97 of the Council of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, 2 August 1997, OJ L 209/1; Regulation 1467/97 of the Council of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, 2 August 1997, OJ L 209/6; Resolution of the European Council of 17 June 1997 on the Stability and Growth Pact, 2 August 1997, OJ C 236/1.
[70] Arts. 121 and 126(2) TFEU; Regulation 1466/97, *cit*.
[71] Art. 126 TFEU; Regulation 1467/97, *cit.*
[72] Art. 126, paras. 6 to 11 TFEU.
[73] De Streel, *cit.*, 344.
[74] Tuori, Tuori, *cit.*, 105; Kaczorowska-Ireland, *cit.*, 31-32. Following the application of the EDP to Germany and France in 2002 and 2003 respectively, the two regulations of the Stability and Growth Pact were amended in 2005 to further weaken the surveillance and correct mechanism. For a chronology of the road to the Stability and Growth Pact and its subsequent development, see e.g.: Lastra, Louis, *cit.*, 94, 111-127; Tuori, Tuori, *cit.*, 27-35; 105-116, Abel, *cit.*, 109-118. For an overview of the reform in the aftermath of the Eurozone sovereign debt crisis, see Section 2 below.
[75] Besides such normative boundaries, Abel (*cit.*, 25) points out an empirical limit, namely the impossibility for Countries to raise taxes indefinitely to increase revenue.
[76] Abel, *cit.*, 95.
[77] Conway, *cit.*, 614; Christian Hofmann, 'A Legal Analysis of the Eurozone crisis', in Paulus (ed), *cit.*, 43, 45.

since it increases the cost of lending, and vice versa.[78] Both these aspects fall within the scope of monetary policy, which is an area of exclusive competence of the EU – and, more precisely, of the European Central Bank.[79] The ECB has "the exclusive right to authorise the issue of the euro"[80] and formulates decisions relating to "key interest rates"[81]. These latter ones are set for the economies of all the Eurozone Countries at the same unitary nominal rate.[82] In other terms, euro area States could not resort to monetary measures as a reaction to economic downturns. Their options were limited and entailed, among others, the search for external help.[83]

At the centralized level, the Union established a rather scarce system of crisis resolution for Eurozone Member States.[84] The architecture of the EMU imposed stringent restraints on the possibility to obtain financial assistance from other EU Member States or from the EU. The first boundary is enshrined in Art. 123 TFEU, which prohibits monetary financing by the European Central Bank and by national central banks,[85] i.e. the norm bans both direct loans to States and direct purchases of public debt instruments on the primary market.[86] The second limit is the no bail-out clause under Art. 125 TFEU, according to which the EU or its Member States "shall not be liable for or assume the commitments" of other EU Member States – *viz.* the provision excludes assistance directly from Member States or from the Union.[87]

There are two exceptions to the no bail-out clause. One is set forth in Art. 122(2) TFEU and applies to all EU Member States, including Eurozone Countries. This rule provides that the Union may grant, under certain conditions, financial assistance to a Member State in difficulty (or seriously threatened with severe difficulties) caused by "natural disasters or exceptional occurrences beyond its control".[88] The other exception is the Medium-Term Financial Assistance Facility as laid out in Art. 143 TFEU. It concerns solely EU Countries with derogations – i.e. those that did not adopt the euro as currency, which could obtain mutual assistance from the Union in further reaching circumstances than those outlined in Art. 122(2) TFEU.[89] The grant of the aid is conditional to the adoption of policy measures by the recipient State.[90]

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[78] Conway, *cit.*, 614-615.
[79] Tuori, Tuori, *cit.*, 24.
[80] Art. 128(1) TFEU.
[81] TFEU, Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank, Art. 12(1).
[82] Conway, *cit.*, 615; Tuori, Tuori, *cit.*, 182.
[83] Abel, *cit.*, 96; Hofmann, *cit.*, 45-46.
[84] Abel, *cit.*, 95, who highlights that the EU legal regime "focuses on crisis prevention rather than on crisis resolution".
[85] Art. 123 TFEU. The prohibition concerns both the Euro system and the European System of Central Banks. On the difference among the two, see Conway, *cit.*, 135-136.
[86] On the prohibition of monetary financing, see Michael Ioannidis, 'ECB', in Amtenbrink, Herrmann (eds), *cit.*, 353, 372-374; Abel, *cit.*, 119-121.
[87] Art. 125 TFEU. See Abel, *cit.*, 122- 123; Tuori, Tuori, *cit.*, 120-136.
[88] Art. 122(2) TFEU. See Tuori, Tuori, *cit.*, 136-145; Abel, *cit.*, 126-128.
[89] Under Art. 143 TFEU (former Art. 119 TEC), mutual assistance is granted where the relevant State "is in difficulties or is seriously threatened with difficulties as regards its balance of payments either as a result of an overall disequilibrium in its balance of payments, or as a result of the type of currency at its disposal, and where such difficulties are liable in particular to jeopardise the functioning of the internal market or the implementation of the common commercial policy". The analysis of this provision is outside the scope of the present dissertation, which focuses on the EU Member States which adopt the euro as a currency. The procedure under Art. 143 TFEU is detailed in Council Regulation (EC) No 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments, 23 February 2002, OJ L

The prohibition of economic aid from other Member States and from the Union pursued the aim of avoiding excessive borrowing and, thus, disproportionate public debt – in line with the EU legal framework on budgetary discipline. The regime was meant to foster prudence in lending, since governments could not rely on other Member States and the Union in case of insolvency.[91] Still, since the default of one Country could have threatened the stability of the euro area as a whole, the management of the 2008 sovereign debt crisis required a flexible interpretation of such norms as well as formal amendments to the EU primary law in order to allow the granting of rescue packages towards Eurozone States facing severe balance of payment problems.

2. Responses to the crisis

The outbreak and the gravity of the 2008 sovereign debt crisis proved the inadequacy of the EU framework on fiscal and budgetary discipline, alongside the need to establish tools meant to support States facing severe balance-of-payment problems. Such awareness triggered both the strengthening of the already existing preventive systems and the establishment of crisis resolution mechanisms. As is shown in the following sections, measures in these two fields either fell within the EU legal regime or were adopted through international law instruments outside the Union framework.

2.1. Crisis prevention

The EU normative scheme meant to prevent sovereign debt crisis was reinforced by means of three set of instruments: i) the "Six Pack" of 16 November 2011; ii) the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) of 2 March 2012; iii) the "Two Pack" of 30 May 2013.[92] This three-step reform further constrained EU States' sovereignty over budgetary and fiscal policies, still without transferring competence on these areas to the Union. Furthermore, these amendments broadened the differences between Eurozone Countries, on the one side, and non single currency adopting EU States on the other.

As is suggested by the name, the so-called Six Pack is composed of six legal acts falling within the EU legal regime, namely five regulations and one directive.[93] It amended the

53/1. On this norm, see e.g. Abel, *cit.*, 128-136; Michael Ioannidis, 'EU Financial Assistance Conditionality after "Two Pack"' (2014) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 61, 68-70 [Ioannidis, 'EU Financial Assistance Conditionality'].

[90] Art. 143(2) TFEU; Council Regulation (EC) No. 332/2002, *cit.*, Art. 3(2)(b) and Art. 4. See Ioannidis, *cit.*

[91] Tuori, Tuori, *cit.*, 32-33.

[92] For an overview see e.g. Alexandre de Steel, 'EU Fiscal Governance and the Effectiveness of its Reform', in Maurice Adams, Federico Fabbrini, Pierre Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (2014), 85; L. Lionello, *The Pursuit of Stability of the Euro Area as a Whole. The Reform of the European Economic Union and Perspectives of Fiscal Integration* (2020). Moreover, Authors pointed out that these reforms disregarded democratic participation: see e.g, Pia Acconci, 'Participatory Democracy Within the Revision of the European Economic Governance Due to the Euro-Zone Crisis', in Elena Sciso, Elena Sciso (ed), *Accountability, Transparency and Democracy in the Functioning of Bretton Woods Institutions* (2017), 107.

[93] Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, 23 November 2011, OJ L 306/1; Regulation

Stability and Growth Pact with the aim of enhancing the procedures of surveillance, correction and sanction. Among other effect, these acts reinforced coordination of national economic and budgetary policies through the establishment of the European Semester. This is an analysis of all EU Member States' national programmes with the aim of providing guidelines and recommendations to be taken into account during the drafting process of domestic budgetary laws for the following year.[94] Moreover, following the Six Pact, the excessive deficit procedure under Art. 126 TFEU can be implemented on the basis of the domestic deficit and debt criteria, whilst previously the EDP could be activated solely on the grounds of the former standard. This novelty applies to all EU States.[95] Besides, the revision introduced a specific procedure aimed at monitoring and correcting macroeconomic imbalances of all EU Member States.[96] The assessment is performed in the context of the European Semester and its scope is wider than that of the EDP under Art. 126 TFEU, since it covers severe imbalances, including those that jeopardise (or risks jeopardising) the proper functioning of the EMU – i.e. not simple violations of the national deficit and debt GDP ratio.[97] Lastly, the Six Pact modified the system of sanctions of the Stability and Growth Pact. Currently, the recommendation of the Commission deciding on the imposition of a fine "shall be deemed to be adopted by the Council unless it decides by a qualified majority" to reject or amend the Commission's recommendation.[98] The introduction of reverse majority voting boosted the role of the Commission and reduced the chances of States impeding the imposition of sanctions on the basis of political interests.[99]

The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) is the second step of this overall reform meant to prevent sovereign debt crisis.[100] Contrarily to the "Six Pact", the TSCG is an international treaty which falls outside the EU legal framework. Yet, a compatibility clause establishes that the TSCG "shall be applied and interpreted" in conformity with the entire body of EU law and it "shall not

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(EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, 23 November 2011, OJ L 306/8 23.11.2011; Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies,23 November 2011, OJ L 306/12; Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, 23 November 2011 OJ L 306/25; Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, 23 November 2011, OJ L 306/33; Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States, 23 November 2011, OJ L 306/41. On the "Six Pack", see: Tuori, Tuori, *cit.*, 101-113; Abel, *cit.*, 112-114, Conway, *cit.*, 622-625.

[94] Regulation (EU) No 1175/2011, *cit.*, Whereas Nos. 9, 14-16; Art. 2-a. See Kennet A. Armstrong, 'The New Governance of EU Fiscal Discipline' (2013) *Jean Monnet Working Paper* 29/13, 1, 13-15.

[95] Regulation (EU) No. 1177/2011, *cit.*, Whereas No. 13; Art. 1(1).

[96] Regulation (EU) No. 1176/2011, *cit.*, Art. 1.

[97] Regulation (EU) No. 1176/2011, *cit.*, Art. 1(2), Art. 2.

[98] Regulation (EU) No. 1173/2011, *cit.*, Art. 6.

[99] Regulation (EU) No. 1173/2011, *cit.*, Whereas No.7.

[100] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, 2 March 2012, entry into force 1 January 2013 [TSCG]. Currently, the TSCG binds 27 EU Member States, among which all the 19 Eurozone Countries. The data are available at: www.consilium.europa.eu. On the TSCG and on its compatibility with EU law, see: Tuori, Tuori, *cit.*, 109-111, 171-180; Abel, *cit.*, 114-116; Conway, *cit.*, 109-114, 630-631; Paul Craig, 'The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism' (2012) 37 *European Law Review* 231.

encroach upon the competence of the Union to act in the area of the economic union".[101] The TSCG contains other several linkages with EU law: as examples, it allocates new competences to the European Commission and it confers jurisdiction to the Court of Justice of the European Union for disputes in specific matters related to the TSCG itself.[102] The agreement aims to foster the budgetary discipline of its Contracting Parties,[103] since "the need for governments to maintain sound and sustainable public finances and to prevent a general government deficit becoming excessive is of essential importance to safeguard the stability of the euro area as a whole".[104] This objective is chiefly pursued through the rules established under its most important title, namely the Fiscal Compact.[105]

This set of provisions introduces the "balanced budget rule".[106] Broadly speaking, the Fiscal Compact requires that the annual structural budgetary position of the general government of each Contracting Parties shall be "balanced or in surplus".[107] This general norm is complemented by specific parameters to assess its respect.[108] The Fiscal Compact also allows Contracting Parties to deviate from the required debt and deficit criteria in "exceptional circumstances", which refer to "an unusual event outside the control" of the State concerned or to "to periods of severe economic downturn".[109] If a Contracting Party deviates from the "balanced budget rule" outside these two hypothesis, the State shall automatically correct such deviation within a specified period of time.[110] Notably, Contracting Parties of the TSCG are obliged to incorporate both the "balanced budget rule" and the automatic corrective mechanism into their national law "through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes".[111]

The Fiscal Compact also established that Contracting Parties subject to the excessive deficit procedure under EU law "shall put in place a budgetary and economic partnership programme", including "a detailed description of the structural reforms" which must be implemented "to ensure an effective and durable correction of its excessive deficit"[112]. The European Commission and the Council of the European Union are entrusted with the task of

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[101] TSCG, Art. 2.
[102] TSCG, Art. 3(2) and Art. 8 respectively. See e.g. Angelos Dimopoulos, 'The Use of International Law as a Tool for Enhancing Governance in the Eurozone and its Impact on EU Institutional Integrity', in Adams, Fabbrini, Larouche (eds), *cit.*, 41, 46-58.
[103] TSCG, Art. 1.
[104] TSCG, Preamble.
[105] TSCG, Title III – Fiscal Compact, Arts. 3-8. Even if it is only one out of the eight titles of the TSCG, the treaty as whole is often (and erroneously) referred to as the Fiscal Compact. Besides the Fiscal Compact, the TSCG institutes the Euro Summit to discuss issues of governance of the euro area (Art. 12). The Euro Summit is a meeting between the Heads of State or Government of the Contracting Parties whose currency is the euro, together with the President of the European Commission. The president of the ECB is invited to attend as well.
[106] TSCG, Art. 3. On the budgetary balance rule, also known as the "golden rule", see Fabrizio Fabbrini, 'The fiscal compact, the "Golden Rule," and the paradox of European Federalism' (2013), *Tilburg Law School Legal Studies Research Paper Series No. 013/2013*, available at: www.ssrn.com.
[107] TSCG, Art. 3(1)(a), Art. 3(3)(b).
[108] TSCG, Art. 3(1)(b) and (d). In greater detail, the annual structural balance of the general government shall have a lower limit of a structural deficit of 0,5 % of the GDP. If the ratio of the general government debt to GDP is "significantly below 60 %", this lower limit of structural deficit may reach 1,0 % of the GDP.
[109] TSCG, Art. 3(1)(c), Art. 3(3)(b).
[110] TSCG, Art. 3(1)(c).
[111] TSCG, Art. 3(2). On this issue, see e.g. Adams, Fabbrini, Larouche (eds), *cit.*, Chapters 8 to 13.
[112] TSCG, Art. 5.

endorsing and monitoring such programmes "within the context of the existing surveillance procedures under the Stability and Growth Pact".[113]

The substance of the TSCG was meant to be incorporated into the legal framework of the European Union.[114] This purpose was partly achieved by means of the Two Pact, the third and last step of the reform of the system of crisis prevention.[115]

Similarly to the Six Pack, the Two Pack comprises two EU regulations.[116] However, it applies solely to euro area Member States.[117] This legal framework distinguishes between three types of surveillance depending on the gravity of the budgetary and fiscal situation of the State concerned.[118] The first form applies to Eurozone Countries that are not subject to an excessive deficit procedure under Art. 126 TFEU. These States must annually submit their draft budgetary plans for the forthcoming year to the European Commission.[119] The second type of surveillance involves Eurozone Countries subject to an EDP, which "shall present to the Commission and to the Council an economic partnership programme" similar to that required under the TSCG.[120] The third and last form of surveillance regards Eurozone States subject to an EDP under Art. 126 TFEU which request financial assistance as a means to manage serious difficulties with respect to their budgetary stability.[121] In this case, the Country concerned receives official economic aid from one of the assistance mechanisms established in the context of the Eurozone sovereign debt crisis – that will be described in the next Sections. The rescue is granted in accordance with a macroeconomic adjustment programme (MAP) meant to "rapidly re-establishing a sound and sustainable economic and financial situation".[122] A MAP usually includes the conditions attached to the financial assistance,[123] and States under such programmes are subject to strict reporting and monitoring requirements.[124]

As just mentioned, this third and last form of surveillance is intimately linked to the functioning of the assistance mechanisms which provide financial aid to Eurozone States

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[113] TSCG, Art. 5.
[114] TSCG, Art. 16.
[115] Abel, *cit.*, 114, 116.
[116] Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, 27 May 2013, OJ L 140/1; Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, 27 May 2013, OJ L 140/11. On these regulations, see e.g. Ioannidis, 'EU Financial Assistance Conditionality', *cit.*; Tuori, Tuori, *cit.*, 108-109, 112, 115-116; Abel, *cit.*, 116-118; Conway, *cit.*, 625-626.
[117] Regulation (EU) 472/2013, *cit.*, Art. 1(1); Regulation 473/2013, *cit.*, Art. 1(3).
[118] Regulation (EU) 472/2013, *cit.*, also distinguishes other three types of surveillance: i) enhanced surveillance, which is the least intrusive form of surveillance and applies when either Member States are in serious financial difficulties and do not receive any form of assistance, or when Member States receive support in the form of precautionary assistance (Arts. 2 and 3); ii) programme-based surveillance, which is the most intrusive form of surveillance and applies to Member States that receive financial aid and are under a macroeconomic adjustment programme (Art. 7); iii) post-programme surveillance, which applies to Member States that have received financial assistance in the past and have not yet repaid a minimum of 75 % of such aid (Art. 14). See Abel, *cit.*, 117-118; Ioannidis, 'EU Financial Assistance Conditionality', *cit.*, 76-89.
[119] Regulation (EU) 473/2013, *cit.*, Art. 6.
[120] Regulation (EU) 473/2013, *cit.*, Art. 9.
[121] Regulation (EU) 472/2013, *cit.*, Art. 7.
[122] Regulation (EU) 472/2013, *cit.*, Art. 7(1).
[123] Ioannidis, 'EU Financial Assistance Conditionality', *cit.*, 76-77.
[124] Regulation (EU) 472/2013, *cit.*, Art. 7(4). See Ioannidis, 'EU Financial Assistance Conditionality', *cit.*, 81-82

experiencing economic difficulties. The following Sections outline their main features and the procedures of the granting of such assistance.

2.2 Crisis resolution

As described above, at the outset of the sovereign debt crisis the EU did not have the necessary instruments to manage the turmoil faced by Eurozone Member States. Against the no bail-out clause under Art. 125 TFEU, at the time the only available mechanism was the Medium-Term Financial Assistance Facility enshrined in Art. 143 TFEU, which applies solely to EU Countries with derogations. On the contrary, Art. 122(2) enshrined the unique exception applicable to euro area Countries, whose use was conditional to demanding requirements.[125]

In light of this flaw, the European Central Bank implemented several actions to fight the crisis, and different assistance mechanisms were established to grant economic and financial aid to Eurozone States suffering difficulties.[126] These instruments entailed various forms of official bail-out, which were granted conditionally to the implementation of macro-economic policies by the requesting Eurozone State. These national reforms negatively affected the enjoyment of fundamental rights.[127]

The following subsections provide a general overview of the assistance mechanisms towards Eurozone States in distress, namely: i) the Greek Loan Facility; ii) the European Financial Stabilization Mechanism; iii) the European Financial Stability Facility; iv) the European Stability Mechanism. The description of these tools aims at outlining their differences and common features, since their specific characteristics influence the range of available fora to which victims of human rights violations may resort.[128]

2.2.1. The first rescue package towards Greece: the so-called Greek Loan Facility

Following the launching of an excessive deficit procedure under Art. 126 TFEU and the disclosure of the real data concerning its deficit and debt to GDP ratio,[129] it appeared clear that Greece was on the verge of default and in need of external financial assistance.[130] In April 2010, the Greek government requested such support, which was granted in May 2010 through

[125] See Section 1.2. above.
[126] The present dissertation does not address the intervention of the European Central Bank. On this topic, see e.g. Abel, *cit.*, 208-211; Tuori, Tuori, *cit.*, 101-104, 162-168; Annamaria Viterbo, 'Legal and Accountability Issues Arising from the ECB's Conditionality' (2016) 1(2) *European Papers* 501; Allegra Canepa, 'Crisi dei debiti sovrani e regolazione europea: una prima rassegna e classificazione di meccanismi e strumenti adottati nella recente crisi economico-finanziaria' (2015) 1 *Rivista AIC* 1, 13-17.
[127] See Section 3 below.
[128] See Section 4 below.
[129] On the EDP under Art. 126 TFEU, see: Council decision of 27 April 2009 on the existence of an excessive deficit in Greece (2009/415/EC), OJ L 135/21; Council recommendation to Greece with a view to bringing an end to the situation of an excessive government deficit, 6 April 2009, Council Doc. 7900/09; Council Decision of 16 February 2010 giving notice to Greece to take measures for the deficit reduction judged necessary in order to remedy the situation of excessive deficit (2010/182/EU).
On the level of Greek deficit and debt to GDP ratio, see: European Commission, 'Report on Greek Government Deficit and Debt Statistics', *cit.*; Eurostat, Provision of deficit and debt data for 2009 - first notification, *cit.*; Eurostat, Provision of deficit and debt data for 2009 - Second notification, *cit.*.
[130] Abel, *cit.*, 140-141.

an *ad hoc* instrument, the so-called Greek Loan Facility. The first rescue package was endowed by the International Monetary Fund (IMF, the Fund) and a pool of bilateral loans from Eurozone Countries, with the exception of Slovakia.[131]

Notably, the credit support of euro area States questions the compatibility of this *ad hoc* assistance mechanism with the no bail-out clause under Art. 125 TFEU. As mentioned above, this provision prescribes that the Union and its Member States "shall not be liable for or assume the commitments" of any other EU Country. The scope of this norm covers direct assistance from Member States, but scholars are divided as to whether bilateral loans belong to the forms of financial support excluded under Art. 125 TFEU. Some Authors argued that the no bail-out clause bans any kind of economic assistance,[132] while others contended that loans and credits are excluded because borrower States are under the duty to pay them back – i.e. they do not imply lending Countries "being liable for or assume the commitments" of the beneficiary.[133] However, according to this latter opinion, the only types of loans compatible with Art. 125 TFEU are those which pursue the objective underpinning such provision, namely budgetary discipline.[134] Despite this debate, no legal action was launched to challenge the conformity of this solution with EU primary law.

The first rescue package to Greece amounted to €110 billion.[135] The disbursement of the loan tranches was subject to strict conditionality, *viz.* the aid was approved on the condition of Greece implementing fiscal, financial and structural policies meant to enhance its budgetary soundness.[136] These credit requirements were specified in some of the instruments which constituted the grounds of the Greek Loan Facility. These acts were all adopted between the 3rd and the 10th of May 2010.[137] Notably, the legal bases of the first rescue package towards

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[131] Alberto de Gregorio Merino, 'Legal Developments in the Economic and Monetary Union during the Debt Crisis: The Mechanisms of Financial Assistance' (2012), 49 *Common Market Law Review* 1613, 1616.

[132] Tuori, Tuori, *cit.*, 122; Hannes Hofmeister, 'To Bail Out or Not to Bail Out - Legal Aspects of the Greek Crisis' (2010-2011) 13 *Cambridge Yearbook of European Legal Studies* 113, 119-123.

[133] De Gregorio Merino, *cit.*, 1626-1628.

[134] De Gregorio Merino, *cit.*, 1627. Both the opinion on the compatibility of the Greek Loan Facility with Art. 125 TFEU were based on the literal, systematic and teleological criteria of interpretation.

[135] The assistance was composed as follow: €80 billion via bilateral loans from Eurozone Countries and €30 billion from the International Monetary Fund (IMF).

[136] De Gregorio Merino, *cit.*, 1617; Aristides P. Chiotellis, Sovereign Debt Reconstructing and the Internal Legal Framework: the Greek Experience, in Paulus (eds), *cit.*, 99, 101.

[137] On the Greek Loan Facility, see: Tuori, Tuori, *cit.*, 90; De Gregorio Merino, *cit.*, 1616-168; Chiotellis, *cit.*, 100-104.

The Greek Loan Facility had seven different legal bases: i) Statement by Heads of State and Government of the Euro area, 25 March 2010, available at: www.consilium.europa.eu; ii) Eurogroup, Statement, 2 May 2010, available at: www.consilium.europa.eu; iii) intercreditor agreement between Eurozone Member States (other than the Hellenic Republic) entrusting the management of pooled bilateral loans under the Loan Facility Agreement to the European Commission, available at: http://gesd.free.fr/euroloan10.pdf; iv) Loan Facility Agreement between Eurozone Member States (other than the Hellenic Republic and the Federal Republic of Germany) and KfW acting in the public interest, subject to the instructions of and with the benefit of the guarantee of the Federal Republic of Germany with the Hellenic Republic and the Bank of Greece as agent to the Borrower, available at: http://gesd.free.fr/euroloan10.pdf; v) Memorandum of Understanding between the Hellenic Republic and the European Commission, this latter acting on behalf of creditor Eurozone Member States, 3 May 2010 (the act is composed by three different memoranda - the Memorandum of Economic and Financial Policies, the Memorandum of Understanding on Specific Economic Policy Conditionality, and Technical Memorandum of Understanding), available at: www.ec.europa.eu; vi) Stand-by Arrangement between the Hellenic Republic and the International Monetary Fund, 3 May 2010, (Attachments I, II and 3, pages 45-68), available at: www.imf.org; vii) Council decision 2010/320/EU of 10 May 2010 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit, 11 June 2010, OJ L 145/6 (amended

Greece may be sorted into two categories, according to their nature and form. The first category entails agreements of international public nature, namely: i) the Memorandum of Understanding (MoU) between Greece and the European Commission, the latter acting on behalf of creditor Eurozone Member States, and ii) the Stand-by Arrangement between Greece and the IMF.[138] The second category embraces EU law instruments, i.e. the Council decision of 10 May 2010 addressed to Greece,[139] which reproduces the basic elements of the two international law instruments, including the conditionality thereby defined.

These policies were implemented through Law No. 3845 of 6 May 2010.[140] This act encompassed, among others: the reduction in public wages and in pensions, alongside the elimination of related bonuses and allowances; the reform of the health, pension and tax sectors (e.g. introduction of a unified statutory retirement age of 65 years, the increase in the minimum contributory period for retirement, modernization of the health care system, tax hikes, cuts of exemptions and deductions); the reform of the labour market (e.g. amendment of the wage bargaining system meant to lower pay rates for overtime work).[141]

2.2.2 The European Financial Stabilization Mechanism: the minor role of an EU tool for EU Member States

Pending the adoption of the Greek Loan Facility, in May 2010 the Council of the European Union agreed to create the European Financial Stabilization Mechanism (EFSM),[142] which was later established by Council regulation 407/2010 enacted under Art. 122(2) TFEU.[143]

Similar to the debate surrounding the Greek Loan Facility, scholars investigated whether the EFSM was compatible with this primary EU law norm. As recalled above, Art. 122(2) TFEU constitutes an exception to the no bail-out clause and foresees the possibility of granting Union financial assistance to a Member State in difficulty or seriously threatened with severe difficulties "caused by natural disasters or *exceptional occurrences beyond its control*"[144]. Some Authors argued that Art. 122(2) is not an appropriate legal base for the EFSM because the 2008 Eurozone sovereign debt crisis was not entirely or mostly generated by the bursting of the US housing market bubble. According to these scholars, euro area States facing balance of payment problems contributed to their own budgetary difficulties,

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several times).

[138] Memorandum of Understanding between the Hellenic Republic and the European Commission, this latter acting on behalf of creditors Eurozone Member States, 3 May 2010, *cit.*; the Stand-by Arrangement between the Hellenic Republic and the International Monetary Fund, *cit.*.

[139] Council decision 2010/320/EU of 10 May 2010, *cit.*, and its subsequent amendments.

[140] Law No. 3845 of 6 May 2010, 'Measures for the application of the support mechanism for the Greek economy by Euro area Member States and the International Monetary Fund' published in the Hellenic Republic Government Gazette, A 65 of the 6 May 2012 (FEK A' 65/6.5.2010).

[141] Memorandum of Understanding between the Hellenic Republic and the European Commission, this latter acting on behalf of creditors Eurozone Member States, 3 May 2010, *cit.* The reforms were detailed in the Memorandum of Economic and Financial Policies and in the Memorandum of Understanding on Specific Economic Policy Conditionality.

[142] Council of the European Union, Extraordinary Council Meeting - Economic and Financial Affairs, Press release 9596/10 (Presse 108), 9/10 May 2010, available at: www.consilium.europa.eu.

[143] Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism,12 May 2010, OJ L 118/1.

[144] Art. 122(2) TFEU (emphasis added).

hence their situation was not caused by exceptional occurrences beyond their control.[145] On the contrary, other Authors contended that the scope of such provision covers also balance of payment problems, such as those experienced by euro area Countries. Moreover, the establishment of the EFSM does not preclude a case-by-case assessment of the specific situation of the State requesting financial assistance as a means to evaluate whether the causes of its budgetary problems are "beyond its control", in accordance with Art. 122(2) TFEU.[146]

In line with this EU primary norm, the EFSM aims at providing Union assistance to a Member State which "is experiencing, or is seriously threatened with, a severe economic or financial disturbance caused by exceptional occurrences beyond its control".[147] The scope of the mechanism is wide, since it covers *all* EU Member States, not solely those which adopted the euro as currency.[148] This reflects the ultimate purpose of the EFSM, i.e. preserving financial stability in the European Union as whole – not only in the euro area.[149]

The EFSM may grant two forms of economic assistance, loans and credit lines,[150] both subject to "strong economic policy conditions".[151] The rather complex procedure to accord this aid is detailed in Art. 3 of Council Regulation 407/2010. Financial assistance is granted by a Council decision,[152] following the submission of "a draft economic and financial adjustment programme" by the EU Member State requesting the aid.[153] The Council decision to award loans or credit lines shall contain, among other elements, "the general economic policy conditions attached to the Union assistance […] as defined by the Commission, in consultation with the ECB",[154] and an "approval of the adjustment programme prepared by the beneficiary Member State to meet the economic conditions attached to the Union financial assistance".[155] After the issuance of the Council decision, the European Commission and the Member State shall conclude "a Memorandum of Understanding detailing the general economic policy conditions laid down" in the Council decision.[156] The European Commission, in consultation with the ECB, periodically monitors the respect of such conditionality.[157] Any change of such policies requires the amendment of the initial Council decision and the approval of a revised adjustment as prepared by the beneficiary Member State.[158] Assistance from the ESFM may be complemented by financial support from the IMF.[159] The loans are disbursed in instalments following the positive evaluation of the European Commission and the ECB on the implementation of the economic policy conditions by the beneficiary Member State.[160]

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[145] Boris Ryvkin, 'Saving the Euro: Tensions with European Treaty Law in the European Union's Efforts to Protect the Common Currency' (2012) 45(1) *Cornell International Law Journal* 227, 235-240.
[146] Tuori, Tuori, *cit.*, 136-143; de Gregorio Merino, *cit.*, 1632-1635.
[147] Council Regulation (EU) No 407/2010, *cit.*, Art. 1.
[148] Council Regulation (EU) No 407/2010, *cit.*, Art. 1.
[149] Council Regulation (EU) No. 407/2010, *cit.*, Recital 5.
[150] Council Regulation (EU) No. 407/2010, *cit.*, Art. 2.
[151] Council Regulation (EU) No. 407/2010, *cit.*, Recital 7.
[152] Council Regulation (EU) No. 407/2010, *cit.*, Art. 3(2).
[153] Council Regulation (EU) No. 407/2010, *cit.*, Art. 3(1).
[154] Council Regulation (EU) No. 407/2010, *cit.*, Art. 3(3)(b) and Art. 3(4)(b).
[155] Council Regulation (EU) No. 407/2010, *cit.*, Art. 3(3)(c) and Art. 3(4)(c).
[156] Council Regulation (EU) No. 407/2010, *cit.*, Art. 3(5).
[157] Council Regulation (EU) No. 407/2010, *cit.*, Art. 3(6).
[158] Council Regulation (EU) No. 407/2010, *cit.*, Art. 3(7).
[159] Council Regulation (EU) No. 407/2010, *cit.*, Art. 3(8).
[160] Council Regulation (EU) No. 407/2010, *cit.*, Art. 4.

The ESFM has a total capacity of €60 billion, which was manifestly inadequate to address the sovereign debt crisis involving several EU Countries.[161] It was activated to provide economic aid to Ireland and Portugal. Both States also received loans from the IMF and the European Financial Stability Facility (EFSF).[162] The ESFM also granted a short-term assistance to Greece in 2015, which was subject to strict conditionality as well – e.g. broadening the tax base; eliminating and streamlining exemptions.[163]

Starting from 2008, Ireland was facing severe difficulties mostly due to the turmoil concerning its banking sector. At last, the government requested and obtained a three-year assistance in 2010, making Ireland the first ESFM programme Country.[164] The aid was a joint financial package of €85 billion from the EFSM, the EFSF, the IMF, together with bilateral loans from the United Kingdom, Sweden and Denmark.[165] Conditionality policies attached to the assistance were implemented in Ireland through a series of legislative acts which introduced structural reforms, among which e.g. cut the national minimum wage by 12%, and a reduction of child benefit and job seekers payments.[166] In December 2013, Ireland exited the bailout facility and is currently under post-programme surveillance.[167]

The Portuguese distress was the result of low productivity growth and scarce competitiveness, together with increasing public indebtedness.[168] In 2011 the government requested and obtained a three-year ESFM financial assistance, in liaison with loans from the ESFS and the IMF.[169] Portugal transposed the general policy conditions of the bail-out programme mainly through annual budget laws between 2011 and 2014. Such statutes entailed, among other provisions: total or partial suspension of the 13th and 14th bonus payments for public employees and pensioners;[170] public sector wage cuts;[171] reductions of overtime pay;[172] and broader grounds to dismiss public workers.[173] In June 2014, Portugal

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[161] De Gregorio Merino, *cit.*, 1619.

[162] Council Implementing Decision 2011/344/EU of 30 May 2011 on granting Union financial assistance to Portugal, 17 June 2011, OJ L 159/88 (and subsequent amendments); Council Implementing Decision 2011/77/EU of 7 December 2010 on granting Union financial assistance to Ireland, 4 February 2011, OJ L 30/34 (and subsequent amendments).

[163] Council Implementing Decision (EU) 2015/1181 of 17 July 2015 on granting short-term Union financial assistance to Greece, 18 July 2015, OJ L 192/15; Council Implementing Decision (EU) 2015/1182 of 17 July 2015 approving the adjustment programme of Greece, 18 July 2015, OJ L 192/19.

[164] Tuori, Tuori, *cit.*, 82; Abel, *cit.*, 151.

[165] European Commission, European Economy – The Economic Adjustment Programme for Ireland, Occasional Papers 72 (February 2011), 40, available at: www.ec.europa.eu.
The programme was based on a Memorandum of Understanding of 3 December 2010 (and subsequent amendment), available at: www. ec.europa.eu. Its main content was transposed in an EU act: Council Implementing Decision 2011/77/EU of 7 December 2010 on granting Union financial assistance to Ireland, 4 February 2011, OJ L 30/34 (and subsequent amendments).

[166] European Commission, European Economy – The Economic Adjustment Programme for Ireland. Spring Review 2011, Occasional Papers 78 (May 2011), 15-16, available at: www.ec.europa.eu.

[167] For the reports on the post-programme surveillance, see European Commission, Financial assistance to Ireland, available at: www.ec.europa.eu.

[168] European Commission, European Economy – The Economic Adjustment Programme for Portugal, Occasional Paper 79 (June 2011), 5-13, available at: www.ec.europa.eu.

[169] European Commission, European Economy – The Economic Adjustment Programme for Portugal, *cit.*, 28.

[170] Law No. 64-B/2011 of 30 December, 'Orçamento do Estado para 2012', Diário da República No. 250/2011, 1º Suplemento, Série I de 2011-12-30 [Budget Law 2012].

[171] Law No. 83-C/2013 of 31 December, 'Orçamento do Estado para 2014', Diário da República No. 253/2013, 1º Suplemento, Série I de 2013-12-31 [Budget Law 2014].

[172] Law No. 23/2012 of 25 June 'Procede à terceira alteração ao Código do Trabalho, aprovado pela Lei n.º 7/2009, de 12 de fevereiro', Diário da República n.º 121/2012, Série I de 2012-06-25 [Law No. 23/2012,

successfully concluded the programme and is currently subject to the post-programme surveillance.[174]

2.2.3 The European Financial Stability Facility: a temporary Special Purpose Vehicle

Due to the rather scarce funds of the EFSM, on 7 June 2010 Eurozone States constituted another assistance mechanism, the European Financial Stability Facility (EFSF). It was founded through a private law agreement and registered as a limited liability company (*société anonyme*). It was a temporary Special Purpose Vehicle meant to grant rescue packages until 30 June 2013. The EFSF enjoyed its separate legal personality whilst the founding Eurozone Countries acted as shareholders and guarantors.[175] Differently from the ESFM, the personal scope of the ESFS encompassed solely euro area States.

Following its registration under Luxembourg law, Eurozone Countries concluded a framework agreement with the EFSF to outline conditions and procedures for the awarding of financial assistance.[176] The procedure was rather intricate. Following a request from the Eurozone country in distress, the European Commission, together with the ECB and the IMF, negotiated and signed the Memorandum of Understanding with the requesting State. This step of the procedure was not necessary if the putative beneficiary State had already signed a MoU with the Commission in the context of the financial assistance provided by the ESFM: in this case, the latter memorandum applied. Subsequently, the Commission, again in liaison with the ECB, suggested the main terms of the Financial Assistance Facility Agreement to be proposed to the requesting State. The detailed technical terms of such agreement, including the conditions to grant the assistance, were later negotiated between the ESFS and the borrowing Country. A Council implementing decision mirroring the content of the MoU was also addressed to the State receiving the aid.[177] The disbursement of the package was conditional on the implementation of the economic and financial reforms imposed by the MoU for the entire duration of the agreement,[178] to be monitored by the European Commission and the ECB.[179]

The ESFS had a total capacity of € 440 billion.[180] It assisted Ireland and Portugal, and both loans were co-funded by the ESFM and the IMF.[181] The ESFS also granted support to Greece.

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amending the Labour Code].

[173] Law No. 23/2012, amending the Labour Code, *cit.*

[174] For the reports on the post-programme surveillance, see European Commission, Financial assistance to Portugal, available at: www.ec.europa.eu.

[175] Tuori, Tuori, *cit.*, 92; Abel, *cit.*, 146; Christos Hadjiemmanuil, 'Euro in Crisis: 2008 – 18', in Amtenbrink, Herrmann (eds), *cit.*, 1253, 1287- 1288.

[176] EFSF Framework Agreement between Kingdom of Belgium, Federal Republic of Germany, Republic of Estonia, Ireland, Hellenic Republic, Kingdom of Spain, French Republic, Italian Republic, Republic of Cyprus Grand Duchy of Luxembourg, Republic of Malta, Kingdom of the Netherlands, Republic of Austria, Portuguese Republic, Republic of Slovenia, Slovak Republic, Republic of Finland and European Financial Stability Facility (as subsequently amended), available at: www.esm.europa.eu.

[177] ESFS Framework Agreement, *cit.*, Art. 2(1)(a).

[178] ESFS Framework Agreement, *cit.*, Recital 2.

[179] ESFS Framework Agreement, *cit.*, Art. 3(1).

[180] ESFS Framework Agreement, *cit.*, Recital 2. On the EFSF funding strategy see Abel, *cit.*, 147-149.

[181] Ireland was the first EFSF programme country: see Master Financial Assistance Facility between European Financial Stability Facility, Ireland as Beneficiary Member State and Central Bank of Ireland, available at:

The second assistance programme for Greece was agreed in March 2012.[182] The credit amounted to €130 billion, to be added to the undisbursed tranches of the first package. The second programme involved a joint action of the EFSF and the IMF.[183] The economic and financial conditions attached to the support facility were implemented into domestic law and included, among others: the involvement of the private sector through a modification of Greek sovereign bonds;[184] a reduction of pharmaceutical spending; cuts in pension expenditures and social security subsidies; tax hikes; a lowering of the minimum wage; and a weakening of the collective bargaining.[185]

2.2.4 The European Stability Mechanism: a permanent international financial institution with a regional mandate

The last assistance mechanism set up pending the crisis is the European Stability Mechanism (ESM), an international organization with its own legal personality. The ESM was created under an intergovernmental treaty between Eurozone States; hence, it falls outside the EU legal framework.[186]

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www.esm.europa.eu. On the ESFS programme towards Portugal, see: Master Financial Assistance Facility Agreement between European Financial Stability Facility, the Portuguese Republic as Beneficiary Member State and Banco De Portugal, available at: www.esm.europa.eu. On the conditionality attached to the programmes and implemented by Ireland and Portugal, see above Section 2.2.2.

[182] The Memorandum of Understanding are attached to European Commission – European Economy, Second Economic Adjustment Programme for Greece, Occasional Papers 94 (March 2012), available at: www.ec.europa.eu. The second assistance programme was also based on Council Decision 2011/734/ of 12 July 2011 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit, 15 November 2011, OJ L 296/38 (as amended).

[183] European Commission – European Economy, Second Economic Adjustment Programme for Greece, *cit.*, 4.

[184] Law No. 4050/12, 'Rules relating to the adjustment of securities issued or guaranteed by the Greek State with the consent of the bondholders', published in the Hellenic Republic Government Gazette, A 36 of the 23 February 2012 (FEK A' 36/23.2.2012). An unofficial translation is available at: http://andreaskoutras.blogspot.com/2012/03/better-tarnslation-of-bondholders-act.html. See also Section 3.1 below.

[185] Law No. 4046/2012, on the approval of Plans of Financial Facilitation between the European Financial Stability Facility (E.F.S.F.), the Greek Republic and the Bank of Greece, the Plan of Memorandum of Understanding between the Greek Republic, the European Commission and the Bank of Greece and other urgent measures to reduce the public debt and rescue the national economy, published in the Hellenic Republic Government Gazette, A 28 of 14 February 2012 (FEK A' 28/14.02.2012); Law No. 4051/2012 introducing retirement adjustments and other emergency regulations in application of Memorandum of Understanding, published in the Hellenic Republic Government Gazette, A 40 of the 29 February 2012 (FEK A' 40/29.02.2012); Law No. 4093/2012 approving the medium-term fiscal strategy 2013-2016 and introducing emergency measures implementing Law N° 4046/2012 and the medium-term fiscal strategy 2013-2016, published in the Hellenic Republic Government Gazette, A 222 of 11 December 2012 (FEK A' 222/11.12.2012); Law N° 4111/2013 providing for retirement adjustments, amendments to Law N° 4093/2012 regarding, amongst others, issues falling under the jurisdiction of the Ministry of Labour, Social Security and Welfare and other provisions, published in the Hellenic Republic Government Gazette, A 18 of 25 January 2013 (FEK A' 18/25.01.2013); Law N° 4151/2013 introducing adjustments for the amendment and improvement of the retirement, financial, administrative and other provisions of the Ministry of Finance, published in the Hellenic Republic Government Gazette, A 103 of 29 April 2012 (FEK A'103/29.4.2013).

[186] Treaty establishing the European Stability Mechanism, 2 February 2012 [ESM Treaty]. On the 2017 proposal of the European Commission to transform the ESM into a European Monetary Fund governed by EU law, see e.g. Francesco Pennesi, 'The Accountability of the European Stability Mechanism and the European Monetary Fund: Who Should Answer for Conditionality Measures?' (2018) 3(2) *European Papers* 511, 530-537.

In greater detail, in 2010 the European Council agreed on the need for a "permanent crisis mechanism to safeguard the financial stability of the euro area as a whole".[187] The European Stability Mechanisms was established in 2012 as an international financial institution with a regional mandate: it mobilises funding and provides stability support under strict conditionality towards Eurozone States "which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States".[188] The scope of the European Stability Mechanism is peculiar: it may grant assistance to Eurozone Countries which are parties of both the ESM Treaty and the Treaty on Stability, Coordination and Governance.[189]

Notably, Art. 136 TFEU was amended after the entry into force of the ESM Treaty.[190] The procedure added a third paragraph to this norm, which stipulates that euro area States may establish a mechanism which provides financial assistance subject to strict conditionality if the creation of such a tool is indispensable to safeguard the stability of the euro area as a whole.[191]

Following the creation of the ESM, it has been argued that the mechanism was in tension with the no bail-out clause under Art. 125 TFEU.[192] The Court of Justice of the European Union (ECJ) clarified this issue in the well-known *Pringle* case, a preliminary ruling following a referral from the Supreme Court of Ireland.[193] The ECJ stated that the no bail-out clause does not prohibit any form of financial assistance from the Union or a Member State toward another Member State: a teleological interpretation of this provision led the Court to affirm that Art. 125 TFEU allows Member States to grant financial assistance to another Member State if this latter "remains responsible for its commitments to its creditors" provided that the conditions attached to the rescue package prompt the beneficiary Country to implement a sound budgetary policy.[194] Financial assistance from the ESM is subject to strict conditionality which is meant to ensure that the recipient State pursues a prudent budgetary and fiscal policy, hence the mechanism (*recte*: the Treaty establishing the ESM) is in compliance with Art. 125 TFEU.[195]

The ECJ further affirmed that Art. 136(3) TFEU, as added after the conclusion of the ESM Treaty, simply confirms the existence of the power of Eurozone States to conclude an

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[187]European Council, Conclusions - 28-29 October 2010, 30 November 2010, EUCO 25/1/10 REV 1, para. 2, available at: www.consilium.europa.eu.

[188] ESM Treaty, Art. 3. Notably, the institutional organization of the ESM mirrors that of the IMF (ESM Treaty, Arts. 4-7). The capital structure and the funding procedure is established under Arts. 8-11. On these issues, see also Abel, *cit.*, 167-174.

[189] ESM Treaty, Recital 5.

[190] European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, 6 April 2011, OJ L 91/1.

[191] Art. 136(3) TFEU.

[192] The compatibility of the ESM with primary EU law has been the object of a massive doctrinal debate. See, among others: Paul Craig, '*Pringle* and the use of EU institutions outside the EU Legal Framework: Foundations, Procedure and Substance' (2013) 9(2) *European Constitutional Law Review* 263 [Craig, '*Pringe*']; Vestert Borger, 'The ESM and the European Court's Predicament in *Pringle*' (2013) 14(1) *German Law Journal* 113; Etienne de Lhoneux, Christos A. Vassilopoulos (eds), *The European Stability Mechanism Before the Court of Justice of the European Union. Comments on the Pringle Case* (2014); Tuori, Tuori, *cit.*, 120-136.

[193] Court of Justice of the European Union, *Thomas Pringle v. Government of Ireland and Others*, Case No. 370/12, Judgment of 27 November 2012, [2012] ECR I-000 [ECJ, *Pringle* case]

[194] ECJ, *Pringle* case, *cit.*, paras. 130 and 137.

[195] ECJ, *Pringle* case, *cit.*, paras. 142-143.

agreement between themselves for the establishment of a stability mechanism of the kind of the ESM.[196] According to this interpretation, Art. 136(3) TFEU has a mere declaratory nature and euro area Countries have always had the power to create such an assistance facility, provided that beneficiary States remain responsible for their commitments *vis-à-vis* their creditors and that the aid is subject to strict conditionality.[197] This reading reinforces the above recalled viewpoint of those scholars arguing in favour of the compatibility of the Greek Loan Facility with Art. 125 TFEU, and it also supports the compliance of the ESFS with this very same provision.[198]

The ESM Treaty details the procedure for granting stability support. Following a request of an ESM member, the European Commission, in liaison with the ECB, assesses the financial situation of the State concerned.[199] On the basis of this evaluation, the ESM Board of Governors may decide in principle to grant stability support.[200] Notably, the ESM Board of Governors is composed by members of the government of the ESM parties who have responsibility for finance.[201] This structure mirrors that of the Economic and Financial Affairs Council (ECOFIN Council), one of the compositions of the Council of the European Union.[202] If the ESM Board of Governors decides to award the aid, the European Commission – together with the ECB and, wherever possible, with the IMF – negotiates with the requesting State a Memorandum of Understanding detailing the conditionality attached to the financial assistance facility. The MoU shall be consistent with any act of EU law.[203] After the approval by the ESM Board of Governors, the European Commission signs the MoU on behalf of the ESM.[204] Lastly, the European Commission – again in liaison with the ECB and, wherever possible, with the IMF – monitors compliance with the conditionality attached to the financial assistance facility.[205] The disbursement of the tranches of assistance depends on the positive outcome of such supervision.[206] Notably, the tasks assigned to the European Commission and the ECB in the context of the ESM lending function have also a legal basis in the above recalled Two Pack,[207] and the content of the MoU is transposed into a Council decision.[208]

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[196] ECJ, *Pringle* case, *cit.*, paras. 184. Besides, according to the ECJ the creation of the ESM falls within the area of economic policy and is not capable of affecting the Union exclusive competence on monetary policy (paras. 60, 62, 68).
[197] Vestert Borger, 'The ESM and the European Court's Predicament in *Pringle*' (2013) 14(1) *German Law Journal* 113, 132.
[198] The *Pringle* case has been the object of a massive doctrinal debate. See, among others: Craig, '*Pringle*', *cit.*, 263; Etienne de Lhoneux, Christos A. Vassilopoulos (eds), *The European Stability Mechanism Before the Court of Justice of the European Union. Comments on the Pringle Case* (2014); Borger, *cit.*, 132; Tuori, Tuori, *cit.*, 120-136.
[199] ESM Treaty, Art. 13(1).
[200] ESM Treaty, Art. 13(2).
[201] ESM Treaty, Art. 5(1).
[202] TEU, Art. 16(2).
[203] ESM Treaty, Art. 13(3).
[204] ESM Treaty, Art. 13(4). Beside the MoU, under Art. 13(5) the ESM Board of Directors (i.e. an organ of the mechanism) also prepares a Financial Assistance Facility Agreement detailing the financial aspects of the stability support to be granted. This agreement reiterates that the ESM grant financial assistance to the requesting state subject to the terms and conditions of the MoU.
[205] ESM Treaty, Art. 13(7).
[206] ESM Treaty, Arts. 15(5), 16(5), 17(5).
[207] Regulation (EU) 472/2013, *cit.*, Art. 7.
[208] Regulation (EU) 472/2013, *cit.*, Recital No. 12, Art. 7.

The ESM has a total capacity of €500 billion.[209] Starting 1 July 2013, it replaced the ESFS, which could not enter new assistance programs after that date. The States parties of the ESM started discussing the reform of its constituting Treaty in 2018 and, in December 2019, an agreement in principle on this reform package was reached, subject to national procedures – which, as of December 2020, are still ongoing.[210] In the context of the Eurozone sovereign debt crisis, the ESM assisted Cyprus, Spain and Greece.

The Cypriot crisis mostly involved the banking sector, since its two largest financial institutions were excessively exposed to Greek sovereign bonds – i.e. to its public debt.[211] Cyprus officially requested financial assistance in 2012, which was agreed and granted in 2013.[212] The main condition to award the support required the restructuring and recapitalization of banks through a bail-in from depositors.[213] Cypriot authorities carried out both operations in March 2013.[214] Besides interventions in the banking sector, the rescue package was subject to the domestic implementation of other reforms, such as e.g. cuts in public expenditure towards welfare services and tax increases.[215] In March 2016, Cyprus successfully exited the programme and is currently under the post-programme surveillance.[216]

Spain was subject to an EDP under Art. 126 TFEU starting from April 2009 and was addressed by Council recommendations with a view of bringing an end to this situation.[217] Beside a general reduction of the public deficit to under3% of the GDP ratio, these recommendations requested Spain to adopt sector-specific policies, such as the reform of its pension and health-care systems. The Spanish Government implemented these measures through several domestic acts, which determined, among others, a freeze of pensions (except for the lowest pension categories) and the exclusion of undocumented migrants from accessing the national health care system.[218]

These measures notwithstanding, the budgetary imbalances of Spain were aggravated in May 2012, when the government partly nationalized Bankia, Spain's fourth largest bank.[219]

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[209] ESM Treaty, Recital 6, Arts. 39 and 41.

[210] A summary of the process of revision of the ESM Treaty is provided by Cristina Sofia Pacheco Dias and Alice Zoppé, 'The proposed amendments to the Treaty establishing the European Stability Mechanism' (2019), available at: www.europarl.europa.eu. See also Jasper Aerts, Pedro Bizarro, 'The reform of the European Stability Mechanism' (2020), 15(2) *Capital Markets Law Journal* 159.

[211] The Economic Adjustment Programme for Cyprus, *cit.*, at 11 (para. 5), 14 (paras. 8-10), 15 (para. 14). See also Section 3.1. below.

[212] The Economic Adjustment Programme for Cyprus, *cit.*, at 37 (para. 57).

[213] The Economic Adjustment Programme for Cyprus, *cit.*, at 59 ff (Annex – Programme Documents). See also Eurogroup Statement on Cyprus, 25 March 2013, available at: www.consilium.europa.eu.

[214] The Economic Adjustment Programme for Cyprus, *cit.*, 42 (para. 62).

[215] The Economic Adjustment Programme for Cyprus, *cit.*, 59 ff (Annex – Programme Documents). On the domestic implementation of such conditionality-driven reforms, see Michael Schwarz, A Memorandum of Misunderstanding The doomed road of the European Stability Mechanism and a possible way out: enhanced cooperation (2014) 51 *Common Market Law Review* 389, 397-398.

[216] For the report on the post-programme surveillance, see European Commission, Financial assistance to Cyprus, available at: www.ec.europa.eu.

[217] Council Decision 2009/417/EC of 27 April 2009 on the existence of an excessive deficit in Spain, 30 May 2009, OJ L 135/25. Council recommendations are available at: www.ec.europa.eu.

[218] Royal Decree Law 8/2010 of 20 May 2010, 'Adoption of extraordinary measures to reduce public deficit', BOE No. 126, 24 May 2010; Royal Decree Law 16/2012 of 20 April 2012, 'Urgent measures to guarantee the sustainability of the National Health Care System and improve the quality of its services', BOE No. 98, 24 April 2012.

[219] European Commission – European Economy, The Financial Sector Adjustment Programme for Spain, Occasional Papers 118 (October 2012), 29, available at: www.ec.europa.eu. See also Tuori, Tuori, *cit.*, 82;

The rescue of this financial institution was made necessary because of the deterioration of the entire banking system, which suffered from the bursting of the Spanish real estate and construction bubble.[220] Following this event, the Spanish government officially requested and obtained an 18-month loan for indirect bank recapitalization. The awarding of assistance was subject to the implementation of bank-specific conditionality and policy conditions concerning the entire banking sector (so-called "horizontal conditionality").[221] In January 2014, Spain successfully completed the programme and is currently under the post-programme surveillance.[222]

Lastly, in 2015 the ESM granted a three-year rescue package to Greece. The support was subject to policy conditionality, such as the elimination of the VAT island discounts, an increase of early retirement penalties, a reform of the healthcare sector, and the privatization of public assets.[223] This was the last facility support granted to Greece, which exited the programme in 2018 and is currently subject to post-programme surveillance.[224]

3. Conditionality measures and their negative impact on socio-economic rights: a general overview

The four assistance mechanisms established to manage the Eurozone sovereign debt crisis diverge from each other on a number of aspects.[225] However, the procedures and conditions for granting financial support to euro area States in distress, alongside their concrete utilization, share some common features. For the purpose of the present dissertation, two of them are particularly relevant. The first concerns the awarding of the rescue packages conditionally on the domestic implementation of economic, fiscal and/or structural policies. The second concerns the twofold legal bases of such conditionality, a characteristic that is strictly linked to the nature of the assistance mechanisms and that is addressed in Section 4.

As is well-known, the constant lending practice of international financial institutions – such as the International Monetary Fund – is to grant facility support under the condition that the beneficiary States implement structural adjustments programmes.[226] According to the

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Maribel González Pascual, 'Welfare Rights and Euro Crisis – The Spanish Case' (2014), in C. Kilpatrick, B. De Witte (eds), *Social rights in times of crisis in the Eurozone: The role of fundamental rights' challenges*, EUI Department of Law Research Paper 2014/05, 95, 96.

[220] The Financial Sector Adjustment Programme for Spain, *cit.*, 8-11. See also Tuori, Tuori, *cit.*, 79.

[221] Memorandum of Understanding on Financial-Sector Policy Conditionality, 20 July 2012, attached to The Financial Sector Adjustment Programme for Spain, *cit.*, 54 ff. See also Abel, *cit.*, 201-204.

[222] For the reports on the post-programme surveillance, see European Commission, Financial assistance to Spain, available at: www.ec.europa.eu.

[223] The third assistance programme was based on: i) Memorandum of Understanding between the European Commission acting on behalf of the European Stability Mechanism and the Hellenic Republic and the Bank of Greece, 19 August 2015 (as amended), available at: www.ec.europa.eu; ii) Financial Assistance Facility Agreement between European Stability Mechanism and the Hellenic Republic as the Beneficiary Member State and the Bank of Greece as Central Bank and Hellenic Financial Stability Fund as Recapitalisation Fund, 19 August 2015, available at: www.ec.europa.eu; iii) Council Implementing Decision (EU) 2015/1411 of 19 August 2015 approving the macroeconomic adjustment programme of Greece, 20 August 2015, OJ L 219/12 (as amended).

[224] For the reports on the post-programme surveillance, see European Commission, Financial assistance to Greece, available at: www.ec.europa.eu.

[225] For more detailed analysis, see Tuori, Tuori, *cit.*, 97-99.

[226] The literature on conditionality is massive. See e.g. Joseph Gold, *Conditionality* (1979); John Williamson,

IMF, conditionality measures pursue a double purpose: on the one hand, they aim at restoring the economic soundness of the Country experiencing balance of payment problems; on the other, the stabilization of the financial situation of the recipient State secures the repayment of the loan and, ultimately, safeguards the Fund resources.[227] IMF financial assistance is disbursed in instalments that are subject to the implementation of lending conditions by the borrowing Country.[228]

Besides doubts on the efficiency of these measures at stimulating the economic recovery of the beneficiary State,[229] the IMF has been harshly criticised for applying a "one-size-fits-all" formula which does not take into account its negative impact on fundamental rights.[230]

Policy conditions attached to stability supports towards Eurozone States mirror those developed by the IMF and jeopardise the enjoyment of human rights.[231] As shown by the practice of the four assistance mechanisms established to manage the euro area crisis, lending conditions included: the liberalization of labour markets, drastic decreases of public expenditure towards welfare services (e.g. social security systems, health-care facilities), the cutting of salaries and pensions of public personnel, and tax hikes. Likewise, Spain had to enact comparable reforms under the 2009 excessive deficit procedure. This set of policies requiring interventions in the public sector is commonly known as austerity. Furthermore, in two cases, namely Cyprus and Greece, conditionality also required the involvement of the private sector.

The lending policies of the International Monetary Fund (1982); Kendall W. Stiles, *Negotiating Debt. The IMF Lending Process* (1991); Jaques J. Polak, *The Changing Nature of IMF Conditionality* (1991); Erik MG Denters, *Law and Policy of IMF Conditionality* (1996); Richard H. R. Harper, *Inside the IMF* (1998); Miguel A Savastano. Michael Mussa, 'The IMF Approach to Economic Stabilization' (1999), *IMF Working Paper*, WP/99/104; François Gianviti, 'The Reform of the International Monetary Fund (Conditionality and Surveillance)' (2000) 34(1) *The International Lawyer* 107; Jean-Pierre Allegret, Philippe Dulbecco, 'The institutional failures of International Monetary Fund conditionality' (2007) 2(4) *The Review of International Organizations* 309; Graham Bird, 'Reforming IMF Conditionality: From "Streamlining" to "Major Overhaul"' (2009) 10 *World Economics Journal* 81; Axel Dreher, 'IMF Conditionality: Theory and Evidence' (2009), 141 *Public Choice* 233.

[227] *Articles of Agreement of the International Monetary Fund*, 22 July 1944, entered into force 27 December 1945, 2 UNTS 39 (as amended), Article V, Section 3. See also International Monetary Fund, IMF Conditionality – Factsheet, available at: www.imf.org; International Monetary Fund - Strategy, Policy, & Review Department, '2018 Review of Program Design and Conditionality' (2018) Policy Paper No. 19/012, 8 (para. 6), available at: www.imf.org.

[228] International Monetary Fund, IMF Conditionality – Factsheet, *cit.*. See also: Elena Sciso, *Appunti di diritto internazionale dell'economia* (3rd ed, 2017), 63-67; Christoph Herrmann, Corinna Dornacher (eds), *International and European Monetary Law. An Introduction.* (2017), 58.

[229] See e.g. Joseph E. Stiglitz, *Globalization and Its Discontents* (2002); United Nations Conference on Trade and Development, *Trade and Development Report – Post-crisis policy challenges in the world economy*, 2011, UNCTAD/TDR/2011, at 79, available at www.unctad.org; International Labour Organization, *World Social Protection Report 2014/15 - Building economic recovery, inclusive development and social justice*, 2014, at 119-160 available at www.ilo.org; Sue J. Konzelmann, *The Economics of Austerity* (2014).

[230] See e.g. M. Rodwan Abouharb, David L. Cingranelli *Human Rights and Structural Adjustment* (2007); R. W. Stone 'The Scope of IMF Conditionality' (2008), 62 *International Organization* 4, 589, 598; Giovanna Adinolfi, 'Aggiustamento economico e tutela dei diritti umani: un conflitto inesistente per le istituzioni finanziarie internazionali?' (2014) 8(2) *Diritti umani e diritto internazionale* 319.

[231] Margot E. Salomon, 'Of Austerity, Human Rights and International Institutions' (2015) 21(4) *European Law Journal* 521, 531-532; A. Monteverdi, 'From Washington Consensus to Brussels Consensus', in Sciso (ed), *cit.*, 73-90; Ioannidis, 'EU Financial Assistance Conditionality', *cit.*, 65-66. On the relation between sovereign crisis and fundamental rights, see Ilias Bantekas, Cephas Lumina (eds), *Sovereign Debt and Human Rights* (2018).

Scholars and international monitoring bodies pointed out the negative impact of such changes on the enjoyment of human rights set forth in international instruments, EU law and national legal regimes. In greater detail, the domestic implementation of lending conditions encroached on various socio-economic rights, such as the right to work, the right to a fair wage and the right to a remuneration which provides a decent living for workers and their families, the guarantees stemming from collective bargaining, the right to social security, the right to be protected against poverty and social exclusion, the right to adequate housing and the right to health.[232]

A sample of the harmful consequences of austerity policies *vis-à-vis* socio-economic rights is the cutting of the minimum wage enacted in Greece which, on the basis of the commitments taken with the lenders, had reduced the minimum salaries of employees under 25 years of age to below the poverty level – a measure conflicting with the right of young workers to fair remuneration.[233] In Spain, in order to enhance the viability of the national health care system, a decree law curtailed the right of undocumented immigrants to have access to public health services,[234] a policy that frustrated the principle of universal health care and represented a retrogression compared to the previous regime.[235] Another example concerns the reform of the labour market in Portugal, which tightened the criteria to extend the coverage of labour relations by collective agreements and attempted to transfer collective bargaining at the level of enterprises (so-called "organized decentralization" of collective bargaining). These changes resulted in a decrease in the number of workers covered by collective agreement, together with a proliferation of direct negotiations of wages and working conditions between employing enterprises and individual employees. The asymmetry of contractual power fostered wage inequality and, more generally, raised concerns on the full respect of the rights of workers.[236]

The incompatibility between austerity measures and human rights constituted the objective of a vast case-law, which is addressed in Chapters 3, 4 and 5 of the present dissertation.

3.1 Some hints on the involvement of the private sector

Besides interventions in the public sector, conditions attached to the granting of financial assistance also entailed the involvement of the private sector through two means: collective action clauses (CACs) and bail-in instruments on bank deposit.

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[232] For an overview of the documents supporting such violations, see e.g. J. P. Bohoslavsky, F. C. Ebert, 'Debt Crises, Economic Adjustment and Labour Standards', in Bantekas, Lumina (eds.), *cit.*, 284. On the tension between austerity measures and human rights, see among others: Lisa Ginsborg, 'The impact of the economic crisis on human rights in Europe and the accountability of international institutions' (2017) 1 *Global Campus Human Rights Journal* 97; Anastasia Poulou, 'Financial Assistance Conditionality and Human Rights Protection: What is the Role of the EU Charter of Fundamental Rights?' (2017) 54 *Common Market Law Review* 991 [Poulou, 'Financial Assistance']; Salomon, *cit*.

[233] Law No. 4046/2012, *cit.*; ILO, Report on the High Level Mission to Greece (Athens, 19-23 September 2011), paras. 309, 311, 312.

[234] Royal Decree-Law 16/2012, *cit*.

[235] Committee on Economic, Social and Cultural Rights, Concluding observation on Spain, 6 June 2012, E/C.12/ESP/CO/5, para. 19.

[236] International Labour Organization, 'Tackling the Jobs Crisis in Portugal' (2014), Studies on Growth with Equity, 68-71; Committee on Economic, Social and Cultural Rights, Concluding observation on Portugal, 8 December 2014, E/C.12/PRT/CO/4, para. 11.

Collective action clause is an umbrella expression encompassing "different clauses found in various forms and to a varying degree in bond contracts under the laws of various jurisdictions".[237] Usually, they empower a qualified majority of bondholders to modify the terms of the bond contract (e.g. its payment time; a haircut) and to bind the minority to such amendment, even without their consent. In other words, contractual terms of the dissenting minority are modified against their will. CACs facilitate the reconstruction of a sovereign debt by avoiding the so-called "holdout problem", i.e. the need of a unanimous decision and the related veto power of the minority of investors in government bonds.[238] CACs are far from being a novelty and have been used also in the context of the Eurozone sovereign debt crisis, namely by Greece.[239]

The second official financial assistance to Greece required the implementation of strict austerity measures and the involvement of the private sector.[240] However, at the outset of the turmoil, Greek bonds did not contain any CACs. Thus, any amendment of such bonds suffered the "holdout problem". In order to circumvent this inconvenience, in February 2012 Greece enacted the "Greek Bondholders Act",[241] which introduced retroactive CACs into all bonds governed by domestic law issued before the 31st December 2011.[242] Subsequently, the Greek government launched an offer to participate in the reconstruction of the national public debt held by private creditors (which amounted to approximately 58% of total public debt) via the exchange of such bonds with other securities.[243] Under the "Greek Bondholders Act", such adjustment was subject to the consent of a (rather low) qualified majority, which was reached.[244] The amendment entailed a reduction of the 53.5% of the face value of the original bonds (so-called "haircut"), a longer maturity period (30 years), and lower interest rates.[245] The 2012 amendment reduced the overall public debt by about €110 billion.[246]

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[237] Frank Elderson, Marino Perassi, 'Collective Action Clauses in Sovereign Foreign Bonds. Towards a More Harmonized Approach' (2003) 4 *Euredia* 239, 241.

[238] Hofmann, *cit.*, 63; Marco Committeri, Francesco Spadafora, 'You never give me your money? Sovereign debt crises, collective action problems, and IMF lending' (2013) 143 *Questioni di Economia e Finanza - Occasional papers* 1, 16-17. Alongside "majority" collective action clauses, there are also "Unanimous-Action Clauses (UACs), where any change in a bond contract requires the consent of each holder." (Committeri, Spadafora, *cit.*, 17).

[239] Antonio Sáinz de Vicuña y Barroso, 'Identical Collective Action Clauses for different Legal Systems: A European Model', in Patrick S. Kenadjian, Klaus-Albert Bauer Andreas Cahn (eds), *Collective Action Clauses and the Restructuring of Sovereign Debt* (2013), 13, 19-20.

[240] Council of the European Union, Statement by the Heads of State or Government of the euro area and EU institutions, 21 July 2011, paras. 2, 5 to 7. The statement is available at: www.consilium.europa.eu.

[241] Law No. 4050/12, *cit.*.

[242] Annamaria Viterbo, *Sovereign Debt Restructuring: The Role and Limits of Public International Law* (2020), 223; *Id*, 'I meccanismi per la risoluzione della crisi del debito sovrano: alla ricerca di un difficile bilanciamento tra interessi pubblici e interessi privati' (2014) 8(8) *Diritti umani e diritto internazionale* 351, 357-358 [Viterbo, 'I meccanismi'].

[243] Cephas Lumina, 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 – Mission to Greece, 27 March 2014, A/HRC/25/50/Add.1, para. 25.

[244] Law 4050/12, *cit.*, Art. 1(4) established that the amendment of the eligible titles requires a participation quorum of at least half of the total outstanding capital of all eligible and a qualified majority in favour of the amendment of at least two thirds of the participating capital. See also Jeromin Zettelmeyer, Christoph Trebesch, Mitu Gulati, 'The Greek Debt Restructuring: An Autopsy' (2013) *Peterson Institute for International Economics Working Paper No. 13-8* 1, 11; Abel, *cit.*, 158-159; Viterbo, 'I meccanismi', *cit.*, 357.

[245] Abel, *cit.*, 157; Viterbo, 'I meccanismi', *cit.*, 358.

[246] Lumina, *cit.*, para. 25.

Notably, in view of this situation, the Treaty establishing the ESM recognised that, under certain circumstances, the involvement of the private sector in the context of macro-adjustment programme "shall be considered".[247] Moreover, the Treaty also imposes that, as of 1 January 2013, collective action clauses shall be included "in all new euro area government securities, with maturity above one year, in a way which ensures that their legal impact is identical"[248]. This reform probably aims at avoiding the passing of further laws like the Greek Bondholders Act, which introduced retroactive clauses.

Another means to involve the private sector is via bail-in instruments on bank deposits. Whilst a bail-out consists in external injection of liquidity towards distressed governments or private-owned entities, a bail-in implies the intervention of shareholders, creditors and depositors of private institutions (e.g. banks) by means of writing off portions of their holdings. Bail-in instruments on bank deposits were required as a prerequisite to agree official economic assistance to Cyprus.[249] The Cypriot sovereign debt crisis was mostly caused by problems in the banking sector, since its two largest financial institutions (the Bank of Cyprus and the Cypriot Popular Bank, also known as Laiki) were excessively exposed to Greek sovereign debt.[250] Following the sale of the Greek operations of the two main banks to the Greek bank Piraeus,[251] the two major Cypriot financial institutions were subject to a thorough restructuring. As for the Bank of Cyprus, it was recapitalized via a partial bail-in of uninsured deposits (i.e. deposits over € 100.000).[252] As for Laiki, the operation was twofold. All insured deposits were moved to the Bank of Cyprus, while uninsured deposits remained in the legacy part of Laiki itself, which will be liquidated over time.[253] Notably, bail-in tools have been recently regulated by a EU law directive.[254]

CACs and the recapitalization of banks via bail-in created tensions with the right to property.[255] The relevant case law is addressed in Chapters 3 and 4 of the present dissertation.

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[247] ESM Treaty, Recital No. 12.
[248] ESM Treaty, Art. 12(3), Recital No. 11.
[249] Eurogroup Statement on Cyprus, *cit*.
[250] The Economic Adjustment Programme for Cyprus, *cit.*, at 11 (para. 5), 14 (paras. 8-10), 15 (para. 14).
[251] The Economic Adjustment Programme for Cyprus, *cit.*, 42 (para. 62).
[252] The Economic Adjustment Programme for Cyprus, *cit.*, 42 (para. 63).
[253] The Economic Adjustment Programme for Cyprus, *cit.*, 42 (para. 63).
[254] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, 12 June 2014, OJ L 173/190 (Section 5 – The bail-in tool).
[255] See e.g. Paul Artemou, 'Rights of European Union Depositors Under Article 17 of the Charter of Fundamental Rights After the Cyprus Bail-Out' (2016) 28(1) *Pace International Law Review* 204; Viterbo, 'I meccanismi', *cit.*.
The impact of the bail-in of the two Cypriot banks and of the 2012 adjustment of bonds governed by Greek law on investors' rights under bilateral (or multilateral) investment treaties is outside the scope of the present dissertation. On the Cypriot bail-in, see e.g. Maurice Mendelson QC, Martins Paparinskis, 'Bail-ins and international investment law: in and beyond Cyprus', in Christian J. Tams, Stephan W. Schill, Rainer Hofmann (eds), *International Investment Law and the Global Financial Architecture* (2017); Giovanni Battista Donato, 'The Cyprus Crisis and the Legal Protection of Foreign Investors' (2015) a/working paper WP 2015/3, available at: www.papers.ssrn.com. On the 2012 adjustment of the bonds governed by Greek law, see e.g. Viterbo, 'I meccanismi', *cit.*; Sebastian Grund, 'Restructuring Government Debt Under Local Law: The Greek Experience and Implications for Investor Protection in Europe (2017), 12(2) *Capital Markets Law Journal* 253; *Id*, 'Enforcing Sovereign Debt in Court – A Comparative Analysis of Litigation and Arbitration Following the Greek Debt Restructuring of 2012' (2017) 1 *Vienna University Law Review* 34; *Id*, 'The Legal Consequences of Sovereign Insolvency–A Review of Creditor Litigation in Germany Following the Greek Debt Restructuring'

4. The multi-layered system of assistance towards Eurozone States and the multi-level protection of fundamental rights in Europe

The second main shared characteristic of the four assistance mechanisms concerns the twofold legal bases of conditionality, a characteristic that is strictly linked to the nature of the assistance mechanisms.

In greater detail, each mechanism (except the European Financial Stability Mechanism) presents a *hybrid nature*: despite being framed under international or private law, they are tied to the EU legal regime.[256] In particular, reference is to the role played by the European Commission and the ECB in the assessment of the requirements to accord loans, in the negotiation and signature of the Memorandum of Understanding and in monitoring compliance of the national policies with the conditionality attached to the MoU.[257]

This hybrid nature is strictly linked to the two-fold legal basis underpinning conditionality measures. The first legal basis of the loans is a MoU signed by the lender and the borrowing State. This is an international legal instrument that details the conditions attached to the assistance facility. Its legally binding nature is a matter of scholarly debate and inconsistent State practice and *opinion juris*.[258] Yet, for the purpose of the present dissertation, such divergence of views should not be overestimated, since lending conditionalities are also enshrined in legally binding instruments of EU and national law.

Indeed, the second legal basis lies within the EU framework. Since the first rescue package to Greece in 2010, the most important elements of the all borrower-lender agreements (including those under the ESFM) have been reiterated in Council decisions

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(2017) 24(3) *Maastricht Journal of European and Comparative Law* 399; Luca Boggio, 'Investors and Sovereign Debt Restructurings: The Protection of Financial Property before International Courts and Arbitrators' (2018) 15(2) *Manchester Journal of International Economic Law*, 143; Venetia Argyropoulou, 'International Arbitration and Greek Sovereign Debt: Postova Banka v. Hellenic Republic, What If - Investors' Protection in the Case of the Greek Sovereign Default under Investment Treaties and Customary Law' (2018), 19 *Oregon Review of International Law* 179.

[256] Dimopoulos, *cit.*, 41; Ioannidis, 'EU Financial Assistance Conditionality', *cit.*, 64-65; Poulou, 'Financial Assistance', *cit.*, 995-1003.

[257] Anastasia Poulou, 'Austerity and European Social Rights: How Can Courts Protect Europe's Lost Generation?' (2014), 15(6) *German Law Journal* 1145, 1156-1159 [Poulou, 'Austerity']; Jean-Victor Louis, 'Guest Editorial: The no-bailout clause and rescue packages' (2010) 47(4) Common Market Law Review 971, 972-974; Tuori, Tuori, *cit.*, 90-97; Ioannidis, *cit.*, 70-89.

[258] See e.g. John H. McNeill, 'International Agreements: Recent U.S.-UK Practice Concerning the Memorandum of Understanding' (1994) 88(4) *The American Journal of International Law* 821; Anthony Aust, *Modern Treaty Law Practice* (2nd ed., 2007), 32-57; Claire Kilpatrick, 'Are Bailouts Immune of EU Social Challenge Because They Are Not EU Law?' (2014) 10 *European Constitutional Law Review* 393, 411-412. As for the State practice, the Greek Council of State classified the first MoU as political programme (judgment No. 668 of 2012), although the Greek government supported the legally binding nature of the same MoU before the European Committee of Social Rights (see e.g. European Committee of Social Rights, *Panhellenic Federation of Public Service Pensioners (POPS) v. Greece*, Complaint No. 77/2012, decision of 7 December 2012). The Portuguese Constitutional Court recognized MoU as legally binding instruments of international law (judgment No. 187 of 2013). Ireland adopted the MoU according to the constitutional process to ratify international agreement. On this state practice, see e.g. Xenophon Contiades, Ioannis A. Tassopoulos, 'The Impact of the Financial Crisis on the Greek Constitution', in Contiades (ed), *cit.*, 195, 200-206; Aristea Koukiadaki, 'Can the austerity measures be challenged in *supra*national Courts? The cases of Greece and Portugal' (2014) available at: www.etuc.org; Antonia Baraggia, *Ordinamenti giudici a confronto nell'era della crisi. La condizionalità economica in Europa e negli Stati nazionali* (2017), 85-86;

addressed to the recipient State. These unilateral, legally binding acts represent the vehicle through which the fiscal consolidation programmes set forth in the MoUs fall under the scope of EU secondary law.[259] Besides, lending conditions were implemented through domestic laws and reforms.

As mentioned in the previous Section, conditionality attached to rescue packages negatively affected the enjoyment of human rights, particularly of socio-economic rights. Victims of such violations faced serious difficulties in the identification of venues for obtaining adequate remedy, not least due to the intricate web of duty-bearers and instruments establishing obligations upon them.[260] Hence, the multilevel system of protection characterizing Europe resulted in a copious case-law on austerity measures.[261]

Among others, the subjects upon which the human rights regime establishes obligations are borrowing States[262] and EU institutions (the Commission, the ECB and the Council). As for the sources of obligations, Eurozone States are bound to respect ES rights set forth in the International Covenant on Economic, Social and Cultural Rights, a number of International Labour Organization Conventions and the European Social Charter. Moreover, these Countries must comply with the (few) socio-economic rights protected under the European Convention on Human Rights, as well as with the Charter of Fundamental Rights of the European Union – if certain conditions are met. Furthermore, States organs must also act in accordance with the socio-economic entitlements enshrined in their constitutions, if those contain a bill of rights. Turning to the EU institutions and bodies, the Commission, the ECB, the Council and the European Financial Stability Mechanism must act in accordance with the provisions of the CFREU. In light of this variety of duty-bearers, plaintiffs initiated proceedings against borrowing States and the EU. Cases were referred to international committees and the ECtHR, the ECJ and national courts and tribunals.

In order to assess whether these mechanisms could (and whether they did) ensure appropriate remedies to the victims, it is necessary to identify which are the main characteristics of an *adequate* redress in contexts of sovereign debt crises. The adequacy of a remedy depends on the nature of the violation and on the manner of the infringement, which varies according to the (class of) right(s) at stake.[263] Two elements are crucial in

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[259] Paul Dermine, 'The End of Impunity? The Legal Duties of "Borrowed" EU Institutions under the European Stability Mechanism Framework' (2017) 13 *European Constitutional Law Review* 369, 378-381; Paul Craig, 'Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications', in Adams, Fabbrini, Larouche (eds), *cit.*, 19, 25-26; Louis, *cit.*, 972; Tuori, Tuori, *cit.*, 90; Ioannidis, 'EU Financial Assistance Conditionality', *cit.*, 72, 89, 93-94.
See also ECJ, *Mallis and Malli v Commission and ECB*, Joined Cases C-105/15 P to C-109/15 P, OJ 2016 C 419/17, Opinion of Advocate General Wathelet, delivered on 21 April 2016, para. 85.

[260] For a general overview of the subjects bound to respect human rights obligations, as well as of the sources of those obligations, see Andreas Fischer-Lescano, *Human Rights in Times of Austerity Policy. The EU Institutions and the Conclusion of Memoranda of Understanding* (2014).

[261] A similar – although not identical – scenario characterises Africa, where different continental and sub-regional human rights monitoring bodies coexist. See e.g. Giuseppe Pascale, 'An Optimistic Perspective on the Proliferation of Human Rights Monitoring Bodies in Africa' (2018), 12 (1) *Diritti umani e diritto internazionale* 145.

[262] On the issue of whether lending States (or those participating in the procedure for granting assistance by third parties) may be held accountable, see Oliver De Schutter, Paul Dermine, 'The Two Constitutions of Europe: Integrating Social Rights in the New Economic Architecture of the Union' (2017) 2 *Journal européen des droits de l'homme* 108, 139.

[263] Dinah Shelton, *Remedies in International Human Rights Law* (2015), 377-378, 383; Ludovic Hennebel, Hélène Tigroudja, *Traité de droit international des droits de l'homme* (2018), 508-509.

understanding which could be the most adequate form of relief in case of violation of socio-economic rights: i) the main features of such guarantees, and ii) the nature and scope of States' obligations on ES rights under international law. The following Chapter addresses such topics, together with the issues of access to justice to claim the violation of socio-economic rights and the legal consequences of such breaches.

CHAPTER II

SOCIO-ECONOMIC RIGHTS IN THE CONTEXT OF ECONOMIC CRISIS

SUMMARY 1. The category of rights and their main characteristics 1.1. Socio-economic rights as a wide-range class of guarantees 1.2. Socio-economic rights as individual entitlements with a collective nature 2. Obligations related to socio-economic rights under international law 2.1. Classifications of human rights obligations under international law: an overview 2.2. General obligations specifically related to socio-economic rights: the case of economic crisis 2.2.1 The International Covenant on Economic, Social and Cultural Rights 2.2.2. ILO Conventions 2.2.3. The (Revised) European Social Charter 2.2.4. The European Convention on Human Rights 2.2.5. The EU Charter of Fundamental Rights 2.2.6. A systemic and teleological approach to international obligations related to socio-economic rights 2.3. Limitations of socio-economic rights under international law 2.3.1 The International Covenant on Economic, Social and Cultural Rights 2.3.2. ILO Conventions 2.3.3. The (Revised) European Social Charter 2.3.4. The European Convention on Human Rights 2.3.5. The EU Charter of Fundamental Rights 3. International law on State responsibility and violations of international socio-economic rights 4. Legal consequences of violations of socio-economic rights in light of general international law on State responsibility 4.1 The right to an effective domestic remedy and the right to individual and collective petition at the international level 4.2 Substantive legal consequences between *lex specialis* and general rules 4.3. Legal consequences of violations of socio-economic rights in the context of sovereign debt crisis: proposed criteria to perform an adequacy assessment

1. The category of rights and their main characteristics

As is well known, human rights have been primarily affirmed and protected in national legal systems. Their full recognition on the international level occurred only with the adoption of the Universal Declaration of Human Rights in 1948,[1] a non-binding document encompassing both civil and political rights, and economic, social and cultural rights. Its proclamation nurtured the negotiation and adoption of a multitude of binding treaties at the universal and regional level, which differed from each other due to their *ratione materiae* or *ratione personae* scope of application and for the functioning of the respective monitoring mechanism – where those were provided for.[2]

Traditionally, economic and social rights (socio-economic rights, ES rights) contrast with civil and political rights on several basis, namely: i) their historical development; ii) the nature of the respective obligations; iii) their justiciability.[3]

As for the first ground, according to a chronological parameter, ES rights are usually labelled as rights of the second generation, as opposed to civil and political rights, known as

[1] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III). Before the proclamation of the Universal Declaration of Human Rights, the protection of labour rights at the international level was mainly the concern of the International Labour Organization established in 1919.

[2] On the history of human rights, see e.g. Christian Tomuschat, *Human Rights: Between Idealism and Realism* (3rd ed, 2014), 12-45.

[3] Cultural rights are outside the scope of the present thesis.

rights of the first generation.[4] However, this classification is disputed. Some Scholars point out that the history of the evolution of human rights "does not make it possible to place the emergence of different human rights into clear-cut stages".[5] Additionally, this classification has a merely descriptive function and, hence, is of little guidance for the purpose of the present dissertation.

The second putative divergence concerns the obligations stemming from these two categories and on the role of the State. In the past, civil and political rights were referred to as "freedoms from the State", i.e. rights that require mere negative obligations of non-interference. On the other hand, socio-economic rights were regarded as "freedoms through the State", *viz.* rights that establish positive obligations on the State of taking active (and costly) measures.[6] This difference was mistaken as well. Generally speaking, currently there is no doubt that each category of rights entails a complex set of legal obligations.[7] For instance, there is no doubt that also traditional civil and political rights require affirmative State actions which may also have broader implications in the socio-economic sphere (e.g. the obligation to provide a generally available life-saving treatment through public health care systems).[8] Besides, also civil and political rights may demand the use of public resources (e.g. the right to a fair trial requires the establishment and the functioning of an adequate judicial system).[9]

The third alleged divergence concerns the notion of justiciability. According to the traditional view, civil and political rights are subject to judicial settlement, whilst individuals cannot invoke socio-economic rights before courts or tribunals in order to claim their being violated and obtain a form of redress. This position has been grounded on the assumption that civil and political rights are directly and immediately enforceable, whilst socio-economic rights are deemed as programmatic, i.e. to be realized gradually.[10] This distinction has proven to be an erroneous generalization. There are civil and political rights which cannot be immediately and directly enforced (e.g. the above mentioned right to a fair trial if there is no impartial and independent court). At the same time, there are socio-economic rights which can (and must) be immediately granted, such as the right to form and join trade unions.[11] Moreover, the establishment of supervisory mechanisms in the international legal order, alongside the growing body of national case-law relying upon ES rights, supports the idea that ES rights are justiciable.[12]

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[4] See e.g. Antonio Cassese, *I diritti umani oggi* (2005), 5; Pietro Pustorino, *Lezioni di tutela dei diritti umani* (2019), 87. On the need to replace "generation" with "dimension", see Eibe Riedel, 'Menschenrechte der dritten Dimension' (1989) 16 *Europäische Grundrechte. Zeitschrift* 9.

[5] Asbjørn Eide, Allan Rosas, 'Economic, social and cultural rights: a universal challenge', in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights* (2nd ed, 2001), 3, 4.

[6] Eide, Rosas, *cit.*, 5; Asbjørn Eide, 'Economic, social and cultural rights as human rights', in Eide, Krause, Rasas (eds), *cit.*, 9, 10 [Eide, 'Economic, social and cultural rights']; Tomuschat, *cit.*, 136.

[7] See Section 2 below.

[8] See e.g. David Harris et al (eds.), *Harris, O'Boyle and Warbrick. The Law of the European Convention of Human Rights* (4th ed, 2018), 214-216.

[9] Eide, 'Economic, social and cultural rights', *cit.*, 24-25; Tomuschat, *cit.*, 146-149.

[10] Eide, 'Economic, social and cultural rights', *cit.*, 10.

[11] Sigrun Skogly, 'The Requirement of Using the 'Maximum of Available Resources' for Human Rights Realisation: A Question of Quality as Well as Quantity?' (2012), 12(3) *Human Rights Law Review* 393, 395-396; Eide, 'Economic, social and cultural rights', *cit.*, 24-25.

[12] See e.g. Aoife Nolan, Bruce Porter, Malcols Langford, *The Justiciability of Social and Economic Rights: An Updated Appraisal*, CHRGJ Working Paper No. 15 (August 2007), available at: www.socialrightscura.ca;

Ultimately, civil and political rights, on one side, and socio-economic rights, on the other, are "universal, indivisible, interdependent and interrelated" and must be treated "globally in a fair and equal manner, on the same footing, and with the same emphasis".[13] Freedom from fear and freedom from want go hand in hand in asking for both protection from external interference and active measures towards the satisfaction of fundamental needs.[14]

These shared features notwithstanding, socio-economic rights have their own peculiarities, which influence the possible means of violations and the legal consequences of the breach.[15]

1.1. Socio-economic rights as a wide-range class of guarantees

Moving to the notion of ES rights, this category encompasses labour and employment rights, alongside rights traditionally associated with the concept of the welfare state and living conditions of individuals – such as the right to housing, to education, to health and to social security.[16]

In greater detail, *economic* rights are meant to guarantee the participation of society in economic life and embrace the right to property, the right to work, rights at work, and the right to social security. *Social* rights pursue the object of ensuring adequate living conditions, a guarantee whose enjoyment relies on the concrete availability of basic goods and services, such as food, water, clothes, shelter and health care.[17] As Eide correctly pointed out, these two sets of rights are strictly related to each other. Economic rights serve the purpose of securing an adequate standard of living though the enjoyment of the right to property, together with the right to work, rights at work (e.g. the right to a fair wage) and the right to social security, which steps in where income is insufficient to ensure the adequate living conditions (e.g. due to the lack of property or unemployment).[18]

Remarkably, the right to property is not set forth in human rights instruments concerning ES rights. Rather, it is enshrined in conventions safeguarding civil and political rights.[19] Similarly, the right to form and join trade unions is guaranteed in both treaties on civil and political rights, as a component of the broader freedom of association, and in

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Malcolm Langford, 'Judicial Review in National Courts. Recognition and Responsiveness', in Eibe Riedel, Gilles Giacca, Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (2014), 417-447.

[13] Vienna Declaration and Plan of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para. 5.

[14] Tomuschat, *cit.*, 4-5, 140.

[15] Dinah Shelton, *Remedies in International Human Rights Law* (2015), 377-378, 383 [Shelton, *Remedies*]; Ludovic Hennebel, Hélène Tigroudja, Traité de droit international des droits de l'homme (2018), 508-509.

[16] Philip Alston, 'Labour Rights as Human Rights: The Not So Happy State of the Art, in *Id*, (eds), *Labour Rights as Human Rights* (2006), 1, 2; UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 33, Frequently Asked Questions on Economic, Social and Cultural Rights*, December 2008, No. 33, 1-3; Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (2009), 3; Claire Kilpatrick, Bruno De Witte, 'A Comparative Framing of Fundamental Rights Challenges to Social Crisis Measures in the Eurozone' (2014), 7 *European Policy Analysis*; Eibe Riedel, Gilles Giacca, Christophe Golay, 'The Development of Economic, Social and Cultural Rights in International Law', in *Id., cit.*, 3, 8-9.

[17] Riedel, Giacca, Golay, *cit.*, 8; Eide, 'Economic, social and cultural rights', *cit.*, 18; Binder et al, *Social Rights in the Case Law of Regional Human Rights Monitoring Institutions* (2016), 23.

[18] Eide, 'Economic, social and cultural rights', *cit.*, 18.

[19] Hennebel, Tigroudja, *cit.*, 1205-1207.

instruments protecting ES rights.[20] Such occurrence confirms the above mentioned interrelation between the two macro-categories of fundamental rights.

As for the sources, socio-economic rights are encompassed in international instruments and EU law. Beside the already recalled Universal Declaration of Human Rights, at the international level ES rights are enshrined in binding instruments of universal and regional scope, which may be either general conventions or treaties concerning specific categories of rights or individuals.[21] For the purpose of the present dissertation, the following instruments will be taken into account: the International Covenant on Economic, Social and Cultural Rights (ICESCR);[22] a number of International Labour Organization (ILO) Conventions;[23] the (Revised) European Social Charter;[24] and the European Convention on Human Rights (ECHR).[25]

Socio-economic rights are also protected in the EU legal framework. For the purpose of the present dissertation, the Charter of Fundamental Rights of the European Union will be taken into account.[26] Moreover, ES rights are also enshrined in national constitutions, and the present thesis pays particular attention to those of Greece, Spain and Portugal.

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[20] Eide, Rosas, *cit.*, 4.

[21] See e.g. Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965, entry into force 4 January 1969) 660 UNTS 195, Art. 5(e) [CERD]; Convention on the Elimination of All Forms of Discrimination against Women (18 December 1979, entry into force 3 September 1981) 1249 UNTS 13, Art. 11 [CEDAW]; Convention on the Rights of the Child (20 November 1989, 2 September 1990) 1577 UNTS 3, Arts. 26-27; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (18 December 1990, entry into force 1 June 2003), 2220 UNTS 3; Convention on the Rights of Persons with Disabilities (13 December 2006, 18 May 2008) 2515 UNTS 3, Arts. 27-28. As for conventions with regional scope, see e.g.: Organization of African Unity, African Charter on Human and Peoples' Rights ('Banjul Charter') 1520 UNTS 217 (27 June 1981, entry into force 21 October 1986), Arts. 14-16 [AfCHPR]; Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ('Protocol of San Salvador') (17 November 1988, 16 November 1999). On the African Human Rights System, see e.g. Giuseppe Pascale, *La tutela internazionale dei diritti dell'uomo nel continente africano* (2017).

[22] International Covenant on Economic, Social and Cultural Rights (16 December 1966, 3 January 1976), 993 UNTS 3 [ICESCR].

[23] For the purpose of the present thesis, five ILO Conventions will be taken into consideration: Convention concerning Freedom of Association and Protection of the Right to Organise (9 July 1948, entry into force 4 July 1950) 68 UNTS 17 [ILO Convention No. 87]; Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (1 July 1949, entry into force 18 Jul 1951) 96 UNTS 257 [ILO Convention No. 98]; Convention Concerning Minimum Wage Fixing with Special Reference to Developing Countries (22 June 1970, entry into force 29 April 1972) 825 UNTS 77 [ILO Convention No. 131]; Convention Concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service, Convention concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service (27 June 1978, entry into force 25 February 1981) 1218 UNTS 87 [ILO Convention No. 151]; Convention Concerning the Promotion of Collective Bargaining (3 June 1981, entry into force 11 August 1983) 1331 UNTS 267 [ILO Convention No. 154].

[24] Council of Europe, European Social Charter (18 October 1961, 26 February 1965) ETS 035 [ESC]; Council of Europe, European Social Charter (Revised) (3 May 1996, entry into force 1 July 1999), ETS 163 [RESC]. The Revised European Social Charter has not yet entered into force for all the States parties to the previous European Social Charter (e.g. Spain is bound by the original version of 1961). The substantive provisions of the two conventions are rather similar, so hereinafter the phrase "(Revised) European Social Charter" is used where reference is made to both the versions. Any relevant difference is specified.

[25] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (4 November 1950, entry into force 3 September 1953), ETS 5 [ECHR].

[26] Council of the European Union, Charter of Fundamental Rights of the European Union (14 December 2007, entry into force 1 December 2009) OJ C 326/1 (as amended).

As mentioned in Chapter I, this variety of instruments results in a multi-level system of protection which is particularly intricate in Europe. Such occurrence underpins the abundant case-law of austerity measures.

1.2. Socio-economic rights as individual entitlements with a collective nature

Traditionally, Scholars have distinguished between individual rights and collective rights. Individual rights are civil and political rights, and economic, social and cultural rights. Collective rights are also known as solidarity rights or rights of the third generation. Such rights include e.g. the right of self-determination of people, the right to peace, the right to development, and the right to a healthy environment. The term "collective rights" highlights that generally they cannot be vindicated by single individuals: due to their very nature, only groups of people can exercise them.[27]

Although this classification is in principle correct, it does not take into account a specific feature of ES rights. This set of guarantees embraces individual entitlements with a *collective* (or *social*) dimension.[28] Differently from collective rights, both single individuals and groups of people may exercise and vindicate socio-economic rights (e.g. through class actions, or by trade unions bargaining collectively or launching judicial proceedings). The *collective* dimension of ES rights pertains to their content and to the correlative obligation of duty-bearers, rather than to the right-holders.

The effective and practical fulfilment of socio-economic rights often relies on the allocation of resources and on labour-market legislation. States policies in these two fields are usually addressed to specific sections of the population (e.g. reduction of public servants' wage), or to its entirety (e.g. cutting of the resources allocated to the national health care system). Therefore, rights-holders suffer from the lowering of the levels of protection both individually and collectively – i.e. as members of the group targeted by the national policy. This assumption stands untouched also for the right to property, at least where the notion refers to salaries and pensions of public servants, or where entire sections of the private sector are involved in the reconstruction of the national public debt.[29]

The collective nature of socio-economic rights finds support in the existence of specific collective complaint procedures before the European Committee of Social Rights and the ILO Committee of Freedom of Association. As for the former, only certain non-governmental organizations are entitled to submit complaints, while the latter examines claims submitted by organizations of employers and workers (as well as governments). Individuals are not entitled to launch actions before such mechanisms. Due to their collective nature, complaints before

[27] Tomuschat, *cit.*, 149-154; Ssenyonjo, *cit.*, 11; Pustorino, *cit.*, 87-88.

[28] Similarly, Kyriaki Pavlidou, 'Social Rights in the Greek Austerity Crisis: Reframing Constitutional Pluralism' (2018), 10(2) *Italian Journal of Public Law* 287, 290, 291, 315. Other Scholars focus on the concept of cooperation and on the correlative duty attached to each right as two elements that distinguish civil rights, on one side, and social rights, on the other. See: Fernando Atria, 'Social Rights, Social Contract, Socialism' (2015) 24(4) *Social & Legal Studies* 598; Emilios Christodoulidis, Marco Goldoni, 'The Political Economy of European Social Rights', in Stefano Civatese Matteucci, Simone Halliday (eds.), *Social Rights in Europe in an Age of Austerity* (2017), 239, 243;

[29] On some occasion also certain civil and political rights have a *collective* dimension. Once again, the right to a fair trial is a suitable example: if the national judicial system does not provide for an impartial and independent court, it is the entire population that may suffer from the violation of this guarantee. However, the *collective* dimension of civil and political rights does not come at stake as often as with regards to ES rights.

the European Committee of Social Rights or the ILO Committee of Freedom of Association may not concern individual situations, but may only contest non-compliance of a State's law (or practice) with the provisions of the European Charter of Social Rights and the ILO Conventions respectively.[30]

The *collective* dimension of ES rights is of relevance to the issue of the legal consequences of a violation of these entitlements, a topic addressed in Section 4 below. It is noteworthy that legal consequences which have an impact on States' budget (e.g. monetary compensation) negatively affect the implementation of several socio-economic rights, insofar as these depend on the availability of economic resources. This last feature is strictly connected to the nature and scope of the general obligations related to ES rights, namely the duty to progressively achieve the full realization of socio-economic rights, the corresponding prohibition of unjustified retrogressive measures and the minimum core obligation – each addressed in Section 2.2. below.

2. Obligations related to socio-economic rights under international law

As introduced above, the dichotomy between civil and political rights, on one side, and ES rights, on the other, has been mostly overcome, as these set of rights are deemed to be "universal, indivisible, interdependent and interrelated".[31] This development has affected the doctrinal debate concerning the classification of human rights obligations, since they can no longer fall only within the (too simplistic) categories of negative and positive obligations. The acknowledgment that each right entails a range of duties has led Authors to address and classify obligations relating to human rights as a whole, and then to focus on specific duties regarding certain (categories of) rights. The present dissertation adopts a similar stance. The following sections briefly outline the main categories of human rights obligations under international law (Section 2.1.) and, subsequently, the content and scope of the general legal obligations related to ES rights (Section 2.2. and subsections). Lastly, Section 2.3. addresses the requirements to legitimately limit socio-economic rights under international treaty-law.

2.1. Classifications of human rights obligations under international law: an overview

The classification of human rights norms and obligations under international law has been a matter of growing scholarly interest.[32] Regarding obligations, Authors have proposed a variety of criteria: some are based on parameters already well-established in national legal systems (such as negative obligations and positive obligations, immediate obligations and progressive obligations, obligations of conduct and those of result), while other standards

[30] On the specific procedures before the European Committee of Social Rights and the ILO Committee on Freedom of Association, see Chapter III, Section 1.
[31] Vienna Declaration and Plan of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para. 5.
[32] As for the classification of norms, Authors distinguish e.g. self-executing and non-self-executing norms. The present subsection focuses on the classification of *obligations*, rather than that of provisions. The topic of self-executing and non-self-executing norms is touched upon in Chapter V of the present dissertation.

have straightforwardly emerged in the international arena – such as the tripartite typology of the obligations to respect, protect and fulfil.[33]

Negative obligations require duty bearers to refrain from interfering in the enjoyment of the relevant right. Positive obligations demand duty bearers to take affirmative steps (e.g. enact laws or provide services) to ensure the effective realization and the protection of the relevant right.[34] The former category of obligations could be breached by means of commissive conducts, whereas the latter could be breached via omissive conducts.[35] The opposition between negative and positive obligations is too simplistic and generic, as each category encompasses obligations of different nature and structure.[36] This distinction *by itself* does not help determine the complex set of conducts required to duty-bearers, and hence is not used in the present dissertation.

The opposition between negative and positive obligations has influenced the dichotomy between immediate obligations and progressive obligations. Initially, only negative obligations of abstention (related to civil and political rights) were considered as immediately applicable, whilst positive obligations (related to ES rights) were deemed as having a progressive nature – i.e. to be implemented gradually.[37] As Section 2.2 outlines, socio-economic rights impose immediate obligations both to refrain and to take affirmative actions, alongside progressive obligations. Hence, the present dissertation adopts the distinction between immediate obligations and progressive obligations.

The distinction between obligations of conduct (or means) and those of result was originally proposed by Ago, the Special Rapporteur on State Responsibility of the International Law Commission (ILC). According to Ago, obligations of conduct specifically require "a particular action or omission", whilst obligations of result require "to ensure the existence of a particular situation, without specifying the means and acts to be employed to achieve that end."[38] The former category of obligations is breached where the duty bearer performs a single conduct which is not in conformity with that specifically prescribed by the international provision.[39] The latter is breached where the duty bearers do not achieve the goal set forth in the international norm.[40]

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[33] Professor Pisillo Mazzeschi carried out a thorough survey of the different classification parameters of international human rights obligations. See Riccardo Pisillo Mazzeschi, 'Responsabilité de l'État pour violation des obligations positives relatives aux droits de l'homme' (2008), *Collected Courses of the Hague Academy of International Law*, Volume 333, 175 [Pisillo Mazzeschi, 'Responsabilité de l'État'].

[34] Pisillo Mazzeschi, 'Responsabilité de l'État', *cit.*, 224-232; Dinah Shelton, Ariel Gould, 'Positive and Negative Obligations', in Dinah Shelton (eds), *The Oxford Handbook on International Human Rights Law* (2013), 562. According to Pisillo Mazzeschi, 'Responsabilité de l'État', "la distinction entre obligations négatives et obligations positives est […] une distinction qui appartient à la théorie générale du droit."

[35] Pisillo Mazzeschi, 'Responsabilité de l'État', *cit.*, 225.

[36] Pisillo Mazzeschi, *cit.*,

[37] María Magdalena Sepúlveda Carmona, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (2003), 128-131 [Sepúlveda Carmona, *The Nature of the Obligations*].

[38] See Roberto Ago, 'Fifth report on State responsibility' (1976) Yearbook of the International Law Commission, Vol. II (1), A/CN.4/291 and Add.1 & 2 and Corr.1, para. 9. See also Rüdiger Wolfrum, 'Obligation of Result Versus Obligation of Conduct: Some Thoughts About the Implementation of International Obligations', in Mahnoush H. Arsanjani et al. (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (2004), 363; Fulvio Maria Palombino, *Introduzione al diritto internazionale* (2019), 196.

[39] Ago, 'Sixth Report on State responsibility' (1977) Yearbook of the International Law Commission, Vol. II (1), A/CN.4/302 and Add.1-3, paras. 1-13 [Ago, 'Sixth Report'].

[40] Ago, 'Sixth Report', *cit.*, 14-46.

This classification is contentious. Scholars highlighted that Ago's distinction is rather different from that traditionally developed in civil law countries. As recalled by Dupuy, in civil law systems obligation of conduct (or means) is "an obligation to endeavour or to strive to realize a certain result" (e.g. that of a doctor to take care of a patient). On the contrary, the obligation of result entails a duty "to attain a precise result" (e.g. that of a debtor to pay back his or her creditor).[41] In other terms, in civil law countries obligations of conduct are characterized by flexibility rather than by a specifically required course of conduct. This is reflected in the words of Crawford, according to which Ago's distinction "is drawn on the basis of determinacy, not risk."[42] As for the practice, international courts and tribunals apply the terms "obligations of conduct" and "obligations of result" inconsistently, which leads to controversial classifications.[43] Ultimately, the final test of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) does not mention Ago's distinction.[44] Besides, this categorization does not help shaping the exact content of the general obligations of States' obligations specifically related to socio-economic rights.[45] Against these considerations, the present dissertation does not adopt Ago's distinction.

The tripartite typology is the most frequently adopted in both literature and in the practice of international monitoring bodies.[46] Shue was the first to point out that each basic right has threefold correlative duties: duties to *avoid* depriving, duties to *protect* from deprivation, and duties to *aid* the deprived.[47] This tripartite typology was later developed by Eide, who proposed the distinction between obligations to respect, to protect and to fulfil.[48] The Committee on Economic, Social and Cultural Rights – the independent body that monitors the implementation of the International Covenant on Economic, Social and Cultural

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[41] Pierre-Marie Dupuy, 'Reviewing the difficulties of codification: on Ago's classification of obligations of means and obligations of result in relation to State responsibility' (1999) 10(2) *European Journal of International Law* 371, 375-376.

[42] James Crawford, 'Second Report on State Responsibility' (1999), Yearbook of the International Law Commission, Vol. II (1), A/CN.4/498 and Add.1–4, para. 57 [Crawford, 'Second Report']. Other critical elements of Ago's distinctions are outlined in Pisillo Mazzeschi, 'Responsabilité de l'État', *cit.*, 277-281.

[43] Se e.g. Crawford, 'Second Report', *cit.*, paras 60-68; Wolfrum, *cit.*, 370-378. In particular, Wolfrum highlights the in incoherence of the International Court of Justice (ICJ) in the *Bosnian Genocide Case*. The ICJ affirms that the obligation to prevent genocide "is one of *conduct* and not one of result, in the sense that *a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide*: the obligation of States parties is rather *to employ all means reasonably available* to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved" (emphasis added). At the same time, the ICJ concluded that "a State can be held responsible for breaching the obligation to prevent genocide *only if genocide was actually committed*." (emphasis added). See ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, paras. 430-431.

[44] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', *Report of the International Law Commission on the work of its fifty-third session* (Fifty-third session, 2001), UN GAOR Supplement No.10, UN Doc. A/56/10 [ARSIWA]. However, as proposed in 1999 (ILC, *Summary record of the 2605th meeting*, July 1999, UN Doc. A/CN.4/SR.2605, paras. 7-8), the Commentary to the final version of the Draft Articles deals with the distinction between obligations of conduct and obligations of result: see Commentary to Art. 12, paras. 11-12.

[45] See Section 2.2. below.

[46] Pisillo Mazzeschi, 'Responsabilité de l'État', *cit.*, 244.

[47] Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (1980), 51-54.

[48] Asbjorn Eide, 'The International Human Rights System', in Asbjorn Eide et al (eds), *Food as a Human Right* (1984), 152; *Id.*, 'Report on the right to adequate food as a human right', 7 July 1987, E/CN.4/Sub.2/1987/23, paras. 66-69 [Eide, 'Report on the right to adequate food']. Similar, although not identical, classifications have been proposed by other Scholars: see Pisillo Mazzeschi, 'Responsabilité de l'État', *cit.*, 246-247.

Rights – adopted and further elaborated such taxonomy.[49] In this regard, it should be recalled that, although the pronouncements of the Committee lack any binding effect, they should be deemed as "an authoritative interpretation of the relevant provisions of the Covenant."[50] Although the tripartite classification arose with regard to ES rights, the Committee specified that any human right imposes such "three types or levels of obligations".[51] This view mirrors the position of the literature.[52]

The tripartite typology highlights that each fundamental right imposes obligations of different nature and content upon duty bearers, among which negative obligations and positive obligations, immediate obligations and progressive obligations.[53] This "spectrum of multiple types of obligations which entail a complex relation among acts and omissions"[54] cannot be adequately addressed by simplistic oppositions. The tripartite typology allows us to overcome the generalization and shortcomings stemming from these dichotomies.[55]

The obligation to *respect* gives rise to the negative duty to abstain from interfering, directly or indirectly, with the enjoyment of the relevant right.[56] As an example, freedom of

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[49] Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999, E/C.12/1999/5, para. 15; CESCR, *General Comment No. 13: The right to education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10, paras. 46-47; CESCR, *General Comment No. 14: The right to the highest attainable standard of health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, paras. 33-37; CESCR, *General comment No. 18: The Right to Work (Art. 6 of the Covenant)*, 6 February 2006, E/C.12/GC/18, paras. 22-28; CESCR, *General Comment No. 19: The right to social security (Art. 9 of the Covenant)*, 4 February 2008, E/C.12/GC/19, paras. 43-51; CESCR, *General comment No. 21: Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the Covenant)*, 21 December 2009, E/C.12/GC/21, paras. 48-54; CESCR, *General comment No. 23: The right to just and favourable conditions of work (Art. 7 of the Covenant)*, 27 April 2016, E/C.12/GC/23, paras. 58-64.

[50] Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary (2005), Introduction, para. 21. Nowak refers this conclusion to the UN Human Rights Committee, but it is valid also for the CESCR. The term "pronouncement" encompasses general comments, concluding observations and case-law on individual-state complaints procedures.

[51] CESCR, *General Comment No. 12*, *cit.*, para. 15; CESCR, *General Comment No. 13*, *cit.*, para. 46; CESCR, *General Comment No. 14*, *cit.*, para. 33; CESCR, *General Comment No. 18*, *cit.*, para. 22; CESCR, *General Comment No. 19*, *cit.*, para. 43; CESCR, *General Comment No. 21*, *cit.*, para. 48; CESCR, *General Comment No. 23*, *cit.*, para. 58.

[52] Pisillo Mazzeschi, 'Responsabilité de l'État', *cit.*, 242-249.

[53] Pisillo Mazzeschi, 'Responsabilité de l'État', *cit.*, 243; Eide, 'Report on the right to adequate food', *cit.*, para. 70.

[54] Sepúlveda Carmona, *The Nature of the Obligations*, *cit.*, 171.

[55] Pisillo Mazzeschi, 'Responsabilité de l'État', *cit.*, 247. The Author points also out the disadvantages of the tripartite typology and, ultimately, proposes three alternative categories: immediate obligations of result, immediate obligation of due diligence and obligations of progressive realization. The present dissertation does not adopt such classification, since it does not reflect the majority of the literature or the practice of monitoring bodies. On the topic of due diligence, see e.g. Riccardo Pisillo Mazzeschi, *Due diligence e responsabilità internazionale degli stati* (1989); Joanna Kulesza, *Due diligence in international law* (2016); Helene Raspail, 'Due diligence et droits de l'homme', in Sarah Casella (ed), *SFDI - Journée d'étude franco-italienne du Mans*, *Journée d'étude franco-italienne du Mans* (2018), 107; Heike Krieger, Anne Peters, and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (2020); Samantha Besson, *La due diligence en droit international* (2020), 409 Collected Courses of The Hague Academy of International Law.

[56] Tomuschat, *cit.*, 146; Hennebel, Tigroudja, *cit.*, 660-661; Riedel, Giacca, Golay, *cit.*, 18; Eide, 'Economic, social and cultural rights', *cit.*, 23-24; Ssenyonjo, *cit.*, 23; Pisillo Mazzeschi, 'Responsabilité de l'État', *cit.*, 245. See also the CESCR's General Comments, *cit*. Ssenyonjo and Pisillo Mazzeschi affirm that the obligation to respect also entails a positive duty: according to the former, this duty consists in repealing laws and rescinding policies that violate international ES rights; according to the latter, this duty occurs e.g. where the State is obliged to recognize and register the right to property of certain individuals. Both Authors appear to be mistaken. Ssenyonjo labels as a positive duty stemming from the obligation to respect a behaviour that fits better within the category of cessation of illicit conduct as a legal consequence of an internationally wrongful act (namely, the violation of a ES right protected under international law). Pisillo Mazzeschi deems the positive duty to recognise

association requires States to refrain from any interference which would restrict trade unions' right to draw up their constitutions and rules.[57] Another example concerns States' obligations to respect the right to health by refraining from denying or limiting equal access for all persons, including illegal immigrants, to health services.[58]

The obligation to *protect* requires the adoption of measures to prevent third parties from interfering in any way with the right in question. Beside preventative measures, such obligation includes the duties to investigate and punish wrongdoers, alongside that to redress victims of violations.[59] As an example, States must protect trade unions against any acts of interference from one another in their establishment, functioning or administration.[60] Another example is the obligation to protect the right to work, which demands that States ensure that an increased flexibility of labour markets does not render work less stable or reduce the social protection of the worker.[61]

The obligation to *fulfil* demands the adoption of adequate measures meant to secure the full realization of the relevant right. The obligation to fulfil imposes a threefold duty: the obligation to facilitate, to promote, and to provide.[62] The obligation to *facilitate* requires the adoption of measures which enable and assist individuals in the enjoyment of the relevant right. For example, States must recognise the right to just and favourable conditions of work through laws, policies and regulations on non-discrimination, or imposing a non-derogable minimum wage.[63] The obligation to *promote* imposes the duty to nurture public awareness through appropriate education and training programmes, as well as through information campaigns.[64] Lastly, duty bearers are under an obligation to directly *provide* a specific right where individuals or groups are unable, on grounds reasonably beyond their control, to enjoy and to realize that right themselves by the means at their disposal. The obligation to provide is meant to safeguard the enjoyment of fundamental rights towards vulnerable and marginalised individuals or groups, such as women, the elderly, and the homeless.[65] For example, the right to just and favourable working conditions requires States to establish non-contributory social security programmes for workers in the informal economy to provide benefits and protection against accidents and disease at work.[66] The obligation to *fulfil* is a positive obligation, as it requires implementation measures.

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and register the right to property as an element of the obligation to respect, but it seems to be better qualified as a component of the duty to fulfil. On the affirmative steps required by the obligation to respect, see also CESCR, *General Comment No. 21*, *cit.*, para. 49.

[57] ILO Convention No. 87, Art. 3.

[58] CESCR, *General Comment No. 12*, *cit.*, para. 34.

[59] Tomuschat, *cit.*, 146-148; Hennebel, Tigroudja, *cit.*, 662-665; Ssenyonjo, *cit.*, 24; Pisillo Mazzeschi, 'Responsabilité de l'État', *cit.*, 245. See also the CESCR's General Comments, *cit.*

[60] ILO Convention No. 98, Art. 2(1).

[61] CESCR, *General Comment No. 18*, *cit.*, para. 25.

[62] Riedel, Giacca, Golay, *cit.*, 19; Ssenyonjo, *cit.*, 25; Pisillo Mazzeschi, 'Responsabilité de l'État', *cit.*, 245-246. See also the CESCR's General Comments, *cit.*

[63] See e.g. CESCR, *General Comment No. 23*, *cit.*, para. 61. See also ILO Convention No. 131, Art. 2(1).

[64] Riedel, Giacca, Golay, *cit.*, 19; Ssenyonjo, *cit.*, 25; Pisillo Mazzeschi, 'Responsabilité de l'État', *cit.*, 246. See also: CESCR, *General Comment No. 14*, *cit.*, para. 37; CESCR, *General Comment No. 23*, *cit.*, para. 63.

[65] Riedel, Giacca, Golay, *cit.*, 20; Ssenyonjo, *cit.*, 25-26; Pisillo Mazzeschi, 'Responsabilité de l'État', *cit.*, 246. Remarkably, in exceptional cases States are obliged to directly provide the right even where individuals have the means to satisfy their need: this is the case e.g. of the obligation to provide primary education. See e.g. CESCR, *General Comment No. 13*, *cit.*, paras. 47-48.

[66] CESCR, *General Comment No. 23*, *cit.*, para. 64.

Ultimately, the tripartite typology highlights that the enjoyment of the very same right requires a range of different behaviours by duty bearers – most frequently, States. These behaviours include abstention and active steps, as well as both measures of immediate nature and those of a more long-term character – *viz.* to gradually realize the relevant right. By this means, the tripartite typology helps us understand which conducts are required by the specific primary obligations binding upon duty bearers. As a corollary concerning the responsibility for internationally wrongful acts, this threefold classification eases the identification of breaches of international obligations safeguarding human rights.[67]

In light of the above, the present dissertation adopts the tripartite typology, alongside the distinction between immediate and progressive realization, when addressing violations of socio-economic rights in the context of the Eurozone sovereign debt crisis.

2.2. General obligations specifically related to socio-economic rights: the case of economic crisis

Beside the particular behaviours required to respect, to protect and to fulfil specific human rights, the enjoyment and realization of socio-economic rights requires compliance with three more general legal obligations which have a "dynamic relationship" with all the other ES rights.[68] These are the well-known obligations to progressively achieve the full realization of socio-economic rights and the related prohibition of taking unjustified retrogressive measures, alongside the obligation to ensure the satisfaction of, at the very least, the minimum essential level of each ES right. Besides, the prohibition of discrimination and the safeguarding of (substantive) equality between men and women are also pivotal for the enjoyment of all socio-economic rights.

These three general legal obligations are based on Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), as interpreted by the UN Committee on Economic, Social and Cultural Rights (CESCR).[69] Although this is the only binding source underpinning these three standards, such general obligations pertain also to ES rights directly or indirectly protected under other instruments, including ILO Conventions, the (Revised) European Social Charter, the European Convention on Human Rights, and the Charter of Fundamental Rights of the European Union.[70]

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[67] Pisillo Mazzeschi, 'Responsabilité de l'État', *cit.*, 247.

[68] CESCR, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23, para. 1.

[69] The CESCR was established under ECOSOC Resolution 1985/17 of 28 May 1985, E/RES/1985/17. The CESCR has the competence to examine individual communications under the Optional Protocol to the ICESCR (10 December 2008, entry into force 5 May 2013), A/RES/63/117 [Op-Protocol to the ICESCR].

[70] These general obligations pertain also to other instruments of universal and regional scope, as well as to those concerning specific categories of rights or individuals. See e,g.; the Convention on the Rights of the Child, Art. 4; Convention on the Rights of Persons with Disabilities, Art. 4(2); American Convention on Human Rights ("Pact of San Josè, Costa Rica") (22 November 1969, entry into force18 July 1978) 1144 UNTS 123 (Art. 26) [ACHR]; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador") OAS Treaty Series No. 69. (17 November 1988, entry into force 16 November 1999); African Charter on the Rights and Welfare of the Child (1990, entry into force 1999) (Art. 11(2), Art. 13(3)).

2.2.1 The International Covenant on Economic, Social and Cultural Rights

Article 2(1) of the ICESCR reads as follow:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, 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.

Article 2(2) sets forth the prohibition of discrimination on any ground, while Article 3 compels State Parties to ensure the equal right of men and women to the enjoyment of all the rights protected in the Covenant. The CESCR, UN Special Rapporteurs and groups of independent experts have extensively interpreted these provisions, which have also been a matter of scholarly attention.

The chief general obligation requires each State "to take steps […] to the maximum of its available resources, with a view to achieving progressively the full realization" of socio-economic rights by all appropriate means.[71] According to this provision, States must gradually achieve the full realization of ES rights subject to the availability of resources.[72] "Available resources" include both those within the State and those accessible through international cooperation and assistance.[73] The Covenant and the CESCR acknowledge that the protection and fulfilment of ES rights may depend on the soundness of public finances, hence socio-economic standards may differ from State to State, as well as over time, according to budgetary constraints. The full realization of ES rights may also be realized "through international assistance and cooperation, especially economic and technical". In this context, States parties of international financial institutions should take steps to ensure that such institutions do not interfere with and pay due consideration to ES rights in their lending policies.[74]

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[71] CESCR, *General Comment No. 3, cit.*, para. 9.

[72] On the progressive obligation to gradually achieve the full realization of ES rights, see e.g. Philip Alston, Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987), 9(2) *Human Rights Quarterly* 156, 172-177; Ssenyonjo, *cit.*, 58-65; Rodrigo Uprimny et al, 'Bridging the Gap. The Evolving Doctrine on ESCR and "Maximum Available Resources"', in Katharine. G. Young (ed), *The Future of Economic and Social Rights* (2019), 624; Katharine G. Young, 'Waiting for Rights. Progressive Realization and Lost Time', in *id.* (ed)., *The Future of Economic and Social Rights* (2019), 654; Aife Nolan, 'Budget Analysis and Economic and Social Rights', in Riedel, Giacca, Golay (eds), *cit.*, 369.

[73] CESCR, *General Comment No. 3, cit.*, para. 13; CESCR, Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 2 October 2000, E/C.12/2000/13, para. 26. On the difficulty of determining whether a State has made use of its maximum available resources, see e.g. Ssenyonjo, *cit.*, 62-64; Olivier De Schutter. 'Public Budget Analysis for the Realization of Economic, Social and Cultural Rights. Conceptual Framework and Practical Implementation', in Young (ed), *cit.*, 527. The CESCR also elaborated indicators to assess States' use of their maximum available resources. On the general issue of indicators as tools to test the implementation of human rights, see e.g. UN Office of the High Commissioner of Human Rights, *Human Rights Indicators. A Guide to Measurement and Implementation* (2012).

[74] CESCR, *General Comment No. 19, cit.*, para. 58; CESCR, *General Comment No. 23, cit.*, para. 71. In this regard, the uncertainty surrounding if (and to what extent) international financial institutions (such as the International Monetary Fund, the Word Bank and the European Stability Mechanism) are bound by the

Although progressive realization is "a necessary flexibility device, reflecting the realities of the real world",[75] it imposes and gives rise to three clear obligations: i) the obligation to "take steps"; ii) the prohibition of unjustified retrogressive measures; iii) the obligation to ensure the satisfaction of, at the very least, minimum essential levels of each socio-economic right.[76]

Under the obligation to take steps, States must move "as expeditiously and effectively as possible towards" the full realization of ES rights.[77] To this end, States "must take deliberate, concrete and targeted steps within a reasonably short time after the Covenant entry into force for the States concerned."[78] These "steps" include – but are not limited to – legislative, administrative, financial, educational and social measures, alongside the provision of judicial or other remedies.[79] Some provisions of the Covenant specifically prescribe the means to be taken,[80] while for others the CESCR specified the required conducts.[81] As for all the other articles, States enjoy discretion in assessing the appropriateness of such means, subject to CESCR review on whether they complied with their obligations.[82] The obligation to take steps is an immediate obligation and encompasses obligations to protect and to fulfil.

The prohibition of *unjustified* retrogressive measures obliges States to refrain from lowering the existing level of protection of ES rights, unless these measures have been introduced after the most careful consideration of all the alternative and are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources. The burden of proof rests upon the State to demonstrate the existence of strong reason(s) underpinning such a decision and that it has

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provisions of the Covenant without their consent – i.e. without being parties to the ICESCR – should be recalled. On this issue, see e.g. François Gianviti, 'Economic, Social and Cultural Rights and the International Monetary Fund', in International Monetary Fund (ed), Current Developments in Monetary and Financial Law, Vol. 3 (2005), 3, available at: www.elibrary.imf.org/doc; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (2006), 137 – 152; Kristina Daugirdas, 'How and Why International Law Binds International Organizations' (2016) 57(2) *Harvard International Law Journal* 325.

[75] CESCR, *General Comment No. 3*, *cit.*, para. 9.

[76] Young refers to the prohibition of retrogression and to the minimum core obligation as "supplements to progressive realization". See Young, *cit.*, 665-669.

[77] CESCR, *General Comment No. 3*, *cit.*, para. 9; CESCR, *General Comment No. 14*, *cit.*, para. 31; CESCR, *General Comment No. 23*, *cit.*, para. 51; Limbourg Principles, *cit.*, para. 21.

[78] CESCR, *General Comment No. 3*, *cit.*, para. 2; CESCR, An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant, 21 September 2007, E/C.12/2007/1, para. 3 [CESCR, An evaluation]. See also CESCR, *General Comment No. 18*, *cit.*, para. 19; CESCR, *General Comment No. 23*, *cit.* para. 50; Limburg Principles, *cit.*, paras. 16. On the immediate obligation "to take steps", see e.g. Alston, Quinn, *cit.*, 165-172; Ssenyonjo, *cit.*, 52-58.

[79] CESCR, *General Comment No. 3*, *cit.*, para. 7; CESCR, An evaluation, *cit.*, 2007, para. 3. See also CESCR, *General Comment No. 23*, *cit.* para. 50.

[80] See e.g. ICESCR, Art. 11(2) on the right to be free from hunger.

[81] See e.g. CESCR, *General Comment No. 19*, *cit.*

[82] CESCR, *General Comment No. 3*, *cit.*, para. 4; Limbourg Principles, *cit.*, para. 20. CESCR, An evaluation, *cit.*, para. 8, outlines a non-exhaustive list of criteria that the CESCR takes into account in assessing the adequateness of the measures taken. These criteria are: (a) The extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights; (b) Whether the State party exercised its discretion in a non-discriminatory and non-arbitrary manner; (c) Whether the State party's decision (not) to allocate available resources was in accordance with international human rights standards; (d) Where several policy options are available, whether the State party adopted the option that least restricts Covenant rights; (e) The time frame in which the steps were taken; (f) Whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether they were non-discriminatory, and whether they prioritized grave situations or situations of risk.

chosen the least harmful option to address the situation.[83] The prohibition of unjustified retrogressive measures could be considered as falling within the category of the obligation to respect, as it prescribes a straightforward duty of abstention.

Lastly, even if States may realize ES rights progressively, they must take immediate actions to ensure the satisfaction of, at the very least, essential levels of socio-economic rights. The assessment of States' compliance with this minimum core obligation considers potential budgetary constraints. However, States facing economic and financial difficulties must demonstrate that every effort has been made to use all the available resources to satisfy, as a matter of priority, minimum essential levels of ES rights.[84] This enhanced burden of proof is grounded on the assumption that minimum core obligations form a mutual base-line from which each State must strive to improve the enjoyment of socio-economic rights.[85] Minimum core obligations are floors and not ceilings, a starting point and not a final destination.[86] This means that (even *justified*) retrogressive measures cannot undermine the access to basic levels of ES rights. This minimum core obligation falls within the category of the obligation to respect, as it implies the negative duty not to encroach on the enjoyment of essential levels of socio-economic rights. Depending on the specific case, the obligation could be framed as an obligation to fulfil, as it imposes the positive obligation to immediately provide such standards where these are lacking.

In contexts of sovereign debt crisis and, more broadly, of resource constraints, these general legal obligations change slightly. Periods of recession may slow down the progressive realization of ES rights due to the lack of economic means and some retrogressive measures may be inevitable. Nonetheless, States must respect strict requirements for these adjustments to be justified. In particular, such reforms must: i) be temporary, i.e. covering only the period of crisis; ii) be necessary and proportionate, *viz.* any other alternative would be more detrimental to ES rights; iii) not be discriminatory, mitigate increasing inequalities, and ensure enhanced protection to disadvantaged and marginalised individuals and groups; iv) identify and secure the protection of the minimum core content (or a social protection floor, according to the ILO's parameters) of each right.[87]

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[83] CESCR, *General Comment No. 3*, *cit.*, para. 9; CESCR, *General Comment No*, 14, *cit.*, para. 32; CESCR, *General Comment No. 18*, *cit.*, para. 21; CESCR, *General Comment No. 23*, *cit.*, para. 52; CESCR, *General Comment No. 19*, *cit.*, para. 42; CESCR, An evaluation, *cit.*, para. 9.
On the prohibition of unjustified retrogressions, see e.g. Marìa Magdalena Sepúlveda Carmona, 'Alternatives to austerity: a human rights framework for economic recovery', in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis*, (2014), 23, 26-27 [Sepúlveda Carmona, 'Alternatives to austerity']; Aoife Nolan, Nicholas J. Lusiani, Christian Curtis, 'Two steps forward, no steps back? Evolving criteria on the prohibition of retrogression in economic and social rights', in Nolan (ed), *cit.*, 121; Uprimny, *cit.*, 630-634.

[84] CESCR, *General Comment No. 3*, *cit.*, para. 10; CESCR, *General Comment No*, 14, *cit.*, para. 43; CESCR, *General Comment No. 18*, *cit.*, para 31; CESCR, *General Comment No. 19*, *cit.*, para. 59; CESCR, *General Comment No. 23*, *cit.* para. 65; CESCR, An evaluation, *cit.*, para. 6; Limbourg Principles, *cit.*, para. 25.
On the minimum core obligation, see e.g. Uprimny, *cit.*, 628-630; Katharine G. Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008), 33 *Yale International Law Journal* 113; Ssenyonjo, *cit.*, 65-69; Sepúlveda Carmona, 'Alternatives to austerity', 26; Ingrid Leijten, *Core Socio-Economic Rights and the European Court of Human Rights* (2018), 146-150.

[85] Ssenyonjo, *cit.*, 66-67; Human Rights Council, *Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephas Lumina. Guiding principles on foreign debt and human rights*, 10 April 2011, A/HRC/20/23, para. 17.

[86] Bob Hepple, 'Rights at Work' (2003), 20, available at: www.oit.org.

[87] Chairperson of the CESCR, *Letter Dated 16 May 2012 Addressed by the Chairperson of the Committee on*

Notwithstanding the acknowledgment of the negative effects that periods of recession may have on the gradual achievement of ES rights, the adoption of justified retrogressive measures in these contexts is subject to narrower conditions than those generally established. Moreover, in times of economic downturn the core obligations must always be respected and provided, with no exception admitted.[88]

2.2.2. ILO Conventions

The ILO Conventions relevant to the present dissertation do not expressly impose the duty to progressively achieve the full realization of labour and employment rights, hence these general legal obligations lack an explicit normative basis.[89] Nonetheless, the practice of the ILO and of the relevant supervisory bodies provides some interesting indications.

First and foremost, the ILO recognises four core labour standards which must be complied with in good faith by all ILO members, regardless of their ratification of the corresponding ILO Conventions. These four core labour standards are: i) freedom of association and the effective recognition of the right to collective bargaining; ii) the elimination of forced or compulsory labour; iii) the abolition of child labour; iv) the elimination of discrimination in respect of employment and occupation.[90]

Moreover, the ILO framework safeguarding social security has a two-fold dimension. The horizontal dimension requires ILO members to establish "as quickly as possible and maintain their social protection floors comprising basic social security guarantees".[91] The implementation of national social protection floors is "a starting point"[92]. The vertical dimension of the ILO framework aims to progressively achieve higher and more comprehensive social security standards.[93]

Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights, 16 May 2012, ESCR/48th/SP /. MAB/SW; Economic and Social Council, *Report of the United Nations High Commissioner for Human Rights*, 7 May 2013, E/2013/82, paras. 15-21; CESCR, *General Comment No. 19, cit.*, para. 42; CESCR, *General Comment No. 23, cit.* para. 52. CESCR, *Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights. Statement by the Committee on Economic, Social and Cultural Rights*, 22 July 2016, E/C.12/2016/1, para. 4; Human Rights Council, *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*, 27 December 2016, A/HRC/34/57, para. 22. CESCR, *General Comment No. 3, cit.*, para. 12 confirms, in more general terms, the need to secure enhanced protection to vulnerable individuals and groups in times of economic crisis. The ILO identified the social protection floor in its Recommendation concerning National Floors of Social Protection (Recommendation No. 202), 14 June 2012 [ILO Recommendation No. 202]. Art. 2 of this recommendation defines social protection floors as "nationally defined sets of basic social security guarantees which secure protection aimed at preventing or alleviating poverty, vulnerability and social exclusion".

[88] Human Rights Council, A/HRC/34/57, *cit.*, para. 23; CESCR, *General Comment No. 23, cit.* para. 52.

[89] As already stated, the ILO Conventions relevant to the present dissertation are: ILO Convention No. 87; ILO Convention No. 98; ILO Convention No. 131; ILO Convention No. 151; ILO Convention No. 154.

[90] International Labour Conference, *ILO Declaration on Fundamental Principles and Rights at Work* (18 June 1998, Annex revised 15 June 2010), Art. 2. On this topic, see e.g. Philip Alston, '"Core Labour Standards" and the Transformation of the International Labour Rights Regime' (2004), 15 *European Journal of International Law* 457.

[91] ILO Recommendation No. 202, Art. 4. Articles 4 and ff. clarify the content of ILO's members obligations by e.g. providing a non-exhaustive list of basic social security guarantees (Art. 5).

[92] ILO Recommendation No. 202, Art. 13(1)(a).

[93] ILO Recommendation No. 202, Arts. 13 and ff. specify the content of ILO's members obligations concerning social security extension strategies. See also Convention concerning Minimum Standards of Social Security (18 June 1952, entry into force 27 April 1955).

Lastly, the ILO Committee on Freedom of Association acknowledges that in contexts of grave economic and financial crisis "governments are entitled to adopt emergency measures".[94] The same Committee also identifies a set of principles that such policies must fulfil in order to comply with the relevant ILO standards. In particular, restrictions of labour and workers' rights should: i) be imposed as an exceptional measure; ii) be necessary; iii) not exceed a reasonable period; iv) be accompanied by adequate safeguards to protect workers' living standards.[95]

2.2.3. The (Revised) European Social Charter

Like the ILO Conventions, both the original European Social Charter of 1961 and its revised version of 1991 lack a provision similar to Art. 2(1) ICESCR. The only two exceptions concern the right to safe and healthy working conditions and the right to social security. As for the former, States parties undertake, in consultation with employers' and workers' organisations, to "promote the progressive development of occupational health services for all workers with essentially preventive and advisory functions."[96] As for the latter, States parties assume "to endeavour to raise progressively the system of social security to a higher level".[97] Both progressive obligations aim at ensuring the effective exercise of the right in question.

Beside these explicit normative provisions, the European Committee of Social Rights has played an important role in shaping States' general legal obligations under the (Revised) Charter. First and foremost, the Committee affirms that State parties must take legal and practical actions to give full effect to the ES rights recognised in the (Revised) European Social Charter.[98] The Committee also distinguishes between rights that require immediate implementation and those that must be gradually achieved – i.e. rights that demand States "devise and implement appropriate measures in order to ensure, gradually and in due course" their effective exercise.[99] Progressive realization concerns rights that entail a particularly complex and costly implementation.[100] The European Committee of Social Rights recognises the margin of discretion that States parties enjoy in allocating budgetary resources, as national

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[94] ILO, 376th Report in which the committee requests to be kept informed of development - Report No 376, Case No 3072 (Portugal), October 2015 [ILO, 376th Report on Portugal], para. 923.

[95] ILO, 365th Report in which the committee requests to be kept informed of development, Case No 2820 (Greece), November 2012 [ILO, 365th Report on Greece], para. 990; ILO, 371st Report in which the committee requests to be kept informed of development, Case No. 2947 (Spain), March 2014, para. 464 [ILO, 371st Report on Spain]; ILO, 376th Report on Portugal, para. 917, 923.
The ILO Committee on Freedom of Association was established in 1951 by the Governing Body of the ILO. Its mandate is to examine alleged infringements of the principles of freedom of association and the right to collective bargaining regardless whether or not the State concerned has ratified the relevant ILO Conventions. On the ILO Committee on Freedom of Association see e.g. ILO - International Labour Office, *Freedom of Association. Compilation of decisions of the Committee on Freedom of Association* (6th ed, 2018), 5-15.

[96] Art. 3(3) (R)ESC.

[97] Art. 12(3) (R)ESC.

[98] European Committee of Social Rights, *International Association Autism-Europe v. France*, Complaint No. 13/2002, Decision of 4 November 2003, para. 53.

[99] European Committee of Social Rights, *Fédération internationale des Ligues des Droits de l'Homme (FIDH) v. Belgium*, Complaint No. 75/2012, Decision of 18/03/2013, para. 145.

[100] European Committee of Social Rights, *International Association Autism-Europe v. France*, *cit.*, para. 53; European Committee of Social Rights, *Fédération internationale des Ligues des Droits de l'Homme (FIDH) v. Belgium*, *cit.*, para. 147.

authorities are better placed to evaluate the needs of the relevant country.[101] Nonetheless, the same Committee has the task to determine whether States comply with their obligations, and specifically whether the measures taken allow the achievement of the objective of the Charter within a reasonable timeframe, with measurable progress, and with financing consistent with the maximum use of available resources. Besides, States must be particularly mindful of the impact of their choices on vulnerable individuals and groups.[102]

As for contexts of sovereign debt turmoil, the European Committee stated that the rights recognised in the (Revised) European Social Charter should not be limited in such periods, which represents a situation when beneficiaries need the protection most.[103] If such restrictions occur, they must be assessed according to the limitation clause of the Charter – which is addressed in Section 2.3. below.

2.2.4. The European Convention on Human Rights

The European Convention on Human Rights (ECHR) does not enshrine a provision equivalent to Art. 2(1) ICESCR. The ECHR mostly sets forth civil and political rights, with few exceptions – e.g. the prohibition of slavery and forced labour,[104] the right to property,[105] and the right to education.[106] On several occasions, the European Court of Human Rights (ECtHR) stated that the ECHR recognises (indirect) protection to socio-economic rights not explicitly established in the Convention – e.g. the right to form and join trade unions.[107] This notwithstanding and contrarily to the European Committee of Social Rights, the ECtHR did not frame States' general legal obligations in matters of ES rights. As for contexts of sovereign debt crisis, the European Court of Human Rights assesses compliance of States' measures in light of the specific limitation clauses attached to the provision allegedly violated. In this regard, a wide margin of appreciation is usually allowed to the national authorities. This aspect is addressed in Section 2.3. below.

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[101] European Committee of Social Rights, *European Roma Rights Centre v. Bulgaria*, Complaint No. 31/2005, Decision on the merits of 18 October 2006, para. 37; European Committee of Social Rights, *Action Européenne des Handicapés (AEH) v. France*, Complaint No. 81/2012, Decision of 11 September 2013, para. 99

[102] European Committee of Social Rights, *International Association Autism-Europe v. France*, *cit.*, para. 53; European Committee of Social Rights, *Fédération internationale des Ligues des Droits de l'Homme (FIDH) v. Belgium*, *cit.*, para. 147; European Committee of Social Rights, *European Roma Rights Centre v. Bulgaria*, *cit.*, para. 37.

[103] See e.g. European Committee of Social Rights, *General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*, Complaint No. 66/2011, Decision of 23 May 2012, para. 12 [*ADEDY v. Greece*]; European Committee of Social Rights, *Greek General Confederation of Labour (GSEE) v. Greece*, Complaint No. 111/2014, Decision of 23 March 2017, para. 88.

[104] Art. 4 ECHR.

[105] Art. 1, Add. Prot. 1 ECHR.

[106] Art. 2, Add. Prot. 1 ECHR.

[107] Art. 11 ECHR safeguard freedom of association, which the Court considers the basis for the freedom to form and join trade unions. On this topic, see e.g. Christina Binder, Thomas Schobesberger, 'The European Court of Human Rights and Social Rights - Emerging Trends in Jurisprudence' (2015), *Hungarian Yearbook of International Law*, 51; Ingrid Leijten, 'The German Right to an *Existenziminimum*, Human Dignity, and the Possibility of a Minimum Core Socioeconomic Rights Protection' (2015), 16(1) *German Law Journal* 23; Ingrid Leijten, *Core Socio-Economic Rights and the European Court of Human Rights* (2018) [Leijten, 'Core Socio-Economic Rights'].

2.2.5. The EU Charter of Fundamental Rights

Similar considerations relate to the EU Charter of Fundamental Rights. Beside the lack of a provision similar to Art. 2(1) ICESCR, the Court of Justice of the EU (ECJ) had never affirmed the existence of Member States' general legal obligations concerning ES guarantees expressly safeguarded in the Charter. In contexts of sovereign debt crisis, the Court of Justice of the European Union adopts the same approach of the European Committee of Social Rights and the ECtHR: the ECJ appraises whether States' policies are in accordance with the claw-back clauses provided for in the rules allegedly infringed. This aspect is addressed in Section 2.3. below.

2.2.6. A systemic and teleological approach to international obligations related to socio-economic rights

The survey of the normative provisions and of the practice of monitoring bodies concerning the general legal obligations related to socio-economic rights, as well as their scope and content in contexts of economic crisis, delineates a patchy framework.

On one side, Art. 2(1) ICESCR expressly provides for a legal basis of the obligation to progressively achieve the full realization of ES rights and the CESCR has helped shaping the nature and content of the other general obligations stemming from this rule. On the other side, the (Revised) European Social Charter and ILO Conventions lack such explicit normative grounds, but the practice of the respective supervisory bodies offers some interesting hints on the matter that partly match the obligations under Art. 2(1) of the Covenant, as interpreted by the CESCR. Lastly, the ECHR and the EU Charter of Fundamental Rights do not envisage any legal basis and the respective Courts do not deal with such issues.

Against this backdrop, the Vienna Convention on the Law of the Treaties (VCLT) may help in finding common grounds concerning the scope and content of general obligations related to socio-economic rights.[108] The first relevant rule is Art. 31(3)(c), which establishes that a treaty shall be interpreted by taking into account "any relevant rules of international law applicable in the relations between the parties".[109] Art. 31(3)(c) VCLT is the foundation of the systemic interpretation of treaties and has the potential to enhance coherence in international law.[110] This provision has at the very least two contentious aspects. The first concerns the notion of "relevant rules". The practice of supervisory bodies confines this notion to rules that relate "to the same subject matter as the treaty provision under interpretation."[111] On the contrary, Scholars support the idea that external rules also embrace those with a similar object or address "the same legal situation".[112] The second contentious aspect regards the notion of

[108] Vienna Convention on the Law of Treaties (23 May 1969, entry into force 27 January 1980) 1155 UNTS 331 [VCLT].
[109] For a comprehensive analysis of Art. 31(3)(c) VCLT, see e.g. Oliver Dörr, 'General rule of interpretation', in Oliver Dörr, Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties. A Commentary* (2nd ed, 2018), 599, 603-613.
[110] UN General Assembly, Report of the Study Group of the International Law Commission to the Fifty-Eighth Session, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law,* UN Doc. A/CN.4/L.682, 13 April 2006, 214, para. 467-479.
[111] Dörr, *cit.*, 610.
[112] Dörr, *cit.*, 605.

applicability in "the relations between the parties". According to a restrictive approach, Art. 31(3)(c) requires that the "relevant rules of international law" bind *all* the States parties of the treaty to be interpreted. Since this stance would severely limit the relevance of Art. 31(3)(c) VCLT, a more extensive view argues that it suffices that the "relevant rules of international law" apply *only to some* of the States parties of the treaty to be interpreted, or to those involved in the settlement of a dispute.[113] The maximum expansion of this extensive approach can be found in the case law of the European Court of Human Rights, which affirmed that it has never distinguished between sources of law according to whether or not they are binding upon the respondent State provided that a consensus emerges "from specialised international instruments and from the practice of Contracting States".[114] Lastly, the interpretation of such external rules by competent organs is usually taken into account.[115]

The application of Art. 31(3)(c) VCLT to the present inquiry may be useful with regard to the obligation to progressively achieve the full realization of socio-economic rights subject to available resources under Art. 2(1) ICESCR, and the corresponding prohibition of unjustified retrogressive measures. The Covenant has nearly universal participation, hence other human rights treaties shall be interpreted taking into account its rules where there is an emerging consensus on the meaning and definition of terms or, at least, where the respondent State before the competent monitoring body is party to the ICESCR. This assumption concerns not only treaty provisions which deal with the same subject matter as that addressed by the ICESCR (as may be the case of ILO Conventions, the (Revised) European Social Charter and the EU Charter of Fundamental Rights), but also human rights conventions with a different textual scope, such as the ECHR. This consideration on the scope of application of Art. 31(3)(c) VCLT stems from the already recalled conception of human rights as "indivisible, interdependent and interrelated",[116] as confirmed by the above mentioned emerging – although exceptional – trend of the European Court of Human Rights to interpret the Convention provisions in a broader manner so as to encompass also ES entitlements that are not expressly protected therein.[117]

The Vienna Convention on the Law of Treaties matters also with regard to the legal general obligation to provide basic levels of socio-economic rights. In this regard, the relevant rule is Art. 31 (1), where it requires to interpret a treaty "in good faith" and "in light of its object and purpose."[118] Human rights treaties are meant to safeguard fundamental rights and freedom,[119] hence an interpretation of their provisions "in good faith" and in light of their object and purpose is incompatible with the idea of the impairment of the essence of the relevant rights and freedoms. This general assumption, which applies to all human rights

[113] Dörr, *cit.*, 610-611.
[114] See e.g. *Demir and Baykara v. Turkey* [GC], application no. 34503/97, 12 November 2008, para. 85
[115] Dörr, *cit.*, 609.
[116] Vienna Declaration and Plan of Action, *cit.*, para. 5. See also Section 1 above.
[117] See Section 2.2.4 above and Chapter III, Section 3 of the present dissertation.
[118] For a comprehensive analysis of Art. 31(1) VCLT, see e.g. Dörr, *cit.*,
[119] See e.g. Inter-American Court of Human Rights, "*Other Treaties" Subject to the Advisory Jurisdiction of the Court (Article 64 American Convention on Human Rights)*, Advisory Opinion Oc-1/82 of 24 September 1982 (Series A No. 1), para. 24; Inter-American Court of Human Rights, *The Effect of Reservations on the Entry into force of the American Convention on Human Rights (Articles 74 and 75 American Convention on Human Rights)*, Advisory Opinion Oc-2/82 of September 24, 1982 (Series A No. 2), para. 29.

treaties, mirrors the notion of minimum core obligation, as developed by the CESCR with reference to Art. 2(1) ICESCR.

Ultimately, despite the normative differences between the ICESCR, the ILO Conventions, the (Revised) European Social Charter and the ECHR, the adoption of a systemic and teleological interpretation to their treaty provisions allows the outline of common grounds concerning the scope and content of general legal obligations related to ES rights, including in contexts of economic crisis. Such grounds are mainly based on Art. 2(1) of the Covenant, as interpreted by the CESCR.

2.3. Limitations of socio-economic rights under international law

Most international treaties safeguarding human rights provide for limitation clauses. These possibilities rest on the assumption that not all human rights are absolute or unconditional rights since the majority must be balanced against general interests.[120] The exceptions are peremptory human rights norms – i.e. *jus cogens* rules from which "no derogation is permitted" (e.g. freedom from torture, prohibition of slavery). [121]

Broadly speaking, limitations of fundamental rights are legitimate if they satisfy three criteria, and specifically they must: i) be prescribed by law; ii) pursue a legitimate aim; iii) be proportionate to such legitimate aim, i.e. the interference is the less restrictive measure among those appropriate to reach the goal.[122] These requirements are meant to circumscribe the situations under which States may interfere with the enjoyment of fundamental rights.[123] Human rights treaties contain two main types of limitation (or claw-back) clauses. The first type is a general one, applicable to all the rights enshrined in the relevant convention. The second type embraces limitation clauses attached to specific (aspects of) right(s).[124]

2.3.1 The International Covenant on Economic, Social and Cultural Rights

Art. 4 of the ICESCR provides for a general limitation clause, according to which States parties may subject the rights enshrined in the Covenant only to such restriction as are

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[120] Amrei Muller, *The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law* (2013), 111.

[121] Art. 53 of the VCLT defines jus cogens rule as "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." This definition has been criticized because it is circular or tautological. In 2015, the ILC included the topic in its programme of work: see UN General Assembly, *Report of the International Law Commission*, (2019) Yearbook of the International Law Commission, Vol. II (1), A/74/10, 141 ff. See also, among others: Enzo Cannizzaro (ed.), *The Present and Future of Jus Cogens* (2015); Robert Kolb, *Peremptory International Law – Jus Cogens: A General Inventory* (2015).

[122] Tomuschat, *cit.*, 105-107; Hennebel, Tigroudja, *cit.*, 699-711. Tomuschat lists four criteria, namely the limitation must: i) pursue a public interest goal; ii) have a legal basis; iii) be necessary in a democratic society; iv) be proportionate.

[123] Alston, Quinn, *cit.*, 193. According to the Authors, the limitation clause in the ICESCR has both a permissive and protective function. It authorises State parties to impose limitations on the rights enshrined in the Covenant, and at the same time it protects the right in question by limiting the purpose for and the manner in which the limitation can legitimately be imposed. Hence, the limitation clause acts "both as a shield and as a sword".

[124] Hennebel, Tigroudja, *cit.*, 695.

determined by law only insofar "as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."

First, in line with other limitation clauses, it establishes that each restriction must respect the principle of legality, i.e. it must have a sufficiently clear and adequately accessible national law. Such law could be statute law, judge-made law or delegated legislation (i.e. rules issued by international organizations), and it must not be discriminatory, or arbitrary, or unreasonable. Moreover, it must provide adequate safeguards and effective remedies against illegitimate restrictions.[125] Second, Art. 4 ICESCR sets forth only one legitimate aim for limiting ES rights under the Covenant – namely, the promotion of "the general welfare in a democratic society". Scholars support a restrictive interpretation of this expression and the idea that it refers to the "well-being of the people as a whole."[126] Authors understand the notion of "democratic society" as one that recognises and respects the principles and the human rights enshrined in the UN Charter and in the Universal Declaration of Human Rights.[127] Third, Art. 4 ICESCR requires limitations to be "compatible with the nature" of the rights. This expression demands a right-by-right approach, as its scope varies in relation to each of the rights set forth in the Covenant. As a corollary, Scholars advocate that this phrase precludes States from adopting "across-the-board" limitations of ES rights.[128] Some Authors have also argued that this phrase should be interpreted considering the minimum core obligations – i.e. States must not impair the basic levels of the socio-economic right in question.[129] Lastly, governments carry the burden of proving that restrictions meet all the requirements under Art. 4 ICESCR.[130]

Beside this generally applicable limitation clause, Art. 8 ICESCR provides detailed limitation clauses concerning the right to form and join trade unions and the right to strike. Art. 8(1)(a) and (c) allow States to restrict the right to form and join trade unions if those are prescribed by law and "necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others". Such specific limitation clauses are broader than that enshrined in Art. 4 ICESCR, as they list more legitimate aims which are by themselves wider than "promoting the general welfare of a democratic society."[131]

A critical issue concerns the relationship between, on one hand, the general claw-back clause under Art. 4 ICESCR and, on the other, the obligation to progressively achieve the full

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[125] Alston, Quinn, *cit.*, 199-200; Limburg Principles, *cit.*, paras. 48-51; Ssenyonjo, *cit.*, 100-101; Muller, *cit.*, 123-124.

[126] Alston, Quinn, *cit.*, 202-203; Limburg Principles, *cit.*, para. 52; Ssenyonjo, *cit.*, 101; Muller, *cit.*, 118.

[127] Alston, Quinn, *cit.*, 203; Limburg Principles, *cit.*, para. 55; Ssenyonjo, *cit.*, 101. Muller (*cit.*, 120-123) proposes a slightly different interpretation, based on the case-law of the European Court of Human Rights which interprets the expression "necessary in a democratic society", a phrase that is included in limitations clauses of the European Convention on Human Right. This approach runs contrary to the position of Alston and Quinn (*cit.*, 204-205), who affirm that such case-law has "a limited value as a guide to interpretation of the Covenant", since the European Court of Human Rights applies the margin of appreciation doctrine, which cannot be transposed as such at the universal level. On the margin of appreciation doctrine see Chapter III, Section 2.3. of the present dissertation.

[128] Alston, Quinn, *cit.*, 201; Ssenyonjo, *cit.*, 101.

[129] Limburg Principles, *cit.*, para. 55; Muller, *cit.*, 124-127.

[130] Alston, Quinn, *cit.*, 201-202; Limburg Principles, *cit.*, para. 54; Muller, *cit.*, 119.

[131] Alston, Quinn, *cit.*, 209-216; Muller, *cit.*, 118; Further, Art. 8(2) allows States to limit the right to form and join trade unions and the right to strike "by members of the armed forces or of the police or of the administration of the State." On this provision, see Alston, Quinn, *cit.*, 214-215.

realization of socio-economic rights to the maximum of available resources. Some Scholars have pointed out that measures justified for reasons of severe resource constraints should aim at "promoting the general welfare in a democratic society" under Art. 4 ICESCR.[132] Hence, according to such Authors, there is no difference in the scope of application of the two provisions. Other Authors reported that, according to the *travaux préparatoires* of the Covenant, the scope of application of Art. 4 ICESCR does not embrace limitations imposed due to scarcity of available resources, which fall only under Art. 2(1) ICESCR.[133] This second position is more in line with the wording of the two articles, hence it is in line with the above cited Art. 31(1) VCLT.[134] Since States have an obligation to gradually achieve the full realization of ES rights subject to their available resources, there is a direct proportionality between, on one side, budgetary means and, on the other, the extent of the obligation under Art. 2(1) ICESCR. The possible lowering of the level of protections of ES rights due to resource constraints is implicit in the wording of Art. 2(1) ICESCR. On the contrary, Art. 4 ICESCR does not address limitations stemming from budgetary shortage, as its wording does not refer to resource availability and it envisages solely one narrow legitimate aim which could underpin such restrictions.

2.3.2. ILO Conventions

The ILO Conventions relevant for the present dissertation do not establish a limitation clause, so it would appear that no restrictions of the rights thereby enshrined are permitted under such treaties.[135] However, as mentioned above, the ILO standards and the work of the relevant monitoring bodies, together with a systemic and teleological approach to international obligations related to socio-economic rights, admit the possibility to restrict rights enshrined in ILO Conventions in times of severe economic constraints – if certain requirements are met.

2.3.3. The (Revised) European Social Charter

Similar to the ICESCR, the original European Social Charter of 1961 and its revised version of 1991 envisage a limitation clause of general scope that is applicable to all the rights thereby safeguarded. Its structure reflects those of other claw-back clauses provided in human rights treaties. Art. G of the Revised European Social Charter (formerly Art. 31) sets forth the requirements for imposing restrictions, which must: i) be prescribed by law, i.e. statutory law or case-law, provided that such sources meet the requirements of accessibility and foreseeability; ii) pursue a legitimate aim – i.e. the protection of the rights and freedoms of others, or of public interest, national security, public health, or morals; iii) be necessary in a

[132] Muller, *cit.*, 133.
[133] Alston, Quinn, *cit.*, 194, 205-206.
[134] See VCLT, Art. 31(1): "A treaty shall be interpreted in good faith in accordance with *the ordinary meaning to be given to the terms of the treaty* in their context and in the light of its object and purpose." (emphasis added)
[135] Mohamed Elewa Badar, 'Basic principles governing limitations on individual rights and freedoms in human rights instruments' (2003) 7(4) *The International Journal of Human Rights* 63, 64. According to this Author "limitations are permitted only where a specific limitation clause is provided for and only to a certain extent, so as to assure maximum protection to the individual."

democratic society for the achievement of such goal – *viz.* proportionate to the object pursued.[136]

The European Committee of Social Rights usually takes Art. G (formerly Art. 31) into account when assessing the merit of a complaint claiming the violation of one of the ES rights enshrined in the Charter – as occurred in the context of the proceedings related to austerity measures imposed during the Eurozone sovereign debt crisis.[137] According to the Committee, Art. G must be interpreted narrowly since it establishes an exception applicable under extreme circumstances.[138] The last remark concerns the scope of application of Art. G, which is wider than that under Art. 4 ICESCR, as the former provides for a list of legitimate purposes which could ground the limitations of ES rights.

2.3.4. The European Convention on Human Rights

The European Convention on Human Rights establishes specific limitation clauses attached to single articles. Each of them imitates the structure of other claw-back clauses envisaged in other human rights treaties, i.e. the respect of the principle of legality, the pursuit of a legitimate aim, and the proportionality of the measures *vis-à-vis* such goals.[139]

A peculiar provision is that of Art. 1, Add. Prot. 1 ECHR on the right to property. At first glance, its wording allows only two types of interference: deprivation of possession and control of the use of property, respectively envisaged in Art. 1(1) and Art. 1(2).[140] The ECtHR's case-law clarified that there is also a third, more general, basis for States' interference with the peaceful enjoyment of possession. This third ground allows States to limit the right to property if it is: i) prescribed by law; ii) pursuing the general interest of the community; iii) proportionate to such aim, *viz,* States must strike a fair balance between the public interest and the protection of individuals' fundamental right, and must not impair the essence of the right to property.[141] According to the Court's case-law, States' enjoy a wide margin of appreciation in the identification of the aim of the interference: the Court respects the choices of national authorities unless they are "manifestly without reasonable foundation".[142] This discretion is even broader "when it comes to general measures of

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[136] Art. G RESC (Restrictions) reads as follow: "1. The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals. 2. The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed." Art. G RESC mirrors the wording of Art. 31 of the previous European Social Charter of 1961.

[137] Chapter III, Section 2.3 of the present dissertation.

[138] European Committee of Social Rights, *Greek General Confederation of Labour (GSEE) v. Greece*, Complaint No. 111/2014, Decision of 23 March 2017, para. 83.

[139] See e.g. Arts. 8-11 ECHR.

[140] Art. 1, Add. Prot. ECHR (Protection of property): "1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be *deprived* of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. 2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to *control the use* of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." (emphasis added)

[141] David Harris et al (eds.), *Harris, O'Boyle and Warbrick. The Law of the European Convention of Human Rights* (4th ed, 2018), 862-863.

[142] ECtHR, *De Conceição Mateus and Santos Januario v. Portugal*, Application Nos. 62235/12 and 57725/12,

economic or social policy", especially "when the issues involve an assessment of the priorities as to the allocation of limited State resources".[143] This third, more general, legal basis to interfere with the right to property under Art. 1(1), Add. Prot. 1 ECHR was the one considered by the European Court of Human Rights when adjudging applications related to austerity-driven policies.[144]

It should also be recalled that Art. 15 ECHR allows for derogations from some obligations in time of "public emergency threatening the life of the nation".[145] In the words of Spadaro, limitations and derogations "can be seen as a continuum. In this vein, States should have recourse to the latter only as a last resort, when limitations have proven to be manifestly insufficient to respond to a public emergency."[146] It is questionable whether an economic and financial crisis, as exceptional as it may be, could be qualified as a "public emergency threatening the life of the nation" within the meaning of Art. 15 ECHR and, consequently, whether a similar turmoil requires Contrasting Parties to derogate from the Convention. In this regard, the austerity-driven case-law of the European Court of Human Rights acknowledged that the domestic measures implemented to achieve fiscal consolidation *vis-à-vis* the serious threat to the national economy fell under the scope of the limitation clauses enshrined in the Convention, even in the absence of a formal derogation by Contracting Parties.[147] Against this backdrop, the present dissertation does not address the role of the derogation clause under the ECHR in the context of the Eurozone sovereign debt crisis.

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decision of 8 October 2013, para. 22. See also Harris et al (eds), *cit.*, 865-867; 871-872.On the doctrine of the margin of appreciation, see e.g. Yuval Shany, 'All roads lead to Strasbourg?' (2018), 9(2) *Journal of international dispute settlement* 180; Eyal Benvenisti, 'The margin of appreciation, subsidiarity and global challenges to democracy' (2018), 9(2) *Journal of international dispute settlement,* 240. The margin of appreciation doctrine is taking shape also in investor-state dispute settlement mechanisms: see Giovanni Zarra, 'Right to Regulate, Margin of Appreciation and Proportionality: Current Status in Investment Arbitration in Light of *Philip Morris v. Uruguay*' (2017), 14(2) *Revista de Direito Internacional* 94.

[143] ECtHR, *De Conceição Mateus and Santos Januario v. Portugal*, Application Nos. 62235/12 and 57725/12, decision of 8 October 2013, para. 22. See also Harris et al (eds), *cit.*, 865-867; 871-872.

[144] See Chapter III, Section 3 of the present dissertation.

[145] Art. 15 ECHR (Derogation in time of emergency): "1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision. 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."

[146] Alessandra Spadaro, 'COVID-19: Testing the Limits of Human Rights' (2020), 11(2) *European Journal of Risk Regulation* 319, 321-322. See also e.g. European Commission of Human Rights, *Denmark, Norway, Sweden and the Netherlands v. Greece (the "Greek case")*, Applications Nos. 3321/67, 3322/67, 3323/67, 3344/67, Report of the Sub-Commission, Volume I, Part 1, 1969, para 113. On derogations from human rights obligations, see also e.g. Emanuele Giuseppe Sommario, *Stati d'emergenza e trattati a tutela dei diritti umani* (2018).

[147] See e.g. ECtHR, *Koufaki and ADEDY v. Greece*, Application Nos. 57665/12 and 57657/12, Decision of 7 May 2013, par. 37. See also Spadaro, *ibidem*, 321. On the austerity-driven case-law of the ECHR, see Chapter III, par. 3 of the present dissertation.

2.3.5. The EU Charter of Fundamental Rights

The EU Charter of Fundamental Rights establishes a limitation clause with a general scope, which is applicable to all the rights and freedoms thereby recognised. Art. 52(1) of the Charter is in line with other claw-back clauses set forth in human rights treaties, as it provides that any restriction must: i) respect the principle of legality; ii) pursue a legitimate aim, i.e. "objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others"; iii) comply with the principle of proportionality. Art. 52(1) of the Charter also explicitly requires the respect of the essence of the relevant right and freedom,[148] even if this condition is implicit in the proportionality test.

Specific attention should be paid to Art. 52(3) of the EU Charter of Fundamental Rights, which establishes that insofar as the Charter contains rights which correspond to rights guaranteed by the ECHR, "the meaning and scope of those rights shall be the same as those laid down by the said Convention."[149] The same article does not prevent EU law "providing more extensive protection", hence setting the ECHR as the minimum standard of protection.[150] The rationale underpinning this clause is ensuring consistency between the EU Charter and the ECHR. It also applies to limitations, which means that any restriction of those rights must comply with the requirements laid down in the relevant claw-back clauses under the ECHR.[151]

The Court of Justice of the EU applied the claw-back clause under Art. 51(1) when assessing compliance of austerity measures with the provisions of the EU Charter on Fundamental Rights.[152]

3. International law on State responsibility and violations of international socio-economic rights

Secondary rules of international law determine the conditions for a State to be considered responsible for a breach of any primary rules (i.e. those establishing international obligations), and the legal consequences stemming from such violations. These secondary rules are mostly codified in the already mentioned ILC's Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), which is applicable also in relation to infringement of obligations related to socio-economic rights.[153]

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[148] Art. 52(1) Charter of Fundamental Rights of the European Union (Scope and interpretation of rights and principles) reads as follows: "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

[149] Giovanni Carlo Bruno, 'The Importance of the European Convention on Human Rights for the Interpretation of the Charter of Fundamental Rights of the European Union', in Giuseppe Palmisano, (ed), *Making the Charter of Fundamental Rights a Living Instrument* (2014), 90.

[150] Lazzerini, *cit.*, 36.

[151] Lazzerini, *cit.*, 36. On the role played by the ECHR in relation with the EU Charter on Fundamental Rights, see Lazzerini, id, 64-80.

[152] Chapter IV of the present dissertation.

[153] Dinah Shelton, 'Remedies and Reparation', in Malcolm Langford et al (eds), *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (2013), 367.

Beside the rules formulated in the ARSIWA, the ILC adopted a set of articles on the responsibility of international organizations for internationally wrongful acts (ARIO).[154] The wording of the majority of these articles is modelled on those applicable to States according to the ARSIWA. The management of sovereign debt crisis usually involves States and international organizations, as confirmed by the Eurozone turmoil. For this reason, the following lines briefly address both works of the ILC.

Art. 2 ARSIWA defines an internationally wrongful act of a State as a conduct, in the form of an action or omission, which is attributable to that State under international law (the so-called subjective element) and constitutes a breach of an international obligation of the State (the so-called objective element). Art. 4 ARIO identifies the same elements referred to international organizations.

As a general rule, a conduct is attributable to a State if it is performed by its organs.[155] There are several exceptions to this principle, all grounded on specific legal or factual relationships between the State in question and other persons or entities which are not its organs.[156] Moreover, the ARISWA addresses also the topic of a State's international responsibility in connection with the acts of another State.[157] The ARIO deals with criteria of attribution of conducts as well. The general rule mirrors that under the ARSIWA: an act is attributable to an international organization if it is performed by its organs or agents.[158] Like the ARSIWA, the ARIO provides for exceptions to this principle[159] and addresses the question of the responsibility of an international organization in connection with the act of a State or of another international organization.[160]

A breach of an international obligation occurs where an act of a State or of an international organization "is not in conformity with what is required of it by that obligation".[161] Whether an international obligation is violated depends on its content and on the corresponding behaviour(s) required of the State or of the international organization.[162] The obligation in question must bind the relevant actor at the time the act occurs.[163]

The work of the ILC also deals with the topic of extension in time of the breach,[164] which has important implications for the legal consequences of an internationally wrongful

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[154] International Law Commission, 'Draft Articles on the Responsibility of International Organizations, with commentaries', *Report of the International Law Commission on the work of its sixty-third session* (sixty-third session, August 2011), UN GAOR Supplement No. 10, UN Doc. A/66/10 and Add. 1 [ARIO].
[155] ARSIWA, Art. 4.
[156] These exceptions are formulated in Arts. 5-11 ARSIWA.
[157] ARSIWA, Arts. 16-18. On this topic, see e.g. Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (2011); Andre Nollkaemper, Ilias Plakokefalos (eds), *Principles of shared responsibility in international law: an appraisal of the state of the art* (2014); André Nollkaemper, Dov Jacobs, Jessica N. M. Schechinger, *Distribution of responsibilities in international law* (2015); Vladyslav Lanovoy, *Complicity and its Limitations in the Law of International Responsibility* (2016); André Nollkaemper et al (eds), *The practice of shared responsibility in international law* (2017).
[158] ARIO, Arts. 6 and 8.
[159] ARIO, Arts. 7 and 9.
[160] ARIO, Arts. 14-18.
[161] ARSIWA, Art. 12; ARIO, Art. 10.
[162] ARSIWA, Commentary to Art. 12, para. 1, according to which "whether and when there has been a breach of an obligation depends on the precise terms of the obligation, its interpretation and application, taking into account its object and purpose and the facts of the case."
[163] ARSIWA, Art. 13; ARIO, Art. 11.
[164] ARSIWA, Art. 14; ARIO, Art. 12. The work of the ILC also addressed the issue of breach consisting of a composite act, respectively at Art. 15 ARSIWA and Art. 13 ARIO.

act. In particular, the ILC distinguishes between instantaneous and continuing violations. As explained by Ago, an instantaneous wrongful act is a breach that is characterised by "the instantaneousness of the conduct of which it consists",[165] whether or not its consequences could have a durable character.[166] Whilst, a continuing wrongful act consists "of a breach that, as such, extends over a period of time."[167] Examples of continuing violations include "the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting State".[168]

Moving to the application of these rules for the violation of socio-economic rights in the context of the Eurozone sovereign debt crisis, a first general remark concerns the relationship between attribution of a breach and accountability of the wrongdoer. International organizations, as subjects of international law, are bound to comply with socio-economic obligations under general international law.[169] However, although the ARIO formulates criteria of attribution of violations to international organizations, there are still two critical aspects concerning the lack of forum and venue to hold international organizations (including international financial institutions) accountable for violations of fundamental rights attributable to them. As is well known, international organizations enjoy jurisdictional immunity before domestic courts and tribunals.[170] Furthermore, accountability mechanisms at the international level "are only rudimental."[171] For the purpose of the present dissertation, it

[165] Roberto Ago, 'Seventh report on State responsibility' (1978) Yearbook of the International Law Commission, Vol. I (1), A/CN.4/307 and Add.1 & 2 and Corr.1 & 2, para. 26

[166] Ago, 'Seventh report, *cit.*, para. 27. Ago defined this conduct as an "instantaneous act producing continuing effects".

[167] Ago, 'Seventh report, *cit.*, para. 27.

[168] ARSIWA, Commentary to Art. 14, para. 3. See also Andrea Saccucci, *La responsabilità internazionale dello Stato per violazioni strutturali dei diritti umani* (2018), 142-148, and the case-law of human rights monitoring bodies thereby provided.

[169] See e.g.Human Rights Council, *Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephas Lumina*, 27 March 2014, A/HRC/25/50/Add. 1, para. 12; Shelton, *Remedies*, *cit.*, 42-51. With specific regards to international financial institutions, see e.g. Sigrun Skogly, *Human Rights Obligations of the World Bank and the IMF* (2001), 93.
Notably, international financial institutions have been reluctant in admitting their human rights obligations under general international law. Their objection is usually grounded on their mandate, which prohibits their interference political affairs of member States. On this stance and on the several reasonings opposed to it, see e.g. Clapham, *cit.*, 137-152.

[170] In this regard, the recent development towards a restrictive (rather than absolute) immunity of international organizations (including international financial institutions) before domestic courts should be mentioned. See e.g. Supreme Court of the United States of America, Jam et al. v. International Finance Corporation, 586 US (2019), Certiorari Decision of 27 February 2019; Pierfrancesco Rossi, 'The International Law Significance of "Jam v. IFC": Some Implications for the Immunity of International Organizations' (2019), 13(2) *Diritti umani e diritto internazionale* 305; Annamaria Viterbo, Andrea Spagnolo, 'Of Immunity and Accountability of International Organizations: A Contextual Reading of "Jam v. IFC"'(2019), 13(2) *Diritti umani e diritto internazionale* 319; Fernando Lusa Bordin, 'To what immunities are international organizations entitled under general international law? Thoughts on Jam v IFC and the "default rules" of IO immunity', (2020), in 72 *Questions of International Law* 5; Yohei Okada, 'The immunity of international organizations before and after Jam v IFC: Is the functional necessity rationale still relevant?' (2020), in 72 *Questions of International Law* 29. See also the case-law of the ECtHR, according to which jurisdictional immunities of international organizations is compatible with Art. 6 of the ECHR only if the applicants have reasonable alternative means to effectively protect their rights under the Convention (e.g. through accountability mechanisms within the organization). See e.g. August Reinisch, Andreas Weber, 'In the Shadow of Waite and Kennedy: The Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement' (2004), 1 *International Organizations Law Review* 59.

[171] Anne Peters, *Beyond Human Rights. The Legal Status of the Individual in International Law* (2016), 492. On

should be noted that there is no venue that allows individuals to claim a breach of their socio-economic rights. This accountability gap exists also in the context of the Eurozone sovereign debt crisis. An exception to this general pattern is the Court of Justice of the EU, which could adjudge and declare violations of the EU Charter of Fundamental Rights resulting from conduct of EU organs or Member States, according to specific procedures and if certain requirements are met.[172]

A second remark concerning attribution of internationally wrongful acts relates to the responsibility of States in connection with acts of another State or of an international organization. Responsibility of States members of international organizations have been a matter of extensive debate.[173] With regard to ES rights, as already recalled the CESCR affirmed that States parties to the Covenant, when acting as members of international financial institutions, should take steps to ensure that these organizations do not interfere with and pay due consideration to socio-economic rights in their lending policies.[174] Moreover, States must comply with their international human rights obligations at all times, including where they act in their capacity as members of international financial institutions.[175] Notwithstanding these developments, responsibility of States members of such organizations still bears no concrete relevance in relation to violations of socio-economic rights. States enjoy jurisdictional immunities before domestic courts of third States, and the (few) monitoring bodies in the international arena have never addressed this issue in the context of individual complaint proceedings.

These two general remarks concerning the topic of attributions of violations of socio-economic rights underpin the choice to address solely the responsibility of Eurozone States that required and obtained economic aid.

Turning to the objective element, the content and scope of States' obligations with regard to socio-economic rights are decisive in order to establish whether there has been a

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this issue, see also e.g. Shelton, *Remedies*, *cit.*, 48-52; Armin von Bogdandy, Mateja Steinbrück Platise, 'ARIO and Human Rights Protection: Leaving the Individual in the Cold' (2012) 9 *International Organizations Law Review* 67; Martina Buscemi, 'La codificazione della responsabilità delle organizzazioni internazionali alla prova dei fatti. Il caso della diffusione del colera a Haiti' (2017), 100(4) *Rivista di diritto internazionale* 989; Martina Buscemi, *Illeciti delle Nazioni Unite e tutela dell'individuo* (2020).

[172] See Chapter 4 of the present dissertation.

[173] See e.g. August Reinisch, 'Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts' (2010), 7 *International Organizations Law Review* 63; Pasquale De Sena, 'Fondo monetario internazionale, Banca mondiale e rispetto dei diritti dell'uomo', in Aldo Ligustro, Giorgio Sacerdoti (eds), *Problemi e tendenze del diritto internazionale dell'economia: liber amicorum in onore di Paolo Picone* (2011), 829; Alain Pellet, 'International Organizations are Definitely Not States. Cursory Remarks on the ILC Articles on the Responsibility of International Organizations', in Maurizio Ragazzi (ed). *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie* (2013), 41; Ana Sofia Barros, Cedric Ryngaert, Jan Wouters (eds), *International Organizations and Member State Responsibility. Critical Perspectives* (2015); Ana Sofia Barros, *Governance as Responsibility: Member States as Human Rights Protectors in International Financial Institutions* (2019).

[174] CESCR, *General Comment No. 19*, *cit.*, para 58; CESCR, *General Comment No. 23*, *cit.*, para. 71.

[175] CESCR, *Letter Dated 16 May 2012*, *cit.*; Human Rights Council, A/HRC/25/50/Add. 1, *cit.*, paras. 13-14; CESCR, Statement 24 June 2016, E/C.12/2016/1, para. 9; Human Rights Council, *Guiding principles on human rights impact assessments of economic reforms. Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights*, 19 December 2018, UN Doc. A/HRC/40/57, Principle No. 2. See also Juan Pablo Bohoslavsky, 'Guiding Principles to Assess the Human Rights Impact of Economic Reforms? Yes', in Ilias Bantekas, Cephas Lumina (eds), *Sovereign Debt & Human Rights* (2018), 402.

breach.[176] Moreover, the extension over time of the violation influences the legal consequences of that internationally wrongful act. Violations of ES rights in contexts of sovereign debt crisis usually occur through commissive conducts of States, and more specifically by means of domestic laws enacting austerity measures. Such policies are often in tension with the prohibition to adopt unjustified retrogressive measures and with minimum core obligations.[177] Austerity measures raise concerns also in relation to specific substantive or procedural guarantees that States must respect, protect or fulfil.

For example, deterioration of the social security scheme afforded to a specific category of workers represents an unjustified retrogressive measure.[178] Another example is cutting the minimum wages below the poverty level, which violates minimum essential levels of the right to just and favourable working conditions.[179] Unilateral modifications of freely concluded collective agreements by means of repeated and extensive intervention through national legislation (e.g. cuts of wages and of other allowances and benefits) are in contrast with States' duty to refrain from amending the content of such binding agreements – i.e. with the States duty to respect the context of such arrangements.[180] Furthermore, such legislative measures usually do not meet the requirements under claw-back clauses, where those are provided for in the text of the relevant instruments.[181]

4. Legal consequences of violations of socio-economic rights in light of general international law on State responsibility

Internationally wrongful acts entail a set of legal consequences in the relations between, on one hand, the State responsible for that act and, on the other, one or more other States, or the international community as a whole, or persons or entities other than States – including individuals.[182] These "automatic substantive corollaries of responsibility"[183] arise irrespective of whether or not a dispute settlement body ascertains the existence of the violation.[184]

The ILC's ARSIWA identifies three legal consequences for the responsible State: i) the obligation to cease continuing the internationally wrongful act;[185] ii) the obligation to offer appropriate assurances and guarantees of non-repetition, if circumstances so require;[186] iii) the obligation to make full reparation for the injury caused by the internationally wrongful act.[187]

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[176] Giorgio Gaja, 'Primary and Secondary Rules in the International Law on State Responsibility' (2014), 4 *Rivista di Diritto Internazionale* 981, 984.
[177] See e.g. Human Rights Council, A/HRC/25/50/Add. 1, *cit.*, para. 5; Sepúlveda Carmona, 'Alternatives to austerity', *cit.*, 32.
[178] European Committee of Social Rights, *ADEDY v. Greece*, *cit.*, paras. 45-49.
[179] CESCR, *General Comment No. 23*, *cit.* para. 65(c). In the context of the Eurozone sovereign debt crisis, see: ILO, Report on the High Level Mission to Greece (Athens, 19-23 September 2011), paras. 309, 311, 312; European Committee of Social Rights, *ADEDY v. Greece*, *cit.*, paras. 60-65.
[180] ILO, 395th Report on Greece, *cit.*, para. 995.
[181] European Committee of Social Rights, *Greek General Confederation of Labour (GSEE) v. Greece*, Complaint No. 111/2014, Decision of 23 March 2017, para. 89-91.
[182] ARSIWA, Art. 28; Commentary to Art. 28, para. 3; Commentary to Art. 33(1), para. 1.
[183] James Crawford, *State Responsibility. The General Part* (2013), 94 [Crawford, *State Responsibility*].
[184] Shelton, 'Remedies and Reparation', *cit.*, 373.
[185] ARSIWA, Art. 30(a).
[186] ARSIWA, Art. 30(b).
[187] ARSIWA, Art. 31.

Full reparation of the injury could take the form of restitution, compensation and satisfaction, either alone or in combination.[188] Besides, the responsible State has the continued duty to perform the primary obligation breached,[189] which stems directly from this primary norm and stands regardless of any breach.

Technically, these three legal consequences operate automatically. Sometimes they may work through diplomatic channels (which could occur e.g. in the event of formal apologies as a form of satisfaction). However, their implementation in practice often requires the invocation of State responsibility before the dispute settlement mechanism which has the competence to rule on the wrongful act, if such venue is available.[190]

As far as violations of human rights are concerned, Art. 33(1) ARSIWA limits the scope of application of the rules on legal consequences for the responsible State to obligations "owed to another State, to several States, or to the international community as a whole". At the same time, Art. 33(2) ARSIWA recognises that such provisions are "without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person". These norms should be read together with Art. 55 on the *lex specialis* principles, according to which ARSIWA as a whole "do not apply where and to the extent that […] the content or implementation of the international responsibility of a State are governed by special rules of international law".

Human rights treaties provide rules on legal consequences of their violation. These norms are strictly connected to the competence of the relevant monitoring body in recommending or ordering the implementation of such measures. Still, there always exist issues "on which treaty regimes remain silent."[191] The question hence is whether rules of general international law governing legal consequences of State responsibility are still applicable to those aspects that are not specifically covered by that particular treaty regime.[192]

The following sections address both the procedural and substantive aspects which follow a breach of international obligations. Section 4.1. deals with the right to an effective domestic remedy and the right to lodge claims at the international level, whereas Section 4.2. sketches the legal consequences of such violation and tackles the issue of the possible residual application of the ARSIWA *vis-à-vis* special secondary norms. Lastly, Section 4.3. suggests some guidelines to assess the adequacy of legal consequences of breaches of socio-economic rights in contexts of sovereign debt crisis.

4.1. The right to an effective domestic remedy and the right to individual and collective petition at the international level

States parties to human right treaties undertake an obligation to respect, to protect and to fulfil each treaty-based right, alongside the more general obligation to ensure the right to an

[188] ARSIWA, Art. 34. These different forms of reparation are dealt with in subsequent Articles, namely: Art. 35 (restitution), Art. 36 (compensation), and Art. 37 (satisfaction).
[189] ARSIWA, Art. 29.
[190] Crawford, *State Responsibility*, *cit.*, 95.
[191] Crawford, *State Responsibility*, *cit.*, 105.
[192] Crawford, *State Responsibility*, *cit.*, 103; Bruno Simma, Dirk Pulkowski, '*Leges Speciales* and Self-Contained Regimes', in Crawford et al, *The Law of International Responsibility* (2010), 139, 146.

adequate and effective remedy for acts violating such rights.[193] The right to an effective remedy has both a procedural and a substantive component.

The procedural component requires the existence of national institutions and procedures which have the competence to assess the merit of individual or collective claims and to rule on the legal consequences of the violation, including granting one or more forms of substantive reparation. Hence, the right to an effective remedy walks hand-in-hand with the States' obligation to ensure that individuals and groups have the possibility to institute proceedings, usually before a tribunal or a court.[194] The substantial component concerns the forms of reparation that the competent international forum could provide, e.g. restitution, compensation, non-monetary remedies, punitive damages.[195]

The monitoring bodies empowered with the task of supervising compliance with the obligations of the relevant treaties also have the competence to ascertain the adequacy and effectiveness of the domestic remedy. This evaluation is based on other international standards, such as the procedural guarantees related to due process of law and the right to a fair trial.[196] Monitoring bodies also assess the adequacy of the substantive form of reparation granted at the national level, i.e. whether it is capable of providing appropriate redress for the consequences of the human rights violation.[197]

The right to a domestic effective remedy is also linked to the rule imposing the exhaustion of local remedies before lodging a complaint before international supervisory bodies. This admissibility criterion is enshrined in the majority of human right treaties and optional protocols,[198] and has been the subject of extensive case-law. According to this practice, the applicability of this requirement presumes the existence of effective and adequate domestic remedies.[199] The right to an effective and adequate domestic remedy, as well as the admissibility criterion of the previous exhaustion of such remedies, are corollaries of the principle of subsidiarity which governs the supervisory tasks of international monitoring bodies: according to this principle, the national authorities are primarily responsible for

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[193] The right to an effective remedy is enshrined in several binding and soft-law documents. See e.g. Universal Declaration of Human Rights, Art. 8; International Covenant on Civil and Political Rights (16 December 1966, entry into force 23 March 1976) 999 UNTS 171, Art. 2(3) [ICCPR]; CERD, Art. 6; CEDAW, Art. 2(c); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984, entry into force 26 June 1987) 1465 UNTS 85, Art. 13; ECHR, Art. 13; Charter of Fundamental Rights of the European Union, Art. 47; ACHR, Art. 25; AfCHPR, Art. 7(1); Arab Charter on Human Rights (15 September 1994), Art. 23; UNGA, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 21 March 2006, A/RES/60/147, Basic Principles 2(b), 3(c), 12-14. On the right to an effective remedy in human rights law, see e.g. Adriana Di Stefano, 'Il diritto di accesso alla giustizia nel diritto internazionale e dell'Unione europea. Brevi note in tema di effettività dei rimedi interni a garanzia dei diritti umani' (2018) 3 *Diritto Costituzionale* 11; Hennebel, Tigroudja, *cit.*, 1294-1312.

[194] Shelton, *Remedies*, *cit.*, 17-18, 96-97; Hennebel, Tigroudja, *cit.*, 1296.

[195] Shelton, *Remedies*, *cit.*, 98.

[196] Shelton, *Remedies*, *cit.*, 100-107; Antônio Augusto Cançado Trindade, *The Access of Individuals to International Justice* (2011), 63-75; Hennebel, Tigroudja, *cit.*, 1297-1303.
On the right to a fair trial, see e.g. Hennebel, Tigroudja, *cit.*, 1312-1369.

[197] Shelton, *Remedies*, *cit.*, 18-19, 106-107; Cançado Trindade, *cit.*, 100-107; Hennebel, Tigroudja, *cit.*,1302-1303.

[198] See e.g. Op-Protocol to the ICESCR, Art. 3; Art. 41(c) ICCPR; ECHR, Art. 34; ACHR, Art. 46(1)(1). Remarkably, the European Social Charter does not require the previous exhaustion of domestic remedy as an admissibility requirement to lodge a complaint before the European Committee on Social Rights.

[199] On the rule imposing the previous exhaustion of domestic remedies, see e.g. Hennebel, Tigroudja, *cit.*, 502-517. See also Cançado Trindade, *cit.*, 98-99; Shelton, *Remedies*, *cit.*, 89-94.

safeguarding treaty-based rights, whilst international proceedings have a subsidiary character, *viz*. are subordinate to the failure in complying with the relevant obligations.[200] The previous exhaustion of local remedies by injured parties (whether natural or legal persons) is also a condition for the State of nationality to exercise diplomatic protection.[201]

Turning to the international level, generally speaking individuals and groups enjoy the right to initiate proceedings before the competent treaty-based committees, commissions and courts to claim States' responsibility and seek a substantive redress for the violations of their human rights – where such venues are available.[202] Each mechanism has its own rules on procedural matters, such as e.g. standing, burden of proof, admissibility criteria.[203]

These considerations stand untouched in case of violations of socio-economic rights. In the event of a breach, individuals and groups should have access to effective remedies at national level,[204] which also entails the obligations of the responsible State to establish such corrective mechanisms.[205] These means include also judicial remedies, in light of the consideration that each ES right has, at the very least, some justiciable dimensions and, hence, cannot be completely beyond the reach of domestic courts and tribunals.[206] Individuals and groups are also entitled to initiate proceedings before international monitoring bodies, where such venues are available.

The European multi-level system of protection of socio-economic rights provides several forums for claiming the violation of socio-economic rights. As mentioned in Chapter I, individuals and/or groups may sue the responsible State before international committees with universal and regional mandates, such as the CESCR, the ILO Committee on Freedom of Association and the European Committee on Social Rights. Moreover, applicants may initiate proceedings before the European Court of Human Rights to vindicate the breach of the (few) socio-economic rights recognised under the ECHR. Furthermore, plaintiffs may resort to the Court of Justice of the European Union to assert the infringement of the EU Charter on Fundamental Rights, if certain conditions are met. Last but not least, petitioners may recourse to national courts and tribunals for violations of international and constitutional provisions safeguarding socio-economic rights.

In the aftermath of the Eurozone sovereign debt crisis, individuals and/or groups referred cases to all such forums. The following chapters of the present dissertation address the case-law of each of these venues.

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[200] Hennebel, Tigroudja, *cit.*,1294, 1299-1; Cançado Trindade, *cit.*, 98.

[201] See, above all, International Law Commission, 'Draft articles on Diplomatic Protection', *Report of the International Law Commission on the work of its fifty-eighth session* (Fifty-eighth session, 2006), UN GAOR Supplement No. 10, UN Doc. A/61/10, Art. 14 and commentary.

[202] For a comprehensive analysis, see Cançado Trindade, *cit.*

[203] For a comparative overview, see e.g. Shelton, *Remedies*, *cit.*, 191-282; Hennebel, Tigroudja, *cit*, 429-561.

[204] CESCR, The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 2 October 2000, E/C.12/2000/13, Guideline No. 22; CESCR, *General Comment No. 3*, *cit.*, para. 5.

[205] The Maastricht Guidelines, *cit.*, Guideline No. 16.

[206] CESCR, *General Comment No. 9: The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24, para. 10. On the justiciability of ES rights, see also Section 1 above.

4.2. Substantive legal consequences between *lex specialis* and general rules

As introduced above, the ILC's ARSIWA identifies three legal consequences for the responsible State: cessation, assurances and guarantees of non-repetition, and full reparation.

The first applies solely in cases of continuing internationally wrongful acts,[207] i.e. violations that extend over a period of time, such as those stemming from legislative provisions incompatible with treaty obligations.[208] Cessation is meant to "to put an end to a violation of international law and to safeguard the continuing validity and effectiveness of the underlying primary rule".[209] The obligation to offer appropriate assurances and guarantees of non-repetition, if circumstances so require,[210] focuses on prevention of future breaches and is "concerned with the restoration of confidence in a continuing relationship".[211] Both these legal consequences – cessation and guarantees and assurances of non-repetition – assumes the continued duty upon the responsible State to conform to the primary obligation previously breached by that same State.[212]

The obligation to make full reparation could take the form of restitution, compensation and satisfaction, either alone or in combination.[213] As clarified by the Permanent Court of International Justice in the *Factory at Chorzów* case, reparation "must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[214]

Restitution in kind has primacy over other forms and consists in the re-establishment of "the situation which existed before the wrongful act was committed."[215] The obligation to provide full reparation by means of restitution meets two limits: material impossibility (e.g. destruction of the property to be restored) and grave disproportionality between, on the one hand, the benefit deriving from restitution and, on the other, the burden that such form of reparation would impose on the responsible State.[216] Where restitution is not provided or it does not fully repair the consequences of the internationally wrongful act, the responsible State must award monetary compensation for any financially assessable material and moral damage.[217] The third and last form of reparation is satisfaction, which may consist in "an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality."[218] Satisfaction must not be disproportionate, not unduly humiliating for the responsible State.[219]

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[207] ARSIWA, Art.30(a).
[208] See also Section 3 above.
[209] ARSIWA, Commentary to Art. 30, para. 5.
[210] ARSIWA, Art. 30(b).
[211] ARSIWA, Commentary to Art. 30, para. 9.
[212] ARSIWA, Art. 29. See also Shelton, *Remedies, cit.*, 38.
[213] ARSIWA, Art. 31 and Art. 34. These different forms of reparation are dealt with in subsequent Articles, namely: Art. 35 (restitution), Art. 36 (compensation), and Art. 37 (satisfaction).
[214] Permanent Court of International Justice, *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Jurisdiction), (Germany v. Poland)*, Judgment, PCIJ Series A. - No. 9, 26 July 1927, 22. The same judgment also identified two out of the three different forms of reparation later codified in the ARSIWA, namely restitution in kind and compensation.
[215] ARSIWA, Art. 35. See also: PCIJ, *Factory at Chorzów*, 22.
[216] ARSIWA, Art. 35; ARSIWA, Commentary to Art. 35, paras. 8-11.
[217] ARSIWA, Art. 36, together with Art. 31(1). See also Art. 38 on interests on principal sum.
[218] ARSIWA, Art. 37.
[219] ARSIWA, Art. 37.

It should also be recalled that the content of the obligation to cease and that of the obligation to make full reparation in the form of restitution in kind may overlap. This is the case of "the freeing of hostages, or the return of objects or premises seized."[220] Nonetheless, cessation is not subject to the limits of restitution, namely material impossibility and proportionality.[221]

As introduced above, Articles 33 and 55 ARSIWA limit the scope of application of these norms. In particular, rules on legal consequences of breaches enshrined in human rights treaties are *lex specialis* in relation to the general framework codified in the ARSIWA. Hence, the former special secondary rules apply in case of infringement of the primary obligations under the relevant human rights convention. However, the question remains whether general international norms on legal consequences of violations may still be relevant in such situations, *viz.* whether the ARSIWA may operate as residual law. This issue relates to the more general topic of the relation between the so-called "self-contained regimes" and general international law and, hence, to the problem of fragmentation in international law. These themes have been the subject of extensive doctrinal debate and significant case-law.[222] Both are outside the scope of the present dissertation. Still, a brief recap of the stance of highly qualified Scholars and of the practice of human rights court is necessary in order to take a position on the role of the ARSIWA's rules on legal consequences of a breach with regard to violations of primary obligations concerning human rights.

Several ILC Special Rapporteurs on State responsibility investigated the relation between secondary rules under special treaty-regimes and general international law.[223] The final version of the ARSIWA codified the *lex specialis* rule in Art. 55, whose commentary distinguishes between "strong forms" and "weaker forms" of *lex specialis*. The former type of regimes completely excludes the application of secondary general obligations, whilst the latter allows for their residual application.[224] According to Koskenniemi, one of the possible meanings of self-contained regime coincides with the notion of "strong form" of *lex specialis*,[225] as the principal characteristic of self-contained regimes is to exclude altogether the application of general rules concerning the consequences of wrongful acts.[226]

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[220] ARSIWA, Commentary to Art. 30, para. 7. See also Saccucci, *cit.*, 235-238; Giulio Bartolini, *Riparazione per violazione dei diritti umani e ordinamento internazionale* (2009), 204-218; Massimo Iovane, *La riparazione nella teoria e nella prassi dell'illecito internazionale* (1990), 198-199.

[221] ARSIWA, Commentary to Art. 30, para. 7.

[222] See e.g. Bruno Simma, 'Self-Contained Regimes' (1985), 16 *Netherlands Yearbook of International Law* 111; ILC, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, 13 April 2006, U.N. Doc. A/CN.4/L.682; Simma, Pulkowski, *cit.*; Crawford, *State Responsibility*, *cit.*, 93.

[223] For a summary of the positions of Special Rapporteurs Ago, Riphagen, Arangio-Ruiz and Crawford, see Koskenniemi, *cit.*, paras. 138-151.

[224] ARSIWA, Commentary to Art. 55, para. 5. See also Simma, Pulkowski, *cit.*, 142; Crawford, *State Responsibility*, *cit.*, 104-105.

[225] Koskenniemi, *cit.*, para. 124. For the Special Rapporteurs, the category of self-contained regime covers three (not clearly distinguished) notions: i) the case where a special set of secondary rules claims priority over the secondary rules in the general law of State responsibility; ii) interrelated wholes of primary and secondary rules, sometimes also referred to as "systems" or "subsystems" of rules that cover some particular problem differently from the way it would be covered under general law; iii) fields of functional specialization, of diplomatic and academic expertise (see paras. 124-137). For the purpose of the present dissertation, the first notion is the relevant one.

[226] Simma, Pulkowski, *cit.*, 144.

Whether special rules on responsibility fall within the first or secondary category and, hence, constitute a self-contained regime is a matter of interpretation.[227] According to Crawford, there are cases where it is clear from the language of the treaty that only the consequences specified are to flow, while in other cases the interpretation of the convention leaves room for the application of the general framework.[228] On the contrary, Simma and Pulkowksi argued that "treaty interpretation does not allow such clear-cut conclusions"[229] and even regimes which are apparently self-contained are not "completely decoupled from the secondary rules of general international law".[230] The latter position is consistent with the view of Koskenniemi, who contended that "no regime is completely isolated from general law".[231]

Regardless of the admissibility *in abstracto* and the existence *in concreto* of self-contained regimes,[232] the question of the relevance of general rules on legal consequences of a breach with regard to gaps of treaty-based systems stands untouched. In this respect, Scholars unanimously support the idea of a "fallback onto the general law of State responsibility" where it serves the purpose of enhancing the effectiveness of the obligations established under the special regime.[233] This position is in line with the already mentioned teleological and systemic criteria of interpretation under Art. 31 VCLT, as they respectively request to interpret a treaty in light of its "object and purpose" taking into account "relevant rules of international law applicable in the relations between the parties", including general international law.[234]

According to Scholars, this approach applies to treaties safeguarding human rights. General rules on legal consequences of a breach fill the gaps of this special regime.[235] The case-law of monitoring bodies confirms this view.[236] As an example, Art. 41 ECHR recognises that, under certain circumstances, the ECtHR "shall afford just satisfaction to the injured party." It covers awards for damages, hence it is *lex specialis* regarding monetary compensation under the ARSIWA.[237] The grant of just satisfaction is a discretionary power of the Court, i.e. it does not necessarily flow from the finding of a breach.[238] However, under Art. 46(1) ECHR States parties must abide by the final judgment of the ECtHR in any case to which they are parties. According to the ECtHR case-law, a finding of a violation "imposes to the respondent State a legal obligation *to put an end* to the breach and *make reparation* for its consequences in such a way as to restore as far as possible the situation existing before the

[227] Koskenniemi, *cit.*, para. 159; Crawford, *State Responsibility*, *cit.*, 104; Simma, Pulkowski, *cit.*, 145.
[228] ARSIWA, Commentary to Art. 55, para. 3; Crawford, *State Responsibility*, *cit.*, 104.
[229] Simma, Pulkowski, *cit.*, 145.
[230]Simma, Pulkowski, *cit.*, 158.
[231] Koskenniemi, *cit.*, para. 159. See also Gaetano Arangio-Ruiz, 'Fourth Report on State Responsibility' (1992), Yearbook of the International Law Commission, Vol. II (1), A/CN.4/444 and Add.1-3, para. 112.
[232] For this distinction, see Arangio-Ruiz, *cit.*, paras. 97-112.
[233] Koskenniemi, *cit.*, paras. 137, 186; Simma, Pulkowski, *cit.*, 148-149; Crawford, *State Responsibility*, *cit.*, 105.
[234] Crawford, *State Responsibility*, *cit.*, 105.
[235] Koskenniemi, *cit.*, 159-164; Simma, Pulkowski, *cit.*, 158-162; Crawford, *State Responsibility*, *cit.*, 104-105; Saccucci, *cit.*, 116-120.
[236] For a comprehensive overview of such case-law, see e.g. Bartolini, *cit.*, 204-495; Shelton, *Remedies*, *cit.*, 193-238.
[237] ECtHR, *Cyprus v. Turkey*, Application No. 25781/94, Judgment (Just Satisfaction) of 12 May 2014, para. 42: "[B] bearing in mind the specific nature of Article 41 as *lex specialis* in relation to the general rules and principles of international law […]".
[238] Harris et al (eds.), *cit.*, 163-164.

breach."[239] Following this statement, the Court may decide that the State must cease the continuing illicit conduct, or it may indicate individual measures (e.g. re-opening of proceedings) or general measures (e.g. amendment to national legislation) that the respondent State must adopt to abide by the judgment and remedy the violation. These measures may also take the form of restitution in kind (e.g. return the property).[240] Moreover, the ECtHR may deem the finding of a violation as a sufficient form of reparation.[241] Such declaratory judgments correspond to satisfaction under the ARSIWA.[242]

Another example is the Optional Protocol to the ICESCR, which empowers the CESCR to adopt recommendations following the examination of an individual communication.[243] This rule does not contain a list of legal consequences that the CESCR may indicate to the respondent State. Despite this normative silence, recently the Committee recommended the adoption of specific forms of reparation (such as monetary compensation), alongside other legal consequences of the breach, namely guarantees of non-repetition.[244]

Having assumed that substantial general rules on State responsibility may be relevant in the field of human rights, the case-law of monitoring bodies raises the question of whether such mechanisms have the competence to recommend or order measures different from those expressly envisaged in the relevant treaty or optional protocol. As a general remark, the competence of these bodies (whether courts, commissions or committees) to recommend or order measures following a breach may be either explicitly recognised under the treaty in question, or inferred through interpretation.[245] Even where this competence has a legal basis, treaty rules may not contain a complete catalogue of legal consequences, as in the examples concerning the ECtHR and the CESCR. In these cases, supervisory mechanisms are still bestowed the competence to recommend or order the adoption of measures different from those set forth in treaty provisions in light of their inherent authority (or powers).[246]

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[239] ECtHR, *Papamichalopoulos and others v. Greece* (Article 50), Application No. 14556/89, Judgment (Just Satisfaction) of 31 October 1995, para. 34 (emphasis added).
[240] Harris et al (eds.), *cit.*, 165, 170-173, 188-194.
[241] Harris et al (eds.), *cit.*, 163.
[242] Matthieu Loup, 'The Content of State Responsibility under the European Convention on Human Rights. Some Reflections on the Court's Approach to General International Law on State Responsibility' (2017), in Samantha Besson (ed), 10 *International Responsibility. Essays in Law, History and Philosophy* 139, 154.
[243] Op-Prot. ICESCR, Art. 9 (Follow-up to the views of the Committee): "1. After examining a communication, the Committee shall transmit its views on the communication, together with its recommendations, if any, to the parties concerned. 2. The State Party shall give due consideration to the views of the Committee, together with its recommendations, if any, and shall submit to the Committee, within six months, a written response, including information on any action taken in the light of the views and recommendations of the Committee. 3. The Committee may invite the State Party to submit further information about any measures the State Party has taken in response to its views or recommendations, if any, including as deemed appropriate by the Committee, in the State Party's subsequent reports under articles 16 and 17 of the Covenant."
[244] CESCR, *General Comment No,* 14, *cit.*, para. 59; CESCR, *General Comment No. 18, cit.*, para. 48; CESCR, *General Comment No. 19, cit.*, para. 77; CESCR, *I.D.G. v. Spain*, Communication No. 2/2014, E/C.12/55/D/2/2014, 17 June 2015, paras. 16-17; CESCR, *Mohamed Ben Djazia, Naouel Bellili and others v. Spain*, Communication No. 5/2015, E/C.12/61/D/5/2015, 20 June 2017, paras. 20-21. The language used by the CESCR does not reflect that of the ARSIWA, as the Committee considers the guarantees of non-repetition as a remedy (i.e. a form of reparation). This terminology reflects that used in other non-binding documents, according to which reparation may take the form of restitution, compensation, rehabilitation satisfaction and guarantees of non-repetition. See e.g. the UN Basic Principles and Guidelines of 2005 (para. 18); the Maastricht Guidelines, para. 23. The present thesis adopts a restrict conception of substantive remedy/reparation which reflects those under the ARSIWA.
[245] On this issue, see e.g. Shelton, *Remedies*, *cit.*,191-238; Peters, *cit.*, 178.
[246] Shleton, *Remedies*, *cit.*, 191-193; Saccucci, *cit.*, 209-212; Palombino, *cit.* (2019), 103-104. See also: PCIJ,

Inherent powers are those powers "that are not explicitly granted to the tribunal but must be seen as a necessary consequence of the parties' fundamental intent to create an institution with a judicial nature".[247] Scholars suggest that the source of the inherent powers of international courts and tribunals is the judicial organs' need to fulfil their functions.[248] Universal and regional monitoring bodies, whether courts, commissions or committees, perform the task of assessing compliance with human rights treaties. Deciding upon the legal consequences of a wrongdoing (including substantial remedial measures) is an intrinsic part of this task.[249]

4.3. Legal consequences of violations of socio-economic rights in the context of sovereign debt crisis: proposed criteria to perform an adequacy assessment

Turning to the legal consequences of violations of socio-economic rights in contexts of sovereign debt crisis, two aspects should be taken into account. The first consists in the collective dimension of socio-economic rights, i.e. the circumstance that the effective enjoyment of these rights often relies on the allocation of resources and on labour-market reforms which are addressed to entire sections of the population. The second encompasses the general obligations concerning these rights, namely the duty to progressively achieve the full realization of ES rights, the prohibition of unjustified retrogressive measures and minimum core obligations.

As mentioned above, the collective dimension of socio-economic rights has both a substantial and procedural component. Regarding the former, violations of socio-economic rights are often caused by legislative measures and Governments' policies that affect individuals both personally and as part of the group targeted by the reform in question. For example, the cut of public servants' wages affects workers individually and as members of the class targeted. About the latter, the European Committee of Social Rights and the ILO Committee on Freedom of Association may rule exclusively on claims submitted by certain

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Factory at Chorzów, 23-24; ICJ, *Nuclear Tests (Australia v. France)*, Judgment of 20 December 1974, I.C.J. Reports 1974, p. 253, para. 23; International Centre for Settlement of Investment Disputes, *Hrvatska Elektroprivreda v. The Republic of Slovenia*, ICSID Case No. ARB/05/24, Order Concerning the Participation of Counsel, 6 May 2008, para. 33; ECtHR, *Salduz v. Turkey* [GC], Application No. 36391/02, Judgment of 27 November 2008, Joint Concurring Opinion of Judges Rozakis, Spielmann, Ziemele and Lazarova Trajkovska, para. 12; Inter-American Court of Human Rights, *Baena Ricardo et al v. Panama*, Judgment of 28 November 2003 (Competence), para. 72. See in particular *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, Decision of 30 April 1990, UNRIAA vol. XX, p. 215, para. 114, according to which "The question which arises is whether an order for the cessation or discontinuance of the wrongful omission may be issued in the present circumstances. *The authority to issue an order for the cessation or discontinuance of a wrongful act or omission results from the inherent powers of a competent tribunal* which is confronted with the continuous breach of an international obligation which is in force and continues to be in force." (emphasis added).

[247] Iran–US Claims Tribunal, *Iran v. United States (Decision Ruling on Request for Revision by Iran)*, Decision of 1 July 2011, DEC 134-A3/A8/A9/A14/B61-FT), para. 59.

[248] Iran–US Claims Tribunal, Iran v. United States, *cit.*, para. 59. See also Palombino, *cit.*, 103-104; Chester Brown, 'The Inherent Powers of International Courts and Tribunals' (2006), 76(1) *British Yearbook of International Law* 196, 228.

[249] Shelton, *Remedies*, *cit.*, 191-193; Dinah Shelton, 'Inherent and Implied Powers of Regional Human Rights Tribunals', in Carla M. Buckley, Alice Donald, Philip Leach (eds), *Towards Convergence in International Human Rights Law. Approaches of Regional and International Systems* (2016), 454 [Shelton, 'Inherent and Implied Powers'].

non-governmental organizations and from workers' or employers' trade unions, respectively. Because these two bodies do not admit individual claims, both Committees assess the alleged non-compliance of national legislation with the European Charter of Fundamental Rights and ILO Conventions – and not individual situations. Such considerations support the idea that ES rights are often violated through legislative provisions or systemic practices that have a wide-spread impact. Where this event occurs, breaches of socio-economic rights require structural measures to the benefit of all the victims, so to meet their collective dimension. The only way to reach this result is for the measure to address the general cause(s) of the infringement, rather than providing individual redress to single petitioners.[250]

At the same time, such measures should preserve the State's economic soundness. This necessity stems from the State's general obligations concerning socio-economic rights. Although not each and every one of these rights relies on public finances (e.g. the right to form and join trade unions is cost-free for the State), the realization of some of them is undoubtedly costly (e.g. the right to health care). Measures addressing the infringement of ES rights should avoid worsening States' balance of payment problems. The opposite outcome will hinder the Country's capacity to progressively achieve the full realization of socio-economic rights, or even to ensure their minimum core.[251]

Breaches of socio-economic rights in contexts of sovereign debt crisis conform to this scheme. Austerity measures are usually enacted through national statutes, and more specifically State budget laws which allocates resources, impose cuts on public spending, and establish tax hikes according to the designed fiscal outcome to be achieved. The rules thereby enshrined usually govern these matters for a fixed period of time after the entry into force of the law (e.g. the following year, the following three years).[252] Hence, any violations of socio-economic rights caused by such legislation has a continuing character.

As far as legal consequences of internationally wrongful acts are concerned, the responsible State has the duty to cease any such continuing wrongful act – i.e. repealing or amending these domestic statutes. The revocation or modification of national laws implementing austerity measures may also constitute sufficient guarantees and assurances of non-repetition, as long as the novel regime complies with the States' primary international obligations on ES rights.[253] At the same time, these measures overlap with a form of substantive reparation, namely restitution in kind. For example, revocation of austerity measures cutting minimum wages results in the re-establishment of the situation which existed before the wrongful act was committed, as occurred in Portugal.[254] Another example concerns Spain, where a statute restored the universal access to public health care,[255] as

[250] Shelton, 'Remedies and Reparation', *cit.*, 380; David Bilchitz, 'Socio-economic rights, economic crisis, and legal doctrine' (2014), 12(3) *International Journal of Constitutional Law* 710, 717. See also Saccucci, *cit.*, 67.
[251] Michael Reisman, 'Compensation for Human Rights Violations: The Practice of the Past Decade in the Americas', in Albert Randelzhofer, Christian Tomuschat (eds.) *State Responsibility and the Individual. Reparation in Instances of Grave Violations of Human Rights* (1999), 63, 65-67.
[252] See e.g. the Portuguese budget law: Law No. 64-B/2011 of 30 December, 'Orçamento do Estado para 2012', Diário da República No. 250/2011, 1º Suplemento, Série I de 2011-12-30; Law No. 83-C/2013 of 31 December, 'Orçamento do Estado para 2014', Diário da República No. 253/2013, 1º Suplemento, Série I de 2013-12-31.
[253] Saccucci, *cit.*, 133.
[254] Judgment of the Portuguese Constitutional Court No. 187/2013 in Cases Nos. 2/2013, 5/2013, 8/2013 and 11/2013 (Diário da República n.º 78/2013, Série I de 2013-04-22). For further details, see Chapter V.
[255] Royal Decree Law No. 7/2018 of 27 July "sobre el acceso universal al Sistema Nacional de Salud".

opposed to the previous exclusion of undocumented migrants.[256] Nonetheless, cessation does not encounter the same limitations as restitution in kind, hence States responsible for the breach could not refuse to remove austerity measures by invoking material impossibility or disproportionality.

Lastly, monetary compensation is not a suitable form of reparation for violations of socio-economic rights in the context of sovereign debt crisis. First, the individual character of monetary compensation would be at odds with the *collective* nature of the ESC rights. Second, should a monetary compensation be awarded, other victims could, in theory, seek a similar relief. This could potentially result in the State being ordered to pay very large sums. A similar collateral effect occurred for example in Romania, where the Constitutional Court declared the unconstitutionality of pension cuts and scheduled the awarding of compensation in favour of the individual affected. This decision was financially unsound, since it required the allocation of over 1% of Romania GDP.[257] Still, the preservation of States' already scarce economic resources represents a public interest which should be balanced with the specific ES right violated, with the view not to hamper the enjoyment of other relevant socio-economic rights. Thus, although restoration of wages, pensions and other allowances is in principle fair from the victims' standpoint, it should be weighed with its economic suitability, specifically in a context of a severe sovereign debt crisis.[258] In this regard, it is noteworthy that even a single amendment to economic and fiscal programmes agreed with international lenders leads to a significant budgetary deviation: in other words, the repeal of an austerity measure brings a change in the agreed recovery plan, since the budgetary objectives previously settled could no longer be achieved through conditionality which violates the relevant State's human rights obligations. Thus, on one side the simple removal of an austerity measure affects the fiscal and economic rescue of the State involved by indirectly creating a budgetary gap. On the other side, it triggers the re-negotiation of the relevant Memorandum of Understanding which will be more human rights-oriented.

Besides these legal and economic reasons, considerations of social justice support the idea that making good for damages is not the most adequate redress in situations of sovereign debt crisis. Not all the victims have the economic means to initiate this proceeding and awarding compensation to the parties of the dispute at the expenses of the State budget will divest public spending of its redistributive role.[259] The granting of such a redress would widen the gap between the wealthiest and the most vulnerable individuals and groups and would exacerbate the consequences of the economic crisis: only the wealthier could initiate this proceeding and States' resources would be further reduced at the expense of welfare services,

[256] Royal Decree Law No. 16/2012 of 20 April "de medidas urgentes para garantizar la sostenibilidad del Sistema Nacional de Salud y mejorar la calidad y seguridad de sus prestaciones". For further details, see Chapter V.
[257] Claire Kilpatrick, 'Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry', in T. Beukers, B. De Witte, C. Kilpatrick (eds), *Constitutional Change Through Euro-Crisis Law* (2017), 279, 319.
[258] Akritas Kaidatzis, 'Socio-economic rights enforcement and resource allocation in times of austerity: The case of Greece 2015-2018' (2020), in *Populist Constitutionalism - Working Papers No. 2*, 25, available at: www.popcon.gr.
[259] Helena Alviar Garcìa, 'Distribution of resources led by courts. A few words of caution', in Helena Alviar Garcìa, Karl Klare, Lucy A. Williams (eds), *Social and Economic Rights in Theory and Practice. Critical Inquiries* (2007), 67; David Landau, 'The promise of a minimum core approach: the Colombian model for judicial review of austerity measures', in Nolan (ed), *cit.*, 267, 290.

on which the others – which constitute the majority of the population – rely the most, especially in periods of economic crisis.[260]

This scenario should be distinguished from that of infringement of ES rights outside the context of economic and financial turmoil, as usually in the latter awarding compensation does not seriously impinge upon States' already scarce budgetary resources and, consequently, on its ability to comply with its general international obligations.

Ultimately, in contexts of sovereign debt crises such as that faced by Eurozone States, the legal consequence of the breach should consist in the removal of domestic austerity measures. This outcome could be achieved through legislative or judicial means. Regarding the former, decisions and judgments of supervisory bodies at the international and EU level could trigger the amending process of the contested policy.[261] Such changes result in advantages towards *all* the victims and do not imply payment of losses by the State – *viz.* they meet the *collective* dimension of socio-economic rights and preserve States' economic soundness. Concerning the latter, declarations of unconstitutionality without retroactive effects entail the removal of austerity measures to the benefit of *each and every* right-holder, hence fulfilling the *collective* dimension of ES safeguards, while the restriction of the temporal scope of the rulings prevents a (further) decrease of States' (already scarce) economic resources.[262] When deciding on the legitimacy of austerity measures, national constitutional courts should rely also on treaty-based socio-economic rights in order to ensure that the forum State acts in conformity with its international obligations. The duty of securing compliance with international law stands regardless of the way in which the specific State systems adapts to international law.[263]

In light of the above, the following Chapters address whether international committees, the ECTHR, the ECJ and national courts adopted this approach to legal consequences of violations of socio-economic rights in the context of the Eurozone sovereign debt crisis.

[260] Landau, *cit.*, 283 and 285. Akritas Kaidatzis, 'Socio-economic rights enforcement and resource allocation in times of austerity: The case of Greece 2015-2018' (2020), in *Populist Constitutionalism - Working Papers No. 2*, 25-26, available at: www.popcon.gr.

[261] For an overview of the theory of dialogic remedies, see Kent Roach 'The Challenges of Crafting Remedies for Violations of Socio-economic Rights', in Malcolm Langford (ed), *Social Rights Jurisprudence Emerging Trends in International and Comparative Law* (2009), 46, 51-55.

[262] On the power of Constitutional Courts in determining the temporal scope of declarations of unconstitutionality, see e.g. Allan R. Brewer-Carías, *Constitutional Courts as Positive Legislators. A Comparative Law Study* (2011), 103-114; Francesco Gallarati, *La Robin Tax e l'"incostituzionalità d'ora in poi": spunti di riflessione a margine della sentenza n. 10/2015* (2015), 19 *Federalismi*, 1.

[263] Benedetto Conforti, Angelo Labella, *An Introduction to International Law* (2012), 7.

CHAPTER III

CRISIS LITIGATION AT THE INTERNATIONAL LEVEL

SUMMARY 1. Challenging conditionality measures before international monitoring bodies: brief remarks on complaint procedures 2. The active role of the international committees 2.1. The views of the UN Committee on Economic, Social and Cultural Rights on Spain: the violation of the right to adequate housing 2.1.1. Brief remarks 2.2. The report of the ILO Committee on Freedom of Association: the trade unions' challenges to the structural labour market reforms enacted in Greece, Spain and Portugal 2.2.1. Brief remarks 2.3. The decisions of the European Committee of Social Rights concerning Greece 2.3.1 Dismissal without notice and severance pay 2.3.2. Working conditions of young employees 2.3.3. Public and private pension schemes and the right to social security 2.3.4. Austerity-driven reforms of labour market: reloaded 2.3.5 Brief remarks 3. The approach of the European Court of Human Rights towards the right to property and the right to housing 3.1. Applications claiming the violation of the right to property due to austerity measures 3.1.1. The reduction of public servants' wages and pensions in Greece and Portugal 3.1.2. The haircut on Greek bonds 3.2. Interim measures and the right to housing in Spain 3.3. Brief remarks 4. Strengthening the protection of fundamental rights in times of economic crisis before the European Court of Human Rights 4.1. The unlikelihood of alternative adjudicative approaches towards the right to property and potential strategic litigation *vis-à-vis* labour-related claims 4.2. Legal consequences of the finding of a violation 5. Overlapping jurisdictions and competing proceedings in the area of socio-economic rights: an appraisal in light of the Eurozone sovereign debt crisis 5.1. Competing proceedings and coordinating rules at the domestic level and in international human rights law: a hint 5.2. Competing proceedings in the context of the Eurozone sovereign debt crisis: the uncertainty surrounding the application of the *lis pendens* and *res judicata* principles 6. Preliminary conclusions on crisis litigation at the international level

1. Challenging conditionality measures before international monitoring bodies: brief remarks on complaint procedures

Generally speaking, international human rights treaties provide monitoring mechanisms which usually entail reporting systems and complaint procedures. Under the first system, States parties to a treaty periodically submit national reports on the implementation of the relevant convention to an international body. Such a body has the task to assess States parties' compliance with the treaty mainly based on the information supplied by domestic authorities, alongside additional material eventually submitted by civil society actors, and for the period covered by the report.[1] The latter system covers inter-state complaints and individual and/or

[1] For a comprehensive overview, see Ludovic Hennebel, Helene Tigroudja, *Traité de droit international des droits de l'homme* (2018), 593-613. Civil society actors may engage with monitoring bodies and mechanisms in different ways. For a general overview, see e.g. Office of the United Nations High Commissioner for Human

collective complaints against States as a means to claim the violation of international rules.[2] This system addresses the specific situation raised by plaintiffs in the context of an adversarial procedure and fosters the participation of individuals and civil society.[3]

In the context of the Eurozone sovereign debt crisis, the outcomes of reporting procedures, together with other documents, demonstrated that austerity measures were in tension with several socio-economic rights.[4] In addition, individuals and groups initiated complaints procedure before the UN Committee on Economic, Social and Cultural Rights (CESCR), the Committee on Freedom of Association of the International Labour Organization (ILO), the European Committee of Social Rights, and the European Court of Human Rights (ECtHR). These proceedings claimed States' responsibility for breaches of ES rights with the aim of prompting legal consequences of the wrongful acts – including the granting of forms of substantive reparations.[5] The following lines briefly outline the individual and/or collective complaint procedures before such bodies previous to the analysis of the austerity-driven case-law.

The communication procedure before the UN Committee on Economic, Social and Cultural Rights was set up in 2013, where the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR, the Covenant) entered into force.[6] States Parties to the Covenant are not compelled to ratify the Optional Protocol. Once a State accepts the competence of the CESCR to review communications, complaints may claim the violation "of any of the economic, social and cultural rights set forth in the Covenant".[7]

Rights, 'Working with the United Nations Human Rights Programme. A Handbook for Civil Society' (2008).
Not each reporting system requires the automatic submission of a report by a fixed period of time. An exception is e.g. Art. 52 of the European Convention of European Rights (ECHR), which establishes that "[o]n receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention." On this provision see Hennebel, Tigroudja, *cit.*, 603-604.

[2] For a comprehensive overview, see Hennebel, Tigroudja, *cit.*, 429-586. On the functioning of the implementing mechanisms, see also Antonio Cassese, *I diritti umani oggi* (2005), 50-52, 100-102; Pietro Pustorino, *Lezioni di tutela dei diritti umani* (2019), 45-75.

[3] On the difference between the reporting system and the complaint systems, see e.g. Robin R. Churchill, Urfan Khaliq, 'The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights? (2004), 15(3) *European Journal of International Law* 417, 448-450; Holly Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights' (2009), 9(1) *Human Rights Law Review* 61, 75.

[4] Chapter I of the present dissertation. The functioning of the reporting procedures concerning the International Covenant on Economic Social and Cultural Rights (ICESCR), the ILO Conventions, and the European Social Charter is outside the scope of the present dissertation. On this issue, see e.g. Allan Rosas Martina Scheinin, 'Implementation Mechanisms and Remedies' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights* (2nd ed, 2001), 425, 426-428.

[5] Chapter II, Section 4.1 of the present dissertation.

[6] International Covenant on Economic, Social and Cultural Rights (16 December 1966, 3 January 1976), 993 UNTS 3 [ICESCR]; UN General Assembly, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (10 December 2008, entry into force 5 May 2013), A/RES/63/117 [Op-Prot. ICESCR]. On the Op-Prot. ICESCR see e.g. Hennebel, Tigroudja, *cit.*, 287-288; Pustorino, *cit.*, 73-74; Eibe Riedel, Gilles Giacca, Christophe Golay, 'The Development of Economic, Social and Cultural Rights in International Law', in Eibe Riedel, Gilles Giacca, Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (2014), 3, 28-35; Deborah Russo, 'Il Protocollo Facoltativo al Patto Internazionale sui Diritti Economici, Sociali e Culturali: verso un allineamento dei sistemi procedurali di tutela dei diritti umani' (2015) 1 *Osservatiorio sulle Fonti* 1; Malcolm Langford et al. (eds), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (2016).

[7] Op-Prot. ICESCR, Art. 2.

Communications may be submitted by or on behalf of individuals or groups of individuals, provided that they were "under the jurisdiction" of the State Party that allegedly infringed one or more of the Covenant provisions.[8] Besides listing admissibility requirements, among which the exhaustion of domestic remedies,[9] the Optional Protocol clarifies that the CESCR may decline to consider a communication "where it does not reveal that the author has suffered a clear disadvantage", unless the case raises a serious issue of general importance.[10] After examining a communication, the Committee issues a non-binding view on the merit. If the CESCR finds a violation of the Covenant rights, it also adopts non-binding recommendations. The Committee transmits its views and recommendations, if any, to the parties concerned. The CESCR assesses whether the respondent State takes action in the light of the views and recommendations in the context of the follow-up procedure.[11]

The present dissertation examines the report issued in the context of the complaint procedure before the ILO Committee on Freedom of Association,[12] which was established in 1950.[13] This Committee examines complaints submitted by organizations of employers and workers, as well as by Governments, claiming violations of ILO Conventions on freedom of association, regardless of whether or not the State concerned had ratified the relevant

[8] Op-Prot. ICESCR, Art. 2.

[9] Op-Prot. ICESCR, Art. 3 (Admissibility): "1. The Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted. This shall not be the rule where the application of such remedies is unreasonably prolonged. 2. The Committee shall declare a communication inadmissible when: (a) It is not submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit; (b) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date; (c) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement; (d) It is incompatible with the provisions of the Covenant; (e) It is manifestly ill-founded, not sufficiently substantiated or exclusively based on reports disseminated by mass media; (f) It is an abuse of the right to submit a communication; or when (g) It is anonymous or not in writing."

[10] Op-Prot. ICESCR, Art. 4.

[11] Op-Prot. ICESCR, Art. 10.

[12] The International Labour Organization provides for three types of complaint procedure. Art. 24 of the ILO Constitution enables industrial associations of employers or of workers to make representations to the International Labour Office "that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party". The ILO Governing body usually establishes an ad hoc Committee to examine the situation. This procedure is governed by the following document: ILO Governing Body, Standing Orders concerning the procedure for the examination of representations under articles 24 and 25 of the Constitution of the International Labour Organization (8 April 1932, as subsequently amended).
Art. 26 of the ILO Constitution allows a State to file a complaint with the International Labour Office "if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified in accordance with the foregoing articles."
On the procedures under Art. 24-26 of the ILO Constitution, see e.g. Rosas, Scheinin, *cit.*, 442; Hennebel, Tigroudja, *cit.*, 305; Dinah Shelton, *Remedies in International Human Rights Law* (2015), 205 [Shelton, *Remedies*]; Niklas Brunn, *Legal and Judicial International Avenues: The ILO*, in Niklas Bruun, Klaus Lörcher, Isabelle Schömann (eds), *The Economic and Financial Crisis and Collective Labour Law in Europe* (2014), 243, 261-262.

[13] In January 1950, the ILO Governing Body, following negotiations with the UN Economic and Social Council, set up a Fact-Finding and Conciliation Commission on Freedom of Association. A year later, in 1951, the ILO Governing Body constituted the ILO Committee on Freedom of Association to perform the preliminary examination of complaints against member States of the ILO. See International Labour Office, 'Freedom of Association. Compilation of decisions of the Committee on Freedom of Association' (6th edition, 2018), Introduction, para. 2; Special procedures for the examination in the International Labour Organization of complaints alleging violations of freedom of association, paras. 1-2, 70 [Special procedures before the ILO CFA.]. The compilation is available at: www.ilo.org.

instruments.[14] Notably, the exhaustion of local remedies is not an admissibility requirement.[15] Following the examination of the relevant complaint, the Committee may suggest to the ILO Governing Body the adoption of recommendations towards the State concerned – i.e. measures and actions to be taken to bring the situation in compliance with ILO standards on freedom of association.[16] In all cases where the Committee acts in this way, States' compliance with the relevant recommendations is subject to a follow-up procedure.[17] The conclusions of the ILO Committee on Freedom of Association are not binding, nor are its recommendations.

The European Committee on Social Rights is empowered to examine collective complaints under the Additional Protocol to the European Social Charter of 1995 that entered into force in 1998.[18] The complaint mechanism under this Protocol was modelled on the system governing the procedure before the ILO Committee on Freedom of Association.[19] Acceptance to be bound by the Additional Protocol is optional.[20] Four types of organizations may allege the "unsatisfactory application" of the provisions of the Charter: i) international organisations of employers and trade unions which are observers in a consultative capacity at the meetings of the Governmental Social Committee of the Council of Europe in the context of the reporting procedure;[21] ii) other international non-governmental organisations (NGOs) which have consultative status with the Council of Europe and have been put on a list established for this purpose by the Governmental Committee;[22] iii) representative national organisations of employers and trade unions within the jurisdiction of the Contracting Party against which they have lodged a complaint;[23] iv) any other representative NGO with particular competence in the matters governed by the Charter, subject to the consent of the

[14] Special procedures before the ILO CFA, para. 31. In greater detail, the complaint may be submitted by: i) national organizations of employers and workers; ii) international organizations of employers and workers which have consultative status within the ILO; iii) international organizations of employers and workers where the allegations relate to matters directly affecting their affiliated organizations. Para. 32 clarifies that the Committee of Freedom of Association "has full freedom to decide whether an organization may be deemed to be an employers' or workers' organization within the meaning of the ILO Constitution".

[15] Special procedures before the ILO CFA, para. 30.

[16] More in detail, following this examination, the Committee may: i) suggest to the ILO Governing Body to close the case; ii) suggest to the ILO Governing Body the adoption of recommendations to resolve the problem; iii) ascertain whether it would be appropriate to endeavour to obtain the agreement of the government concerned for the case to be referred to a Fact-Finding and Conciliation Commission. See International Labour Office, 'Freedom of Association. Compilation of decisions of the Committee on Freedom of Association' (6th edition, 2018), Introduction, para. 2; Special procedures before the ILO CFA, paras. 1-2.

[17] Special procedures before the ILO CFA, para. 70.

[18] Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (9 November 1995, entry into force 1 July 1998), ETS No.158 [Additional Protocol to the ESC].
On the system of collective complaint and on the amendments to the system, see e.g. Churchill, Khaliq, *cit.*; Cullen, *cit.*; Shelton, *Remedies, cit.*, 219-220; Klaus Lörcher, 'Legal and Judicial International Avenue: The (Revised) European Social Charter, in Bruun, Lörcher, Schömann (eds), *cit.*, 265, 290-294; Hennebel, Tigroudja, *cit.*, 319-321; Giuseppe Palmisano, 'La Charte Social Révisée, vingt ans après, défis et perspective', in Claudio Panzera et al (eds), *La Carta Sociale Europea tra universalità dei diritti ed effettività delle tutele* (2016).

[19] Churchill, Khaliq, *cit.*, 442.

[20] Acceptance may be manifested by either ratifying the Additional Protocol or, for State Parties to the Revised European Social Charter, to make a declaration under Art. D2.

[21] Additional Protocol to the ESC, Art. 1(a) together with Art. 27(2) of the European Social Charter. Currently, only three organizations have such status: the European Trade Union Confederation (ETUC), for employees, and Business Europe and International Organisation of Employers (OIE), for employers.

[22] Additional Protocol to the ESC, Art. 1(b).

[23] Additional Protocol to the ESC, Art. 1(c).

State Party within the jurisdiction of which such NGO operates.[24] These four types of organizations may lodge a complaint before the European Committee of Social Rights relating to the provisions of the Charter binding upon the respondent State: contrary to other human rights treaty, the European Social Charter (both in its original and revised version) provides for an *à la carte* ratification mechanism according to which signatory States may accept as binding only some of the rights enshrined in the Charter itself – if certain minimum conditions are met.[25] Following the examination of the complaint, the European Committee of Social Rights issues a non-binding decision on the merits which is transmitted to the Committee of Ministers of the Council of Europe.[26] The Committee of Ministers may suggest measures to be taken to bring the situation in compliance with the Charter and the case is subject to the follow-up procedure.[27]

Lastly, the European Court of Human Rights may receive applications from any person, NGO or group of individuals alleging that one of the States Party to the European Convention of Human Rights (ECHR) had violated one or more of the rights thereby enshrined,[28] provided that the contested event occurred under its jurisdiction.[29] Each Contracting Party to the Convention automatically accepts the competence of the ECtHR to receive and examine such applications. There are several admissibility criteria, among which the previous exhaustion of domestic remedies.[30] Furthermore, the Court may declare any application inadmissible if it is manifestly ill-founded, or if the applicant has not suffered a significant

[24] Additional Protocol to the ESC, Art. 2(1).

[25] Additional Protocol to the ESC, Art. 4. Council of Europe, European Social Charter (18 October 1961, 26 February 1965) ETS 035 [ESC], Art. 20; Council of Europe, European Social Charter (Revised) (3 May 1996, entry into force 1 July 1999), ETS 163 [RESC], Art. A. The Revised European Social Charter has not yet entered into force for all the States parties to the previous European Social Charter (e.g. Spain is bound by the original version of 1961). The substantive provisions of the two conventions are rather similar, so hereinafter the phrase "(Revised) European Social Charter" is used where reference is made to both the versions. Any relevant difference is specified.
According to Art. 20 ESC and Art. A RESC, each Contracting Parties undertakes to consider itself bound by at least, respectively, five out of nine selected articles of the European Social Charter (namely Arts. 1, 5, 6, 12, 13, 16) and six out of nine selected articles of the Revised European Social Charter (namely arts. 19 and Arts. 1, 5, 6, 7, 12, 13, 16, 19 and 20). In addition to this minimum requirement, each Contracting Party considers itself bound by such a number of articles or numbered paragraphs of the Charter as it may select, provided that, in respect of the original European Social Charter, the total number of articles is not less than ten or the numbered paragraphs are no less than forty-five, while as for the revised version the total number of articles must be no less than sixteen or the numbered paragraphs are no less than sixty-three. Any Contracting Party may, at any time after the ratification, declare that it considers itself bound by any articles or any numbered paragraphs of the Charter which it had not previously accepted.

[26] Additional Protocol to the ESC, Art. 8(2).

[27] Additional Protocol to the ESC, Arts. 9-10.

[28] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (4 November 1950, entry into force 3 September 1953), ETS 5 [ECHR], Art. 34.On individual applications before the ECtHR, see e.g. Shelton, *Remedies*, *cit.*, 205-219*;* Pustorino, *cit.*, 47-54; Keith Ewing, John Hendy QC, 'International Litigation Possibilities in European Collective Labour Law: ECHR', in Bruun, Lörcher, Schömann (eds), *cit.*, 295.

[29] ECHR, Art. 1. The notion of jurisdiction under human rights treaties, and in particular under Art. 1 ECHR, has developed through case-law and has been subject to doctrinal debate. This topic is outside the scope of the present dissertation. On this issue see e.g. Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (2011); David Harris et al (eds.), *Harris, O'Boyle and Warbrick. The Law of the European Convention of Human Rights* (4th ed, 2018), 102-104.

[30] ECHR, Art. 35 (1). For a comprehensive overview of the admissibility requirements, see e.g. Harris et al (eds.), *cit.*, 45-106.

disadvantage.[31] Following the examination of the application, the Court may issue either a decision on admissibility, or a judgment on the merits. If the Court finds a breach, the judges may indicate individual or general measures which are meant to bring the situation in compliance with the Convention and to remedy the violation, including monetary compensation.[32] The judgments of the ECtHR are binding upon the respondent State, which must abide with the Court's assessment.[33]

2. The active role of the international committees

As already mentioned in the previous Chapters, Eurozone States which obtained financial aid subject to strict conditionality are bound to respect the ES rights set forth in the International Covenant on Economic, Social and Cultural Rights, a number of ILO Conventions,[34] and the (Revised) European Social Charter. Complainants initiate proceedings against borrowing States before the international committees empowered to supervise the implementation of such instruments. The following Sections analyse their relevant austerity-driven case-law.

2.1. The views of the UN Committee on Economic, Social and Cultural Rights on Spain: the violation of the right to adequate housing

At the universal level, the CESCR adopted two non-binding views,[35] both finding Spain in violation of the right to adequate housing under Article 11(1) ICESCR.[36] None of these individual-state complaints directly touched upon the consequences of austerity measures. Nonetheless, these proceedings dealt with substantive and procedural aspects of the right to adequate housing in the context of sovereign debt crisis.

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[31] ECHR, Art. 35 (3)(a) and (b).

[32] ECHR, Art. 41. On the notion of "just satisfaction" see Harris et al (eds.), *cit.*, 162-170. See also Chapter II, Section 4.2 of the present dissertation.

[33] ECHR, Art. 46. On the execution of the Court's judgments, see Harris et al (eds.), *cit.*, 183-202. See also Chapter II, Section 4.2. of the present dissertation.

[34] For the purpose of the present thesis, five ILO Conventions will be taken into consideration: Convention concerning Freedom of Association and Protection of the Right to Organise (9 July 1948, entry into force 4 July 1950) 68 UNTS 17 [ILO Convention No. 87]; Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (1 July 1949, entry into force 18 Jul 1951) 96 UNTS 257 [ILO Convention No. 98]; Convention Concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service, Convention concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service (27 June 1978, entry into force 25 February 1981) 1218 UNTS 87 [ILO Convention No. 151]; Convention Concerning the Promotion of Collective Bargaining (3 June 1981, entry into force 11 August 1983) 1331 UNTS 267 [ILO Convention No. 154].

[35] CESCR, *I.D.G. v. Spain*, Communication No. 2/2014, Un Doc. E/C.12/55/D/2/2014, 17 June 2015; *Mohamed Ben Djazia, Naouel Bellili and others v. Spain*, Communication No. 5/2015, UN Doc. E/C.12/61/D/5/2015, 20 June 2017.

[36] ICESCR, Article 11(1): "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent."

In the first case, *I.D.G. v. Spain*, the applicant missed several mortgage repayments on her place of residence as a result of the serious economic crisis in Spain.[37] The lending institution launched a mortgage enforcement procedure and obtained an auction order. The applicant took cognizance of this procedure only when she received the notification of such order, as allegedly she was not properly notified earlier.[38] The CESCR analysed whether the applicant's right to adequate housing was violated by reason of possibly inadequate notice of the mortgage enforcement proceeding under Spanish law which the applicant claimed prevented her proper defence and, ultimately, deprived her from protecting her right to adequate housing in court.[39]

In the second case, *Mohamed Ben Diazia v. Spain*, the author and his family were evicted due to the expiry of the term of their rental contract. They were left without alternative accommodation since authorities did not grant public housing, regardless of the consequences on his minor children and despite the several applications for social housing submitted by the applicant for well over a decade – all of which ultimately proved unsuccessful.[40] In this regard, the author pointed out that Spain reduced the available public house stock by selling units to investment companies, despite the insufficient number of housing to deal with the emergency situation stemming from the severe economic crisis.[41] In light of this, the applicant claimed the violation of the right to adequate housing under Art.11(1) ICESCR. Notably, the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living lodged a submission as third-party intervener.[42] The Special Rapporteur highlighted that the communication raised important questions concerning, among other aspects, the obligation of Spain to prevent and respond to lack of housing, including by addressing structural causes, and the obligation to adopt positive measures to help tenants who cannot afford rent.[43]

In both cases, at the outset the Committee recalled the general principles regulating the right to housing under Art. 11(1) of the Covenant. In *I.D.G. v. Spain* also considered Art. 2(1) ICESCR, which, taken together with the right to housing, imposes "various obligations which are of immediate effect" including the adoption of measures that ensure access to an effective and appropriate judicial remedy to persons whose right to adequate housing may be affected by mortgage enforcement.[44] The Committee further recalled that appropriate procedural protection, including "adequate and reasonable notice for all affected persons prior to the scheduled date of eviction", is especially pertinent in relation to mortgage foreclosure proceedings.[45] In this regard, the authorities "should take all reasonable measures and make every effort", since the effective notice allows affected persons "to participate in the proceedings in defence of their rights."[46]

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[37] CESCR, *I.D.G. v. Spain*, *cit.*, paras. 2.2. and 3.2. On this case, see Juan Carlos Benito Sànchez, 'The UN Committee on Economic, Social and Cultural Rights' Decision in I.D.G. v. Spain: the right to housing and mortgage foreclosures' (2016), 3 *European Journal of Human Rights* 320.
[38] CESCR, *I.D.G. v. Spain*, *cit.*, paras. 2.1-2.10 provide the detailed descriptions of the facts of the case.
[39] CESCR, *I.D.G. v. Spain*, *cit.*, paras. 3.3-3.5, 9.7.
[40] CESCR, *Mohamed Ben Djazia, Naouel Bellili and others v. Spain*, *cit.*, paras. 2.2 – 2.20, 4.7.
[41] CESCR, *Mohamed Ben Djazia, Naouel Bellili and others v. Spain*, *cit.*, paras. 3.1.-3.3, 5.5.
[42] Appointed according to the Commission on Human Rights, Resolution 2000/9, 17 April 2000.
[43] CESCR, *Mohamed Ben Djazia, Naouel Bellili and others v. Spain*, *cit.*, para. 8.3.
[44] CESCR, *I.D.G. v. Spain*, *cit.*, para. 11.2-11.3.
[45] CESCR, *I.D.G. v. Spain*, *cit.*, para. 12.1.
[46] CESCR, *I.D.G. v. Spain*, *cit.*, 12.2.

In the *Mohamed Ben Diazia* case, the Committee asserted that although an eviction due to the expiry of the term of a rental contract is a dispute between individuals, State parties have the obligation to guarantee that such eviction does not infringe Art. 11(1) ICESCR. This is a corollary of the obligation to protect by adopting measures to avoid the interference of third parties in the enjoyment of Covenant rights.[47] Furthermore, the Committee affirmed that forced eviction, including that of persons living in rental accommodation, is prima facie incompatible with the Covenant and that it could be justified only if certain requirements are met.[48] In any event, eviction should not render individuals homeless. In this regard, the obligation to fulfil Covenant rights requires State parties to take all necessary steps, to the maximum of their available resources, to provide alternative housing to evicted persons who need it, a duty that includes the protection of the family unit, as well as the resolution of institutional shortcomings and structural causes of the lack of housing.[49]

Turning to the communications at stake, the Committee concluded that Spain did not comply with such standards. As for the *I.D.G.* case, the CESCR affirmed that the State did not exhaust all available means to serve notice in person and, hence, the notice during the foreclose procedure at stake was inadequate.[50] Moreover, the Committee declared that such inadequate notice significantly affected the applicant's right to a defence, which entailed a violation of her right to housing under Art. 11(1) ICESCR, as she was deprived of the possibility of defending herself during the enforcement process.[51] Ultimately, the failure to fulfil its obligation to provide the applicant with an effective remedy mounted to a violation of Art. 11(1) ICESCR, together with Art. 2(1).[52]

With regard to the *Mohamed Ben Diazia* case, against Spain's argument based on limited available resources – i.e. the number of public housing units *vis-à-vis* the requests for accommodation, the CESCR considered that the respondent State violated the obligation to take steps, using all available resources, to realize the right under Art. 11(1) of the Covenant.[53] Subsequently, the Committee recalled that in times of economic and financial crisis States parties may adopt deliberate retrogressive measures if those policies are temporary, necessary, proportionate and non-discriminatory. The CESCR argued that the reduction of availability of public housing caused by the selling of stock to investors constituted an unjustified retrogressive measure, since Spain failed to show the necessity of a decrease of public housing "precisely at a time when demand for it was greater owing to the economic crisis."[54] Lastly, the Committee highlighted that the only alternative accommodation offered to the author would have hindered his family unity, in violation of the State's duty to grant protection.[55]

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[47] CESCR, *Mohamed Ben Djazia, Naouel Bellili and others v. Spain, cit.,* paras. 14.1-14.2.
[48] CESCR, *Mohamed Ben Djazia, Naouel Bellili and others v. Spain, cit.,* paras. 13.2-15.1. Namely forced eviction must: i) be provided by law, ii) be duly justified (e.g. in case of persistent non-payment of rental), iii) be proportionate – i.e. a measure of last resort in the absence of no less onerous alternatives means; iv) ensure prior access to an effective judicial remedy.
[49] CESCR, *Mohamed Ben Djazia, Naouel Bellili and others v. Spain, cit.,* paras. 13.1, 15.2-15.4.
[50] CESCR, *I.D.G. v. Spain, cit.,* , 13.3.
[51] CESCR, *I.D.G. v. Spain, cit.,* 13.5-13.6.
[52] CESCR, *I.D.G. v. Spain, cit.,* 15-16.
[53] CESCR, *Mohamed Ben Djazia, Naouel Bellili and others v. Spain, cit.,* para.17.5.
[54] CESCR, *Mohamed Ben Djazia, Naouel Bellili and others v. Spain, cit.,* para.17.6.
[55] CESCR, *Mohamed Ben Djazia, Naouel Bellili and others v. Spain, cit.,* para. 17.7.

In each proceeding, the Committee issued both individual and general recommendations to Spain. As for individual measures, in the *I.D.G.* case the CESCR required Spain to ensure the suspension of the auction procedure unless the applicant has due procedural protection, [56] whilst in the *Mohamed Ben Diazia* case the CESCR required Spain to provide the author and his family public housing or any other measure enabling them to enjoy adequate accommodation, alongside the awarding of monetary compensation for the violation suffered.[57] As for the general recommendations, the Committee demanded the adoption of structural reforms as guarantees of non-repetition with the aim of preventing similar violations in the future, including appropriate legislative measures on matters of mortgage enforcement procedure,[58] or the development and implementation of a comprehensive plan to guarantee the right to adequate housing for low-income persons.[59]

2.1.1. Brief remarks

Although none of these cases directly concerned the consequences of austerity measures, these proceedings are worthy of attention since the CESCR took the chance to clarify the scope of the procedural and substantive aspects of the right to adequate housing in the context of a sovereign debt crisis.

In the *I.D.G.* case, the Committee focused on the procedural aspect of Art. 11(1) ICESCR and stated that Spain failed to make every effort to ensure access to an effective and appropriate judicial proceeding to persons whose right to adequate housing may be affected by mortgage enforcement. From the standpoint of the classification of primary obligations related to ES rights, this is an obligation to fulfil, and more specifically an obligation to facilitate – i.e. the one that requires the adoption of measures which enable and assist individuals in the enjoyment of the relevant right.[60] As Scholars pointed out, the CESCR's considerations on due process and fair trial, hence on procedural aspects, may specify the scope of the right to housing and, at the same time, foster its protection at both the international and domestic level.[61]

The *Mohamed Ben Djazia* case concerned the substantial aspect of the right to adequate housing. In this proceeding, the CESCR stated that Spain did not take the necessary measures meant to avoid the interference of third parties in the enjoyment of the right under Art. 11(1) of the Covenant. Furthermore, the Committee also asserted that the respondent State adopted an unjustified retrogressive measure by selling stock of public housing to investors and, hence, it breached the obligation to grant alternative accommodation to evicted persons who need it. The first conduct is a violation of the obligation to protect, i.e. the duty to adopt

[56] CESCR, *I.D.G. v. Spain*, *cit.*, 16.
[57] CESCR, *Mohamed Ben Djazia, Naouel Bellili and others v. Spain*, *cit.*, para. 20.
[58] CESCR, *I.D.G. v. Spain*, *cit.*, 16-17. The CESCR also took note of the recent amendment of the legislation regulating enforcement proceedings adopted as a consequence of a judgment of the Court of Justice of the European Union (ECJ) in matters of consumer protection. See ECJ, *Mohamed Aziz v. Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, Case C-415/2011, judgment of 14 March 2013,
[59] CESCR, *Mohamed Ben Djazia, Naouel Bellili and others v. Spain*, *cit.*, para. 21.
[60] On the obligation to fulfil see Chapter II, Section 2.1.
[61] Juan Carlos Benito Sanchez, 'The UN Committee on Economic, Social and Cultural Rights' Decision in I.D.G. v. Spain: The Right to Housing and Mortgage Foreclosures' (2016), in 3 *Journal européen des droits de l'homme* 320, 336 [Benito Sanchez, 'The UN Committee on Economic, Social and Cultural Rights'].

measures to prevent third parties from interfering in any way with the right in question. The second conduct infringes the obligation to fulfil, and more specifically the obligation to directly provide a specific right where vulnerable individuals or groups are unable to enjoy and to realize that right themselves by the means at their disposal.[62] In this regard, the CESCR stressed that Spain decreased the number of public housing units precisely at a time when people needed it the most due to the consequences of the severe economic crisis. Thus, the Committee reiterated that States' Parties to the ICESCR enjoy discretion in the allocation of public resources and that, in times of economic distress, national authorities may also adopt retrogressive measures. At the same time, the CESCR recalled that such discretion is not limitless and finds its boundaries in the proportionality principle, namely in the need to prove the necessity of the restriction imposed.[63] This stance also shows that general obligations of progressive realization and the corresponding prohibition of unjustified retrogressive measures play a pivotal role in assessing violations of ES rights in the context of sovereign debt crisis.[64]

On matters of legal consequences of the breach, the views of the CESCR present both advantages and disadvantages. As for the advantages, following the assessment of non-compliance with the Covenant, the Committee issued both individual and general recommendations to Spain. According to the Committee, general recommendations also entail guarantees of non-repetition, since State parties have the obligation to prevent similar violations in the future.[65] The general measure recommended by the CESCR included positive actions of Spain, such as adopting legislative reforms to ensure that domestic policies on public housing and the national legal framework on forced evictions and mortgage proceedings (together with their enforcement) are in compliance with the procedural and substantive aspects of the right to housing under Art. 11(1) of the Covenant. These legal consequences of the breach might be potentially relevant to the entire (segment of the) population suffering from the contested reforms, hence they match the collective dimension of ES rights. Moreover, such measures do not severely impair States' solvency, either. As Scholars pointed out, although the Committee's views are issued in the context of individual complaint procedures, which assess the specific violation claimed by the authors, their outcome may produce effects *vis-à-vis* the structural and more complex issues underpinning the particular case – such as the mortgage enforcement system in Spain, or the lack of alternative housing for all those who need it.[66]

Notably, in the *Mohamed Ben Djazia* case the Committee affirmed that Spain was under the obligation to provide the author with an effective remedy, in particular to award monetary compensation. This outcome does not meet the criteria proposed in Chapter II to assess the adequacy of legal consequences of breaches of socio-economic rights in time of sovereign

[62] On the obligation to protect and to fulfil see Chapter II, Section 2.1.
[63] Jessie Hohmann, 'Resisting Dehumanising Housing Policy: The Case for a Right to Housing in England' (2017), in 4(1) *Queen Mary Human Rights Law Review* 1, 25.
[64] Ben TC Warwick, 'Debt, Austerity, and the Structural Responses of Social Rights', in Ilias Bantekas, Cephas Lumina (eds), *Sovereign Debt and Human Rights* (2018), 381, 196.
[65] This aspect has been also noted by Benito Sanchez, 'The UN Committee on Economic, Social and Cultural Rights', cit., 338.
[66] Warwick, *cit.*, 383-384. The Author also stressed that the structural and complex issues underpinning the single case may not be its authentic roots which, in the case of violation of ES rights in context of sovereign debt crisis, are the causes of the public debt and the functioning of the macro-economic system (384-390).

debt crisis. On the other hand, it should be noted that it represents a shortcoming of the specific case, rather than a more general fault of the individual communication procedure.[67]

On matters of implementation, both cases are still under the respective follow-up procedures, which means that Spain has still not adopted the requested measures and, hence, has still not complied with the CESCR's recommendations.[68] This is one of the main general disadvantages of the individual communication procedure before the CESCR, as its outcome lacks a binding nature. The shortcomings stemming from this feature are reinforced if one considers that in 2018 the Committee issued a series of interim measures requesting Spain to suspend the eviction of individuals in cases where no alternative accommodation was available.[69] In some cases, Spanish judges did not comply with these measures, thus persons became homeless following the execution of the eviction, in violation of Art. 11(1) ICESCR.[70] Notably, the formally non-binding nature of CESCR's interim measures and views does not deprive these decisions of any practical legal effects in adjudication proceedings before domestic courts and tribunals, as Chapter V attempts to show.

2.2. The report of the ILO Committee on Freedom of Association: the trade unions' challenges to the structural labour market reforms enacted in Greece, Spain and Portugal

Still at the universal level, trade unions filed complaints before the ILO Committee on Freedom of Association claiming that the implementation of austerity measures in Greece, Portugal, and Spain violated several ILO Conventions.[71]

These organizations argued that structural reforms both in the public and private sector of the labour market infringed workers' and trade unions' rights, including freedom of association. The complainants also contested the lack of prior consultation, which resulted in the unilateral modifications of working conditions set forth in freely concluded collective agreements and, hence, in a breach of the principles governing collective bargaining.[72]

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[67] Chapter II, Section 4.3.

[68] OP-ICESCR, Article 9. Committee on Economic, Social and Cultural Rights, *Report on the sixty-fifth and sixty-sixth sessions (18 February–8 March 2019, 30 September–18 October 2019), Supplement No. 2* (2020) UN Doc. E/2020/22, E/C.12/2019/3, para. 81.

[69] The CESCR may issue interim measures under OP-ICESCR, Art. 5(1).

[70] Juan Carlos Benito Sanchez, 'Committee on Economic, Social and Cultural Rights Decisions on the Right to Housing in Spain (2017-2018): Ben Djazia et al., Forced Evictions and Judicial Developments' (2019), 3-4, available at: www.researchgate.net.

[71] ILO, 365th Report in which the committee requests to be kept informed of development, Case No 2820 (Greece), November 2012 [ILO, 365th Report on Greece]. ILO, 371st Report in which the committee requests to be kept informed of development, Case No. 2947 (Spain), March 2014 [ILO, Report 371st on Spain]. ILO, 376th Report in which the committee requests to be kept informed of development - Report No 376, Case No 3072 (Portugal), October 2015 [ILO, 376th Report on Portugal].

[72] The complaint against Greece referred to the following ILO Conventions: ILO Convention No. 87; ILO Convention No. 98; ILO Convention No. 151; ILO Convention No. 154. As for the specific and numerous issues raised by the petitioners, see ILO, 365th Report on Greece, *cit.*, paras. 787-892.
The complaint against Spain referred to the following ILO Conventions: ILO Convention No. 87; ILO Convention No. 98; ILO Convention No. 154. As for the specific issues raised by the petitioners, see ILO, Report 371st on Spain, *cit.*, paras. 320-333.
The complaint against Portugal referred to the following ILO Conventions: ILO Convention No. 87; ILO Convention No. 98; ILO Convention No. 151. As for the specific issues raised by the petitioners, see ILO, 376th Report on Portugal, *cit.*, paras. 900-905.

The replies of the three Governments rejected all the allegations moved against them on the basis of similar reasons. First, they argued that the adopted measures were necessary to deal with the economic crisis. Enhancing internal flexibility at the enterprise level aimed at fighting unemployment, since private business activities could adapt working conditions to the changes in economic and productive circumstances rather than dismissing employees with temporary contracts.[73] This would have also generated employment and fostered growth, together with the competitiveness of their national economy. In addition, reforms concerning the public sector were meant to reduce public expenditure and, consequently, sustain national debt.[74]

The second motivation relied on compliance with other international or European Union obligations. The Governments of Greece and Portugal asserted that the contested reforms were suggested by international lenders and that disbursement of the loan was conditional to the implementation of such structural adjustments.[75] Spain invoked the principle of budgetary stability, as introduced in Article 135 of its Constitution in observance of EU law, and its commitments to the European Union under the excessive deficit procedure.[76]

The last reason concerned the issue of consultation. Greece and Spain argued that the overall complexity of the situation and the need to take the contested measures as quickly as possible did not allow prior consultations with trade unions.[77] On the contrary, Portugal asserted that it duly consulted workers' and employers' organizations, although referring only to one of the several provisions challenged by the plaintiffs.[78] Beside these common grounds, notably the Greek Government asserted that national law may restrict workers' rights, according to the evolving socio-political conditions, as long as the core of ILO standards is observed. In the case at stake, austerity measures were proportionate to the unprecedented economic crisis and did not violate such core standards.[79] At the same time, the Greek Government stressed that the financial crisis and the international economic environment reduced the quality of labour rights, hence redefining the concept of their core content.[80]

In each report, the ILO Committee on Freedom of Association took due note of the grave and exceptional financial and economic crisis and of the urgency to manage such an extremely serious situation and to fight unemployment. The Committee, however, stated that this context nurtures the need to strengthen the role of workers' and employers' organizations in the decision-making process leading to the adoption of urgent measures which affect their rights.[81] The Committee also recalled that States should refrain from intervening to alter the content of freely concluded collective agreements, which should be binding on the parties.[82] Nonetheless, Governments facing emergency circumstances may impose restrictions on

[73] ILO, 371st Report on Spain, *cit.*, paras. 334-338.
[74] ILO, 365th Report on Greece, *cit.*, paras. 893-898; ILO, 376th Report on Portugal, *cit.*, para. 906.
[75] ILO, 365th Report on Greece, *cit.*, paras. 893-898; ILO, 376th Report on Portugal, *cit.*, para. 906.
[76] ILO, 371st Report on Spain, *cit.*, paras. 399-402. On the principle of budgetary stability and the excessive deficit procedure, see Chapter I, Sections 1.2. and 2.2. of the present dissertation.
[77] ILO, 365th Report on Greece, *cit.*, para. 907; ILO, 371st Report on Spain, *cit.*, paras. 342, 345, 351 and 408.
[78] ILO, 376th Report on Portugal, *cit.*, para. 907.
[79] ILO, 365th Report on Greece, *cit.*, paras. 912-913.
[80] ILO, 365th Report on Greece, *cit.*, para. 918.
[81] ILO, 365th Report on Greece, *cit.*, paras. 988-990; ILO, 371st Report on Spain, *cit.*, paras. 445, 453, 462; ILO, 376th Report on Portugal, *cit.*, paras. 916-917, 923.
[82] ILO, 365th Report on Greece, *cit.*, paras. 988-989; ILO, 371st Report on Spain, *cit.*., paras. 445, 463; ILO, 376th Report on Portugal, *cit.*, para. 917.

collective agreements already entered into force if such limitations are: i) exceptional measures; ii) necessary; iii) temporary in nature – i.e. in force for a reasonable period, having regard to the severe negative consequences on workers' terms and conditions of employment and their particular impact on vulnerable workers; iv) accompanied by adequate safeguards to protect workers living standards.[83]

In light of these principles, the ILO Committee on Freedom of Association addressed the specific issues raised by the complaints. As an example, it did not contest the indication of the Greek Government on the necessity of wage reduction for public servants as a means to deal with its budgetary imbalances, but it considered essential "that consultations take place with the employers' and workers' organizations concerned as a matter of urgency to review these measures".[84] Again, as an example, the Committee considered the significant interventions of the Greek Government in the voluntary nature of collective bargaining and in the principle of inviolability of freely concluded collective agreements,[85] with particular regard to the granting of collective bargaining rights to non-elected "association of persons" which may seriously undermine the position of trade unions as representative of workers.[86] On the Spanish legislation, the Committee stated that permanent provisions on internal flexibility at enterprise level, such as those enacted to face the crisis, could lead "to an overall destabilization of the collective bargaining machinery" and, hence, constituted "a weakening of freedom of association and collective bargaining" contrary to principles set forth in ILO Conventions.[87] Similar problems were raised, for example, in relation to statutory rules that directly suspended collective agreements contrary to them or repealed their provisions.[88] Lastly, with reference to Portugal, the Committee noted the absence of consultation with trade unions regarding the contested legal norms and invited the Government to promote social dialogue in order to find, to the fullest extent possible, solutions agreed by the most representative trade unions.[89]

At the end of each report, the ILO Committee on Freedom of Association suggested the ILO Governing body to recommend the adoption of general measures to the interested Government. For example, Greece and the social partners were invited to hold a permanent and intensive social dialogue on these measures with a view to review all of them, as well as to ensure the participation of social partners in the determination of any other further negotiation with the international lenders where these touched upon core matters of freedom of association and collective bargaining.[90] Spain was invited to fully respect the principles concerning consultation of the most representative workers' and employers' organizations on legislation affecting their interests with sufficient advance notice prior to their adoption.[91] Lastly, Portugal was incited to, among other activities, perform a joint evaluation with trade unions on the impact of the contested legislations on the exercise of their rights, and

[83] ILO, 365th Report on Greece, *cit.*, paras. 990, 995; ILO, 371st Report on Spain, *cit.*., para. 464; ILO, 376th Report on Portugal, *cit.*, paras. 917, 923.
[84] ILO, 365th Report on Greece, *cit.*, para. 990.
[85] ILO, 365th Report on Greece, *cit.*, para. 995.
[86] ILO, 365th Report on Greece, *cit.*, para. 998.
[87] ILO, 371st Report on Spain, *cit.*, para. 453.
[88] ILO, 371st Report on Spain, *cit.*, para. 462-463.
[89] ILO, 376th Report on Portugal, *cit.*, paras. 916.
[90] ILO, 365th Report on Greece, *cit.*, para. 1002-1003.
[91] ILO, 371st Report on Spain, *cit.*, para. 465.

particularly the right to collective bargaining, so as to ensure the temporary nature of the exceptional measures adopted in the context of the economic crisis.[92]

2.2.1. Brief remarks

In each of these reports, the ILO Committee on Freedom of Association took the chance to outline some general remarks on the relationship between, on the one side, the economic and financial crisis and, on the other, the duty to respect trade unions' and workers' rights.

With regards to States' obligations, the ILO Committee specified that Governments are under the obligation to respect freedom of association and the right to bargain collectively, hence they must refrain from intervening on the content in freely concluded collective agreements. Moreover, States have the obligation to fulfil such guarantees, namely by promoting social dialogue, i.e. through prior consultations with the most representative workers' and employers' organizations on legislation which may affect their interest with sufficient advance notice.[93] These principles apply also in the context of economic crisis, where States are entitled to adopt emergency measures at the expense of freely collective bargaining, as far as these measures are exceptional, necessary, temporary, and accompanied by adequate safeguards of workers' living standards.

Notably, Government replies relied not only on the economic crisis, but also on their other EU and international commitments, alongside the provisions of their national constitutions. In this regard, it should be recalled that States are not exempted from obligations arising from a treaty (including human rights instruments) on the grounds of other international (or EU) obligations. In case of conflicting obligations, the State is forced to choose which one it will abide by and, consequently, will be held responsible for breaching the other, opposing, obligation.[94] As for the budget balance rule invoked by Spain, Art. 27 of the Vienna Convention on the Law of Treaties codifies the customary rule which establishes the irrelevance of internal law as justification for a State failure to perform a treaty.[95]

Regarding the outcome of the proceeding, the ILO Committee proposed to the ILO Governing body general recommendations mostly meant to cease the wrongful conduct and to ensure the non-repetition of the violation. The promotion of social dialogue on existing legislative provisions in tension with the ILO standards is a way to secure, to the fullest possible extent, solutions agreed by the relevant parties – *viz.* a means to nurture amendments of existing legislation, or its repealing, in order to establish a legal framework in compliance with freedom of association and the right to bargain collectively.

Such recommendations are of general nature: if implemented by the respondent Government, these measures could benefit the entire section of the population suffering from labour market reforms and, hence, they are in line with the collective nature of socio-

[92] ILO, 376th Report on Portugal, *cit.*, para. 927.
[93] On the obligation to respect and to fulfil, see Chapter II, Section 2.1.
[94] Art. 30(5) of the Vienna Convention on the Law of Treaties (23 May 1969, 1155 UNTS 331) [VCLT]. See also Benedetto Conforti, *Diritto Internazionale* (11th Edition, 2018), 98; Fulvio M. Palombino, *Introduzione al diritto internazionale* (2019), 87 [Palombino, *Introduzione*].
[95] Art. 27 VCLT (Internal Law and Observance of Treaties): "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." The only alleged exception to this rule is the doctrine of counter-limits, which is outside the scope of the present dissertation. On this issue see e.g. Fulvio M. Palombino (eds), *Duelling for Supremacy. International Law vs. National Fundamental Principles* (2019).

economic rights. Additionally, these measures do not hinder States' solvency. Thus, such general recommendations meet the criteria proposed in Chapter II to assess the adequacy of legal consequences of breaches of ES rights in times of sovereign debt crisis.

On the matter of implementation, whilst Spain conformed to those recommendations,[96] the ILO Committee's report on Portugal is still under the follow-up procedure, which means that the State of Portugal has still not fully adopted the measures suggested.[97] As for Greece, according to the reports of the ILO Committee the State has never provided the information requested on the effect given to the recommendations. Lastly, the case on Greece was declared closed in 2015.[98]

Similarly to the CESCR's views, the lack of binding nature is the chief shortcoming of the complaint procedure before the ILO Committee, which had no impact on subsequent labour reforms.[99] Moreover, some Authors also pointed out that, on certain issues raised by trade unions, the language and conclusions of the reports was rather feeble, including the mere encouragement to social dialogue.[100] However, and again similarly to the considerations concerning the non-execution of the CESCR's views by Spain, the formally non-binding nature of the ILO Committee's reports does not divest them of any legal value when it comes to domestic litigations concerning the contrast between austerity measures and labour rights, as Chapter V tries to demonstrate.

2.3. The decisions of the European Committee of Social Rights concerning Greece

At the regional level, the European Committee of Social Rights issued several decisions concerning austerity measures implemented by the Greek Government. Each decision of the European Committee found Greece in breach of several rights guaranteed under the European Social Charter.[101] The complainants challenged the same national provisions contested before the ILO Committee on Freedom of Association. The consequences of the overlap between the fields under the jurisdiction of these quasi-judicial bodies are addressed in Section 5 below.

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[96] ILO, 378th Report on the effect given to the recommendations of the committee and the governing body, Case No. 2947 (Spain), June 2016. The Report also took into account the rulings of the Spanish Constitutional Court and Supreme Court. The case-law of the Spanish Constitutional Court on austerity measures is addressed in Chapter V, Section 2.3. of the present dissertation.

[97] ILO, 391st Report of the Committee on Freedom of Association, para. 73.

[98] ILO, 376th Report on the effect given to the recommendations of the committee and the Governing Body, Case No 2820 (Greece), October 2015. The information of the closure of the case is provided here: www.ilo.org.

[99] Matina Yannakourou, 'Challenging austerity measures affecting work rights at domestic and international level. The case of Greece', in Claire Kilpatrick, Bruno De Witte (eds), *Social rights in times of crisis in the Eurozone: The role of fundamental rights' challenges* (2014), EUI Department of Law Research Paper 2014/05, 19, 27.

[100] Marìa Luz Rodrìguez, 'Labour Rights in Crisis in the Eurozone: the Spanish Case', in Thomas Beukers, Bruno De Witte, Claire Kilpatrick (eds), *Constitutional change through euro-crisis law* (2017), 104, 107.

[101] The only exception to this trend is *Panhellenic Association of Pensioners of the OTE Group Telecommunications (FPP-OTE) v. Greece*, Complaint No. 156/2017, Decision on admissibility of 22 March 2018, which declared the complaint inadmissible because the complaint referred to the 1961 European Social Charter and the 1988 Additional Protocol, which were no longer applicable to Greece as it had ratified the 1991 Revised European Social Charter and was bound by its provisions.

2.3.1 Dismissal without notice and severance pay

The first complaint alleged that the provision of Law No. 3899/2010 which allows the dismissal of employees without notice and severance pay was in violation of the right of all workers to a reasonable period of notice for termination of employment.[102] Moreover, the plaintiff also claimed that the same statute infringed workers' right to take part in the determination and improvement of the working conditions and working environment,[103] since it established the primacy of special enterprise-level collective agreements over previous relevant sector collective agreements.[104]

The Greek Government referred to the economic crisis and stated that the contested measures were introduced to enhance the competitiveness of the country and to promote a more decentralized collective bargaining system. According to the Government, these reforms did not affect the core of the freedom of association and of collective bargaining.[105] In light of these considerations, the possibility of dismissal without notice and severance pay was reasonable.[106] On the second issue, the Government pointed out that the contested provision did not allow enterprise-level collective agreements to stipulate working conditions less favourable than those provided in the relevant general collective agreement and that, in any event, such norm was subsequently replaced. For these reasons, there was no violation of the freedom of collective bargaining.[107]

At the outset, the European Committee of Social Rights recalled the general principles applicable in time of economic crisis, a context that "should not have as a consequence the reduction of the protection of the rights recognised by the Charter." In view of the general obligation "to pursue by all appropriate means" the effective realization of the rights thereby enshrined, the Committee reiterated that State parties must "take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries need the protection most."[108] The European Committee clarified that such general principles apply also to labour law. Although economic crises may lead to changes in legislation and practice to limit public spending and relieve constraints on business, these modifications should not result in depriving a broad category of employees of their fundamental labour rights. The opposite conduct would, on the one hand, "force workers to shoulder an excessive share of the consequences of the crisis" and, on the other, "increase the burden on welfare systems, particularly social assistance."[109] On the specific issues raised by the applicants, the Committee unanimously concluded that dismissal without notice and severance pay was a violation of the Charter,[110] whilst it considered that the right to take part in the determination

[102] Art. 4(4) ESC.
[103] Art. 3(1) of the 1988 Additional Protocol to the Charter.
[104] European Committee of Social Rights, *General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*, Complaint No. 65/2011, Decision of 23 May 2012, paras. 1, 6, 21-22, 31-33.
[105] *Cit.*, paras.14-15.
[106] *Cit.*, paras. 23-24.
[107] *Cit.*, paras. 34-38.
[108] *Cit..*, para. 16.
[109] *Cit.*, paras. 17-18.
[110] *Cit.*, paras. 25-28.

and improvement of the working conditions and working environment does not concern the right to collective bargaining.[111]

Following this decision, the Committee of Ministers recommended Greece to revoke the above-mentioned legislative provision as soon as possible. The Greek Government replied affirming its firm intention to abide by the recommendation "as soon as the economic situation of the country would allow", without providing a set timeframe.[112]

2.3.2. Working conditions of young employees

The second complaint argued that the provisions introducing and governing "special apprenticeship contracts" for individuals between 15 and 18 years old breached several provisions of the European Social Charter,[113] and that the employment conditions for new entrants to the labour market under 25 years old breached the right to fair remuneration, alone and together with the prohibition of discrimination.[114]

The Government requested the Committee to declare the complaint unfounded.[115] As a preliminary remark, Greece referred to the economic crisis suffered by the country and clarified that the measures at stake formed part "of an overall package of initiatives introduced to deal with the structural problems in the labour market and the operation of social security and welfare systems." The Government also pointed out that the contested statutes were the cornerstone of those policies meant to fight youth unemployment, which had worsened as a result of the economic crisis.[116] In light of these, Greece argued – among other motivations – that "special apprenticeship contracts" were "a means of integrating young people into the labour market" and that could "create preconditions for stable employment."[117] The Government also claimed that the contested legislation on employment

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[111] *Cit.*, paras. 39-40. According to the Committee, the right to collective bargaining falls within the scope of Arts. 5 and 6 ESC that Greece had not accepted at the time.

[112] Committee of Ministers, Resolution CM/ResChS(2013)2, General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece, Complaint No. 65/2011, Resolution of 5 February 2013.

[113] European Committe on Social Rights, *General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*, Complaint No. 66/2011, Decision of 23 May 2012, paras. 17-18, 22-23, 34, 43 [*GENOP-DEI and ADEDY v. Greece*].

Specifically, the petitioners asserted that: i) "special apprenticeship contracts" did not ensure adequate job security or social protection, since those were simply contracts of up to one year, in violation of the right to work under Art. 1(1) ESC; ii) the provisions introducing and regulating such contracts did not mention the minimum age in respect of dangerous and unhealthy occupations, that Art. 7(2) ESC sets at 15 years old, or the obligation, in the case of certain jobs, to provide regular medical control, that is enshrined in Art. 7(9) ESC; iii) the exclusion of young workers from the scope of labour legislation, deprived them of the right to at least three weeks' annual holiday with pay, in breach of Art. 7(4) ESC; iv) the lack of a coherent body of rules establishing e.g. obligations for the employers to provide training, or the division of time between practical and theoretical training, was in breach of Art. 10(2) ESC on obligations related to the right to vocational training; v) provisions on "special apprenticeship contracts" provided a very limited and rudimentary social security coverage, in violation of Art. 12(3) ESC which establishes the obligation to endeavour to raise progressively the system of social security to a higher level.

[114] *GENOP-DEI and ADEDY v. Greece, cit.*, paras. 51-54. The right to fair remuneration is provided under Art. 4(1) ESC. As for the prohibition of discrimination, the applicants referred to Art. 1(2) ESC, but the European Committee of Social Rights considered the complaint under the Preamble of the ESC.

[115] *GENOP-DEI and ADEDY v. Greece, cit.*, para. 9

[116] *GENOP-DEI and ADEDY v. Greece, cit.*, para. 11.

[117] *GENOP-DEI and ADEDY v. Greece, cit.*, para. 19. On the specific issue of "special apprenticeship contracts",

conditions for new entrants to the labour market under 25 years old created incentives to employ persons belonging to this age as a means to fight youth unemployment. Besides, the Government asserted that the minimum wage offered to workers under 25 years old ensures them a decent living.[118]

Following the allegations of the applicants and the Government's reply, the European Committee of Social Rights preliminarily recalled the general principles governing State parties' obligations in the context of economic crisis.[119] Concerning the obligation to "endeavour to raise progressively the system of social security to a higher level",[120] the European Committee once again recognised that in times of economic crisis States parties may introduce measures to consolidate public finances and, ultimately, to ensure "the maintenance and sustainability of the existing social security system." However, such measures should refrain from undermining the core framework of the national security system at stake and from excluding entire categories of workers from the protection it offers against serious social and economic risk. Measures that do not satisfy these requirements constitute unjustified retrogressive steps.[121] In the case at stake, the national legislation of "special apprenticeship contracts" created a distinct category of workers which is "effectively excluded" from the protection offered by the social security system. Such deterioration does not fulfil the above-mentioned requirements and, hence, it is a breach of the relevant Charter provision.[122]

On the matter of employment conditions for new entrants to the labour market under 25 years old, the European Committee recalled the general principle according to which it is permissible to pay a lower minimum wage to younger employees but that this wage can be deemed fair only if it is above the poverty line in the given country.[123] As for the prohibition of discrimination, the European Committee stated that a differential treatment must be based on objective justification and proportionate to achieve that purpose. In the case at hand, the Committee noted that the minimum wage for all workers under 25 years old was substantially below the national minimum wage and, hence, it could not be considered fair.[124] Moreover,

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the Government argued that: i) their introduction did not constitute a violation of the right to work under Art. 1(1) ESC; ii) protective provisions of labour law governing the employment of minors applied to "special apprenticeship contracts", including rules governing minimum age for access to employment and for periodical medical examination and, hence, these norms complied with Art. 7(2) and (9) ESC; iii) the contested legislation did not violate the right to vocational training under Art. 10(2), and submitted information on the length of the apprenticeship and the provision of theory classes and period of practical instruction with remuneration. As regards annual holiday with pay under Art. 7(4), Greece confirmed that the contested statute did not provide for such leave. Lastly, Greece did not reply to the alleged violation of the right to social security under Art. 12(3) ESC (see paras. 24, 26-27, 30, 35, 44).

[118] *GENOP-DEI and ADEDY v. Greece*, *cit.*, para. 55

[119] *GENOP-DEI and ADEDY v. Greece*, *cit.*, paras. 12-14.

[120] Art. 12(3) ESC.

[121] *GENOP-DEI and ADEDY v. Greece*, *cit.*, para. 47.

[122] *GENOP-DEI and ADEDY v. Greece*, *cit.*, para. 48. On the "special apprenticeship contracts", the Committee concluded that: the statute introducing and governing them did not violate the right to work under Art. 1(1) ESC, since the invoked Charter provision does not cover the job security or social protection; ii) the contested legislation complied with the requirements of age limits for unhealthy and dangerous occupations and those concerning regular medical control under Art. 7(2) and (9) ESC; iii) the absence of a three-week holiday leave with pay violated Art. 7(4) ESC; iv) provisions regulating "special apprenticeship contracts" violated the right to vocational training under Art. 10(2) ESC due to the lack of a comprehensive body of rules.

[123] *GENOP-DEI and ADEDY v. Greece*, *cit.*, paras. 57-60.

[124] *GENOP-DEI and ADEDY v. Greece*, *cit.*, paras. 61-65.

the Committee acknowledged that the integration of young workers in the labour market in time of economic crisis through employment policy represented a legitimate aim, but it considered that the extent of the reduction, and the manner of its implementation, were not proportionate "even when taking into account the particular economic circumstances in question."[125]

In light of the above, the Committee of Ministers invited Greece to revoke the contested measures as soon as possible. Once again, the Greek Government replied affirming its firm intention to abide by the recommendations "as soon as the economic situation of the country would allow", without providing a set timeframe.[126]

2.3.3. Public and private pension schemes and the right to social security

In 2012, the European Committee of Social Rights received a series of collective complaints concerning the same facts, namely allegations that a number of legislative reforms of both public and private pension schemes, considered jointly and together with the amendments to the taxation system, constituted a breach of the obligation to "endeavour to raise progressively the system of social security to a higher level."[127] The plaintiff affirmed that these reforms did not respect the principle of proportionality: they were neither suitable nor necessary for the recovery of public funds, since there were alternative measures which could have proved more effective and less detrimental of pensioners' rights.[128]

The Government replied that the contested reforms were necessary for the protection of public interests in light of the grave financial crisis affecting the country, and that were part of a programme of fiscal and structural policies meant to enhance the competitiveness of the Greek economy and the operation of its labour market. Moreover, limitations of pensioners' rights resulted from Greece's other international obligations deriving from the financial support mechanisms, which considered the implementation of such reforms as a condition for the loan instalments. Besides, the Government affirmed that the statutes at stake provided exemptions for the most vulnerable groups.[129]

As a preliminary remark, the European Committee of Social Rights held that Greece was not exempted from the obligations arising from the European Social Charter on the

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[125] *GENOP-DEI and ADEDY v. Greece*, *cit.*, para. 68.

[126] Committee of Ministers, Resolution CM/ResChS(2013)3, General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece, Complaint No. 66/2011, Resolution of 5 February 2013.

[127] Art. 12(3) ESC. The European Committee of Social Rights decided on the following collective complaints: *Federation of employed pensioners of Greece (IKA –ETAM) v. Greece*, Complaint No 76/2012 [*(IKA –ETAM) v. Greece*]; *Panhellenic Federation of Public Service Pensioners (POPS) v. Greece*, Complaint No 77/2012; *Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v. Greece*, Complaint No 78/2012; *Panhellenic Federation of pensioners of the Public Electric Corporation (POS-DEI) v. Greece*, Complaint No 79/2012; *Pensioners' Union of the Agricultural Bank of Greece (ATE) v. Greece*, Complaint No 80/2012. All the decisions on the merits were issued on 7 December 2012.

[128] See e.g. *(IKA –ETAM) v. Greece*, *cit.*, paras. 62-64. The complaints contested the following national measures: i) the reductions in primary and auxiliary pensions; ii) the unreasonable reduction in and subsequent elimination of holiday, Christmas and Easter; iii) the imposition of a social solidarity contribution, which is levied on a sliding scale from pensions above a certain monthly amount; iv) the suspensions or drastic reductions of all pension payments for pensioners with an occupation; v) the reduction of the social security benefit for private sector pensioners by lowering the income ceilings on which the benefit is paid (paras. 13-29, 56-60).

[129] *(IKA –ETAM) v. Greece*, *cit.*, paras. 10-11, 65-67.

grounds of its other international obligations under the financial support mechanism. Hence, the Committee affirmed its competence in assessing the national measures implementing loan requirements.[130]

Moving to the issue at stake,[131] the European Committee recalled that when economic reasons do not allow the preservation of the acquired level of social security, States parties may lawfully reduce the benefit available under their national systems provided that the country concerned maintains "the social security system on a satisfactory level" that takes into account the legitimate expectations of its beneficiaries and the right of all persons to effectively enjoy the right to social security.[132] The Committee also considered the claw-back clause under Art. 31(1) of the Charter and stressed that any restriction of the right to social security must be necessary to ensure the maintenance of the social security system and must refrain from depriving individuals from effective protection against social and economic risks. These principles apply also to limitations related to pension systems *vis-à-vis* the need to consolidate public finances in contexts of economic crisis.[133]

The Committee concluded that the reductions introduced by Greece did not in themselves violate the Charter, but their cumulative effects amounted to "significant degradation of the standard of living and the living conditions of many of the pensioners concerned."[134] Moreover, the Committee concluded that, even considering the particular context of the economic crisis and the need to adopt urgent measures, the Greek Government did not respect the proportionality principle in their decision-making process, as it did not conduct a meaningful impact assessment of these restrictions on vulnerable groups and did not verify whether alternative and less restrictive means could have been adopted.[135]

In light of the violation of the right to social security, the Committee of Ministers recommended Greece to bring the situation in conformity with the relevant provision of the Charter. The Greek Government provided information on the legislative reforms adopted to improve the functioning of its social security system and to support vulnerable individuals while dealing with the economic crisis.[136]

2.3.4. Austerity-driven reforms of labour market: reloaded

In 2014, the European Committee on Social Rights received a communication arguing that the reforms enacted from 2010 onwards in response to the economic and financial crisis

[130] *(IKA –ETAM) v. Greece*, *cit.*, paras. 50-52.
[131] The Committee considered resolutions of the Committee of Ministers of the Council of Europe, documents of the Parliamentary Assembly of the Council of Europe, the case-law of the European Court of Human Rights, ILO's evaluations and reports (*(IKA –ETAM) v. Greece*, *cit.*, paras. 30-47) and the observation of the European Trade Union Confederation (*id.*, para. 92).
[132] *(IKA –ETAM) v. Greece*, *cit.*, paras. 68-69. The Committee also recalled its previous stance on State parties' obligations in time of economic crisis, as expressed in *General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*, *cit.*, 75.
[133] *(IKA –ETAM) v. Greece*, *cit.*, paras. 71-75
[134] *(IKA –ETAM) v. Greece*, *cit.*, paras. 77-78.
[135] *(IKA –ETAM) v. Greece*, *cit.*, paras. 79-83.
[136] See e.g. Committee of Ministers, Resolution CM/ResChS(2014)7, Federation of employed pensioners of Greece (IKA –ETAM) v. Greece, Complaint No 76/2012, Resolution of 2 July 2014.

violated several rights enshrined in the European Social Charter.[137] Notably, the complaint challenged the same national measures that constituted the object of two previous communications – those on dismissal without notice and severance pay and on working conditions of young employees,[138] alongside subsequent reforms of the labour market which impinged on the very same situations.[139]

The Government reply is quite remarkable. First, it did not contest the merits of the complaint and simply reiterated its commitment "to comply with Greece's international obligation and to respect social rights", including through the re-establishment of employees' rights in collective and individual bargaining.[140] Subsequently, it merely observed that Greece was still suffering from the consequences of the crisis and reported its efforts to replace austerity programmes with expansionary policies.[141] It further advocated for the renegotiation of memoranda of understanding which outlined the material conditions of the loan in order to bring them in compliance with the 1991 Revised European Social Charter – which meanwhile entered into force for Greece.[142]

On the issues already posed in previous communications, the Committee referred to the examination performed in the respective follow-up proceedings and concluded that Greece had not yet brought its legislation in line with the Charter.[143] Thus, the Committee focused on whether the already challenged domestic rules (or similar norms) violated other Charter provisions. For example, the European Committee on Social Rights reiterated that the

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[137] European Committee of Social Rights, *Greek General Confederation of Labour (GSEE) v. Greece*, Complaint No. 111/2014, Decision of 23 March 2017 [*GSEE v. Greece*].

[138] See respectively Section 2.3.1 and 2.3.2 above.

[139] The GSEE contended that: i) the deregulation of employment (through measures concerning e.g. reduction of wages, temporary occupations, termination of contracts, collective agreements, and arbitration) and the decentralization of the system of collective bargaining violated Greece obligation to achieve and maintain a level of employment as high and stable as possible under Art. 1(1) ESC; iii) reductions of the minimum wage of workers under 25 years old violated the prohibition of discrimination on the ground of age under Art. 1(2) ESC; iii) the changes in working time resulted in the excessive length of daily and weekly working hours, which could not be deemed as reasonable under Art. 2(1) ESC and did not grant a sufficient weekly rest period as prescribed by Art. 2(5) ESC; iv). the minimum wage for young workers and apprentices could not be considered fair within the meaning of Arts. 4 and 7(5) ESC; v) the reforms of the procedures of collective bargaining did not allow workers to be informed, consulted, or involved in the changes concerning their employment conditions, hence Greece violated workers' right to contribute to the determination and improvement of such conditions under Art. 3 of the 1988 Additional Protocol to the Charter. The complaint also stressed that the contested situation was exacerbated by the overall deregulation and decentralization of collective bargaining. (*GSEE v Greece*, *cit.*, paras. 95-114, 140-147, 166-180, 207-212, 232-238).

[140] *GSEE v. Greece*, *cit.*, para. 23.

[141] *GSEE v. Greece*, *cit.*, paras. 115-117.

[142] *GSEE v. Greece*, *cit.*, para. 119. The Government also stated that the material conditions attached to the memoranda of understanding "amount to coercion exerted by threats or the use of force within the meaning of Art. 52 of the Vienna Convention on the Law of Treaties" (para. 118). Art. 52 of the VCLT provides that: "The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect." The stance of the Greek Government takes for granted the qualification of the memoranda as binding treaties, rather than non-binding agreements, since only the former falls within the scope of application of the VCLT. Chapter V of the present dissertation addresses the qualification of memoranda before national courts, although not in a comprehensive manner as it is outside the scope of the thesis.

[143] The Committee reiterated that the following austerity measures violated the Charter provisions: i) the minimum wage of workers under 25 years old is unfair, hence in breach of Art. 4(1) ESC (paras. 187-193); ii) the reduction of minimum wage for workers under 25 years old is discriminatory and breaches Art. 4(1) ESC, read in conjunction with the Preamble of the Charter (paras. 194-197); iii) dismissal without a period of notice or severance pay breaches Art. 4(4) ESC (para. 198-205); iv) the absence of annual holiday with pay for workers under "special apprenticeship contracts" is in violation of Art. 7(7) ESC (paras. 225-230).

reduction of the minimum wage violated the prohibition of discrimination on grounds of age and that the remuneration thus determined was manifestly unfair and far below the threshold established to be considered fair. However, the assessment on the issue of salaries of young workers was grounded on articles of the European Social Charter other than those considered in previous communications.[144]

In its evaluation of the merits of the complaint, the Committee took also into account Art. 31 of the Charter. This claw-back clause is "an exception applicable only under extreme circumstances" and hence "must be interpreted narrowly". The Committee recalled its previous stance and reiterated that limitation complies with Art. 31 if: i) it is prescribed by law; ii) it pursues one of the legitimate aims listed in Art. 31; iii) it is proportionate – i.e. necessary in a democratic society in response to a pressing social need.[145] The Committee recognised that all the contested measures had a clear legal basis in Greek law and that these policies were meant to protect a public interest – i.e. one of the purposes listed in Art. 31 of the Charter, namely the necessity to address the economic crisis through international loans.[146] Whilst the Committee acknowledged that States have a margin of appreciation in defining the notion of public interest, this discretion is not boundless and States cannot "divest themselves of their obligations by surrendering their power" to outline the content of such notion to external institutions.[147] This principle applies also in situations where creditor institutions exercise considerable pressure by prescribing detailed measures that result "in a dismantling of important parts of labour law and the employment system".[148] Even in extreme circumstances such as the severe economic crisis affecting Greece, limitations must be proportionate, *viz.* be appropriate for reaching the goal pursued, the most suitable for achieving such objective, the least restrictive on the relevant rights, and able to maintain an adequate level of protection of basic social needs.[149]

In the case at hand, the Committee recognised that "the dramatic shrinkage of the Greek economy and the very high rate of unemployment represented a pressing social need",[150] but it concluded that the measures were not proportionate since there was no evidence that the Government performed a thorough analysis of their effects on the population and, more specifically, on vulnerable groups, alongside the absence of consideration of any other

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[144] *GSEE v. Greece*, *cit.*, paras. 130-138 (on Art. 1(2) ESC), paras. 187-193 (on 4(1) ESC).
On the specific issue raised by the complainant, the Committee concluded that: i) the contested measures by themselves did not necessarily rule out the attainment of full employment in violation of Art. 1(1) ESC; ii) the rules on working hours did not violate the right to a reasonable daily rest period and a weekly rest period of at least one day under Arts. 2(1), 2(5) ESC and 7(5) ESC; iii) the lack of legislative provisions setting upper limits to weekly working hours, together with the absence of sufficient guarantees on collective bargaining, constituted an infringement of the obligation to provide for reasonable weekly working hours under Art 2(1) ESC. Lastly, the European Committee addressed the claim under Art. 3 of the 1988 Additional Protocol to the Charter. It recalled that such norm does not cover collective bargaining. However, differently to its previous stance (see Section 2.3.1. above), the Committee recognises the applicability of such rule as it obliges State parties to ensure that procedures – which are outside the scope of those referred to in the articles on the Charter specifically referred to collective bargaining – are implemented "with a view of ensuring the effective exercise of the right of workers to participate in the determination and improvement of working conditions." In the case at stake, Greek legislation did not fulfil such requirements (paras. 124-129, 153-164, 216-224, 243-244).
[145] *GSEE v. Greece*, *cit.*, para. 83.
[146] *GSEE v. Greece*, *cit.*, para. 84.
[147] *GSEE v. Greece*, *cit.*, para. 87.
[148] *GSEE v. Greece*, *cit.*, para. 86.
[149] *GSEE v. Greece*, *cit.*, paras. 85, 87-90.
[150] *GSEE v. Greece*, *cit.*, para. 90.

alternative less restrictive measures.[151] Furthermore, the Committee stressed that none of the legislative measures challenged in the complaint achieved the aim of restoring the labour market or the economic and financial situation in Greece.[152]

Lastly, the European Committee of Social Rights stressed the exceptional features of the facts underlying the complaint and the seriousness of the violations of the Charter, due to the large numbers of the articles infringed, their negative effects on a significant part of the Greek population and the persistent nature of the some of the breaches, already identified in previous cases.[153] The Committee further highlighted that the legislative inaction, under strong pressure from international lenders, with respect to amending such contested law was contrary to the obligation to undertake steps that enable the full, practical and effective exercise of the rights enshrined in the Charter.[154] According to the Committee, the identified violations posed a challenge to "the interest of the wider community and the shared fundamental standards of all the Council of Europe's member states, namely human rights, democracy and the rule of law".[155]

In light of the gravity of the situation, the Committee of Ministers published the decision as soon as it was notified and invited Greece to submit at the earliest possible "a comprehensive report on the measure taken or envisaged to bring the situation into conformity with the Charter".[156]

2.3.5 Brief remarks

In its decisions concerning austerity measures enacted in Greece, the European Committee of Social Rights clarified the general principles governing the obligations of States Parties to the Charter in the context of sovereign debt crisis.

At the outset, the European Committee reiterated the obligation to progressively achieve the full realization of the right to social security and, more generally, the requirements to be met in order to adopt justified retrogressive measures. The Committee stressed once again the relationship between national economic goals and the obligations stemming from the Charter. Even if States Parties may lower the level of protection, national authorities must prove that these restrictions were proportionate. The approach of the European Committee in assessing whether the backsteps were justified is based on two factors. First, the European Committee of Social Rights did not recognise a wide margin of appreciation to State Parties, opposing the broad discretion acknowledged by the European Court of Human Rights.[157] This stance is strictly linked to the degree of severity of the proportionality test: whilst the European

[151] *GSEE v. Greece*, *cit.*, paras. 90-91.
[152] *GSEE v. Greece*, *cit.*, para. 92.
[153] *GSEE v. Greece*, *cit.*, paras. 246-247.
[154] *GSEE v. Greece*, *cit.*, para. 248-249.
[155] *GSEE v. Greece*, *cit.*, para. 250.
[156] Committee of Ministers, Resolution CM/ResChS(2017)9, Greek General Confederation of Labour (GSEE) v. Greece, Complaint No. 111/2014, Resolution of 5 July 2017.
[157] Lorenza Mola, 'The Margin of Appreciation accorded to States in Times of Economic Crisis. An Analysis of the Decision by the European Committee of Social Rights and by the European Court of Human Rights on National Austerity Measures' (2015) 5(1) *Lex Social* 174, 182, available at: www.upo.es/revistas. See also Lorenza Mola, 'Le "misure di austerità" adottate dalla Grecia davanti al Comitato europeo dei diritti sociali' (2012), 6 *Diritti umani e diritto internazionale* 419; Lorenza Mola, 'Carta sociale europea e riforme strutturali del mercato del lavoro in tempi di crisi economica' (2013) 7 *Diritti umani e diritto internazionale* 206.

Committee performed a strict assessment of the necessity (i.e. whether the contested measures were the least restrictive among those suitable to achieve the aim), the examination of the European Court of Human Rights on the same aspect was superficial – as highlighted in Sections 3 and 4 below. Secondly, Greece had to prove that it had carefully considered the effect of conditionality towards the enjoyment of the social-economic rights enshrined in the Charter. In other words, the European Committee clarified that in period of economic distress, States Parties to the Charter which intend to lower the standards of protection are under the obligation to execute a human rights impact assessment, which is essential to both ensure that restrictions are justified and to defend themselves in the context of an adversarial proceeding before the European Committee.[158]

Another noteworthy aspect of the decisions of the Committee concerns the importance of respecting the core framework of national social security systems, which entails the prohibition of excluding entire categories of workers from their protection and to provide for the elderly with income below the poverty line. In this regard, the European Committee evoked specific parameters where it established the poverty threshold – namely Eurostat indicators.[159] This reference helps shape the minimum core obligations of States Parties in matters of social security in times of economic crisis and, hence, helps in avoiding an unlimited shrinking of the level of protection. Ultimately, by adopting unjustified retrogressive measures and impinging upon the essential level of social security protection, Greece failed to comply with its obligation to respect (i.e. refrain from affecting the enjoyment of) socio-economic rights. Such interferences were not justified in light of the claw-back clause under Art. 31 of the Charter, either.

The European Committee of Social Rights also took the chance to highlight its position in the event of conflicting obligations, i.e. where a State party to the European Social Charter is also bound by other international (or EU) commitments which are incompatible with the Charter provisions. The European Committee of Social Rights expressed a position which is in line with general international law (as already recalled in Section 2.2.1 above), the Committee stated that Greece was not exempted from the obligations arising from the European Social Charter on the grounds of its other international obligations, specifically those under the financial support mechanism. This approach confirms that the European Committee refuses the adoption of the "Bosphorus Doctrine", or "doctrine of equivalent protection", developed by the European Court of Human Rights.[160] In principle, States party to the ECHR that are also members of another international organization – such as the EU – are still liable under the Convention for all conduct performed due to the membership to this other international organization. However, in the ECtHR's view, these forms of conduct are allegedly in compliance with the Convention as long as the relevant organization is seen as protecting fundamental rights in a manner which can be considered at least equivalent to that

[158] See e.g. Deborah Russo, 'I vincoli internazionali in materia di tutela dei diritti sociali: alcuni spunti dalla giurisprudenza recente sulle "misure di austerità"' (2013), 2 *Osservatorio sulle Fonti* 1, 11; Giovanni Guglia, 'La giurisprudenza del Comitato Europeo dei Diritti Sociali al tempo della crisi economica: le decisioni concernenti la Grecia', in Claudio Panzera et al (eds), *cit.*, 83, 92-94.

[159] Francesco Costamagna, 'Riduzione delle risorse disponibili e abbassamento dei livelli di tutela dei diritti sociali: il rispetto del nucleo minimo quale limite all'adozione di misure regressive' (2014), 2 *Diritti umani e diritto internazionale* 371, 385; Antonia Baraggia, Maria Elena Gennusa, 'Social Rights Protection in Europe in Times of Crisis: "A Tale of Two Cities"' (2017), in 11(4) *ICL Journal* 479, 501.

[160] Baraggia, *cit.*, 502.

provided by the ECHR. According to the Court, the EU fulfils this requirement.[161] The European Committee has never accepted a corresponding relative presumption of conformity: the standards of safeguards of socio-economic rights as provided under the Charter are higher than those under EU law.[162] As Chapter IV shows, there is still no conformity in the level of protection afforded by these two systems.

On the matter of implementation, following these decisions, the Committee of Ministers of the Council of Europe adopted resolutions calling Greece to revoke the contested measures. These actions were meant to cease the wrongful act and ensure its non-repetition. Hence, they would have fulfilled the parameters outlined in Chapter II, as these means would have met the collective nature of socio-economic rights without affecting the solvency of the State. However, all the resolutions of the Committee of Ministers are still under the respective follow-up procedure, since Greece did not perform adequate reforms to bring its legislation in conformity with the European Social Charter – as shown by the latest proceeding before the European Committee of Social Rights.

Notably, the Committee stated that the persistent non-compliance with its findings on the violation of the Charter (i.e. the non-amendments of the contested national legislations) was by itself a violation of the obligation to progressively achieve the full realization of the Charter's rights. Taking into account the non-binding nature of the Committees' decisions and of the recommendations of the Council of Ministers, this statement is quite remarkable. The normative and interpretative value of the views, decisions and reports of international committees is addressed in Sections 3.2.2 and 4 below and in Chapter V.

3. The approach of the European Court of Human Rights towards the right to property and the right to housing

The European Court of Human Rights receives applications claiming the violation of the European Convention of Human Rights, an instrument which mostly enshrines typical civil and political rights, with only few exceptions – such as the prohibition of slavery and

[161] See e.g. ECtHR, *M. & Co. v. the Federal Republic of Germany*, Application No 13258/87, decision of 9 February 1990; *Hava Yollari Turizmve Ticaret Anonim Sirketi ("Bosphorus Airways") v Ireland*, Application No. 45036, decision of 30 June 2005, paras 153 ff.; *Michaud v France*, Application No 12323/11, Judgment of 6 December 2012), paras 105 ff; *Povse v Austria*, Application Noo 3890/11, judgment of 18 June 2013, para 77; *Avotins v Latvia*, Application No 17502/07, judgment of 23 May 2016, para 49. As for the literature, see e.g. Tobias Lock, 'Beyond Bosphorus: The European Court of Human Rights' case law on the responsibility of member states of international organisations under the European convention on human rights' (2010) 10 *Human Rights Law Review* 529; Oliver De Schutter, 'Bosphorus post-accession: Redefining the relationships between the European Court of Human Rights and the parties to the convention', in V. Kosta et al. (eds.), *The EU accession to the ECHR* (2014), 177; Elisa Ravasi, *Human rights protection by the ECtHR and the ECJ: A comparative analysis in light of the equivalency doctrine* (2017); Maura Marchegiani, *Il principio della protezione equivalente come meccanismo di coordinamento tra sistemi giuridici nell'ordinamento internazionale* (2018).

[162] European Committee on Social Rights, *CFE-CGC v. France*, Complaint No. 16/2003, decision of 12 October 2004, paras. 29-40; *Confédération Générale du Travail (CGT) v. France*, Complaint No. 55/2009, decision of 23 June 2010, paras. 31-42; *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, Complaint No. 85/2012, decision of 3 July 2013, para. 74. See e.g. Jean-François Akandji-Kombé, 'La Charte sociale européenne et les autres instruments européens des droits de l'homme', in Claudio Panzera et al (eds), *cit.*, 41, 44-47 ; Claudio Panzera, ''Diritti ineffettivi? Gli strumenti di tutela della Carta Sociale Europea', in *id*, 109, 133.

forced labour, the right to property, and the right to education.[163] Nonetheless, socio-economic rights other than those expressly set forth in the Convention have been included in its scope of application through case-law, such as the right to adequate housing or the right to health.[164]

In the context of the Eurozone sovereign debt crisis, individuals and organizations lodged several applications before the European Court of Human Rights claiming that austerity measures violated their right to property – instead of other workers' or trade unions' rights, hence arguing a violation that differs from those complained of before the CESCR, the ILO Committee on Freedom of Association and the European Committee of Social Rights. Applications were submitted against several member States of the Council of Europe. The following section will address only those against Greece and Portugal, according to the scope of the present dissertation and in light of the substantial correspondence of the reasoning and outcome of all such proceedings.[165]

3.1. Applications claiming the violation of the right to property due to austerity measures

The European Court of Human Rights dealt with two main issues: i) the cut of salaries and other benefits and allowances of public servants, alongside the reduction of retirement pensions; ii) the haircut on Greek bonds.[166] The Court assessed whether such measures complied with the requirements to limit the right to property under Art. 1, Add. Prot. 1 ECHR, *viz.* whether such restrictions were provided for by law, pursued a legitimate aim in the public interest, and were proportionate.

3.1.1. The reduction of public servants' wages and pensions in Greece and Portugal

The European Court of Human Rights received a series of applications claiming that the cut of salaries and other allowances and benefits, as well as the reduction of retirement pensions, adopted by Greece and Portugal in response to the economic crisis were in violation of the right to property under Art. 1, Add. Prot. 1 ECHR. The Court found all the applications manifestly ill-founded and declared them inadmissible.[167]

In each case, the ECtHR considered that the contested austerity policies constituted an interference with the right to the peaceful enjoyment of possessions, but it concluded that such

[163] Respectively set forth in Art. 4 ECHR, Art. 1, Add. Prot. 1 to the ECHR, and Art. 2 Add. Prot. 1 to the ECHR.
[164] See e.g. Andreea Maria Roșu, *The European Convention on Human Rights in Times of Economic Crisis and Austerity Measures* (2015), 16-28; Ingrid Leijten, *Core Socio-Economic Rights and the European Court of Human Rights* (2018), 25-58, 233-290. For a comprehensive overview of this case-law, see Christina Binder at al. (eds), *Social Rights in the Case Law of Regional Human Rights Monitoring Institutions*, (2016), 29-298.
[165] On the decisions and judgments issued in relation to the applications not covered in the following Sections, see e.g. Roșu, *cit.*, 28-48.
[166] On the participation of the private sector in the restricting of the Greek public debt, see Chapter I, Section 3.1 of the present thesis.
[167] See e.g. *Koufaki and ADEDY v. Greece*, Application Nos. 57665/12 and 57657/12, Decision of 7 May 2013 [*Koufaki and ADEDY v. Greece*]; *De Conceição Mateus and Santos Januario v. Portugal*, Application Nos. 62235/12 and 57725/12, Decision of 8 October 2013 [*De Conceição Mateus and Santos Januario v. Portugal*]; *da Silva Carvalho Rico v. Portugal*, Application No. 11341/2014, Decision of 1 September 2015 [*da Silva Carvalho Rico v. Portugal*].

limitations complied with the requirements set forth in the claw-back clause under Art. 1, Add. Prot. 1 ECHR.[168] First of all, the Court noted that these interferences were established under domestic statutory provisions, hence they were provided for by law.[169] Second, the European Court of Human Rights stated that reducing public spending and responding to an extremely serious economic crisis were clearly in the public interest within the meaning of Art. 1, Add. Prot. 1 ECHR.[170] The judges also noted that the introduction of such policies was part of broad programmes designated by national authorities and international creditors with the view of achieving budgetary recovery.[171] In this regard, the Court acknowledged that States Parties to the ECHR enjoy a "wide margin of appreciation" in regulating their economic and social policies, since national authorities "are in principle better placed than an international judge" to decide what is in the public interest of a community on economic and social grounds. The Court further stated that discretion is even broader when these issues involve "an assessment of the priorities as to the allocation of limited State resources." [172] The ECtHR reached the same conclusion irrespective of whether the contested measures were continuing and permanent, such as in Greece, or transitory and temporary, such as in Portugal.

Lastly, the Court assessed whether national authorities struck a fair balance between the demands of the general interest of the community and the requirements of protection of the applicants' right to the peaceful enjoyment of property. The proportionality test represents a constraint to the margin of appreciation enjoyed by States, which is not unlimited.[173] The requisite fair balance is met if applicants had not to bear "a disproportionate or excessive burden"[174] and, in cases concerning pensions, if their right to derive benefits from the social security scheme at stake had not been "infringed in a manner resulting in the impairment of the essence" of such right.[175] The Court also clarified that the assessment of proportionality depends "on the particular circumstances of the case and the applicants' personal situation". In light of this, while "a total deprivation of entitlements resulting in the loss of means of subsistence" would violate the right to property, a commensurate reduction would not.[176]

The ECtHR concluded that the cuts of public servants' wage and pensions were proportionate to the general interest of reducing States' imbalance. This conclusion took into account the severe economic crisis affecting the respondent Countries, alongside the fact that the situation of the applicants had not risked falling below the subsistence threshold, since the

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[168] *Koufaki and ADEDY v. Greece*, para. 34; *De Conceição Mateus and Santos Januario v. Portugal*, paras. 19-20; *da Silva Carvalho Rico v. Portugal*, para. 33.
[169] *Koufaki and ADEDY v. Greece*, para. 35; *De Conceição Mateus and Santos Januario v. Portugal*, paras. 20-21; *da Silva Carvalho Rico v. Portugal*, para. 35-36.
[170] *Koufaki and ADEDY v. Greece*, paras. 36-41; *De Conceição Mateus and Santos Januario v. Portugal*, paras. 25; *da Silva Carvalho Rico v. Portugal*, paras. 37-40.
[171] *De Conceição Mateus and Santos Januario v. Portugal*, para. 25; *da Silva Carvalho Rico v. Portugal*, para. 39.
[172] *Koufaki and ADEDY v. Greece*, para. 31; *De Conceição Mateus and Santos Januario v. Portugal*, para. 22; *da Silva Carvalho Rico v. Portugal*, para. 37.
[173] *De Conceição Mateus and Santos Januario v. Portugal*, para. 23; *da Silva Carvalho Rico v. Portugal*, para. 38.
[174] *Koufaki and ADEDY v. Greece*, para. 32; *De Conceição Mateus and Santos Januario v. Portugal*, para. 23; *da Silva Carvalho Rico v. Portugal*, para. 38.
[175] *De Conceição Mateus and Santos Januario v. Portugal*, para. 24; *da Silva Carvalho Rico v. Portugal*, para. 41.
[176] *De Conceição Mateus and Santos Januario v. Portugal*, para. 24; *da Silva Carvalho Rico v. Portugal*, para. 41.

claimants were not at risk of having insufficient means to live. Notably, the Court also stated that the existence of possible alternative solutions to reduce the State budget deficit and overcome the financial crisis does not in itself render the contested measures unjustified. Provided that the legislator remained within the boundaries of its margin of appreciation, it is not for the ECtHR to decide whether other options could have been identified for reaching the pursued aim. Thus, according to the Court the contested measures did not impose a disproportionate and excessive burden on the applicants.[177] The judges reached this conclusion irrespective of whether the national constitutional courts had upheld the contested measures, as decided by the Greek Council of State, or declared them unconstitutional, as determined by the Portuguese Constitutional Court. Ultimately, the ECtHR found the applications manifestly ill-founded and declared them inadmissible.

3.1.2. The haircut on Greek bonds

The applicants in *Mamatas and others v. Greece* claimed that their forcible participation in the restructuring of the Greek public debt violated their right to property under Art. 1, Add. Prot. 1 ECHR.[178] As already mentioned,[179] the Greek Bondholders Act of 2012 introduced retroactive collective action clauses (CACs) into all bonds governed by domestic law issued before the 31st December 2011.[180] Subsequently, the Greek government launched an offer to exchange such bonds with other securities. The required consent of a (rather low) qualified majority was reached. The amendment entailed, among others, a reduction of 53.5% of the face value of the original bonds (the so-called "haircut").[181] The European Court of Human Rights declared the contested measures in compliance with the Convention.

Similar to the decisions concerning cuts of public servants' wages and pensions, the Court recognised that the measure constituted an interference in the peaceful enjoyment of possessions under Art. 1, Add. Prot. 1 ECHR and assessed whether Greece met the

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[177] *Koufaki and ADEDY v. Greece*, para. 44, 46, 48; *De Conceição Mateus and Santos Januario v. Portugal*, paras. 28-29; *da Silva Carvalho Rico v. Portugal*, paras. 44-45.

[178] *Mamatas and Others v. Greece*, Application Nos. 63066/14, 64297/14 and 66106/14, Judgment of 21 July 2016 [*Mamatas and Others v. Greece*]. The applicants also claimed the violation of the prohibition of discrimination under Art. 14 ECHR, together with the right to property, since the different situations were treated in the same way – namely, small investors were treated as legal entities holding State bonds. The Court concluded that there was no violation (paras. 121-142). On this decision, see e.g. A. Viterbo, 'La ristrutturazione del debito sovrano greco allo scrutinio della Corte europea dei diritti umani: nessuna tutela per i piccoli investitori' (2017), 11 *Diritti umani e diritto internazionale* 1, 294 [Viterbo, 'La ristrutturazione'].

[179] Chapter I, Section 3.1. of the present dissertation.

[180] Annamaria Viterbo, *Sovereign Debt Restructuring: The Role and Limits of Public International Law* (2020), 223; *Id*, 'I meccanismi per la risoluzione della crisi del debito sovrano: alla ricerca di un difficile bilanciamento tra interessi pubblici e interessi privati' (2014) 8(8) *Diritti umani e diritto internazionale* 351, 357-358 [Viterbo, 'I meccanismi']. CACs empower a qualified majority of bondholders to modify the terms of the bond contract and to bind the minority to such amendment, even without their consent. In other words, contractual terms of the dissenting minority are modified against their will. See e.g. Christian Hofmann, 'A Legal Analysis of the Eurozone crisis', in Cristoph G. Paulus (ed), *A Debt Restructuring Mechanism for Sovereigns. Do we need a legal procedure?* (2014), 43, 63; Marco Committeri, Francesco Spadafora, 'You never give me your money? Sovereign debt crises, collective action problems, and IMF lending' (2013) 143 *Questioni di Economia e Finanza - Occasional papers* 1, 16-17. Alongside "majority" collective action clauses, there are also "Unanimous-Action Clauses (UACs), where any change in a bond contract requires the consent of each holder." (Committeri, Spadafora, *cit.*, 17).

[181] Abel, *The Resolution of Sovereign Debt Crises: Instruments, Inefficiencies and Options for the Way Forward* (2019), 157; Viterbo, 'I meccanismi', *cit.*, 358.

requirements to legitimately limit this right.[182] Notably, prior to this analysis, the judges recalled the principles developed through its case-law on austerity measures implemented during the Eurozone sovereign debt crisis. In particular, the ECtHR reiterated that State parties enjoy a wide margin of appreciation in deciding economic and social policies, since national authorities are in principle better placed than an international court to determine the means to achieve the identified aim. Hence, the Court generally respects the legislature's policy choice, unless it is manifestly unreasonable.[183]

On the first condition to restrict the right to property, the Court recalled that the principle of lawfulness presupposes that the limitations are provided for by applicable provisions of domestic law, which must be sufficiently accessible, precise and foreseeable in their application.[184] The judges deemed that the Greek Bondholders Act constituted an adequate legal basis, as it was accessible to the applicants and, hence, the haircut was lawful.[185] Notably, the Court disregarded the retroactive nature of the Greek Bondholders Act and whether it could have been in tension with the requirement of foreseeability. As for the legitimate aim, the Court considered the significant financial crisis and the need to receive an international loan, which was conditional to the participation of the private sector in restructuring the Greek public debt. In light of this, the ECtHR deemed that the exchange of bonds, which reduced the overall public debt by about €110 billion, contributed to maintain economic stability in the public interest of the community within the meaning of Art. 1, Add. Prot. 1 ECHR.[186]

Regarding the proportionality test, the European Court of Human Rights noted that the haircut resulted in the reduction of the 53,5% of the nominal value of the bonds. However, the ECtHR considered that the benchmark to assess the extent of the actual loss was not the value that the applicants would have expected at the original bonds' term to maturity. Rather, the relevant parameter was the value of the bonds when the Greek Bondholders Act was adopted, a time where the uncertainty surrounding Greek solvency had already affected the monetary value of such financial assets.[187] Moreover, the Court affirmed that the forcible participation of the applicants did not influence, as such, the assessment of proportionality, since the complainants could have sold their bonds on the market before the expiry of the invitation by the Government.[188] The ECtHR recalled that the introduction of CACs was a condition of the disbursement of the loan and, had the Government refused to enact the Greek Bondholders Act, the bondholders would have suffered from a larger cut of their receivables. Thus, the exchange of bonds was an appropriate and necessary means to reduce the Greek public debt.[189] Besides, the ECtHR considered that investments are risky activities and unforeseeable events may debilitate States' economic soundness and, consequently, cause economic losses

[182] *Mamatas and Others v. Greece*, paras. 94-95. According to some Authors, the replacement of Greek bonds (i.e. the extinction of old bonds followed by the issuance of new ones) amounted to a deprivation of property under Art. 1, Add. Prot. 1 ECHR which could have resulted in a more rigorous assessment of the situation. For a different opinion on this aspect, see Viterbo, 'La ristrutturazione', *cit.*, 297.
[183] *Mamatas and Others v. Greece*, para. 88 (and the ECtHR's decisions thereby cited).
[184] *Mamatas and Others v. Greece*, para. 98.
[185] *Mamatas and Others v. Greece*, paras. 97-100.
[186] *Mamatas and Others v. Greece*, paras. 101-105.
[187] *Mamatas and Others v. Greece*, para. 112.
[188] *Mamatas and Others v. Greece*, paras. 113-114.
[189] *Mamatas and Others v. Greece*, para. 116.

for bondholders.[190] Ultimately, the European Court of Human Rights, taking into account the wide margin of appreciation enjoyed by State Parties, concluded that Greece struck a fair balance between the general interest of the community and the rights of the applicants, and that the Government did not impose an excessive burden on these latter.[191]

3.2. Interim measures and the right to housing in Spain

Families with children requested the ECtHR to apply interim measures under Rule 39 of the Rules of the Court to obtain the suspension of forced evictions ordered by the Spanish Government without providing alternative accommodation.[192] The Court upheld every request, each of which was eventually lifted for different reasons. The first case concerned a mother with minor children, who lived in an illegally occupied apartment. The ECtHR lifted the interim measure and declared the main application inadmissible for non-exhaustion of domestic remedies, since the *recurso de amparo* launched by the applicants was pending before the Spanish Constitutional Court which, according to the ECtHR, could uphold the claim under Art. 15 or Art. 18 of the Spanish Constitution – respectively enshrining the prohibition of degrading treatment and the right to private life.[193] The second case regarded a family living in a former livestock trail full of unauthorised constructions. The family received an order of eviction and demolition, which was part of a broader plan to requalify the area. The ECtHR struck out of the list the main application because the matter had been resolved: the Spanish Government withdrew the authorisation to enter and demolish the applicants' house, took steps to secure their stability and to provide a wider solution to all the people affected by the contested plan of requalification of that plot of land.[194] The last case concerned two families who lived in squatted apartments. The Court lifted the interim measures since the Government assured that alternative accommodation would have been provided at the local level.[195]

Notably, following the interim measures adopted by the ECtHR, Spanish Courts have suspended evictions of families with children.[196]

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[190] *Mamatas and Others v. Greece*, para. 117.
[191] *Mamatas and Others v. Greece*, paras. 119-120.
[192] Rule 39: "1. The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it. 2. Where it is considered appropriate, immediate notice of the measure adopted in a particular case may be given to the Committee of Ministers. 3. The Chamber may request information from the parties on any matter connected with the implementation of any interim measure it has indicated."
[193] *A. M. B. v. Spain*, Application No. 77842/2012, 28 January 2014. The interim measure was granted on the 12 December 2012. The *recurso de amparo* is one of the means to request a constitutional review to the Spanish Constitutional Court. See Chapter V, Section 2.3.
[194] *Mohamed Raj and Others v. Spain*, 3537/2013, 16 December 2014. The interim measure was granted on the 31 January 2013.
[195] *Ceesay, Ceesay and Others v. Spain*, 62688/2013. The interim measure was granted on 15 October 2013.
[196] Dolores Utrilla, 'Spain', in Stefano Civitarese Matteucci, Simon Halliday (eds), *Social Rights in Europe in an Age of Austerity* (2018), 98, 113.

3.3. Brief remarks

The European Court of Human Rights was the last venue called to decide upon alleged contrasts between national-adjustment programmes and internationally recognised human rights. The Court assessed whether Greek and Portuguese austerity-driven legislation violated the right to property and concluded either that the applications were inadmissible[197] or that the measures under review were in compliance with the ECHR.[198] The judges grounded the assessment of the applications on the doctrine of the margin of appreciation, which is strictly linked to the principle of subsidiarity.

The principle of subsidiarity underpins the functioning of human rights monitoring institutions. According to this principle, national authorities are primarily responsible for safeguarding the rights set forth in international human rights treaties and conventions, whilst the judicial and quasi-judicial review of supervisory mechanisms in the context of complaint procedures is subordinate to the States' failure in complying with such obligation. This principle applies also to the ECHR system and to the tasks of the European Court of Human Rights.[199]

One of the corollaries of the principle of subsidiarity in regional human rights systems is the margin of appreciation doctrine.[200] In greater detail, the ECHR aims at promoting a

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[197] *Koufaki and ADEDY v. Greece, cit.*; *de Conceição Mateus and Santos Januario v. Portugal, cit.*; *da Silva Carvalho Rico v. Portugal, cit.*.

[198] *Mamatas and Others v. Greece, cit.*.

[199] On the principle of subsidiarity, see e.g. Harris et al (eds.), *cit.*, 17-18; Adriana Di Stefano, *Convenzione europea dei diritti dell'uomo e principio di sussidiarietà* (2009); Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014), 14 *Human Rights Law Review* 487; Alastair Mowbray, 'Subsidiarity and the European Convention on Human Rights' (2015), 15 *Human Rights Law Review* 313; Samantha Besson, 'Subsidiarity in International Human Rights Law — What is Subsidiary about Human Rights?' (2016) 61(1) *The American Journal of Jurisprudence* 69. For the case-law of the ECtHR, see *Handyside v. The United Kingdom,* Application No. 5493/72, Judgment of 7 December 1976, para. 48; *Kudła v Poland,* Application No 30210/96, Judgment of 26 October 2000, para. 152; *S.A.S. v. France,* Application No. 43835/11, Judgment of 1 July 2014, para. 129.

[200] According to Besson, it is possible to distinguish three types of human rights subsidiarity. The first is procedural subsidiarity, which pertains to the competence of human rights bodies to review a complaint. This first type of subsidiarity is strictly linked to admissibility requirements, especially the priori exhaustion of domestic remedies. The second is substantive subsidiarity, which regards the intensity and content of the review of the international supervisory body. This second type of subsidiarity is linked with the fourth-instance doctrine and with the margin of appreciation doctrine. The third is remedial subsidiarity which concerns States' freedom to choose the remedial means after an adverse judgment of an international human rights body or court. See Besson, *cit.*, 78-83.

On the doctrine of the margin of appreciation, see e.g. Harris et al (eds.), *cit.*, 14-17; Rosario Sapienza, 'Sul margine d'apprezzamento statale nel sistema della Convenzione europea dei diritti dell'uomo' (1991), *Rivista di diritto internazionale* 571; Eva Brems, 'The margin of appreciation doctrine in the case-law of the European court of human rights' (1996) 56 *Zeitschrift fur Auslandisches Offentliches Recht und Volkerrecht.* 230; Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1991) 31(4) *Journal of International Law and Politics* 843 [Benvenisti, 'Margin of Appreciation']; Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2006) ,16(5) *The European Journal of International Law* 907 [Shany, 'Toward a General Margin of Appreciation Doctrine]; George Letsas, 'Two Concepts of the Margin of Appreciation' (2006), 26(4) *Oxford Journal of Legal Studies* 705; Dominic McGoldrick, 'A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee' (2016), 65(1) *International & Comparative Law Quarterly* 21; Yuval Shany, 'All Roads Lead to Strasbourg?' (2018), 9(2) *Journal of international dispute settlement* 180; Eyal Benvenisti, 'The Margin of Appreciation, Subsidiarity and Global Challenges to Democracy' (2018), 9(2) *Journal of international dispute settlement* 240 [Benvenisti, 'The Margin of Appreciation, Subsidiarity']; Janneke Gerards, 'Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights' (2018) 18(3) *Human Rights Law Review* 495. The margin of

minimum standard of protection common to all States Parties to the Convention, which are characterised by country-specific legal and factual features. Against this backdrop, the margin of appreciation doctrine is meant to reconcile the effective protection of Convention rights and the national sovereignty of States parties to the ECHR.[201] According to this doctrine, States parties to the Convention have some room for manoeuvre in fulfilling the commitments stemming from the ECHR.[202] With regard to limitations of rights, due to their direct and continuous contact with the specific situation of their countries, national authorities are in principle in a better position than an international judge (such as the ECtHR) to make an initial assessment of the aim pursued by a restriction and of its proportionality – with particular regard to the necessity of the measures to achieve the general interest at stake. This margin of appreciation is recognised both to the domestic legislator and to other domestic bodies, including judicial, that are called to interpret and apply the national law in force.[203]

Since this doctrine rests upon the respect of States' sovereignty and different national traditions, its width mostly depends on the existence of a European consensus on the matter under scrutiny: the absence of a common approach among State parties to the Convention results in a broad margin of appreciation in favour of domestic authorities.[204] However, even if such consensus is lacking, the discretion recognised to States parties is not absolute, since it "goes hand in hand" with the European Court's supervision. In the context of interference with rights enshrined in the Convention, the ECtHR's supervision covers both the national legislation and the decision that the competent domestic courts deliver in the exercise of their

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appreciation doctrine is taking shape also in investor-state dispute settlement mechanisms: critically, see Giovanni Zarra, 'Right to Regulate, Margin of Appreciation and Proportionality: Current Status in Investment Arbitration in Light of *Philip Morris v. Uruguay*' (2017), 14(2) *Revista de Direito Internacional* 94.

The margin of appreciation doctrine was originally developed in relation to derogations in time of emergency under Art. 15 of the Convention and later the Court case-law expanded its scope of application to States' interference with ECHR rights under the relevant claw-back clauses. On the evolution of the margin of appreciation doctrine see Sapienza, *cit.* See also Council of Europe, High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration (18-20 April 2012); Council of Europe, Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (24 June 2013, yet to entry into force), CETS No. 213.

[201] Paul Mahoney, 'The Doctrine of the Margin of Appreciation under the European Convention of Human Rights: Its Legitimacy and Application in Practice' (1998) *Human Rights Law Journal* 1; ECtHR, *Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium*, Application no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, Judgment (Merits) of 23 July 1968, para. 10. See also Mireille Delmas-Marty, *Le flou du droit: Du code pénal aux droits de l'homme* (2004) according to which the margin of appreciation doctrine "tente de conjuguer l'universalisme des droits de l'homme avec le relativisme des traditions nationales" (at 15).

[202] See e.g. Harris et al (eds.), *cit.*, 14-15 and the case-law thereby provided.

[203] See e.g. ECtHR, *Handyside v. The United Kingdom*, *cit.*, para. 48.

[204] According to Benvenisti, in the case-law of the ECtHR "consensus is inversely related to the margins doctrine: the less the court is able to identify a European-wide consensus on the treatment of a particular issue, the wider the margins the court is prepared to grant to the national institutions". See Benvenisti, 'Margin of Appreciation', *cit.*, 851. Similarly, see Harris et al (eds.), *cit.*, 11; Hennebel, Tigroudja, *cit.*, 645-646; Palombino, *Introduzione*, *cit.*, 104-105. On the other elements which influence the width of the margin of appreciation and the correspondent deference to national authorities see: Brems, *cit.*, 256-264; Françoise Tulkens, Luc Donnay, 'L'usage de la marge d'appréciation par la Cour européenne des droits de l'homme. Paravent juridique superflu ou mécanisme indispensable par nature?' (2006) *Revue de science criminelle et de droit pénal comparé* 2, 15-20. Recently, in ascertaining the existence of a consensus, the Court has also considered the law and practice of States not members of the Council of Europe. See Harris et al (eds.), *cit.*, 10. See e.g. ECtHR, *Demir and Baykara v. Turkey*, Application no. 34503/97, Judgment of 12 November 2008 [Grand Chamber].

margin of appreciation. The supervision concerns both the aim of the measure and its proportionality.[205]

The principle of proportionality prescribes that the measure restricting human rights must be: i) suitable to achieve the pursued aim, ii) necessary for its attainment – i.e. the least restrictive means among those suitable to reach such goal, and iii) strictly proportionate to the object pursued – *viz.* a fair balance must be struck between the general interest of the community and the individual right at stake.[206] If the State does not fulfil one of these three cumulative requirements, the limitation of the right is incompatible with the relevant claw-back clause and, hence, it constitutes a violation of the Convention.

In the austerity-related cases analysed in the previous Section, the ECtHR recognised that wide discretion is granted to States when it comes to general measures of economic and social policy, specifically when the issues involve an assessment of the priorities as to the allocation of limited budgetary resources. The recognition of such a broad margin of appreciation had two consequences on the assessment of the proportionality of the measure. First, the Court did not ascertain the necessity of the measures, as it denied its competence on deciding whether better alternative measures could have been envisaged in order to reduce the State budget deficit – provided that the legislator did not exceed its margin of appreciation.[207] In other words, the Court refused to assess whether austerity measures imposing salary and pension cuts represented illegitimate retrogressive measures – i.e. whether these policies were not the least restrictive means to reach the achieved purpose. Second, the ECtHR did not conduct firm scrutiny on whether national authorities struck a fair balance between the general interest of granting State solvency and the right to property of the applicants. In the cases against Greece and Portugal the Court stated that, for an interference to be contrary to Art. 1, Add. Prot. 1 ECHR, it must result in the impairment of the essence of the right to property and represent a disproportionate and excessive burden on the applicants.[208] According to the Court's self-restraint approach, it appears that a restriction of the right to property would constitute a violation of the Convention only if it amounts to a total deprivation of e.g. salaries or pensions entitlements.[209] That is to say that the restriction would have breached the Convention only if it had impinged upon the minimum core of the right to property.

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[205] See e.g. ECtHR, *Handyside v. The United Kingdom, cit.*, para. 50; *A. v. Norway*, Application No. 28070/06, Judgment of 9 April 2009, para. 74.

[206] Vincenzo Cannizzaro, *Il principio della proporzionalità nell'ordinamento internazionale* (2000), 54; Robert Alexy, 'Proportionality and Rationality', in Vicki C. Jackson, Mark Tushnet (eds.), *Proportionality. New frontiers, new challenges*, 13. See also Emily Crawford, 'Proportionality' (2011), in Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Public International Law*, available at: www.opil.ouplaw.com. On the principle of proportionality in the ECHR system, see also Sébastien van Drooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des droits de l'homme: prendre l'idée simple au sérieux* (2001). Other Authors add a fourth element to the proportionality test, namely the existence of a legitimate aim. See e.g. Aharon Barak, *Proportionality: Constitutional Rights and their Limitation* (2012), 3, 245–302, 529–39.

[207] *Koufaki and ADEDY v. Greece*, para. 44, 46, 48; *de Conceição Mateus and Santos Januario v. Portugal*, paras. 28-29; *da Silva Carvalho Rico v. Portugal*, paras. 44-45.

[208] *Koufaki and ADEDY v. Greece*, para. 32; *De Conceição Mateus and Santos Januario v. Portugal*, para. 23; *da Silva Carvalho Rico v. Portugal*, para. 38.

[209] For a different stance, see e.g. ECtHR, *Lengyel v. Hungary*, Application no. 8271/15, Judgment of 18 July 2017. In this case the Court declared that the reduction of the applicant's disability benefit by half was not proportionate and, hence, Hungary violated Art. 1, Add. Prot. 1 ECHR.

Possibly, the Court's self-restrained attitude was intended to avoid a worsening of the sovereign debt crisis affecting both Greece and Portugal. The finding of a violation would have almost definitely required making good for damages or spurred structural reforms. Either legal consequence would have had budgetary implications: they could have exacerbated the imbalance of payments or, at best, could have delayed the economic recovery of the two Countries – also because of the potential renegotiations of the lending agreements with their creditors. This stance is in line with the Court's usual cautious approach towards issues involving budgetary considerations and occasioning economic burdens for respondent States.[210] Against this background, the Court decided to place greater emphasis on the respondent States' interests, although these did not necessarily equate with those of the persons negatively affected by austerity measures.

On the contrary, the Court granted interim measures to applicants claiming the violation of the right to housing by Spain. The Convention does not safeguard the right to housing as such, but that the Court's case-law protects under Art. 3 and Art. 8 ECHR, which respectively enshrines the prohibition of inhuman and degrading treatments and the right to respect for private and family life, including to a home. Although the wording of the provisions of Art. 3 and Art. 8 suggests that Contracting States have the mere obligation to refrain from conducts which may impinge upon such rights, the Court's interpretation of these norms extended their scope of application so as to encompass also obligations to take affirmative steps, i.e. obligations to protect and to fulfil, according to the tripartite typology outlined in Chapter II.[211] With specific regard to the right to housing, the Court recognised protection against forced evictions which could have resulted in vulnerable individuals (such as severely ill persons or Roma people) becoming homeless. Even if States parties are not under the obligation to provide everyone within their jurisdiction with a home, the ECtHR's trend is to assess whether the State is required to provide alternative adequate and decent accommodation (such as social housing) to protect the special needs of the individuals involved.[212] This trend could enhance the safeguarding of people affected by forced evictions in times of sovereign debt crisis. The consequences of economic turmoil (such as increased unemployment) and of the policies enacted as a response (such wage and pension cuts) could cause difficulties in making mortgage or rent payments. The combined effects of these factors may, ultimately, enlarge the category of vulnerable individuals whose special needs deserve a

[210] See e.g. the ECtHR's stance concerning the removal of seriously ill third-country nationals, which could claim to remain in the territory of a Contracting Party in order to continue to benefit from medical assistance and services in the host Country (which bears the related costs) only in very exceptional cases. See e.g. *D. v United Kingdom*, Application No 30240/96, Judgment of 2 May 1997, paras 53–54; *N. v the United Kingdom*, Application No 26565/05, Judgment of 27 May 2008, para 42; *Yoh-Ekale Mwanje v Belgium*, Application No 10486/10, Judgment of 20 December 2011, para 83; *Samina v Sweden*, Application No 55463/09, Judgment of 20 January 2012, paras 50, 54, 55, 61; *Husseini v Sweden*, Application No 10611/09, Judgment of 8 March 2012, paras 84, 86, 90, 94; *Paposhvili v Belgium*, Application No 41738/10, Judgment of 13 December 2016, para. 183. See also Vladislava Stoyanova, 'How Exceptional Must 'Very Exceptional' Be? Non-Refoulement, Socio-Economic Deprivation, and *Paposhvili v Belgium*' (2017), 29(4) *International Journal of Refugee Law* 580.

[211] Chapter II, Section 2.1. On the extensive interpretation of Art. 3 and Art. 8 ECHR, see e.g. Harris et al (eds.), *cit.*, 237-281, 501-570.

[212] For an overview of the ECtHR's approach to the right to housing under Art. 3 and Art. 8 of the Convention, see e.g. Leijten, *Core Socio-Economic Rights, cit.*, 233-248; Françoise Tulkens 'The contribution of the European Convention on Human Rights to the poverty issue in times of crisis', Seminar on Human Rights for European Judicial Trainers, 14-23, available at: www.echr.coe.int.

particular protection including, as the case may be, providing them with alternative accommodation.

4. Strengthening the protection of fundamental rights in times of economic crisis before the European Court of Human Rights

The Court's stance towards requests for interim measures related to the right to housing raises two questions. The first is whether the ECtHR could have adopted a different and more protective stance with regard to applications concerning the right to property where those are related to cuts in wages and social security issues. The second is whether the applicants could have obtained a more favourable outcome had they alleged the violations of other Convention rights (Section 4.1). The last subsection briefly reviews the legal consequences of violations of the ECHR, also in light of consequences of the interim measures on the right to housing (Section 4.2).

4.1. The unlikelihood of alternative adjudicative approaches towards the right to property and potential strategic litigation *vis-à-vis* labour-related claims

The majority of crisis-related applications against Greece and Portugal had social-security implications, so one could argue that the stance of the Court is consistent with the content of the Convention, which foremost safeguards civil and political rights – and not socio-economic guarantees, as the instruments supervised by the ICESCR, the ILO Committee on Freedom of Association and the European Committee of Social Rights.[213] Yet, the textual scope of the ECHR does not alone justify this standpoint: indeed, as mentioned above, in its the previous case-law the ECtHR found violations of socio-economic rights though a broad interpretation of the Convention, so as to include in its scope also ES entitlements that are not expressly protected therein.[214] Therefore, it may be useful to explore whether this approach is applicable to claims related to the right to property.

This trend is based on two main arguments. The first concerns the social and economic implications of Convention rights, and the second is the Court's interpretation of the ECHR in light of other international instruments.[215] As for the former, according to the ECtHR "there is no water-tight division" separating the sphere of social and economic rights and that of civil and political rights.[216] This stance is connected with the teleological interpretation of the

[213] Oliver De Schutter, Paul Dermine, 'The Two Constitutions of Europe: Integrating Social Rights in the New Economic Architecture of the Union' (2017), 2 *Journal européen des droits de l'homme* 108, 133-136.
[214] Leijten, *Core Socio-Economic Rights, cit.*; Keith Ewing, John Hendy QC, 'International Litigation Possibilities in European Collective Labour Law: ECHR', in Bruun, Lörcher, Schömann (eds), *cit.* 295; Christina Binder, Thomas Schobesberger, 'The European Court of Human Rights and Social Rights - Emerging Trends in Jurisprudence' (2015), *Hungarian Yearbook of International Law*, 51, 54; Ingrid Leijten, 'The German Right to an *Existenziminimum*, Human Dignity, and the Possibility of a Minimum Core Socioeconomic Rights Protection' (2015), 16(1) *German Law Journal* 23, 24-25, 35-36.
[215] Leijten further elaborates on these theories, which she respectively calls "the effectiveness thesis" and "the indivisibility thesis". See Leijten, *Core Socio-Economic Rights, cit.*, 62-77.
[216] See ECtHR, *Airey v. Ireland*, Application no. 6289/73, Judgment of 9 October 1979, para. 26. As convincingly pointed out, the issue at stake concerns "the scope and depth of the ECHR's economic and social dimension". See Leijten, *Core Socio-Economic Rights, cit.*, 26.

Convention and, more specifically, with its *effective* interpretation. As recalled in the previous Chapter, Art. 31(1) of the Vienna Convention on the Law of Treaties requires a treaty be interpreted "in light of its object and purpose." As the ECHR is a human rights treaty, the realization of its "object and purpose" entails the practical and effective protection of the rights thereby enshrined,[217] including their socio-economic repercussions which, hence, fall within the scope of the Convention.

The second element is the Court's well-established case-law principle according to which "the Convention cannot be interpreted in a vacuum" and the ECtHR must take into account all the other relevant rules relating to the protection of human rights[218] – which also include the ones concerning socio-economic rights. Notably, the Court goes further than Art. 31(3)(c) of the Vienna Convention of the Law of Treaties,[219] since it also considers rules that are not applicable in relations between the parties. One of the most famous examples of this approach is the well-known *Demir and Baykara v. Turkey* case, in which the Grand Chamber of the ECtHR interpreted Art. 11 of the Convention in light of several instruments enshrining socio-economic rights, such as the ICESCR, ILO Conventions, provisions of the European Social Charter that Turkey had not accepted, and the Charter of Fundamental Rights of the European Union, which is not binding upon Turkey as it is not an EU Member State. The Court also referred to the interpretation provided by the relevant supervisory organs, such as the ILO Committee on Freedom of Association and the European Committee of Social Rights.[220] The Court further considered that the wish expressed by the member States of the ECHR to strengthen the mechanism of the European Social Charter was "an argument in support of the existence of a consensus among Contracting States to promote economic and social rights", which could be taken into account when interpreting the provisions of the Convention.[221]Ultimately, this method of interpretation led the Court to conclude that the right to bargain collectively with employers is one of the essential elements of the right to form and to join trade unions, which is expressly recognised under Art. 11 ECHR.[222] Such integrated approach allows to consider the international legal order as a whole and highlights the autonomous importance of socio-economic rights – i.e. not as merely means to ensure the enjoyment of civil and political rights.[223]

Moving to the austerity-related applications against Greece and Portugal, the emerging trend of the ECtHR in matters of socio-economic rights could have led the Court to a different assessment of the applicants' allegations in light of the social security implications of national austerity measures. In this regard, the ECtHR could have referred to the ICESCR and to the European Social Charter, both as interpreted by the respective monitoring bodies. Notably, the European Committee of Social Rights found that the very same Greek provisions contested

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[217] On the principle of effectiveness, see e.g. Harris et al (eds.), *cit.*, 18-19; Hennebel, Tigroudja, *cit.*, 640-642.

[218] See e.g. ECtHR, *Demir and Baykara v. Turkey*, para. 65-86, 147-154; *Correia De Matos v. Portugal*, Application No. 56402/12, Judgment of 4 April 2018, para. 134; *RMT v. the United Kingdom*, Application No. 31045/10, Judgment of 8 April 2014, paras. 27-37.

[219] Art. 31(3)(c) VCLT establishes that a treaty shall be interpreted taking into account "any relevant rules of international law applicable in the relations between the parties".

[220] *Demir and Baykara v. Turkey*, paras. 85-86, 99-105. The same judgment provides useful indications on the criteria used by the Court in interpreting the Convention and recalls other cases where the ECtHR referred to other international instruments: see paras. 60-75.

[221] *Demir and Baykara v. Turkey*, para. 84.

[222] *Demir and Baykara v. Turkey*, para. 153.

[223] Hennebel, Tigroudja, *cit.*, 644-645; Leijten, *Core Socio-Economic Rights*, *cit.*, 75.

before the ECtHR did not comply with Art. 12(3) of the European Social Charter, which prescribes the obligation to progressively raise the standard of domestic social security systems. The majority of the decisions of the European Committee of Social Rights issued before the European Court of Human Rights declared the applications against Greece and Portugal inadmissible as manifestly ill-founded. Had the ECtHR referred to the relevant provisions of the European Social Charter as interpreted by the European Committee of Social Rights, maybe it would have found a violation of the right to property. Regrettably, the Court opted not to apply such a scheme and preferred to act in self-restraint. By this means, the ECtHR also lost a chance to foster the authoritativeness of the pronouncements of human rights treaty bodies, including the European Committee of Social Rights, in matters of interpretation.

Although these considerations are based on the ECtHR's previous case-law, their concrete feasibility in individual complaints proceedings challenging conditionality clash with the consistent deferential approach that the Court adopted towards national austerity measures, which is grounded on the above-recalled principle of subsidiarity and the margin of appreciation doctrine. While the ECtHR's protective stance towards socio-economic rights is an emerging trend, the principle of subsidiarity and the margin of appreciation doctrine are deeply rooted in the interpretative adjudicative approach of the Court. The prominent role of such notions in the Convention system severely impairs the actual likelihood of a shift of the Court's attitude towards similar applications, should they be lodged in the future.

This conclusion calls into question whether the applicants challenging Greek and Portuguese austerity measures could have reached a more favourable outcome had they invoked different provisions of the Convention, and whether this different tactic could prove useful in possible future cases on austerity-driven measures.

In the above-analysed proceedings against Greece and Portugal, applicants claimed the violation of their right to property due to the cuts in salaries and pensions. Instead, the claimants could have chosen to allege the breach of their right to bargain collectively, which the Court expressly recognised as one of the "essential elements" of trade union-freedom under Art. 11 ECHR,[224] which, as such, cannot be restricted.[225] Plaintiffs could have supported their allegations by referring, on the one hand, the stance of the ECtHR in the *Demir and Baykara* case and, on the other, to the conclusions of the ILO Committee on Freedom of Association and of the European Committee on Social Rights on the very same Greek and Portuguese legislation. The overlap between the fields under the jurisdiction of these judicial and quasi-judicial bodies may constitute an obstacle to these applications, as outlined in Section 5 below.

4.2. Legal consequences of the finding of a violation

As mentioned in Chapter II, according to the case-law of the ECtHR a finding of a violation "imposes to the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the

[224] *Demir and Baykara v. Turkey*, para. 153.
[225] *Demir and Baykara v. Turkey*, para. 144.

situation existing before the breach."[226] Hence, the Court enjoys a degree of discretion in deciding which kind of legal consequences (if any) stems from a violation of the Convention: the ECtHR may decide that the State must cease the continuing illicit conduct, or it may indicate individual or general measures, or decide to order restitution in kind or monetary compensation. Lastly, the ECtHR may deem the finding of a violation as a sufficient form of reparation.[227]

Had the Court found a violation of the Convention in the austerity-related case-law against Portugal and Greece, it could have required the State to adopt general measures addressing the underlying problem and ensuring non-repetition of the infringement (e.g. amending the existing legislation on budget allocation), rather than awarding monetary compensation in favour of the applicants. In other words, the Court could have indicated a legal consequence that matches both the collective nature of ES rights and the need to preserve States' solvency.

The wide-ranging consequences of favourable outcomes of Courts' proceedings is also supported by the cases concerning the right to housing in Spain. On one of these occasions, the ECtHR lifted the interim measure suspending the eviction because, among other reasons, the Government took steps to provide a global solution to all the people who were likely to lose their accommodation due to the requalification of the relevant area. The second relevant event concerns the attitude of the Spanish Court which, following the orders adopted by the Court, suspended the evictions of families with children in proceedings different from those that had given rise to the request for interim measures.

These considerations notwithstanding, it should be stressed that individual complaints before the ECtHR are meant to assess whether the respondent State violated the Convention with regard to the specific case of the applicant, instead of addressing the general human rights situation in that Country. This may impact the choice of the specific legal consequences stemming from the finding of a breach, since the Court is not tasked with balancing the different interests at stake – namely, that of the victim to obtain a redress (including monetary compensation) and, on the other side, that of preserving States' solvency with the view of granting basic solvency to the benefit of the rest of the population.[228] Hence, if it is true that the Court enjoys discretion in deciding whether to grant monetary compensation (whether alone or together with general measures), the possibility that judges opt to award damages could not be excluded beforehand.

5. Overlapping jurisdictions and competing proceedings in the area of socio-economic rights: an appraisal in light of the Eurozone sovereign debt crisis

The previous sections highlight two situations of alleged competing jurisdictions between the judicial and quasi-judicial human rights bodies which addressed austerity-related

[226] ECtHR, *Papamichalopoulos and others v. Greece* (Article 50), Application No. 14556/89, Judgment (Just Satisfaction) of 31 October 1995, para. 34 (emphasis added).
[227] Harris et al (eds.), *cit.*, 163-165, 170-173, 188-194.
[228] Benedetto Conforti, 'Il ruolo della Corte di Strasburgo', in *id., Scritto di Diritto Internazionale – Vol. II* (2003), 275, 277-278; Carmela Salazar, 'La Crisi ha…"Sparigliato le Carte"? Note sulla Tutela Multilivello dei Diritti Sociali nello "Spazio Giuridico Europeo"', in Claudio Panzera et al (eds), *La Carta Sociale Europea tra universalità dei diritti ed effettività delle tutele* (2016), 53, 64.

cases at the international level. The first supposedly occurred between the ILO Committee on Freedom of Association and the European Committee of Social Rights, which dealt with the very same Greek and Portuguese legislation (Section 2.2. and 2.3. above). The second one could potentially arise should applicants adopt the proposed strategic litigation before the European Court of Human Rights (Section 4.1.).

These two specific situations are related to the more general topic of multiple competing proceedings before international fora with overlapping jurisdiction, which is the result of the proliferation of dispute settlement mechanisms at the international level – including in the field of human rights.[229] Multiple competing proceedings give rise to several concerns, among which potential conflicting outcomes and lack of legal certainty. These adverse consequences have amplified the scholarly debate on the tools for ensuring consistency and finality.[230]

The following does not elaborate on this topic in detail (as it is clearly beyond the scope of the present dissertation) but provides a few preliminary remarks (Section 5.1.) which guide the brief analysis of alleged competing proceedings related to austerity measures (Section 5.2).

5.1. Competing proceedings and coordinating rules at the domestic level and in international human rights law: a hint

Broadly speaking, two or more jurisdictions are overlapping where "a certain dispute can be addressed by more than one available forum."[231] This could give rise to competing proceedings, i.e. two or more sets of proceedings addressing the same dispute between the same parties and based on the same cause of action. These scenarios include sequential proceedings, where a forum is vested with a case already decided by another forum, and parallel proceedings, where two or more fora are simultaneously called to settle the same case.[232] Sequential and parallel proceedings may lead to several problems, among which incompatible judgments and lack of finality.[233]

These issues originally pertained solely to domestic legal systems and, later, have affected international law due to the above-mentioned proliferation of dispute settlement mechanisms. National orders have developed different coordinating mechanisms which seek

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[229] Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003), 6-8 [Shany, *The Competing Jurisdictions*]; Hennebel, Tigroudja, *cit.*, 523.

[230] A wealth of literature addresses different aspects of this topic. See e,g. Shany, *The Competing Jurisdictions*, *cit.*; Thomas Buergenthal, 'Proliferation of International Courts and Tribunals: Is It Good or Bad?' (2001), 14(2) *Leiden Journal of International Law* 267; Joost Pauwelyn, Luiz Eduardo Salles, 'Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions' (2009), 42(1) *Cornell International Law Journal* 77, 85;Nadja Erk-Kubat, *Parallel proceedings in international arbitration: a comparative European perspective* (2014); Giovanni Zarra, *Parallel Proceedings in Investment Arbitration* (2017); Laurence Boisson de Chazournes, 'Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach' (2017), in 28(1) *European Journal of International Law* 17, 64; Christoph Schreuer, 'Multiple Proceedings', in Andrea Gattini, Attila Tanzi, Filippo Fontanelli (eds.), *General Principles of Law and International Investment Arbitration* (2018)*;* Payam Akhavan, 'Forum Shopping and Human Rights: Staring at the Empty Shelves', in Martin Scheinin (ed.), *Human Rights Norms in 'Other' International Courts* (2019), 412; Philipp Janig, August Reinisch, 'General Principles and the Coherence of International Investment Law: of Res Judicata, Lis Pendens and the Value of Precedents', in Mads Andenas et al (eds), *General Principles and the Coherence of International Law* (2019).

[231] Shany, *The Competing Jurisdictions, cit.*, 21.

[232] Pauwelyn, Salles, *cit.*, 85.

[233] Shany, *The Competing Jurisdictions, cit.*, 8-11; Pauwelyn, Salles, *cit.*, 79-85

to avoid the potential negative consequences of competing jurisdictions and multiple proceedings. In view of the scope of the present dissertation, the prohibition of *lis pendens* and the *res judicata* principle in international human rights law should be briefly addressed.[234] The *lis pendens* principle regards parallel proceedings and prohibits the parties of a pending litigation (i.e. one that has not yet been decided) to initiate another proceeding before a different forum.[235] The *res judicata* principle relates to subsequent proceedings and precludes the examination of the merits of the case if another forum had already decided on the same dispute.[236]

From the specific perspective of human rights treaty law, quite a few universal and regional conventions and optional protocols lay down both rules,[237] including the Optional Protocol to the ICESCR and the European Convention on Human Rights.[238] From the viewpoint of general international law, the *res judicata* principle is deemed as a general principle of law,[239] while there is still uncertainty as to the legal status of the prohibition of *lis pendens*. While the majority of legal doctrine opposes the conclusion that this rule is a norm of international law,[240] few authors support the idea that the prohibition of *lis pendens* is a general principle of law[241] and that international courts and tribunals could apply this rule by relying on their inherent powers – i.e. even where their constituent instruments do not set forth such prohibition. According to this position, international courts and tribunals may apply the *res judicata* principle on the basis of their inherent powers as well – absent such provision in their constituent instruments.[242]

The requirements for the application of the *res judicata* principle and the prohibition of *lis pendens* are built on the "triple identity test", which demands the overlap between: i) the parties of the competing proceedings; ii) the object of the proceedings or relief sought (*petitum*); iii) the cause of action or legal ground (*causa petendi*).[243] These elements are

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[234] Common law countries also recognise other coordinating tools, such as the *forum non conveniens* doctrine and anti-suit injunctions. The legal status of these instruments under general international law is still a matter of debate. On these issues, see e.g. Pauwelyn, Salles, *cit.*, 110-117; Zarra, *Parallel Proceedings*, *cit.*, 90-98.

[235] Janig, Reinisch, *cit.*, 249; Shany, *The Competing Jurisdictions*, *cit.*, 22; Pauwelyn, Salles, *cit.*, 86.

[236] Shany, *The Competing Jurisdictions*, *cit.*, 22-23; Pauwelyn, Salles, *cit.*, 86.

[237] See e.g. Optional Protocol to the International Covenant on Civil and Political Rights (16 December 1966, entry
into force 23 March 1976) 999 UNTS 171, Art. 5(2)(a); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984, entry into force 2 6 June 1987) 1465 UNTS 85, Art. 22(5)(a); Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (18 December 1979, entry into force 3 September 1981) 2131 UNTS 83, Art. 4(2)(a); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (18 December 1990, entry into force 1 June 2003), 2220 UNTS 3, Art. 77(3)(a); International Convention for the Protection of All Persons from Enforced Disappearance (20 December 2006, entry into force 23 December 2010) 2716 UNTS 3, Art. 31(2)(c); Optional Protocol to the Convention on the Rights of the Child on a communications procedure (19 December 2011, entry into force 14 April 2014), UNGA Res. A/RES/66/138, Art. 7(d); Optional Protocol to the Convention on the Rights of Persons with Disabilities (13 December 2006, entry into force 3 May 2008) 2518 UNTS 283; American Convention on Human Rights ("Pact of San Josè, Costa Rica") (22 November 1969, entry into force18 July 1978) 1144 UNTS 123, Art. 46(1)(c).

[238] See respectively Op-Protocol to the ICESCR, Art. 3(2)(c) and Art. 35(3)(b) ECHR.

[239] See e.g. Janig, Reinisch, *cit.*, 254-257.

[240] Doubts were expressed by e.g. Pauwelyn, Salles, *cit.*, 106-110; Zarra, *cit.*, 118.

[241] See e.g. Shany, *The Competing Jurisdictions*, *cit.*, 270 according to which the *lis pendens* rule "probably qualifies as a general principle of law". Similarly, see Janig, Reinisch, *cit.*, 257-258.

[242] See e.g. Akhavan, *cit.*, 422.

[243] The triple identity test is rooted in the famous dissenting opinion of Judge Anzilotti on the *res judicata* principle, where he referred to "the three traditional elements for identification, *persona, petitum, causa*

cumulative and not alternative. International courts and tribunals, including human rights bodies, have interpreted these requirements inconsistently and their attitude has ranged from a strict approach, which demands the formal identity of the three elements, to a softer approach, which requires a looser substantive sameness.[244] Beside the lack of coherence among different human rights bodies, the very same forum has interpreted such requirements in changeable ways. For example, the European Court of Human Rights shifts from requiring the formal identity of the applicants as a condition to apply the *lis pendens* rule enshrined in the Convention to accepting their substantive sameness – i.e. it deemed sufficient that the applicants were associated to a certain degree with the competing proceeding.[245] Such inconsistent attitude – which is further addressed in the following section – results in a case-by-case approach which undermines the predictability of the *lis pendens* and *res judicata* rule, including in austerity-driven litigations.

5.2. Competing proceedings in the context of the Eurozone sovereign debt crisis: the uncertainty surrounding the application of the *lis pendens* and *res judicata* principles

The previous section assumed that international human rights law falls within the definition of "legal system" and, hence, is a suitable framework for the application of the *lis pendens* and *res judicata* principles. The present section briefly examines the potential application of these norms in competing proceedings challenging austerity measures.

Before moving to such examination, two preliminary remarks should be outlined. The first concerns the legal basis of the two rules, whilst the second relates to the notion of competing dispute settlement mechanisms.

As for the first remark, only the CESCR and the ECtHR are bound to apply the *lis pendens* and *res judicata* rules by treaty provisions governing the admissibility of complaints.[246] The CESCR shall declare a communication inadmissible when "the same matter has been or is being examined under another procedure of international […] settlement"[247], whilst the ECtHR shall not deal with any individual application that "is substantially the same as a matter that has already been submitted to another procedure of international […] settlement and contains no relevant new information."[248] Quite the opposite, there are no treaty provisions governing *res judicata* and *lis pendens* before the ILO Committee on Freedom of Association and the European Committee of Social Rights. As mentioned above, the *res judicata* rule is deemed as a general principle of law, while the legal status of the prohibition of *lis pendens* is still uncertain. The present analysis adopts a cautious approach and assumes that the latter has not yet been enshrined in general international law,

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petendi". See Permanent Court of International Justice, *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Dissenting Opinion of Judge Anzilotti, 16 December 1927, PCJI Serie A – No. 13, 23.

[244] Janig, Reinisch, *cit.*, 263.

[245] Harris et al (eds.), *cit.*, 73-74; Hennebel, Tigroudja, *cit.*, 530.

[246] Pauwelyn and Salles correctly distinguish between "matters of jurisdiction and admissibility": the former concerns "the *scope* of a tribunal's decisional authority", while the latter relates to "the conditions governing the exercise of the *specific action or process* before the tribunal" or "circumstances that represent 'legal impediments' […] to proceed to a ruling on the merits." (Pauwelyn, Salles, *cit.*, 94).

[247] Op-Prot. ICESCR, Art. 3(2)(c).

[248] ECHR, Art. 35(2)(b).

hence the following assessment considers that judicial and quasi-judicial bodies may apply solely the *res judicata* rule by relying on their inherent powers.[249]

As for the second remark, according to the case-law of judicial and quasi-judicial human rights bodies, competing dispute settlement proceedings encompasses both regional courts, such as the ECtHR, and quasi-judicial mechanisms, such as UN treaty bodies (including the CESCR), the ILO Committee on Freedom of Association and the European Committee of Social Rights.[250] Hence, whether the outcome of the proceeding has a formal binding nature is irrelevant in assessing the existence of overlapping jurisdictions and competing proceedings and, consequently, in the application of the *res judicata* and *lis pendens* rules, provided that the triple identity test is satisfied.

Turning to the case-law on the Eurozone sovereign debt crisis, the first situation of alleged competing proceedings regards those before the ILO Committee on Freedom of Association and those before the European Committee on Social Rights. This set of actions is characterised by a partial overlap between: i) the parties of the proceedings, since some of the trade unions were complainants before both committees;[251] ii) the *petitum* of the proceedings, which addressed the same Greek national austerity measures;[252] iii) the *causa petendi*, which generally speaking concerned similar (although not identical) workers' rights, such as the right to collective bargaining and the right to participate in the determination of working conditions.[253] Moreover, the European Committee on Social Rights decided upon the relevant communications in May 2012, while the ILO Committee issued its report in November

[249] A clarification on the legal status of the *lis pendens* principle in international law may derive from the future judgment on the *Case concerning the application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, which is currently pending before the International Court of Justice (ICJ). In this case, the United Arab Emirates asked the Court to order, as a preliminary measure, that Qatar immediately withdraw its Communication submitted to the UN Committee on the Elimination of All Forms of Racial Discrimination (which is the body tasked with monitoring the implementation of the homonymous Convention). The ICJ affirmed that this measure did not concern a plausible right under Convention and that it had not made a pronouncement on the issue at that stage of the proceedings, nor did it consider it necessary to decide whether any *lis pendens* exception is applicable in that situation. See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Order of 14 June 2019, I.C.J. Reports 2019, p. 361, para. 25.

[250] For an overview of this case-law, see e.g. Shany, *The Competing Jurisdictions*, *cit.*, 59-66; Harris et al (eds.), *cit.*, 72-73; Hennebel, Tigroudja, *cit.*, 523-532.

[251] For example, GENOP-DEI and ADEDY formally associated themselves with the complaint brought by GSEE before the ILO Committee on Freedom of Association and challenged the Greek austerity measures before the European Committee of Social Rights (see e.g. European Committee of Social Rights, *General Federation of employees of the national electric power corporation (GENOP DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*, *cit.*).

[252] See e.g. the claims against the Greek law establishing the primacy of special enterprise-level collective agreements over previous relevant sector collective agreements (ILO, 356th Report on Greece, *cit.*, para. 997; European Committee of Social Rights, *General Federation of employees of the national electric power corporation (GENOP DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*, *cit.*, paras. 31-33).

[253] See e.g. ILO, 356th Report on Greece, *cit.*, para. 997 (recalling ILO Conventions Nos. 87 and 97) and European Committee of Social Rights, *General Federation of employees of the national electric power corporation (GENOP DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*, *cit.*, paras. 31-33 and paras. 39-40. It should be recalled that, on this occasion, the European Committee stated that the right of workers to participate in the determination and improvement of their working conditions (under Art. 3(1) of the 1998 Optional Protocol of the Charter) does not concern the right to collective bargaining, which falls within the scope of Arts. 5 and 6 ESC that Greece had not accepted at the time.

2012.[254] The partial overlap of these subsequent proceedings notwithstanding, the ILO Committee on Freedom of Association did not address the issue. The lack of case-law on this matter does not allow to speculate on the possible reasons underpinning the stance of the ILO Committee or on potential future assessments, should a similar situation occur. The same could be held true with regard to the European Committee of Social Rights. As for the CERSCR, the *res judicata* and *lis pendens* rules are set forth in a treaty clause, hence the Committee is bound to apply them provided that the relevant requirements are met. However, due to its recent set up, the CESCR had not yet had the occasion to deal with alleged competing proceedings and, hence, to clarify the extent of the application of the *res judicata* and *lis pendens* rules.

The other situation which could have given rise to potential competing proceedings involves the European Court of Human Rights, should applicants pursue the strategic litigation proposed above (Section 4.1). The ECtHR had several chances to construe the elements of the tripartite identity test and its approach was not always consistent.

The interpretation of the first element has led to incoherent outcomes. On some occasions involving alleged overlaps with disputes settled by the ILO Committee on Freedom of Association, the Court declared the applications admissible because the parties of the proceedings were not identical, although the applicants before the ECtHR were connected to a certain degree with the complaints before the ILO Committee.[255] Notably, in one of these cases the Court concluded that the parties of the proceedings were not the same even if the complainant before the ILO Committee submitted the claim on behalf of the applicant before the ECtHR.[256] Quite the reverse, in other occasions the European Court of Human Rights declared the applications inadmissible because it deemed that the parties of the two proceedings were substantially the same. In these cases, the Court held that while, formally, the applicants had not been the complainants before the ILO Committee on Freedom of Association, they were closely associated to the proceeding before the ILO Committee either because the complainant before such Committee acted on their behalf or due to their status as officials of the complainant before the ILO Committee.[257]

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[254] Trade unions initiated the proceedings before the ILO Committee in October 2010 and the ILO Committee issued its report in November 2012. As for *General Federation of employees of the national electric power corporation (GENOP DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*, *cit.*, the complaint before the European Committee on Social Rights was registered on 11 February 2011 and the European Committee issued its decision the 23 May 2012 (the decision was notified to the Greek Government on 18 June 2012 and was made public on 5 February 2013).

[255] See e.g. European Commission of Human Rights, *Council of Civil Service Unions and others v. the United Kingdom*, Application no. 11603/85, Decision on Admissibility of 27 January 1985, The Law, para. 1; ECtHR, *Eğitim ve Bilim Emekçileri Sendikası v. Turkey*, Application No. 20641/05, Judgment of 25 September 2012, paras. 37-39. In the first case the complainant before the ILO Committee on Freedom of Association was the Trade Union Congress (TUC) and the first applicant before the European Commission of Human Rights (the Council of Civil Service Unions) was a member of the TUC. In the second case, the complainant before the ILO Committee on Freedom of Association was the KESK (Kamu Emekçileri Sendikaları Konfederasyonu), a confederation to which the applicant before the ECtHR was affiliated. Since the applicant trade unions had their own legal personality and had not lodged the complaint before the ILO committee, nor had they intervened in that proceedings, the ECtHR declared that the proceedings were not substantially the same and, hence, declared the applications admissible.

[256] ECtHR, *Eğitim ve Bilim Emekçileri Sendikası v. Turkey*, *cit.*, para. 38.

[257] European Commission of Human Rights, *Cereceda Martín v. Spain*, Application no. 16358/90, Decision on Admissibility of 12 October 1992, pages. 132-134. *The Professional Trades Union for Prison, Correctional and Secure Psychiatric Workers and Others (POA and Others) v. the United Kingdom*, Application no. 59253/11,

The interpretation of the second and third element of the triple identity test seems to be less problematic. With respect to the object of the proceedings, the ECtHR seems to adopt a formalistic, and hence strict, approach. In a case concerning the alleged violation of the right to form and join trade unions respectively under Art. 5 European Social Charter and Art. 11 ECHR, the Court stated that while the proceeding before the European Committee of Social Rights had a general character – i.e. it concerned the national legislation as such, the one before itself concerned the a domestic court's order which, although based on the same national legislation, addressed the specific situation of the individual applicants. Thus, the two complaints could not be regarded as being substantially the same.[258] In line with this reasoning, in another case the ECtHR concluded that the proceeding before the ILO Committee on Freedom of Association and the one launched before the Court itself had the same object, as both argued that the very same national provisions contravened the respondent State's obligations on freedom of association – respectively enshrined in the ILO Convention No. 87 and in Art. 11 ECHR.[259] This conclusion is strictly linked to the assessment of the last element of the triple identity test, namely the legal basis (or *causa petendi*) of the alleged competing proceedings. In this regard, it should be recalled that the jurisdiction of the human rights supervisory bodies is treaty-based, therefore there would be no overlap of causes of action should a formalistic approach prevail. If these judicial and quasi-judicial mechanisms were to adopt a restrictive interpretation, proceedings before the same parties and with the same *petitum* but based on different convention provisions would automatically be excluded from the application of the *res judicata* and *lis pendens* rules. Rather, a wider interpretation of the *causa petendi* element would result in overlaps in each case where the legal grounds of two or more proceedings before different human rights supervisory bodies are substantially the same, *viz.* share similar scope of application and purpose (such as for example Art. 5 of the European Social Charter and Art. 11 ECHR, as respectively interpreted by the European Committee of Social Rights and the ECtHR).

Therefore, whilst the *petitum* and *causa petendi* elements do not raise particular issues as to their scope, the interpretative approach of the European Court of Human Rights with regards to the first element of the tripartite identity test (namely, the formal identity or substantive sameness of the parties) results in unpredictability and uncertainty as to the exact ambit of application of the *res judicata* rule and of the prohibition of *lis pendens*, at least in those proceedings involving parties which are not formally identical.

In the above analysed austerity-related litigations before the ECtHR (Section 3), the very same trade union that submitted the applications to the Court had already lodged the complaints before the ILO Committee on Freedom of Association and the European Committee of Social Rights. Hence, had it challenged the violation of Art. 11 for the alleged

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Decision on Admissibility of 21 May 2015, paras. 29-31. In the first case, the complainant before the ILO Committee on Freedom of Association was submitted by the trade union to which the individual applicants before the European Commission of Human Rights were members. In the second case, the first applicant before the ECtHR (the POA) was the complainant before the ILO Committee on Freedom of Association, whilst the Court stated that "the second and third applicants must be seen as being *closely associated* with the proceedings and the complaints before the Committee on Freedom of Association, by virtue of their status as officials of the POA" (para. 30) (emphasis added).

[258] ECtHR, *Tommy Evaldsson and others v. Sweden*, Application no. 75252/01, Decision on Admissibility of 28 March 2006, The Law, para. 1.

[259] *POA and Others v. the United Kingdom*, *cit.*, para. 28.

breach of the right to bargaining collectively (as proposed in Section 4.1. above), the Court would have had every reason to declare its application inadmissible. However, the interpretative approach of the ECtHR does not allow to foresee with sufficient certainty whether the Court would declare admissible applications lodged by trade unions affiliated to the complainants before other dispute settlement mechanisms (such as the ILO Committee of Freedom of Association and the European Committee of Social Rights) or by single individuals, including members of trade unions which initiated such other proceedings.

In this regard, the Court should adopt a strict approach and require the formal identity of the parties as condition for the application of the *res judicata* or *lis pendens* rules. The need to avoid competing proceedings and, consequently, conflicting outcomes and lack of finality should be balanced with the right of individuals and groups to initiate proceedings before international treaty-based bodies to claim the violation of their fundamental rights and seek a substantive redress.[260] A broad interpretation of the first element of the tripartite identity test, *viz*. the substantial sameness of the parties rather than their formal identity, bears the risk of an excessive restriction of the right to individual and collective petition before the ECtHR itself, a result that would be contrary to the spirit of the Convention.

Lastly, it should be highlighted that the possible multiplication of proceedings could represent a problem with regard to potential future austerity-litigations only insofar as putative applicants lodge complaints before international bodies other than the ECtHR. If plaintiffs opt not to, then they will avoid the assessment of this admissibility criterion and, at the same time, they will be able to reinforce their claim on e.g. the right to housing or the right to collective bargaining by relying on the provisions of other international instruments (such as the ICESCR, ILO Conventions and the European Social Charter), as interpreted by the relevant monitoring bodies in the aftermath of the Eurozone sovereign debt crisis.

6. Preliminary conclusions on crisis litigation at the international level

The sketch of this case-law shows both the advantages and the disadvantages characterizing the justiciability of socio-economic rights at the international level.

As for the advantages, the establishment of treaty-based bodies empowered with reviewing the respect of the instruments expressly encompassing ES rights represents a step towards the adoption of appropriate legal consequences in the event of their violation. The CESCR, the ILO Committee on Freedom of Association and the European Committee of Social Rights recommended measures that might be potentially relevant to the entire (segment of the) population suffering from the contested reforms, hence they match the collective dimension of ES rights.[261] Plus, with the exception of one view of the CESCR, these treaty-bodies did not suggest the awarding of monetary compensation, which meets the need to preserve States' solvency. This feature stems from the collective feature of the complaint

[260] Similarly, see e.g. Shany, *Competing Jurisdiction*, *cit.*, 23-24.
[261] Malcolm Langford et al., 'Introduction', in *Id*, (eds), (eds), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (2016), 13.

procedure, which allows monitoring bodies to address the general and structural problems underpinning the claims – rather than specific situations of individual applicants.[262]

However, the outcomes of these Committees lack legally binding force and their enforceability fully relies on the defending Country's discretion and political will.[263] In this regard, the literature and the practice of monitoring bodies are slowly developing the idea that States parties to a convention should, at the very least, consider the pronouncements of the corresponding treaty bodies in good faith.[264] For example, according to the UN Human Rights Committee, States parties to the International Covenant on Civil and Political Rights are under the "duty to cooperate with the Committee".[265] This duty "arises from an application of the principle of good faith to the observance of all treaty obligations".[266] Consequently, State parties "must use whatever means lie within their power in order to give effect" to its views.[267] According to Scholars and the practice, States must take into due account the pronouncements of treaty bodies, which interpret legally binding norms and are more than mere non-binding recommendations.[268] The "authoritativeness of their pronouncements on matters of treaty interpretation" also stems from the impartiality and independence of their members,[269] alongside the characteristics of the procedures and of the pronouncements which, more often than not, are similar to those of judicial proceedings and decisions.[270]

This notwithstanding, the current regime still struggles in ensuring the *effet utile* of these provisions.[271] This shortcoming characterises also the repeals suggested in the context of the Eurozone crisis: as mentioned above, the two views issued by the CESCR against

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[262] Panzera, cit, 125.

[263] Basak Çali, 'Enforcement', in Langford et al. (eds), *cit.*, 359, 368.

[264] See e.g. Christian Tomuschat, 'Human Rights Committee' (2019), in Rüdiger Wolfrum (eds), *Max Planck Encyclopedias of International Law*, available at: www.opil.ouplaw.com, para. 14; European Commission for Democracy Through Law (Venice Commission), Report on the implementation of international human rights treaties in domestic law and the role of courts, 8 December 2014, CDL-AD(2014)036, paras. 50, 78; Nikolaos Sitaropoulos, 'States are Bound to Consider the UN Human Rights Committee's Views in Good Faith' (11th March 2015), in *Oxford Human Rights Hub*, available at: www.ohrh.law.ox.ac.uk; UN Human Rights Committee, *General comment no. 33: Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, 25 June 2009, CCPR/C/GC/33, paras. 13-15; Deborah Russo, 'I trattati sui diritti umani nell'ordinamento italiano alla luce delle sentenze n. 120 e 194 del 2018 della Corte costituzionale' (2019), 13 (1) *Diritti umani e diritto internazionale* 155 [Russo, 'I trattati'].
On the different position concerning the legal nature of the views of UN treaty bodies, see e.g. Rosanne van Alebeek, André Nollkaemper, 'The legal status of decisions by human rights treaty bodies in national law' (2012), in E Helen Keller, Geir Ulfstein (eds), *UN Human Rights Treaty Bodies Law and Legitimacy*, 356, 382-387. Notably, a Spanish Court affirmed that a view of the UN Committee on the Elimination of Discrimination Against Women was binding upon the State: see Spanish Supreme Administrative Tribunal, Fourth Section Judgment No. 1263/2018 of 17 July 2018 (Spanish version available at: https://www.womenslinkworldwide.org). See also Koldo Casla, 'Supreme Court of Spain: UN Treaty Body individual decisions are legally binding' (1 August 2018), *Ejil!Talk*, available at: www.ejiltalk.org.

[265] UN Human Rights Committee, *General comment no. 33*, *cit.*, para. 15.

[266] *Cit.*.

[267] UN Human Rights Committee, *General comment no. 33*, *cit.* para. 20.

[268] International Law Association, Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies (2004), para. 15; European Commission for Democracy through Law (Venice Commission), Report on the implementation of international human rights treaties in domestic law and the role of Courts, *cit.*, para. 78.

[269] Serena Forlati,' On "Court Generated State Practice": The Interpretation of Treaties as Dialogue between International Courts and States' (2015), 20 *Austrian Review of International and European Law* 99, 108.

[270] Russo, I trattati, *cit.* 168.

[271] This issue is also addressed in Chapter V, Section 3.2. of the present dissertation, which deals with the role of human rights treaties and of the authoritative interpretation of treaty bodies before domestic constitutional courts.

Spain, the ILO Committee's report concerning the situation in Portugal and all the recommendations of the Committee of Ministers of the Council of Europe towards Greece are still under the respective follow-up procedures,[272] which means that these Countries still have not complied with the measures thereby attached. Still, the views, reports and decisions of these mechanisms are not completely devoid of practical legal value: these may perform a key interpretative function before domestic courts, as Chapter V attempts to demonstrate.

On the other side, the ECtHR's judgments are binding upon the Contracting Parties. Still, contrary to the findings of the Committees, the Court considered all the contested measures as in compliance with the right to property under the Convention. The Court relied on the States' wide margin of appreciation in allocating limited budgetary resources, alongside its (alleged) lack of competence in deciding whether Greek and Portuguese reforms constituted illegitimate retrogressive measures. This self-restraint approach is in tension with the Court's emerging trend to include socio-economic rights in the scope of the Convention, which is also confirmed by the interim measures ordered against Spain with regard to the right to housing – which is indirectly protected under Art. 3 and Art. 8 of the Convention. This further supports the idea that applicants could have adopted a different litigation strategy in the attempt to obtain a more favourable outcome – namely, claiming the violation of the right to collective bargaining under Art. 11 ECHR. Notably, the Court could have issued binding judgments finding the violation of the Convention and ordering general measures, such as the cessation of the wrongful conduct (e.g. through the repeal or amendment of national legislation) and guarantees of non-repetition. Nonetheless, the ECtHR could have also awarded monetary compensation to successful applicants and, thus, it could have caused "collateral damages" to the rest of the population which benefit from social services funded through public resources.

Furthermore, the austerity-driven litigation at the international level is no stranger to the problem of overlapping jurisdictions and competing proceedings, which is a consequence of proliferation of international courts and tribunals, including various human rights dispute settlement mechanisms. The case-law related to the Eurozone sovereign debt crisis highlighted two situations of potential overlapping jurisdictions. The first is the one between the proceedings before the ILO Committee on Freedom of Association and the European Committee of Social Rights, which dealt with the very same Greek legislation. Absent any pronouncement based on the *res judicata* principle, the two committees respectively issued a report and several decisions which, however, did not result in conflicting outcomes. The second situation of potential overlapping jurisdictions regards the European Court of Human Rights, should future applicants adopt the litigation strategy suggested above. Although the ECHR expressly enshrines the *lis pendens* and *res judicata* principles, the Court adopted an incoherent interpretation of the "same parties" requirement, which results in uncertainty as to the exact scope of their application. Besides, the broad standard of substantive sameness,

[272] CESCR, *Report on the sixty-third and sixty-fourth sessions (12–29 March 2018, 24 September–12 October 2018), Supplement No. 2*, UN Doc. E/2019/22 E/C.12/2018/3, 2019, p. 15; ECSR, *Follow-Up to Decisions on the Merits of Collective Complaints - Findings 2018*, December 2018, available at www.rm.coe.int. The ILO CFA declared closed the cases against Greece and Spain: see ILO, 376th Report on the effect given to the recommendations of the committee and the Governing Body, Case No 2820 (Greece), October 2015; ILO, 378th Report on the effect given to the recommendations of the committee and the Governing Body, Case No 2947 (Spain), June 2016.

rather than a strict parameter requiring the formal identity between the parties, may impair the individuals' right to lodge a petition before the ECtHR. Thus, treaty clauses regulating competing proceedings, although a step forward to legal certainty and finality, are not by themselves sufficient to foster coherence and to avoid competing proceedings or, to the contrary, unjustified restrictions of procedural rights – such as that of submitting applications before the ECtHR.

Ultimately, this survey shows that the monitoring institutions at the international level did not represent the most effective venues to establish enforceable legal consequences of violations of ES rights, due to either specific structural characteristics of some of the mechanisms (i.e. the non-binding nature of the Committees' outcomes) or the deferential approach adopted by others (*viz.* the ECtHR). Such flaws make it worth exploring whether other fora are available. The specific features of the management of the Eurozone sovereign debt crisis allow us to consider – at least – two other routes: the ECJ and national judiciaries.

CHAPTER IV

CRISIS LITIGATION AT THE EU LEVEL

SUMMARY 1. Challenging conditionality measures before the Court of Justice of the European Union 2. Theoretical inadequacy and practical unsuccessfulness of the action for compensation for non-contractual liability of the EU 2.1. The bail-in of Cypriot banks and the right to property 2.2. Council decisions and the reform of the Greek pension scheme 2.3. Brief remarks 3. Theoretical adequacy and practical unsuccessfulness of the action for annulment for violations of socio-economic rights under EU law 3.1. The inadmissibility of claims against the statement of the Eurogroup of 25 March 2013 and Memorandum of Understanding with Cyprus 3.2. The lack of standing in proceedings against the decisions of the Council 3.3. Brief remarks 4. Preliminary rulings between outranked workers' right and consumer protection 4.1. The dismissal of referrals concerning workers' rights under the Charter 4.2. Indirect protection of the right to housing through consumer legislation 4.3. Brief remarks 5. International human rights law and the EU legal system: the legacy of the "Laval Quartet" 6. Preliminary conclusions on crisis litigation at the EU level

1. Challenging conditionality measures before the Court of Justice of the European Union

As clarified in Chapter I,[1] the involvement of the European Union (EU, the Union) organs and the use of EU law instruments in the assistance programmes provided to euro-area States call into question the applicability of the Charter of Fundamental Rights of the European Union (CFREU, the Charter),[2] which establishes – among other entitlements – socio-economic rights and principles.[3] In the context of the Eurozone sovereign debt crisis, individuals affected by austerity measures resorted to the Court of Justice of the European Union (ECJ, the Court) to challenge the compatibility of such policies with the Charter itself.[4]

[1] Chapter I, Section 2.2 and Section 4.

[2] Charter of Fundamental Rights of the European Union, 26 October 2012, OJ 2012 C 326/02 [CFREU]. On the CFREU see e.g. Nicole Lazzerini, *La Carta dei diritti fondamentali dell'Unione europea. I limiti di applicazione* (2018).

[3] For an overview of the ES provisions of the Charter "in peril", see e.g. Anastasia Poulou, 'Austerity and European Social Rights: How Can Courts Protect Europe's Lost Generation?' (2014), 15(6) *German Law Journal* 1145, 1161-1169 [Poulou, 'Austerity']. On the evolution of human rights protection within the EU framework, see e.g. Gerard Conway, *European Union Law* (2015), 290-295; Alina Kaczorowska-Ireland, *European Union law* (2016), 235-241; Ugo Villani, *Istituzioni di Diritto dell'Unione europea* (6th edition, 2020), 50-63.

[4] The Court of Justice of the European Union is a collective name that covers: i) the Court of Justice of the European Union (former Court of Justice of the European Union); ii) the General Court (former Court of First Instance); iii) specialised courts. The present Chapter does not distinguish between the competence of the Court of Justice of the European Union and the General Court, which both issued decisions concerning austerity measures.

The present Chapter analyses the ECJ's austerity related case-law. The survey underpins the question of what role international human rights sources could have played before the Court in the context of the Eurozone sovereign debt crisis and, more generally, in situations where the economic interests of the Union, which are strictly linked to the functioning of the single European market and the European Monetary Union, are in tension with guaranteeing fundamental rights.

Before moving to the review of the Courts' case-law concerning conditionality, two issues deserve preliminary attention, namely: i) the scope of application of the CFREU; ii) the difference between rights and principles. Both topics are relevant for the analysis of the Court's approach to the proceedings concerning economic and fiscal consolidation programmes, as well as for exploring whether the ECJ could have reached different conclusions on the same matter had it adopted a different stance.

Regarding the first, Art. 51(1) CFREU prescribes that the rules of the Charter "are addressed to the institutions, bodies, offices and agencies of the Union" and to the Member States "only when they are implementing Union law". A distinction must be drawn between, on one hand, "institutions, bodies, offices and agencies" and, on the other, EU Member States. The first category encompasses all the EU authorities set up in the Treaties[5] or by EU secondary law, alongside EU agents (e.g. Europol personnel), which are bound to respect the Charter whenever they exercise competences and powers conferred on them by EU law.[6] On the other side, the Charter applies to EU Member States solely when those are "implementing" EU law within the meaning of Art. 51(1) CFREU.[7] The ECJ's case-law offers some clarification on this notion. First and foremost, the Court stated that the concept in question requires a "certain degree of connection" between EU law and the national measures at stake.[8] The Court then provided a non-exhaustive list of elements that should be taken into account in the determination of whether a States is "implementing EU law" and, thus, bring that State conduct within the scope of application of the Charter. More in detail, the following factors should be considered: i) whether the national legislation is meant to implement EU law; ii) the nature of the national legislation and if it pursues aims others than those covered by EU law; iii) if there are specific EU rules on the matter, or capable of affecting the matter.[9]

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[5] Consolidated version of the Treaty on the Functioning of the European Union, 26 October 2012, OJ L 326/47 [TFEU], Arts. 3 and 127-133. As is well-known, the distribution of power between the EU and its Member States is based on the principles of conferral, subsidiarity and proportionality, all set forth in Art. 5 of the consolidated version of the Treaty on the European Union, 26 October 2012, OJ L 326/01 [TEU].

[6] Lazzerini, *cit.*, 137; Explanations relating to the Charter of Fundamental Rights, OJ C 303/17, 14 December 2007, 'Explanation on Article 51 - Field of application' [Explanations]. As for the legal value of the Explanations, Art. 6(1) TEU clarifies that the rights, freedoms and principles in the CFREU "shall be interpreted with due regard to the explanations referred to in the Charter". See also Massimiliano Delfino, 'Art. 51 CFREU', in Edouard Ales et al (eds.), 'International and European Labour Law' (2018).

[7] The rule applies to every State organ (central authorities, regional or local bodies, and public organisations) and agent, as well as to entities, whatever their legal form, entrusted by the State for providing public service under its control which have for such purpose special powers beyond those resulting from the normal rules applicable in relations between individuals. See: Explanation on Article 51, *cit.*; Lazzerini, *cit.*, 104-106.

[8] See in particular ECJ, Case C-206/13, *Cruciano Siragusa v Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo*, Judgment of 6 March 2014, para. 24.

[9] ECJ, *Cruciano Siragusa v Regione Sicilia*, *cit.*, 25; Case C-40/11, *Yoshikazu Iida v Stadt Ulm*, Judgment of 8 November 2012, para. 79. See also Lazzerini, *cit.*, 200-206; Kaczorowska-Ireland, *cit.*, 244-249.

The distinction between EU "institutions, bodies, offices and agencies" and its Member States bears its consequences also for the applicability of the Charter in the context of the Eurozone sovereign debt crisis. As for the EU authorities, the mechanisms meant to manage the Eurozone turmoil have involved three EU institutions, namely the European Commission, the European Central Bank (ECB) and the Council, and one EU body, the European Financial Stability Mechanism.[10] The applicability of the Charter to the European Financial Stability Mechanism and to the Council has never been contested: the former is an EU institution and the latter is an EU body established under a specific regulation; moreover, both operate within the Union system.[11] On the contrary, the issue of whether the CFREU binds the European Commission and the ECB has been a matter of debate: their qualification as institutions notwithstanding, they perform tasks assigned under international law instruments outside the EU regime. The ECJ clarified this issue by expressly ruling that "the Charter is addressed to the EU institutions, including […] when they act outside the EU legal framework".[12] This statement covers at least the conduct of the European Commission and the ECB, which were the institutions involved in the relevant proceedings.[13] Following the applicability of the CFREU to these institutions, individuals affected by austerity-measures resorted to the ECJ to challenge the compatibility of austerity measures with the Charter by two means: the action for compensation for non-contractual liability of the EU and the action for annulment.

As for EU Member States, Council decisions addressed to beneficiary States reproduced or contained the economic and financial conditionality attached to rescue packages.[14] Council decisions are unilateral, legally binding acts of the Union,[15] hence theoretically austerity measures enacted in national legal orders are "implementing" EU law – alongside other international commitments of the receiving States (e.g. those under the Memorandum of Understanding, if these are deemed as binding instruments).[16] In light of these, victims of human rights violations induced national courts to refer questions concerning the interpretation of the provisions set forth in the CFREU through a referral for a preliminary ruling to the ECJ.

Moving to the difference between rights and principles, Art. 51(1) CFREU establishes that EU authorities and Member States (when implementing EU law) must respect the rights and observe the principles enshrined in the Charter, as well as promoting their application.

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[10] Chapter I, Section 2.2.

[11] Luise Fromont, 'L'application problématique de la Charte des droits fondamentaux aux mesures d'austérité: vers une immunité juridictionnelle?' (2016), 4 *Journal européen des droits de l'homme* 469, 482-483.

[12] ECJ, *Ledra Advertising Ltd and Others v European Commission and European Central Bank (ECB)*, Joined Cases Nos. C-8/15 P to C-10/15 P, Judgment of 20 September 2016, para. 67 [*Ledra Advertising* case (2016)].

[13] ECJ, *Ledra Advertising* case (2016), para. 67; *Dr. K. Chrysostomides & Co. LLC v Council of the European Union, European Commission, European Central Bank (ECB), Euro Group, European Union*, Case 680/13, judgment of 13 July 2018, para. 203 [*Dr K. Chrysostomides & Co. LLC* case]; Opinion of Advocate General Wahl, Joined Cases C-8/15 P to C-10/15 P, 21 April 2016, para 85. See also Simone Vezzani, 'Sulla responsabilità extracontrattuale dell'Unione europea per violazione della Carta dei diritti fondamentali: riflessioni a margine alla senza della Corte di giustizia nel caso *Ledra Advertising*' (2016), 99(1) *Rivista di diritto internazionale* 156; Oliver De Schutter, *The Implementation of the Charter of Fundamental Rights in the EU institutional framework. Study for the AFCO Committee* (2016), 38.

[14] Chapter I, Section 2.2.

[15] Art. 288(4) TFEU: "A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them."

[16] Claire Kilpatrick, 'Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry' (2017), in Thomas Beukers, Bruno De Witte, Claire Kilpatrick (eds), *Constitutional Change Through Euro-Crisis Law*, 279, 311 [Kilpatrick, 'Constitutions'].

Art. 52(5) CFREU further states that the provisions of the Charter which contain principles "may be implemented by legislative and executive acts" of the Union and of its Member States when they are implementing EU law, and that such principles "shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality." According to Scholars, the difference between rights and principle does not concern the scope of application of the Charter, rather it relates to the justiciability of its provisions.[17] Courts could rely on CFREU principles and rights as parameters of interpretation or validity of EU law or national legislation implementing EU law – i.e. whenever the Charter is applicable under Art. 51(1) CFREU. As opposed to rights, principles do not, by themselves, give rise to judicially enforceable claims, i.e. a principle does not entitle individuals to demand positive actions by the Union or its Member States where these fail to act to safeguard the principle at stake. Instead, Charter rights are judicially enforceable. However, a further distinction should be drawn between directly effective rights and non-directly effective rights,[18] as individuals can rely only on the rights encompassed in the former category to call the Union and its Member States (when implementing EU law) to take steps meant to adequately ensure the rights in question.[19]

These considerations notwithstanding, the difference between rights and principles is not clear yet, since the ECJ has still to provide for criteria allowing the interpreter to draw a dividing line between these two concepts.[20] Rather than focusing on Art. 52(5) CFREU, the ECJ preferred to embrace a case-by-case stance.[21] As for socio-economic rights, for example the Court affirmed that Art. 26 and Art. 27 of the Charter (which respectively enshrine the rights of persons with disabilities and workers' right to information and consultation within the undertaking) cannot be invoked as such before courts: for this purpose, both provisions must be given "more specific expression in European Union or national law."[22] Whilst, the ECJ concluded that Art. 31(2) CFREU on workers' right to a period of paid annual leave is "both mandatory and unconditional in nature", as it does not need "to be given concrete expression by the provisions of EU or national law", which are only required to specify the

[17] For further elaboration on this issue, see e.g. Lazzerini, *cit.*, 155-162; Villani, *cit.*, 57-58.

[18] Whilst the doctrine of the direct applicability of EU law concerns the method of incorporation of EU law into municipal law, the doctrine of direct effect of EU law addresses the conditions under which EU norms "thus incorporated into the municipal legal order are susceptible of being invoked before national courts by private individuals", i.e. when such provisions are "susceptible of receiving judicial enforcement". On this distinction, see above all Winter, 'Direct Applicability and Direct Effect-Two Distinct and Different Concepts in Community Law' (1972) 9(4) *Common Market Law Review* 425, 425-426. According to the well-established case-law of the ECJ, a norm of EU law (including a Charter provision) is directly effective if it is sufficiently clear and precise, and unconditional – i.e. it does not need any further implementing measures. See e.g. Kaczorowska-Ireland, *cit.*, 311-312,314-322 (and the case-law thereby referred to).

[19] Kaczorowska-Ireland, *cit.*, 249-250; Lazzerini, *cit.*, 163; Villani, *cit.*, 58-60; Explanations, *cit.*, 'Explanation on Article 52 - Scope and interpretation of rights and principles'.

[20] Kaczorowska-Ireland, *cit.*, 250; Villani, *cit.*, 57. Explanations, *cit.*, do not provide any useful guidance either, since the document simply lists three examples of principles (Articles 25 on the rights of the elderly, Art. 26 on the rights of persons with disabilities, and Art. 37 on environmental protection) and then states that "in some cases, an Article of the Charter may contain both elements of a right and of a principle, e.g. Articles 23, 33 and 34", which respectively concerns gender equality, family and professional life, and social security and social assistance.

[21] Villani, *cit.*, 57-58.

[22] ECJ, *Wolfgang Glatzel v Freistaat Bayern*, Case C-356/12, Judgment of 22 May 2014, para. 78 (on Art. 26); *Association de médiation sociale v Union locale des syndicats CGT, Hichem Laboubi, Union départementale CGT des Bouches-du-Rhône, Confédération générale du travail (CGT*),Case C-176/12, Judgment of 15 January 2014, paras. 45 and 48 (on Art. 27).

duration of the period and the conditions for the exercise of that right. Hence, the provision has a horizontal direct effect, i.e. it confers workers a right "that they may actually rely on in disputes between them and their employer" in fields falling within the scope of the Charter.[23]

Lastly, it should be recalled that Art. 52(1) CFREU establishes a general claw-back clause which provides that any limitation to the Charter rights must: i) be provided for by law; ii) pursue "objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others"; iii) comply with the principle of proportionality, including the respect of the essence of the relevant right and freedom.[24] In assessing whether the contested austerity measures complied with the Charter provisions, the ECJ took into consideration the claw-back clause under Art. 51(1) CFREU.

The following Sections outline a critical survey of the austerity-related case-law of the ECJ, which is mostly related to the right to property under Art. 17 CFREU. The Chapter takes into account three proceedings: the action for compensation for non-contractual liability of the EU (Section 2), the action for annulment (Section 3), and the preliminary rulings procedure (Section 4). This review poses the question of whether the ECJ could have reached different outcomes had it duly considered international human rights sources (Section 5). The last part outlines preliminary conclusions (Section 6).

2. Theoretical inadequacy and practical unsuccessfulness of the action for compensation for non-contractual liability of the EU

The action for compensation for non-contractual liability of the European Union is governed by Arts. 268 and 340 of the Treaty on the Functioning of the European Union (TFEU). Art. 268 establishes the exclusive jurisdiction of the ECJ over disputes relating to compensation for damage stemming from non-contractual liability of the EU,[25] whilst Art. 340 TFEU provides that such liability is governed by the general principles common to the laws of EU Member States. Art. 340(2) deals with the non-contractual liability of the Union, and Art. 340(3) addresses the non-contractual liability of the European Central Bank (ECB).[26]

The end of this action is making good any damage caused by EU institutions or by the ECB or by their servants in the performance of their duties. Hence, the action is not intended to remove the contested measure from the Union's legal order, which is the aim of the action for annulment. This difference has also led the ECJ to clarify that the action for compensation for non-contractual liability of the EU is autonomous from the action for annulment, i.e. the

[23] ECJ, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V. v Tetsuji Shimizu*, Case C-684/16, Judgment of 6 November 2018, para. 74; *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth, in his capacity as owner of TWI Technische Wartung und Instandsetzung Volker Willmeroth e.K. v Martina Broßonn*, Joined Cases C-569/16 and C-570/16), Judgment of 6 November 2018, para. 85.

[24] On the claw-back clause under Art. 52(1) CFREU and on the relation between the Charter and the European Convention on Human Rights, see Chapter II, Section 2.3.5.

[25] Art. 268 TFEU: "The Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340."

[26] Art. 340(2) and (3) TFEU: "2. In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties. 3. Notwithstanding the second paragraph, the European Central Bank shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its servants in the performance of their duties."

former could be launched even if the legality of the contested act was not challenged through the latter.[27]

Any natural and legal persons, alongside Member States, may initiate an action for non-contractual liability. An association has standing if it proves to have either "a particular interest of its own which is distinct from that of its members or a right to compensation which has been assigned to it by others".[28] The action could be launched against any EU institution, body, agencies or offices, as the ECJ has interpreted the term "institution" under Art. 340(2) broadly.[29] This action is barred "after a period of five years from the occurrence of the event" giving rise to the liability.[30] The ECJ has interpreted this provision as establishing that applicants may bring an action under Art. 340(2) or (3) within five years from the occurrence of the damage.[31]

The ECJ's case-law has established the conditions of liability based on the general principles common to the laws of EU Member States.[32] The Court has developed this set of requirements with regard to the non-contractual liability of the Union under Art. 340(2) TFEU, but these conditions are "applicable *mutatis mutandis* to the non-contractual liability of the ECB" under Art. 340(3) TFEU.[33] The ECJ has identified the following three requirements of cumulative nature: i) the unlawful conduct of an EU institution resulting in a sufficiently serious breach of a rule of EU law which is intended to protect the interests of individuals – including the CFREU provisions; ii) the existence of an actual and concrete damage suffered by the applicant; iii) the existence of a causal link between the unlawful conduct of the EU institution and the damage complained of.[34]

Moving to the scope of application of this proceeding in the context of the Eurozone sovereign debt crisis, individuals might have initiated this proceeding against: i) the conduct of the European Commission and the ECB within the framework of the different assistance mechanisms established to provide economic aid to euro-area States, namely the Greek Loan Facility, the European Financial Stability Facility and the European Stability Mechanism; ii) the conduct of the European Financial Stabilization Mechanism; iii) the Council decisions granting the assistance under the European Financial Stability Facility, and those mirroring the conditions attached to loan agreements negotiated with the other mechanisms.[35] Applicants brought the action against a plethora of acts and conduct of the Union, which are addressed in the next subsections.

Before moving to the survey of the ECJ's stance, it is crucial to emphasise the theoretical inadequacy of monetary compensation as a form of reparation in the context of sovereign debt crisis. The end of this action is making good of damages in favour of

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[27] Kaczorowska-Ireland, *cit.*, 513-514; Villani, *cit.*, 410. See also the case-law quoted thereby and in ECJ, *Alessandro Accorinti and others v. ECB*, Case T-79/13, judgment of 7 October 2015, para. 61.

[28] ECJ, *Julia Abad Pérez and others v. Council of the European Union and Commission of the European Communities*, Case T-304/01, Judgment of 13 December 2006, para. 52 (and the case-law thereby quoted).

[29] Kaczorowska-Ireland, *cit.*, 514-515; Villani, *cit.*, 411-412. See also the case-law thereby quoted.

[30] Art. 46 Statute of the ECJ (Protocol No. 3 to the TFEU).

[31] See e.g. ECJ, *Biret International SA v Council of the European Union* Case T-174/00, Judgment of 11 January 2002, paras. 38-40.

[32] Kaczorowska-Ireland, *cit.*, 522.

[33] ECJ, *Alessandro Accorinti and others*, *cit.*, para. 65.

[34] Kaczorowska-Ireland, *cit.*, 524-530; Villani, *cit.*, 412-415. See also the case-law quoted thereby and in ECJ, *Ledra Advertising* case 2016, *cit.*, 64-65; *Alessandro Accorinti and others*, *cit.*, 65-67.

[35] For a detailed overview, see Chapter I, Section 2.2.

successful applicants. This kind of relief has an individual nature, since it benefits solely the parties of the dispute. As suggested in Chapter II, legal consequences for violations of socio-economic rights should take into account their collective dimension with a view to benefit all the portion of the population affected by austerity measures. At the same time, the necessity to preserve State solvency should be taken into account.[36] Due to its individual character, monetary compensation does not satisfy the first requirement – i.e. a favourable outcome to the advantage of society at large. Moreover, even if the awarding of monetary compensation under this proceeding does not affect States' solvency – since the sum awarded is paid from EU funds – the ECJ has expressed its concern on the negative effects that a series of successful actions for compensation could bear on the Union budget.[37]

Even assuming that making good for damages constitutes an adequate legal consequence for infringements of ES rights in context of sovereign debt crisis, from a victim-centred perspective the action for compensation for non-contractual liability of the EU proved to be ineffective in the context of the Eurozone sovereign debt crisis. As the next Sections shows, none of the actions awarded damages to the plaintiffs.

2.1. The bail-in of Cypriot banks and the right to property

Applicants claimed compensation for the loss suffered due to the reconstruction and recapitalization of the two largest Cypriot banks by means of writing off portions of depositors' holdings, which was the prerequisite to agree official economic assistance to Cyprus.[38] These actions include the set of proceedings which led to the famous *Ledra Advertising* case, alongside – at the very least – another judgment concerning the bail-in of Cypriot banks.[39]

The proceedings that paved the way to the *Ledra Advertising* judgment sought the annulment of the ESM-Cyprus Memorandum of Understanding (MoU) – which is addressed in Section 3.1.below – and claimed that the conduct of the European Commission and of the ECB within the framework of the ESM violated the right to property under Art. 17 CFREU.[40]

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[36] Chapter II, Section 4.3.

[37] On several occasions, the ECJ stated that if the Court had granted the applicants the compensation that they claimed, "other holders of deposits in Cypriot banks which suffered a reduction in value at the material time could, in theory, have sought similar compensation. This could potentially have resulted in the European Union and the ECB being ordered to pay very large sums by way of compensation. It is therefore appropriate to conclude that the dispute represented a major economic interest for the Commission and the ECB." See e.g. ECJ, *Christos Evangelou and Yvonne Evangelou v European Commission and European Central Bank*, Case T-292/13 DEP, Order of the 21 September 2017, para 23; *CMBG Ltd v European Commission and European Central Bank (ECB)*, case T-290/13 DEP, order of 21 September 2017, para. 23; *Fialtor Ltd v European Commission and European Central Bank (ECB)*, case T-294/13 DEP, order of 21 September 2017, para. 23. See also Francesco Pennesi, *The Accountability of the European Stability Mechanism and the European Monetary Fund: Who Should Answer for Conditionality Measures?* (2018), in 3(2) *European Papers* 511, 529.

[38] Chapter I, Sections 2.2.4 and 3.1.

[39] ECJ, *Dr K. Chrysostomides & Co. LLC* case, *cit.*

[40] ECJ, *Ledra Advertising* case 2016, *cit.*; *Evangelou v European Commission and European Central Bank*, Case T-292/13, order of 14 November 2013; *CMBG Ltd v. Commission et BCE*, T-290/13, order of 10 November 2014; *Eleftheriou et Papachristofi v. Commission and ECB*, T-291/13, order of 10 November 2014; *Theophilou v. Commission and ECB*, T-293/13, order of 10 November 2014; *Fialtor Ltd v. Commission and ECB*, T-294/13, order of 10 November 2014. The last four cases were all decided on the same day, together with the order issued by the General Court on *Ledra Advertising Ltd v. European Commission and European Central Bank*, T-289/13, order of 10 November 2014 [*Ledra Advertising* case 2014]. Other applications concerning the same issues are

The applicants identified two sets of conduct which allegedly caused their damage: i) the inclusion in the ESM-Cyprus MoU of the provisions that established the bail-in instruments on bank deposits; ii) the failure by the Commission to ensure that the bail-in was in conformity with EU law (including Art. 17 CFREU) when it signed the MoU on behalf of the ESM. As for the commissive conduct, the Court stated that, although the Treaty establishing the ESM entrusts the Commission and the ECB of certain tasks, these duties "do not entail any power to make decisions of their own" and that their activities pursued within the ESM Treaty solely commit the ESM. Thus, the adoption of the MoU did not originate with the Commission or the ECB. Since the ECJ did not consider the MoU as an act attributable to such institutions, the Court denied its competence to consider the claim for compensation.[41] Regarding the omissive conduct of the Commission, the ECJ recalled its case-law according to which where the action that allegedly gives rise to the damage consists in a failure to act, it is particularly necessary to be certain that a causal link exists between the inaction and the damage pleaded. In the cases at stake, the Commission signed the relevant MoU after the bail-in of the Cypriot banks. In light of the chronological succession of the events, the Court concluded that the applicants did not prove with the necessary certainty the existence of the causal link between the alleged inaction of the Commission and the damage suffered.[42]

The majority of the applicants appealed the relevant orders. The Court joined the cases and delivered the well-known *Ledra Advertising* judgment. The ECJ reversed the assessment on the admissibility of the action. First, the Court stated that, even if the duties conferred on the Commission and the ECB within the ESM Treaty do not entail any power to make decisions on their own, such a finding does not prevent unlawful conduct like the adoption of the MoU on behalf of the ESM from being raised against the Commission and the ECB in an action for compensation.[43] The ECJ also recalled that the tasks conferred on the Commission and the ECB within the ESM Treaty do not alter the essential character of the powers conferred on those institutions under the EU Treaties. In particular, the Commission retains its role as "guardian of the Treaties". Such a task requires it to secure that the MoUs concluded by the ESM are consistent with EU law and, consequently, to refrain from signing a MoU if the Commission doubts its compliance with EU law. Against this backdrop, the ECJ concluded that it had jurisdiction to consider the action for compensation.[44]

On the merits of the claim, the Court reiterated the three cumulative conditions for the Union and the ECB to incur in non-contractual liability and then moved on assessing whether the Commission had contributed to a serious breach of the applicants' right to property under Art. 17 CFREU. As a preliminary remark, the ECJ clarified that "the Charter is addressed to the EU institutions, including […] when they act outside the EU legal framework".[45]

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still pending before the ECJ: see e.g. *Anastasiou v Commission and ECB*, Case T-149/14; *Pavlides v Commission and ECB*, Case T-150/14; *Brinkmann (Steel Trading) and others v Commission and ECB*, Case T-161/15.

[41] *Ledra Advertising* case (2014), paras. 42-47; *Evangelou* case, paras. 42-47; *CMBG Ltd* case, paras. 42-47; *Eleftheriou et Papachristofi*, paras. 42-46; *Theophilou* case, paras. 42-46; *Fialtor Ltd* case, paras. 42-46.

[42] *Ledra Advertising* case (2014), paras. 48-54; *Evangelou* case, paras. 48-54; *CMBG Ltd* case, paras. 48-54; *Eleftheriou et Papachristofi*, paras. 48-54; *Theophilou* case, paras. 42-46; *Fialtor Ltd* case, paras. 48-54.

[43] *Ledra Advertising* case (2016), paras. 54-55.

[44] *Ledra Advertising* case (2016), paras. 56-6o. The role of the European Commission as "guardian of the Treaties" stems from Art. 17(1) TEU, which establishes that it "shall promote the general interest of the Union" and "shall oversee the application of Union law". On this issue, see also ECJ, *Thomas Pringle v. Government of Ireland and Others, Case No. 370/12*, Judgment of 27 November 2012, para. 163.

[45] *Ledra Advertising Ltd* (2016), para. 67. The ECJ also stated that "in the context of the adoption of a

Following the applicability of the CFREU, the Court recalled that the right to property under Art. 17 of the Charter is not absolute and that, under Art. 52(1) CFREU, it may be limited, provided that the restrictions genuinely meet "objectives of general interests" and "do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the right guaranteed".[46] The ECJ declared that the adoption of the MoU pursued the end of ensuring "the stability of the banking system of the euro area as a whole", which the Court deemed as an objective of general interest of the Union.[47] As for the proportionality test, the ECJ briefly reminded that the bail-in provided for: i) the taking over, by Bank of Cyprus, of Cyprus Popular Bank's insured deposits; ii) the conversion of 37.5% of the uninsured deposit; iii) the temporary freezing of another part of those deposits. Moreover, the Court also took into account that the failure of Cypriot banks would have resulted in imminent financial loss for their depositors.[48] In light of these considerations, alongside the importance of the aim pursued by the bail-in, the ECJ concluded that the contested measures did not "constitute a disproportionate and intolerable interference impairing the very substance of the appellants' right to property."[49] Consequently, the Court dismissed the action since it did not consider that the Commission had contributed to a breach of the claimants' right.[50]

A more recent action for compensation for non-contractual liability of the Union and the ECB due to the bail-in of Cypriot banks is the *Chrysostomides* case.[51] The applicants contested that several acts of the EU obliged Cyprus to adopt, maintain and continue to implement the bail-in.[52] Following a thorough assessment of jurisdiction and admissibility,[53]

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memorandum of understanding such as that of 26 April 2013, the Commission is bound, under both Article 17(1) TEU, which confers upon it the general task of overseeing the application of EU law, and Article 13(3) and (4) of the ESM Treaty, which requires it to ensure that the memoranda of understanding concluded by the ESM are consistent with EU law, to ensure that such a memorandum of understanding is consistent with the fundamental rights guaranteed by the Charter."

[46] *Ledra Advertising Ltd* (2016), paras. 69-70.

[47] *Ledra Advertising Ltd* (2016), paras. 71-72.

[48] *Ledra Advertising Ltd* (2016), paras. 72-73.

[49] *Ledra Advertising Ltd* (2016), para. 73.

[50] *Ledra Advertising Ltd* (2016), paras. 74-75.

[51] ECJ, *Dr K. Chrysostomides & Co. LLC* case, *cit.* A similar case is still pending before the ECJ: *Yavorskaya and Others v Council of the European Union, European Commission, European Central Bank (ECB) and Eurogroup,* Case T-405/14.

[52] The following acts were at issue: i) the EuroGroup Statement of 25 March 2013; ii) the 'Euro Group Agreement of 25 March 2013'; iii) the 'decision of the Governing Council of the ECB of 21 March 2013 to demand payment of the Emergency Liquidity Assistance (ELA) on 26 March 2013 unless a rescue package is agreed'; iv) the 'ECB decisions to continue the granting of ELA'; v) the negotiation and conclusion, by the Commission, of the MoU of 26 April 2013; vi) other acts, namely the Euro Group statements of 12 April, 13 May and 13 September 2013, the 'Commission's findings that the measures adopted by the Cypriot authorities complied with conditionality', Decision 2013/236 and the approval, by the Commission and the ECB, of the payment of various tranches of the financial assistance facility (FAF) to the Republic of Cyprus. ECJ, *Dr K. Chrysostomides & Co. LLC* case, para. 77.

[53] As for jurisdiction, in light of the chronological succession of the events, the Court concluded that the adoption, maintenance or continued implementation of the bail-in were not attributable to the EU. Notably, the ECJ found the following acts attributable to the ESM alone: i) the negotiation and conclusion, by the Commission, of the MoU of 26 April 2013; ii) the 'Commission's findings that the measures adopted by the Cypriot authorities complied with conditionality'; iii) the approval, by the Commission and the ECB, of the payment of various tranches of the FAF to the Republic of Cyprus. The only exception was Art. 2(6)(b) of Council decision of 25 April 2013 addressed to Cyprus, which required the Country to maintain and continue to implement the conversion of the uninsured deposit in the Bank of Cyprus into shares, and that Cyprus had no margin of discretion in this regard. In any event, the ECJ concluded that it had jurisdiction on the action on two

the ECJ moved to the merits and considered whether the action satisfied the three cumulative requirements. The Court reached the same conclusion as that of the previous *Ledra Advertising* case, i.e. the interference with the right to property under Art. 17 CFREU was provided by Cypriot law, pursued the legitimate aim of preserving the stability of the banking system of the euro area as a whole, and was proportionate to that object.

Notably, the ECJ performed an in-depth assessment of the proportionality of the measure, as opposed to the extremely short and superficial review carried out in the *Ledra Advertising* judgment. The ECJ evaluated whether each contested measure was: i) suitable to reach the identified goal; ii) necessary, *viz.* whether the alternative measures proposed by the applicants were feasible or could have allowed the achievement of the expected outcome; iii) strictly proportionate to the aim pursued, i.e. whether the contested measures constitute a disproportionate and intolerable interference impairing the very substance of the depositors' right to property *vis-à-vis* the importance of the identified goal.[54] Against this assessment, the Court dismissed the action since it did not satisfy the first of the three cumulative conditions to claim the non-contractual liability of the EU, namely the contested conduct and acts of the EU institutions did not result in a sufficiently serious breach of the right to property under Art. 17 CFREU.

2.2. Council decisions and the reform of the Greek pension scheme

In the *Sotiropoulou* case, applicants sought compensation for the loss suffered as a result of the reduction of their main pensions pursuant to the reform of the Greek pension system that, according to the authors, was required by a number of Council decisions

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different grounds. First, the bail-in (i.e. the cause of the damage pleaded) was in part attributable to the Union due to the Council decision of 25 April 2015. Second, acts and conducts other than this Council decision (but connected with the grant of the financial assistance) were capable of incurring non-contractual liability on the part of the Union since the relevant EU authorities had performed such conduct within their EU law competences. The acts and conduct at issue were the following: i) acts and conduct by which the harmful decrees, according to the applicants, were 'approved by the Commission, the ECB, Eurogroup and the Council'; ii) conduct of the Commission and the ECB relating to the MoU of 26 April 2013, iii) the communication, by the defendants and in particular by the Eurogroup, of precise assurances that the harmful measures would not be adopted and, iv) various decisions adopted by the ECB concerning ELA which benefited Laïki. ECJ, *Dr K. Chrysostomides & Co. LLC* case, paras. 105-208.

As for admissibility, the ECJ declared that only some claims fulfilled the formal requirements, namely: i) the identification with a sufficient degree of accuracy the alleged unlawfulness of the contested acts and conduct, and ii) the evidence concerning the causal link between that conduct and acts and the harm invoked. The action was admissible insofar as it related to the following acts and conducts: i) the obligation to maintain or implement the conversion of uninsured deposits in the Bank of Cyprus into shares as follows from Article 2(6)(b) of Decision 2013/236; ii) the signing, by the Commission, of the MoU of 26 April 2013; iii) the monitoring, by the Commission and by the ECB, of the application of the harmful measures under Article 13(7) of the ESM Treaty; iv) the alleged communication of precise assurances, by the defendants, and in particular by the Eurogroup, that the harmful measures would not be adopted; v) the decisions adopted by the ECB concerning ELA. The ECJ also rejected the defendants' objection based on the non-exhaustion of domestic remedies. ECJ, *Dr K. Chrysostomides & Co. LLC* case, paras. 210-244.

[54] ECJ, *Dr K. Chrysostomides & Co. LLC* case, paras. 245-403. Notably, the Court acknowledged that EU authorities enjoy a wide margin of discretion where they are required "to make technical choices and to undertake forecasts and complex assessment" in a complex and changing environment (para. 291).

The applicants also claimed the violation of the principles of legitimate expectations and equal treatment. The ECJ found that they failed to establish any legitimate expectations or grounds for discrimination in this particular case, while in respect of one head of the claim the ECJ concluded that the discrimination was justified (*cit.*, paras. 404-508).

addressed to Greece in the context of a excessive deficit procedure (EDP).[55] In particular, the applicants complained that such cuts caused a radical decrease of their social security protection and a rapid deterioration of their standard of living which ultimately constituted a violation of their right to human dignity (Art. 1 CFREU), their right as elderly persons to lead a life of dignity and independence (Art. 25 CFREU), and their right to access social security benefits and services (Art. 34 CFREU).[56]

On the merits of the action, the ECJ assessed whether the action satisfied the first of the three cumulative requirements of actions for non-contractual liability, namely whether the contested measures resulted in a sufficiently serious breach of the rights of the applicants. The ECJ preliminarily clarified that the Council enjoys a wide discretion where it adopts decisions in the context of an EDP. Thus, in the assessment of the first requirement of the action, the ECJ had to consider whether the Council, in adopting the disputed decisions, manifestly and gravely disregarded the limits of that discretion.[57] The ECJ noted that the contested measures were adopted in the context of an EDP and, lately, following the finding that the deterioration of the Greek public budget constituted a threat to its financial stability and to that of the euro area as whole. The Court concluded that, in such a situation, the adoption of cost-saving measures, including those related to the pension system, was not manifestly unjustified and, hence, the Council did not exceed the limits of its discretion.[58]

Furthermore, the Court concluded that the interferences in the enjoyment of the entitlements at stake respected the claw-back clause set forth in Article 52(1) of the Charter. The ECJ performed an assessment similar to that carried out in the *Ledra Advertising* case, to which the Court also referred to. First, the ECJ declared that the contested measures aimed at ensuring budgetary discipline in Greece and the financial stability of the euro area as whole, thus that measures pursued a legitimate aim. Second, the Court held that the reduction of pensions did not constitute an excessive and intolerable interference impairing the very

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[55] See *Leïmonia Sotiropoulou and Others v. Council of the European Union*, Case T-531/14, Judgment of 3 May 2017 [*Leïmonia Sotiropoulou* case]. The following Council decisions were at stake: 2010/320/EU of 8 June 2010 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit, OJ L 145/6 (and the subsequent decisions amending it); 2011/734/EU of 12 July 2011 of 12 July 2011 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit OJ L 296/38 (and the subsequent decisions amending it). See *Leïmonia Sotiropoulou and Others v. Council of the European Union*, Case T-531/14, Application, OJ L 351/11.
Applicants also brought an action of annulment against the ECB Securities Markets Programme (SMP), established under
Decision of the European Central Bank 2010/281/UE of 14 May 2010 establishing a securities markets programme (ECB/2010/5), OJ L 124/8. The applicants claimed the violation of the principles of legitimate expectation, of legal certainty and of equal treatment of private creditors as by the above-mentioned decision, the ECB protected itself from the haircut on bonds governed by Greek law (Chapter I, Section 3.1). The ECJ rejected each claim. See *Accorinti and Others v European Central Bank (ECB)*, Case T-79/13, judgment of the 7 October 2015. The judgment is not addressed in detail as the specific actions undertaken by the ECB in the context of the Eurozone economic crisis (as the SMP) and their impact on socio-economic rights are outside the scope of the present thesis. On this issue, see e.g. Annamaria Viterbo, 'Legal and Accountability Issues Arising from the ECB's Conditionality' (2016), 1(2) *European Papers* 501.

[56] The applicant also claimed the violation of the principle of conferral of powers and the principle of subsidiarity (Articles 4 and 5 TEU). This complaint was dismissed as well (*Leïmonia Sotiropoulou* case paras. 67-74).

[57] *Leïmonia Sotiropoulou* case, paras. 77-80.

[58] *Leïmonia Sotiropoulou* case, paras. 84-87.

substance of the applicants' rights *vis-à-vis* the imminent risk concerning Greek solvency. Therefore, the Council had not manifestly and seriously disregarded the limits of its discretion.[59] In view of the above, the ECJ dismissed the action in its entirety.

2.3. Brief remarks

Putting aside the theoretical inadequacy of monetary compensation as a legal consequence for violation of socio-economic crisis, the above cases deserve some reflections concerning the legal accountability of EU institutions and the reasoning underpinning these decisions.

As for the first issue, the *Ledra* and *Chrysostomides* judgments should be welcomed, at least in principle. Both clarified that EU institutions cannot shield themselves beyond the formal division between the EU and the hybrid mechanisms providing financial aid to Eurozone Member States, taking into account the institutional ties between them.[60] Ultimately, the management of the crisis through the outsourcing of EU institutions could not lead to an accountability gap to the detriment of the protection of fundamental rights, which are currently enshrined in primary EU law.[61] According to the ECJ, the event that the MoU falls outside the EU is relevant with regard to the admissibility of an action for annulment under Art. 263 TFEU, but not with regard to an action for damages under Arts. 268 and 340 TFEU, since the two actions are autonomous. However, the merit of the judgments set extremely high requirements for an action to succeed, alongside the possibility that the ECJ performs a superficial proportionality test.[62]

This last consideration is strictly linked to the second reflection on the Court's case-law on actions for damages. The line of reasoning of the ECJ is flawed, at least in the *Ledra Advertising* and in the *Sotiropoulou* case. The right to property may be restricted, under Art. 52(1) CFREU, if the limitation is provided by law, purses a legitimate aim and is proportionate to that goal. The second condition is the least critical. The ECJ identified the legitimate aim in the "stability of the banking system of the euro area as a whole", a position that is similar to that of the European Court of Human Rights in austerity-driven applications concerning the right to property – i.e. the financial recovery of the State, possibly through international loan. Instead, the ECJ did not pay adequate attention to the other two requirements to limit the right to property under Art. 17 CFREU.

Besides the silence of the judgment on the legal basis of the Cypriot bail-in in *Ledra Advertising*, neither *Ledra Advertising* nor *Sotiropoulou* offer a thorough analysis of the proportionality of the limitation.[63] This shortcoming has been fixed in the subsequent

[59] *Leïmonia Sotiropoulou* case, paras. 88-90.
[60] Chapter I, Section 2.2.
[61] Paul Dermine, 'The End of Impunity? The Legal Duties of "Borrowed" EU Institutions under the European Stability Mechanism Framework' (2017) 13 *European Constitutional Law Review* 369, 377-378; Anastasia Poulou, 'The Liability of the EU in the ESM framework' (2017) 24(1) *Maastricht Journal of European and Comparative Law* 127, 138 [Poulou, 'The Liability']; Andrea Spagnolo, 'The loan of organs between international organizations as a "normative bridge": insights from recent EU practice' (2017), 26 *Italian Yearbook of International Law* 171, 183-184.
[62] Francesco Costamagna, 'The Court of Justice and the Demise of the Rule of Law in the EU Economic Governance: The Case of Social Rights' (2016), 487 *Carlo Alberto Notebooks* 1, 24-25, available at: www.iris.unito.it.
[63] Poulou, 'The Liability', *cit.*, 138.

Chrysostomides judgment, in which the ECJ conducted a comprehensive proportionality test. The circumstance that even this decision deemed the contested austerity measures in compliance with the Charter does not divest the importance of a detailed assessment of whether the interference on the applicants' right is suitable and necessary to achieve the identified goal, and if the chosen means represent the least restrictive alternative. This could help in shaping the relationship between the economic dimension and the social dimension of the Union – if the EU and its institutions, including the ECJ, intend to attain this further step of the integration process. This is even more true in situations of emergency and economic distress, where other legitimate interests of public policy may severely impair the enjoyment of fundamental rights.

Additionally, findings based on sound legal reasoning ease the understanding of the conclusion reached by the Court, enable counsellors to submit well-structured actions and nurture the ECJ's legitimacy, especially considering that under the EU legal order individuals enjoy few possibilities to reach the Court and that the management of the economic crisis was characterised by the almost complete lack of democratic accountability of the actors involved.[64]

3. Theoretical adequacy and practical unsuccessfulness of the action for annulment for violations of socio-economic rights under EU Law

Under Art. 263(1) TFEU, as interpreted by the ECJ, the Court has jurisdiction to review the legality of any EU act, whether its form or nature, provided that it produces binding legal effects *vis-à-vis* third parties, i.e. it negatively affects that parties' legal positions.[65] For an act to be contested under Art. 263(1) TFEU, it must be attributable to the European Union: it must be adopted by an EU institution, body, office or agency.[66]

This proceeding is meant to remove the contested acts from the Union's legal order. The general rule under Art. 264(1) TFEU establishes that if the action for annulment is well-founded, the ECJ "shall declare the act concerned to be void." Such judgment applies *erga omnes* and *ex tunc*, hence it benefits everyone (and not only the parties of the proceeding before the ECJ) and deprives the act at stake of its past effects. Art. 264(2) TFEU sets forth an exception to this general rule and states that the ECJ may limit the temporal effects of such declaration if it considers it necessary for e.g. the need of legal certainty. The Court has used its power either to issue *ex nunc* judgments, i.e. declarations with no retroactive effects, or to maintain the effects of the act annulled, until such time as the competent EU authority

[64] Giovanni Zaccaroni, 'Procedural rights within the European Economic Constitution: the rights and interests of those affected by the legal measures enacted to counter the economic crisis' (2019), in Herwig C.H. Hofmann, Katerina Pantazatou and Giovanni Zaccaroni (eds), *The Metamorphosis of the European Economic Constitution*, 177; Poulou, 'Austerity', *cit.*, 1152.

[65] Art. 263(1) TFEU: "The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects *vis-à-vis* third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties." For a comprehensive analysis and the relevant ECJ's case-law see e.g. Kaczorowska-Ireland, *cit.*, 468-473; Villani, *cit.*, 374-382. See also the case-law thereby reported

[66] Kaczorowska-Ireland, *cit.*, 468-471; Villani, *cit.*, 364-376. See also the case-law thereby reported.

replaces it.[67] The ECJ may also declare the partial annulment of the act, i.e. the judgment removes only one or more parts of the contested act (but not its entirety) from the EU legal order.[68] However, partial annulment of an EU act "is possible only if the elements whose annulment is sought may be severed from the remainder of the act", a requirement that is not satisfied where "the partial annulment of an act would have the effect of altering its substance".[69]

Art. 263 TFEU identifies three categories of applicants: i) so-called "privileged applicants", namely Member States, the European Parliament, the Council, the Commission; ii) "semi-privileged applicants", i.e. the Court of Auditors, by the ECB, the Committee of the Regions; iii) "non-privileged applicants", which encompass natural or legal persons.[70] The distinction into categories relies on the conditions to establish standing before the ECJ.[71] For the purpose of the present thesis, the *locus standi* of "non-privileged applicants" deserves attention.

The standing requirements concerning this category are extremely strict. Natural and legal persons may challenge three types of acts: i) acts directly addressed to them; ii) any regulatory act which is "of direct concern to them and does not entail implementing measures"; iii) any other act which is "of direct and individual concern to them".[72] In any case, natural and legal persons must prove their interest to act: they are required to demonstrate that the contested EU act has negatively affected their rights protected under EU law, including the CFREU.[73] The third category of acts that natural and legal persons may challenge are those of interest for the present dissertation.

As for the "direct concern" requirement, applicants must demonstrate that the contested measures, first, affect directly their legal situation and, second, that such measure leave no discretion to its addressee (i.e. the Member State) in its implementation, so that such implementation "is purely automatic and resulting from EU rules without the application of other intermediate rules".[74] In other words, applicants must show that there is a direct causal

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[67] Kaczorowska-Ireland, *cit.*, 495; Villani, *cit.*, 401-402. See also the case-law thereby reported.
[68] Kaczorowska-Ireland, *cit.*, 495; Villani, *cit.*, 399-401. See also the case-law thereby reported.
[69] ECJ, *European Parliament v Council of the European Union*, Case C-540/03, judgment of 27 June 2006, paras. 27-28 (and the case-law thereby quoted).
[70] Art. 263(2), (3) and (4) TFEU: "2. It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers. 3. The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives. 4. Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures."
[71] Kaczorowska-Ireland, *cit.*, 474-491; Villani, *cit.*, 382-391. See also the case-law thereby reported.
[72] Art. 263(4) TFEU. Regulatory acts include any act of general application, i.e. that applies to "objectively determined situations and produces legal effects in regard to categories of persons envisaged generally and in the abstract", and that does not require implementing measure. On the notion of regulatory act, see Kaczorowska-Ireland, *cit.*, 476-480 (and the case-law thereby provided). The quotation is from ECJ, *Inuit Tapiriit Kanatami and Others v. European Parliament and Council of the European Union*, Case C-583/11 P, judgment of 3 October 2013, para. 27 (which was confirmed in paras. 45-62).
[73] Kaczorowska-Ireland, *cit.*, 475; Villani, *cit.*, 383-384. See also the case-law thereby reported.
[74] ECJ, *ADEDY and Others v Council of the European Union*, Case No. T-541/10, Order of 27 November 2012, para. 64 (and the case-law thereby provided). See also Kaczorowska-Ireland, *cit.*, 480-482 (and the case-law thereby reported).

link between the contested EU act and its negative effects on their position.[75] As for the "individual concern" requirement, applicants must prove that the contested act "affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons."[76] The ECJ interpreted the notions of "certain attributes" and "certain circumstances" restrictively.[77] The "direct and individual concern" condition applies also to associations, such as trade unions.[78] This action is barred after two months from the publication of the act in question or of its notification to the applicants, or, if neither applies, from the day on which such act came to their knowledge.[79]

Art. 263(2) TFEU identifies four grounds for annulment of EU acts which apply also to actions brought by non-privileged applicants: i) lack of competence, ii) infringement of an essential procedural requirement, iii) infringement of the Treaties or of any rule of law relating to their application, iv) misuse of powers. For the purpose of the present thesis, the third ground should be considered, since "infringement of Treaties" includes breaches of the CFREU, general principles of EU law, with specific regard to those regarding fundamental human rights, alongside any other act of EU law which prevails over the contested measure according to the hierarchy of sources of EU law.[80]

As mentioned above, if the action for annulment is well-founded, the ECJ "shall declare the act concerned to be void."[81] Art. 266 TFEU established the obligation of the EU institution whose act has been declared void to "to take the necessary measures to comply with the judgment" of the ECJ. Thus, the judgment of the Court annuls the acts, but it cannot impose specific measures to the relevant EU institution, which enjoy a margin of discretion in this regard.[82] However, the ECJ has recently clarified that such institutions must eliminate the annulled provision from any other measures that reproduce it and must exclude the annulled provision from any other future measures to be adopted.[83]

Turning to the Eurozone sovereign debt crisis, natural and legal persons might have launched this proceeding against two categories of acts which are incontestably attributable to EU institutions, namely: i) acts of the European Financial Stabilization Mechanism, which is a EU body; ii) Council decisions granting the assistance under the European Financial Stability Facility, and those mirroring the conditions attached to loan agreements negotiated with the other mechanisms.[84] Applicants brought actions for annulment against a Eurogroup statement on Cyprus, a MoU adopted by the ESM and Cyprus, and Council decisions addressed to Greece,.[85]

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[75] Villani, *cit.*, 385-386 (and the case-law thereby reported).
[76] ECJ, *Plaumann & Co. v Commission,* C-25/62, judgment of 15 July 1963, 107.
[77] On this requirement, see Kaczorowska-Ireland, *cit.*, 482-491; Villani, *cit.*, 386-391. See also the case-law thereby reported.
[78] Kaczorowska-Ireland, *cit.*, 475-476 (and the case-law thereby reported).
[79] Art. 265(5) TFEU. On the exceptions of this time-limit rule, see Kaczorowska-Ireland, *cit.*, 493-494; Villani, *cit.*, 391-392. See also the case-law thereby reported.
[80] Kaczorowska-Ireland, *cit.*, 492; Villani, *cit.*, 394-395. See also the case-law thereby reported.
[81] Art. 264(1) TFEU.
[82] Kaczorowska-Ireland, *cit.*, 495-497; Villani, *cit.*, 402. See also the case-law thereby reported.
[83] *Ville de Paris (France), Ville de Bruxelles (Belgium), Ayuntamiento de Madrid (Spain) v European Commission*, Joined Cases T-339/16, T-352/16 and T-391/16, judgment of 13 December 2018, para. 159.
[84] For a detailed overview, see Chapter I, Section 2.2.
[85] Persons affected by such measures launched actions for annulment against ESM-State MoUs, but the ECJ declared them inadmissible: according to the Court, ESM-State MoUs fall outside its *ratione materiae* scope, since they are acts of the ESM, i.e. external to the EU legal regime. See *Pringle* case, para. 161; *Evangelou* case,

Recalling that legal consequences of violations of socio-economic rights in context of financial imbalances should suit their collective dimension, i.e. be at the advantage of the (entire sections of) population affected by austerity measures, and preserve States' solvency, actions for annulment could provide an adequate response – at least theoretically. The end of the proceeding is the removal of contested EU acts imposing conditionality, an effect that would benefit all the individuals involved. Thus, it would match the collective nature of ES rights. In addition, the removal of the act from the EU legal order would not affect States' (already scarce) public finances, hence there would be no threat to its solvency. This theoretical suitability notwithstanding, from the victims' standpoint the adjudicative approach of the ECJ proved the concrete ineffectiveness of the action of annulment with regard to the proceedings related to the Eurozone sovereign debt crisis. As the next subsections show, none of the actions led to the removal of the contested act.

3.1. The inadmissibility of claims against the statement of the Eurogroup of 25 March 2013 and Memorandum of Understanding with Cyprus

The ECJ dismissed several actions seeking the annulment of the Eurogroup statement of 25 March 2013 concerning the restructuring and recapitalization of Cypriot banks.[86] The applicants appealed the order and the proceeding led to the *Mallis and Others* judgment, in which the ECJ confirmed its earlier conclusions.[87] The plaintiffs argued that the Eurogroup statement was attributable to the European Commission and the ECB because the Eurogroup was under the control of these two institutions. The ECJ rejected such arguments on the consideration that the Commission and the ECB simply take part in the meetings of the Eurogroup.[88] Further, the Court clarified that the contested statement could not be regarded as an act producing legal binding effects with respect to third parties, since the Eurogroup is an informal forum for discussion between representatives of the Eurozone Member, and not a decision-making body. Moreover, the examination of its content confirmed its purely informative nature, which was not altered by the involvement of the Commission and the ECB.[89] Lastly, the Court clarified that the Eurogroup is not an EU institution, body, office or agency within the meaning of Art. 263(1) TFEU.[90] In light of this, the ECJ considered all the action as inadmissible and confirmed this conclusion in the appeal proceeding.

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para. 56-60; *Ledra Advertising* case, para. 53-54.

[86] ECJ, *Mallis and Malli v Commission and ECB*, Case T-327/13, order of 16 October 2014; *Tameio Pronoias Prosopikou Trapezis Kyprou v Commission and ECB*, Case T-328/13, order of 16 October 2014; *Chatzithoma v Commission and ECB*, Case T-329/13, order of 16 October 2014; *Chatziioannou v Commission and ECB*, Case T-330/13, order of 16 October 2014; *Nikolaou v Commission and ECB*, Case T-331/13, order of 16 October 2014. The orders dismissed the respective actions.

[87] *Mallis and Others v. The European Commission and European Central Bank (ECB)*, Joined Cases C-105/15 P to C-109/15 P, judgment of 20 September 2016. The final judgment dismissed the appeal as unfounded and, hence, confirmed the previous orders.

[88] ECJ, *Mallis and Others*, para. 47.

[89] ECJ, *Mallis and Others*, paras. 49-59.

[90] ECJ, *Mallis and Others*, para. 61. Notably, in the subsequent *Dr K. Chrysostomides & Co. LLC* case, the ECJ admitted an action for non-contractual liability against the very same statement of the Eurogroup. The Court took into account *Mallis and Others* and justified its different stance through a distinction. The ECJ affirmed that the jurisdiction exercised in disputes relating to action for annulment differs from the jurisdiction it exercises in disputes relating to non-contractual liability both with respect to its purpose and the pleas which may be raised. The action for damage for non-contractual liability is an independent and autonomous proceeding which seeks

Other applicants sought the annulment of some provisions of the MoU between Cyprus and the ESM, in the same proceedings in which they sought compensation for non-contractual liability of the EU.[91] The ECJ considered that "neither the ESM nor the Republic of Cyprus is among the institutions, bodies, offices or agencies of the European Union", hence it had no jurisdiction to examine the legality of the MoU, which is an act that they adopted together.[92] The ECJ dismissed the actions as inadmissible. Some of the plaintiffs lodged an appeal against such orders and the Court confirmed its position in the *Ledra Advertising* case. In this judgment, the ECJ reiterated that the Cyprus-ESM MoU is an act of the ESM, falling outside the EU legal order: it cannot be attributed to the European Commission and to the ECB, whose activities under the ESM Treaties commit the ESM alone.[93]

3.2. The lack of standing in proceedings against the decisions of the Council

The ECJ received two actions lodged by the Greek trade union ADEDY, which sought the annulment of two decisions of the Council concerning the first financial assistance facility to Greece.[94] Notably, neither the *ADEDY* judgments nor the applications mention the CFREU. The applications lodged by the Greek trade union which initiated the proceeding referred to the right to property under Art. 1, Additional Protocol No. 1 of the European Convention of Human Rights (ECHR).[95] Furthermore, the association also generally argued that the

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compensation of the harm suffered, and not the removal of the contested act from the EU legal order. Hence, even acts which fall outside the scope of actions for annulment is, in principle, capable of incurring non-contractual liability on the part of the Union. Hence, in light of the different and complementary purpose of the two types of action, the ECJ concluded that the concept of "institution" within the meaning of Art. 340(2) TFEU is not restricted to institutions, bodies, offices or agencies of the Union referred to in Art. 263(1) TFEU. In order to qualify EU entities as an "institution" under Art. 340(2) TFEU it is necessary to determine whether the EU entity responsible for the act or conduct complained of was: i) established by the Treaties and, ii) is intended to contribute to the achievement of the Union's objectives. In contrast, for the qualification of bodies, offices or agencies under Art. 263(1) TFEU the relevant criterion relates to whether the entity in question has the power to adopt acts intended to produce legal effects *vis-à-vis* third parties (paras. 109-112). See Section 3.3. below.

[91] ECJ, *Evangelou* case; *CMBG Ltd* case; *Fialtor Ltd* case; *Eleftheriou et Papachristofi* case; *Theophilou v. Commission* case; *Ledra Advertising Ltd* case (2014). The applicants of the last three cases lodged an appeal, but the ECJ confirmed its conclusion: see *Ledra Advertising Ltd* case (2016).

[92] ECJ, *Evangelou* case, para. 58; *CMBG Ltd* case, para. 58; *Fialtor Ltd* case, para. 58; *Eleftheriou et Papachristofi* case, para. 58; *Theophilou v. Commission* case, para. 58; *Ledra Advertising Ltd* case (2014), para. 58.

[93] ECJ, *Ledra Advertising Ltd* case (2016), 51-54. The ECJ reached the same conclusion in the previous *Pringle* case: Thomas Pringle v. Government of Ireland and Others, Case No. 370/12, Judgment of 27 November 2012, para. 161. A different situation concerns the financial assistance to non-euro area Member States under Art. 143 TFEU and secondary EU law (see Chapter I, Sections 1.2. and 2.2.). In these situations, the memorandum of understanding is concluded by the Commission, on behalf of the European Union (and not of the ESM) and has its legal basis in provisions of EU law, hence the memorandum constitutes an act of an EU institution. See ECJ, *Eugenia Florescu and Others v Casa Județeană de Pensii Sibiu and Others*, Case C-258/14, judgment of 13 June 2017, paras. 29-36. The case concerned a reference for a preliminary ruling, but the conclusion could be regarded as applicable also to other actions. On the *Florescu* case, see e.g. Alberto Miglio, 'Le condizionalità di fronte alla Corte di giustizia' (2017), 11(3) *Diritto internazionale e diritti umani* 763; Marco Rocca, '*Florescu*: A Memorandum of Understanding Finally before the Court' (2018), 4 *International Labor Rights Case Law* 98; Menelaos Markakis, Paul Dermine, 'Bailouts, the legal status of Memoranda of Understanding, and the scope of application of the EU Charter: *Florescu*' (2018), 55 *Common Market Law Review* 643.

[94] *ADEDY v Council of the European Union*, Case T-541/10, Order of 27 November 2012; *ADEDY v Council of the European Union*, Case T-215/11, Order of 27 November 2012. Although none of the orders explicitly referred to the CFREU, these rulings are worthy of attention due to their underpinning reasoning.

[95] *ADEDY v Council of the European Union*, Case No. T-541/10, Application, OJ C 30/49; *ADEDY v Council of the European Union*, Case No. T-215/11, OJ C 186/29. Council of Europe, European Convention for the

contested acts contained a number of provisions affecting their financial interests and working conditions.[96] Since Art. 52(3) of the CFREU establishes that insofar as the Charter contains rights which correspond to rights guaranteed by the ECHR, "the meaning and scope of those rights shall be the same as those laid down by the said Convention.", the orders of the ECJ are worthy of attention due to their underpinning reasoning – which could be relevant for future similar cases under Art. 17 CFREU.

The ECJ dismissed both actions on a procedural ground: according to the Court, the applicant lacked standing.[97] In particular, the trade union struggled to prove that the contested provisions were of "direct concern" to it, i.e. that such norms had directly affected their rights and that the addressee – namely, Greece – had enjoyed no discretion in its implementation. The first action contested the reduction in bonuses and retirement pensions, alongside an increase in the retirement age.[98] The second application challenged the means-test of family allowances and the increase in the workload of the applicants due to the deterioration of public services stemming from the limited recruitment in the public administration.[99] In order to establish whether the applicants had standing, the ECJ examined whether the provisions of the Council decisions were of direct concern to them. According to the Court, each measure sets a clear objective, namely the reduction of Greek excessive debt, without specifying the means to achieve such goal. Since these provisions were framed in general terms, Greek authorities had a wide discretion in determining their specific content and the means to reach the identified end, provided that such ultimate aim was pursued. Since their implementation was not purely automatic, none of these provisions was of direct concern for the applicants that, consequently, lacked standing.[100]

Furthermore, the ECJ declared that dismissal of their applications would not deprive the applicants of effective judicial protection. The Court stressed that, due to the wide discretion left to Greek authorities, it would have been the Greek law which, possibly, would have directly affected the legal situation of the applicants. Therefore, the plaintiffs had the possibility of challenging those national measures before domestic courts and, in the context

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Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (4 November 1950, entry into force 3 September 1953), ETS 5 [ECHR].

[96] *ADEDY v Council of the European Union*, Case T-541/10, Order of 27 November 2012, para. 59; *ADEDY v Council of the European Union*, Case No. T-215/11, para. 57. The applicants also complained that the European Commission and the Council exceeded the powers conferred on them by the Treaties. Since the applicant trade union failed to prove its standing, the ECJ dismissed these claims as well.

[97] *ADEDY v Council of the European Union*, Case T-541/10, Order of 27 November 2012, paras. 60-88; *ADEDY v Council of the European Union*, Case T-215/11, Order of 27 November 2012, paras. 62-100.

[98] *ADEDY v Council of the European Union*, Case T-541/10, para. 67. The following Council decisions were at stake: Council decision 2010/320/EU of 10 May 2010 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit, 11 June 2010, OJ L 145/6, as amended by Council decision 2010/486/EU of 7 September 2010 amending decision 2010/320/EU addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit, OJ L 241/12.

[99] *ADEDY v Council of the European Union*, Case T-215/11, Order of 27 November 2012, paras. 75, 77. The following Council decision was at stake: Council decision 2011/57/EU of 20 December 2010 amending decision 2010/320/EU addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit, OJ L 26/15.

[100] *ADEDY v Council of the European Union*, Case T-541/10, paras. 73-85; *ADEDY v Council of the European Union*, Case T-215/11, paras. 79-94.

of that dispute, argued that the contested acts were invalid, thus leading the domestic court to refer a question for a preliminary ruling to the ECJ.[101]

3.3. Brief remarks

The ECJ case-law confirms the extremely stringent interpretation of the two admissibility conditions of actions for annulment launched by non-privileged applicants. In the first set of proceedings, the ECJ declared the applications inadmissible since the contested measures were either not binding (the Eurogroup statement) or not attributable to the EU (as the ESM-Cyprus MoU). This stance could be problematic from the point of view of accountability for violation of socio-economic rights. The exclusion of conduct attributable to the Eurogroup and the ESM – which affected the enjoyment of human rights – from the jurisdiction of the ECJ may conflict with the principle of effective judicial protection.[102] A partial overturn occurred in the above-mentioned *Chrysistianides* judgment concerning actions for damages. Although dismissed on the merits, the ECJ declared that the actions against the Eurogroup statement of 25 March 2013 were admissible. The Court acknowledged that the Eurogroup "is a body of the Union formally established by the Treaties and intended to contribute to achieving the objectives of the Union" and that its acts and conduct "in the exercise of its powers under EU law are therefore attributable to the European Union."[103] The ECJ further stated that the contrary solution would clash with the rule of law principle, insofar as it would allow the establishment, within the EU legal system, of "entities whose acts and conduct could not result in the European Union incurring liability."[104] The Council appealed this judgment, and the recent opinion of the Advocate General endorses the appellant's plea seeking to set aside this part concerning the nature of the Eurogroup and the consequent admissibility of the claim.[105]

The second set of cases shows that natural persons and trade unions face significant obstacles in the attempt to directly challenge acts of EU law different from acts addressed to them or regulatory acts. The burden of proof concerning the "direct and individual concern" requirement, which applies also to Council decisions, is generally hard to meet. In the cases at stake, it should be noted that, if it is evident that certain provisions of the contested Council decisions conferred a margin of appreciation as for the specific means to achieve the identified aim (namely, to put an end to the Greek excessive deficit situation as rapidly as possible), others were sufficiently precise and did not leave discretion to Greek authorities.[106]

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[101] *ADEDY v Council of the European Union*, Case T-541/10, paras. 89-97 (in particular, para. 90); *ADEDY v Council of the European Union*, Case T-215/11, paras. 100-108 (in particular, para. 102).

[102] Pennesi, *cit.*, 520-524; Anastasia Poulou, 'Financial Assistance Conditionality and Human Rights Protection: What is the Role of the EU Charter of Fundamental Rights?' (2017), 54 *Common Market Law Review* 991, 1004 - 1007 [Poulou, 'Financial Assistance'].

[103] ECJ, *Dr K. Chrysostomides & Co. LLC* case, *cit.*, 113.

[104] ECJ, *Dr K. Chrysostomides & Co. LLC* case, *cit.*, 113.

[105] ECJ, *Council v K. Chrysostomides & Co. and Others*, Case C-597/18 P, Appeal brought on 21 September 2018 by the Council of the European Union against the judgment of the General Court (Fourth Chamber, Extended Composition) delivered on 13 July 2018 in Case T-680/13: *Dr. K. Chrysostomides & Co. LLC and Others v Council of the European Union and Others*; Opinion of Advocate General Pitruzzella of 28 May 2020, in particular paras. 91-126.

[106] See e.g. Art. 2(1)(b) of Council decision 2010/320/EU which prescribes that "Greece shall adopt […] before the end

Had the ECJ performed a deeper examination of such provisions, it would have reached the conclusion that the measures were of "direct concern" for the applicants and, hence, the Court would have moved on the "individual concern" requirement.

The finding that the applicants lacked standing to bring an action of annulment backed the ECJ's suggestion to indirectly challenge the validity of national legislation enacting austerity measures before domestic courts and, thus, triggering the referral of a question for a preliminary ruling. This avenue proved ineffective too, as the next Section shows.

4. Preliminary rulings between outranked workers' right and consumer protection

Under Art. 267 TFEU, as interpreted by the ECJ, the Court has jurisdiction to give preliminary rulings on the interpretation of all acts of the Union, including the CFREU where the forum State is implementing EU law within the meaning of Art. 51(1) of the Charter.[107] The ECJ has also jurisdiction on the validity "of acts of the institutions, bodies, offices or agencies of the Union", but not on primary sources of EU law.[108] According to the Court, this procedure establishes direct cooperation between the ECJ itself and the national courts "as part of which the latter are closely involved in the correct application and uniform interpretation of European Union law and also in the protection of individual rights conferred by that legal order."[109]

Domestic courts and tribunals may refer a question to the ECJ if these national judicial organs consider that a decision is necessary to give a judgment on the case before them.[110] Lower courts and tribunals enjoy discretion on whether referring a question to the ECJ, i.e. in assessing the necessity and the relevance of obtaining a judgment of the ECJ on the matter. On the contrary, courts and tribunals of last resort must bring the question to the Court if such a question is raised before them.[111] The ECJ rejects questions that are similar to others that the

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of June 2010 […] a law repealing all exemptions and autonomous taxation provisions in the tax system, including income from special allowances paid to civil servants"; Art. 2(2)(b) of Council decision 2010/320/EU which prescribes that "Greece shall adopt […] by the end of September 2010: […] a law reforming the pension system with a view to ensuring its medium and long-term sustainability. The law should, in particular, introduce: a unified statutory retirement age of 65 years (including for women)". See also Poulou, 'Financial Assistance', *cit.*, 1022-1023, which lists other measures included in Council decisions that "were so detailed and fully determinative of the Member State's implementing acts that the Greek legislature reproduced them verbatim."

[107] Art. 267(1) TFEU: "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings
concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union." The ECJ has interpreted this provision as empowering the Court itself to interpret: i) primary sources of EU law (the TUE, the TFEU, the CFREU subject to Article 51(1) of the Charter; protocols and annexes to the Treaties; acts of accession to the Communities and the EU); ii) all acts of the institutions, bodies, offices or agencies of the EU; iii) the judgments of the ECJ itself; iv) international agreements concluded by the EU and third countries. See Kaczorowska-Ireland, *cit.*, 392-397 and the case-law thereby reported.

[108] Art. 267(1) TFEU. See also Kaczorowska-Ireland, *cit.*, 416.

[109] ECJ, Opinion 1/09 of 8 March 2011, para. 84.

[110] For an overview of the extensive case-law of the ECJ on the notion of "national court and tribunals", see e.g. Kaczorowska-Ireland, *cit.*, 398-403; Villani, *cit.*, 431-440.

[111] Art. 267(2) and (3) TFEU. The obligation upon courts and tribunals of last resort is not absolute. The ECJ has recognised three exception to this duty: i) the doctrine of precedent, i.e. if the ECJ had already interpreted a sufficiently similar – although not identical – question; ii) if the decision of the ECJ on the question is irrelevant *vis-à-vis* the main dispute; iii) the doctrine of the *act clair* (or *in claris non fir interpretatio*), i.e. where the

Court had already interpreted, and those questions that are not relevant or connected with the subject of the main proceeding pending before domestic courts.[112] In this regard, it should be noted that the ECJ adopts a flexible approach: since it can either reformulates the question(s) or take into account EU provisions that national courts and tribunals did not mention in their request, the ECJ may rule on the matter and, hence, avoid the dismissal of the referral.[113] The ECJ may even turn a request for interpretation into one of validity.[114]

A preliminary ruling on interpretation binds the referring court, which must take it into consideration when resolving the main dispute. However, the ECJ has endorsed the doctrine of precedent, according to which it rejects a referral if it concerns a question similar to one that it had already interpreted. Thus, it appears that also national courts and tribunals different from the referring one are bound to take into account the decisions on interpretation issued by the ECJ.[115] Preliminary rulings on validity which declare (part of) the act void are addressed to referring courts, which hence should not apply the contested provision. Nonetheless, a judgment declaring the act invalid "is sufficient reason for any other national court to regard that act as void for the purposes of a judgment which it has to give."[116] An act declared void under Art. 267 TFEU remains in force – contrarily to acts declared null under Art. 263 TFEU. The EU institution, body, office or agency that had adopted the act "are bound to determine from the Court's judgment the effects of that judgment."[117]

As for the temporal effects, in principle both rulings on interpretation and declarations of invalidity have retroactive effects. This notwithstanding, the ECJ may limit the temporal effects of decisions of interpretation to the future if two conditions are met: i) those concerned have acted in good faith; ii) there must be a risk of serious difficulties in the implementation of a retrospective decision, including a serious impact on the public finances of the forum State. In this event, the ruling applies retroactively only to those persons who had launched proceedings before the issuance of the ECJ's decision.[118] The ECJ may limit the temporal effects of preliminary rulings declaring an EU act void as well, and also in this case only individuals who had already initiated proceedings may rely on the invalidity in the main disputes.[119]

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interpretation of EU law is sufficiently clear and does not leave scope for reasonable doubts. If national courts and tribunals of last resort do not refer the question to the ECJ, Member States may be liable to afford reparation of damage caused to individuals as a result of infringements of EU law. Moreover, the European Commission may start an infringement proceeding under Art. 258 TFEU against the Member State whose courts and tribunals had erroneously interpreted EU law. Kaczorowska-Ireland, *cit.*, 409-413; Villani, *cit.*, 437-438 (and the case-law thereby reported).

[112] Kaczorowska-Ireland, *cit.*, 406-408; Villani, *cit.*, 417. In order to avoid such rejection, request for a preliminary ruling "shall contain: (a) a summary of the subject-matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based; (b) the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law; (c) a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings."

[113] Kaczorowska-Ireland, *cit.*, 408; Villani, *cit.*, 420-423.

[114] Villani, *cit.*, 421-422.

[115] Villani, *cit.*, 441.

[116] ECJ, *SpA International Chemical Corporation v Amministrazione delle finanze dello Stato*, Case C-66/80, judgment of 13 May 1980, para. 13.

[117] ECJ, *SpA International Chemical Corporation*, *cit.*, para. 16.

[118] Kaczorowska-Ireland, *cit.*, 415-416; Villani, *cit.*, 442-443.

[119] Kaczorowska-Ireland, *cit.*, 420; Villani, *cit.*, 443-444.

The last important general remark concerns the relation between the action of annulment under Art. 263 TFEU and the preliminary ruling on the validity of EU act. Since the former represents an opportunity for non-privileged applicants to challenge the validity of EU law before the ECJ, the Court rejects referrals in which a party of the main proceeding might have had standing according to Art. 263 TFEU but failed to launch the action within the two-month time limit.[120]

Besides representing an additional safeguard for persons with no *locus standi* to propose an action for annulment, the request for a preliminary ruling is a tool to indirectly control whether national law violates EU law: by demanding a clarification of the meaning of EU provisions, domestic judicial organs implicitly raise the issue of whether national policies comply with the Union system.[121] In contexts of economic turmoil, domestic courts and tribunals may request the ECJ to clarify whether specific provisions of the CFREU preclude Member States to adopt certain austerity measures on condition that the forum State is "implementing" EU law within the meaning of Art. 51(1) of the Charter when it enacts these policies.

During the Eurozone sovereign debt crisis, national courts and tribunals could have referred questions concerning the interpretation and validity of Council decisions imposing or reproducing austerity measures, or questions of interpretation of the CFREU. Portuguese tribunals sought clarification on the interpretation of workers' rights enshrined in the CFREU,[122] whilst Spanish courts requested the interpretation of the Unfair Contract Terms Directive and of Art. 47 CFREU.[123]

4.1. The dismissal of referrals concerning workers' rights under the Charter

[120] Kaczorowska-Ireland, *cit.*, 418-419; Villani, *cit.*, 424-425.

[121] Villani, *cit.*, 422-423. See also *ADEDY v Council of the European Union*, Case No. T-541/10, para. 90; *ADEDY v Council of the European Union*, Case No. T-215/11, para. 102.

[122] Portuguese Courts also requested a preliminary ruling on whether the cut of the salaries paid to the members of the Portuguese Court of Auditors (which resulted from a national law that lowered the amount of public sector remuneration in order to reduce the State's excessive budget deficit) was contrary to the principle of judicial independence under Art. 19 TEU and Art. 47 CFREU. The ECJ admitted the request and ruled that the principle under Art. 19 TEU does not preclude general salary-reduction measures, such as those at issue in the main dispute. The ECJ took into consideration the aim pursued, namely the reduction of the Portuguese excessive budget deficit, and the nature of the contested measure - which provided for a limited reduction of the amount of remuneration, was applied to various public office holders and employees performing duties in the public sector, and temporary. Notably, the ECJ did not address the issue whether Portugal was implementing EU law under Art. 51 CFREU and, hence, did not rely on Art. 47 CFREU – i.e. the ECJ did not take the chance to engage with the question of the applicability of the CRFEU. Rather, AG Saugmandsgaard Øe stated that the adoption of the relevant national measures constituted an implementation of EU law within the meaning of Art. 51 CFREU, and that the Court therefore had jurisdiction to answer the request for a preliminary ruling in so far as it concerns Art. 47 CFREU. The AG then expressed the view that Art. 47 CFREU does not preclude the adoption of measures as those contested in the main dispute. See ECJ, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, Case C-64/16, judgment of 27 February 2018; *id.*, opinion of Advocate General Saugmandsgaard Øe delivered on 18 May 2017, paras. 43-53 and 69-82. For a comment, see e.g Zaccaroni, *cit.*; Matteo Bonelli, Monica Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary' (2018), 4(3) *European Constitutional Law Review* 622; Michał Krajewski, 'Associação Sindical dos Juízes Portugueses: The Court of Justice and Athena's Dilemma' (2018), 3(1) *European Papers* 395.

[123] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts OJ L 95/29, 21 April 1993. See e.g. *Finanmadrid EFC SA v Jesús Vicente Albán Zambrano and Others*, Case C-49/14, Judgment of 18 February 2016, OJ 2016 C 145/04.

As suggested by the ECJ in the context of the actions seeking the annulment of Council decisions addressed to Greece, Portuguese tribunals referred several questions related to the interpretation of the workers' rights set forth in the CFREU.[124] The ECJ dismissed all of them by stating that the respective order for reference did not contain concrete evidence that Portugal was "implementing" EU law within the meaning of Article 51(1) of the Charter while enacting the contested national reforms.[125]

4.2. Indirect protection of the right to housing through consumer legislation

Notably, an indirect protection of the right to housing stemmed from the referrals of Spanish tribunals related to the interpretation of the Unfair Contract Terms Directive.[126] In its rulings, the ECJ declared that the Directive precluded several procedural rules related to the mortgage enforcement proceeding, as governed by Spanish law, since those norms did not allow national courts to assess whether contractual clauses of a mortgage agreement contained unfair terms pending the foreclosure proceeding.[127] In one of these cases, the ECJ also declared that Spanish law governing mortgage enforcement proceedings contrasted with the Directive, read in conjunction with Art. 47 CFREU.[128] The ECJ preliminarily recalled that the Directive aims at the protection of the consumer, who is deemed to be in a weak position *vis-à-vis* the seller or the supplier.[129] The Spanish system of enforcement proceedings placed at risk the attainment of such objectives due to the imbalance between the procedural rights of the consumers and of the sellers or suppliers, which increased the disparity existing at the contractual level.[130] The ECJ declared that such imbalance was contrary to the principle of equality of arms (or procedural equality), which is "an integral element of the principle of

[124] The Portuguese tribunals referred similar questions to the ECJ, namely whether the CFREU precluded the adoption of austerity measures as those enacted in Portugal via the 2011 and 2012 State budget laws (Law 55-A/2010 and Law 64-B/2011). The referring Tribunals expressed doubts on measures imposing cuts of salaries and suspension of payment of holiday and Christmas bonuses and invoked Art. 20 CFREU on equality before the law, Art. 21(1) CFREU on the prohibition of discrimination, and 31(1) CFREU on the right to working conditions that respect workers' health, safety and dignity, precluded the adoption.

[125] *Sindicato dos Bancários do Norte and Others v BPN*, Case C-128/12, Order of 7 March 2013, OJ C 129/04, para. 11-14; *Sindicato Nacional dos Profissionais de Seguros e Afins v Fidelidade Mundial*, Case C-264/12, Order of 26 June 2014, OJ C 315/39, para. 17-21; *Sindicato Nacional dos Profissionais de Seguros e Afins v Via Directa-Companhia de Seguros SA*, Case 665/13, OJ 16/16, para. 11-16.

[126] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts OJ L 95/29, 21 April 1993.

[127] See ECJ, *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, Case C-415/11, Judgment of 14 March 2013, OJ C 141/07; *Banco Popular Español SA v Maria Teodolinda Rivas Quichimbo and Wilmar Edgar Cun Pérez and Banco de Valencia SA v Joaquín Valldeperas Tortosa and María Ángeles Miret Jaume*, Joined Cases C-537/12 and C-116/13, Judgment of 14 November 2013, OJ C 102/04; *Finanmadrid EFC SA v Jesús Vicente Albán Zambrano and Others*, Case C-49/14, Judgment of 18 February 2016, OJ C 145/04. The judgment issued on the case *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* was also mentioned before the UN Committee on Economic, Social and Cultural Rights in one of the communications challenging the Spanish mortgage enforcement system: see Chapter III, Section 2.

[128] ECJ, *Juan Carlos Sánchez Morcillo, María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria, SA*, Case C-169/2014, Judgment of 17 July 2014, OJ C 175/40.

[129] ECJ, *Juan Carlos Sánchez Morcillo*, para. 22.

[130] ECJ, *Juan Carlos Sánchez Morcillo*, para. 46. The Spanish system of mortgage enforcement proceedings established that the consumer might not appeal against a judicial decision that dismissed the objection to the enforcement proceeding, whilst the supplier/seller might appeal against a decision that upholds the objection to the enforcement proceeding.

effective judicial protection of the rights that individuals derive from EU law", also guaranteed by Article 47 of the Charter.[131] All these rulings impacted the Spanish mortgage regime, which was amended through declarations of the Supreme Court and legislative reforms.[132]

4.3. Brief remarks

The ECJ's stance towards referrals for preliminary ruling shows weaknesses and strengths of this proceeding, at least in the context of the Eurozone sovereign debt crisis.

Faults concern the first set of cases seeking the interpretation of workers' rights under the CFREU. The Court's restrictive approach is highly questionable for at least three reasons, all showing the inconsistency of the ECJ.

First, the Court adopted a formalistic approach contrary to its previous case-law, according to which the lack of the explicit specification of the link between national legislation and EU law in the wording of the order for reference did not preclude the ECJ to rule on the matter. In this regard, it is sufficient to recall that an earlier referral did not identify the Union provisions which the Member State was "implementing". This notwithstanding, the ECJ found that the situation was governed by EU law and that the CFREU was applicable under Art. 51(1) CFREU and, consequently, it ruled on the question.[133] Although there is no doubt about the importance of a well-framed reference by national judicial organs, the ECJ could have adopted the same attitude, since the Portuguese acts at stake were executing the loan requirements enclosed in Council decisions.[134] This formalistic stance underpins also the second shortcoming. In detail, the ECJ did not conform with the approach it had embraced in other rulings, according to which terms "implementing" had a broad meaning, including "acting within the scope of EU law" or "concerning matters of EU law".[135] In this regard, in a previous similar – although not identical – case to the one at stake, the ECJ affirmed that the objectives set out in the relevant Council decision were "sufficiently detailed and precise" to infer that the purpose of the national law under scrutiny was to implement such act within the meaning of Article 51(1) of the Charter – consequently, the CFREU was applicable. [136]

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[131] *Juan Carlos Sánchez Morcillo, María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria, SA*, Case C-169/2014, Judgment of 17 July 2014, OJ C 175/40, para. 48.

[132] Maribel Gonzalez Pascual, 'Welfare Rights and Euro Crisis – The Spanish Case', in Kilpatrick, De Witte (eds), *Social rights in times of crisis*, *cit.*, 95, 100-102.

[133] ECJ, *Åklagaren v Hans Åkerberg Fransson*, Case C-617/10, judgment of 26 February 2013, paras. 15, 24-31, and the relevant application (OJ C 72/14). On the *Fransson* judgment see e.g. Nicole Lazzerini, 'Il contributo della sentenza Åkerberg Fransson alla determinazione dell'ambito di applicazione e degli effetti della Carta dei diritti fondamentali dell'Unione europea' (2013), 96(3) *Rivista di diritto internazionale* 883. For further critical views on this point, see e.g. Dermine, *cit.*, 380-381 and the literature thereby quoted.

[134] Kilpatrick, 'Constitutions', *cit.*, 311; Claire Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?' (2014), 10 *European Constitutional Law Review* 393, 419 [Kilpatrick, 'Are the Bailouts Immune'].

[135] See the case-law reported in: Tobias Lock, 'Article 51 CFR', in Manuel Kellerbauer, Marcus Klamert, Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (2019), 2241, 2243; Daniel Ulber, 'Art. 28 CFREU', in Edoardo Alles at al. (eds), *International and European Labour Law* (2018), 1457, 1464-1465.

[136] ECJ, *Florescu* case, Opinion of AG Bot delivered on 21 December 2016 (para. 65-71) and judgment (para. 48). See also ECJ, *Mallis and Others*, Opinion of Advocate General Wathelet, delivered on 21 April 2016, para. 89, according to which "the Council decisions thus addressed to a Member State support the view that national measures […] constitute an implementation of EU law".

Lastly, the Court did not take the chance to follow the path it had set out in the above-mentioned decisions concerning actions for annulment of Council decisions addressed to Greece.[137]

On the other side, the rulings stemming from Spanish courts concerning the Unfair Contract Terms Directive led to reforms of the Spanish mortgage enforcement regime and to an improvement of the procedural aspects of the right to housing. The same rulings of the ECJ are also recalled in one of the views of the UN Committee on Economic, Social and Cultural Rights concerning the right to adequate housing in the context of the Eurozone sovereign debt crisis – which, however, is still under follow-up procedure because Spain did not comply with the recommendations thereby suggested.[138] These changes have a collective dimension, due to their wide-ranging corrective consequences which benefit not only the applicants of the domestic disputes – i.e. the parties of the main proceeding originating the rulings, but the entire sections of the population affected by the prior Spanish mortgage system. Plus, these amendments pursued the aim of putting an end to the unlawful situation and granting its non-repetition. The legal consequences derived from the preliminary rulings on the Spanish mortgage enforcement procedure confirms the potentiality of this proceeding whilst, at the same time, restricting its concrete effectiveness to issues strictly related to the economic dimension of the Union, as consumer protection.

Lastly, it is worth noting the lack of references seeking the interpretation (or challenging the validity) of Council decisions implementing or imposing conditionality. Differently from actions for annulment, referral for preliminary rulings does not require measures to be of "direct or individual concern". This is a corollary of the procedural functioning of this proceeding, which does not constitute an adversarial procedure and where the reference is brought by national courts – and not by natural or legal persons affected by austerity policies. However, the parties of the main domestic disputes did not persuade the relevant court or tribunal to refer a question on the interpretation or validity of Council decisions, hence the ECJ had no chance to rule on the matter.

5. International human rights law and the EU legal system: the legacy of the "Laval Quartet"

The ECJ's stance in austerity-driven cases falls within the more general problem of the relationship between the economic dimension and the social dimension of the Union, with particular regard to the issue of the balance to be struck between general economic interests and the enjoyment of fundamental rights – i.e. to what extent the pursuit of the former may legitimately interfere with the enjoyment of the latter. This topic is also linked to the role that international public law may play in promoting higher standards of protection of human rights in the EU legal order.

Before the entry into force of the CFREU, the ECJ developed the protection of human rights within the EU legal order by referring to constitutional traditions common to the Member States and to human rights treaties on which Member States have collaborated or

[137] Section 3.2 above.
[138] Chapter III, Section 2.1.

ratified. In this early stage, human rights were framed as general principles of EU (former Community) law.[139] The CFREU maintained this approach. According to its Preamble, the Charter reaffirms the rights as they result from the ECHR, as interpreted by the European Court of Human Rights (ECtHR), and the European Social Charter.[140] The already mentioned Art. 52(3) CFREU governs the interpretation of equivalent rights and establishes that insofar as the Charter contains rights which correspond to rights guaranteed by the ECHR, "the meaning and scope of those rights shall be the same as those laid down by the said Convention." Lastly, Art. 53 contains a safeguard clause which prohibits interpreting the Charter provisions as "restricting or adversely affecting" human rights as recognised in international law and in international agreements to which all EU Member States are parties,[141] including e.g. Conventions of the International Labour Association (ILO) No. 87 and No. 98 on freedom of association and collective bargaining.[142] This notwithstanding, human rights may conflict with other general interests of the Union, such as fundamental freedoms or the stability of the banking system of the euro area as a whole.

As for the austerity-driven cases concerning the right to property, it is difficult to imagine that the reference to the ECHR, as interpreted by the ECtHR in its case-law on conditionality, would have changed the ECJ's stance. On the contrary, the ECtHR and the ECJ judgments share a common feature: their decisions recognise that financial recovery is a legitimate aim to restrict the right to property, and the measures adopted are proportionate to reach such goal. On the other side, the relationship between the economic dimension and the social dimension of the Union, with specific regards to international labour law, has already been the object of a renowned set of decisions of the ECJ, the so-called "*Laval* Quartet". The ECJ' stance in these occasions helps explain its approach to austerity-related proceedings.

The so-called "*Laval* Quartet" actually comprises five decisions. In each of them the ECJ was called to assess the relationship between, on one side, one of the EU fundamental freedoms and, one the other, the trade union's right to strike and to bargain collectively.[143] In

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[139] Kaczorowska-Ireland, *cit.*, 235-241; Csilla Kollonay-Lehoczky, Klaus Lörcher, and Isabelle Schömann, 'The Lisbon Treaty and the Charter of Fundamental Rights of the European Union', in Niklas Bruun, Klaus Lörcher, Isabelle Schömann (eds), *The Lisbon Treaty and Social Europe* (2012), 61, 62-67. On this topic see also e.g. Tonia Novitz, 'European Union and International Labour Standards: The Dynamics of Dialogue Between the EU and the ILO', in Philip Alston (ed), *Labour Rights as Human Rights* (2005), 214.

[140] Council of Europe, European Social Charter (18 October 1961, 26 February 1965) ETS 035 [ESC]; Council of Europe, European Social Charter (Revised) (3 May 1996, entry into force 1 July 1999), ETS 163 [RESC].

[141] On Art. 52(3) CFREU and Art. 53 CFREU, see e.g. Fabio Ferraro, Nicole Lazzerini, 'Art. 52 - Portata e interpretazione dei diritti e dei principi', in Roberto Mastroianni et al (ed), *Carta dei Diritti Fondamentali dell'Unione Europea* (2017), 1062; Massimo Condinanzi, Paolo Iannuccelli Art. 53 - Livello di protezione, in *id.*, 1086; Klaus Lörcher, 'Interpretation and Minimum Level of Protection', in Filip Dorssemont et al., *The Charter of Fundamental Rights of the European Union and the Employment Relation* (2019), 135.

[142] Convention concerning Freedom of Association and Protection of the Right to Organise (9 July 1948, entry into force 4 July 1950) 68 UNTS 17 [ILO Convention No. 87]; Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (1 July 1949, entry into force 18 Jul 1951) 96 UNTS 257 [ILO Convention No. 98]. See also Mèlanie Schmitt, 'Evaluation of EU Responses to the Crisis with reference to Primary Legislation (European Union Treaties and Charter of Fundamental Rights)', in Bruun, Lörcher, Schömann (eds), *The Economic and Financial Crisis and Collective Labour Law in Europe* (2014), 195, 228-230

[143] ECJ, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, Case C-438/05, Judgment of 11 December 2007 [*Viking* case]; *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others*, Case C-341/05, judgement of 18 December 2007 [*Laval* case]; *Dirk Rüffert v Land Niedersachsen*, Case C-346/06, judgment of 3 April 2008 [*Rüffert* case]; *Commission of the European Communities v Grand Duchy of Luxembourg*, Case C-319/06, judgment of 19 June 2008 [*Commission*

three of these judgments, the ECJ also referred, among other instruments, to the ILO Convention No. 87 and to the European Social Charter as sources of the relevant right, which the Court recognised as a fundamental right protected under EU (former Community) law.[144] At the same time, the ECJ stated that the exercise of the right in question may be subject to certain restrictions and must be reconciled with the requirements stemming from the fundamental freedoms under EU law.[145] In each of the cases at stake, the ECJ concluded that the interests underpinning the fundamental freedoms prevailed over the competing right.[146]

Notably, two of these judgments had a follow-up before international committees. Following the judgment of the ECJ in the *Laval* case, the Swedish Government enacted the so-called "Lex Laval", which was contested before the European Committee on Social Rights. The Committee concluded that the reforms violated the right to a fair remuneration, the right to bargain collectively and to take collective action, the right to equality regarding employment with regard to foreign workers.[147] In this occasion, the European Committee on Social Rights reiterated that a presumption of conformity of EU law with the European Social Charter was not justified. Hence, the Committee once again rejected the possibility to apply an interpretative criterion similar to the so-called "Bosphorus Doctrine" developed by the European Court of Human Rights, as mentioned in Chapter III.[148] The Committee recalled that "the law of the Charter and EU law are two different legal systems" that do not necessarily coincide, also taking into account the current status of social rights in the EU legal order and the lack of intention on the side of the Union to accede the European Social Charter.[149]

The national consequences of the *Viking* case were examined by the ILO Committee of Experts on the Applications of Conventions and Recommendations. The ILO Committee

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v. Luxembourg]; *European Commission v Federal Republic of Germany*, Case C-271/08, judgment of 15 July 2010 [*Commission v. Germany*].

The *Viking* case concerned the conflict between the right to strike and the freedom of establishment; the *Laval* case concerned the conflict between the right to strike and the freedom to provide services; the *Rüffert* case concerned the conflict between the right to bargain collectively and the freedom to provide services; the *Commission v. Luxembourg* case concerned the conflict between the right to bargain collectively and freedom to provide services; the *Commission v. Germany* concerned the conflict between, on one side, the right to collective bargaining and, on the other, freedom of establishment and the freedom to provide services.

[144] *Viking* case, paras. 43-44; *Laval* case, paras. 90-91; *Commission v. Germany*, paras. 37-38.

[145] *Viking* case, paras. 44-46; *Laval* case, paras. 91-94; *Commission v. Germany*, paras. 43-44.

[146] The detailed analysis of these judgments is outside the scope of the present dissertation, which have been already addressed by a wealth of literature. See e.g. *Simon Deakin* 'The Lisbon Treaty, the *Viking* and *Laval* Judgments and the Financial Crisis: In Search of New Foundations for Europe's 'Social Market Economy', in Bruun, Lörcher, Schömann (eds), *cit.*, 19; Niklas Bruun, 'Economic Governance of the EU Crisis and its Social Policy Implications, in *id.*, 261; Mark Freedland, Jeremias Prassl (eds), *Viking, Laval and Beyond* (2014); Maria Elena Gennusa and Andrea Rovagnati, 'Implementation and Protection of Workers' Fundamental Rights. Innovations in the Post-Lisbon Treaty Landscape', in Giuseppe Palmisano (ed), *Making the Charter of Fundamental Rights a Living Instrument* (2014), 106; Karin Lukas, *The Fundamental Rights Charter of the European Union and the European Social Charter of the Council of Europe: Partners or Rivals?*, in *id.*, 222; Sacha Garben, 'A Balloon Dynamic in the Area of Social Rights', in Inge Govaere and Sacha Garben (eds), *The Interface Between EU and International Law. Contemporary Reflections* (2019), 125; Schmitt, *cit.*, 195.

[147] European Committee on Social Rights, *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, Complaint No. 85/2012, decision of 3 July 2013.

[148] See Chapter III, Section 2.3.5.

[149] European Committee on Social Rights, *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, *cit.*, para 64. See also European Committee on Social Rights, *CFE-CGC v. France*, Complaint No. 16/2003, decision of 12 October 2004, paras. 29-40; *Confédération Générale du Travail (CGT) v. France*, Complaint No. 55/2009, decision of 23 June 2010, paras. 31-42.

expressed serious concerns that the doctrine that the ECJ articulated in both *Laval* and *Viking* was likely to have a significant restrictive effect on the exercise of the right to strike in practice, hence violating the ILO Convention No. 87 on freedom of association and the right to organise.[150] Although the European Committee of Social Rights and the ILO Committee directly addressed the national situations in question, their conclusions inevitably represented a strong statement against the ECJ judgments.

The Court's line of reasoning "based on market logic"[151] and the clash between EU law and international standards set forth in ILO Conventions and the European Social Charter are extremely similar to the situation relating to the Eurozone sovereign debt crisis.[152] In particular, even if the ECJ recognises labour rights, currently embodied in the CFREU, the Court adopted a restrictive stance either on the admissibility requirements or on the merits of the cases and, where it had the chance to, the ECJ stressed the need to protect the stability of the banking system of the euro area as whole. This general interest of the Union prevails over the fundamental rights and freedoms which are nonetheless recognised in a primary source of EU law. The stance of the Court confirms the imbalance between the economic dimension and the social dimension of the Union, which could not be squared through a strategic reference to human rights treaty law.

6. Preliminary conclusions on crisis litigation at the EU level

The description of the procedures to directly and indirectly challenge austerity measures before the ECJ highlights some features concerning their theoretical suitability to provide adequate legal consequences in case of violations of socio-economic rights in sovereign debt crisis, alongside their concrete effectiveness in addressing applicants' claims and domestic courts' questions.

As for the former, it is appropriate to recall that, for the purpose of the present dissertation, legal consequences of violations of socio-economic rights in the context of sovereign debt crisis should benefit the entire (section of the population) negatively affected by austerity measures, in accordance with the collective dimension of ES rights. At the same time, legal consequences should also preserve States' economic soundness by preventing a worsening of its financial imbalances. The application of these two requirements to the action for non-contractual liability of the EU, the action for annulment and the preliminary ruling proceeding led to the following general considerations.

The action for compensation for non-contractual liability of the EU is theoretically inappropriate, since it is a remedy of an individual character whose aim is awarding monetary compensation to the parties of the relevant proceeding before the ECJ. Thus, it does not meet the collective dimension of socio-economic rights. Actions for annulment and requests for preliminary rulings are theoretically suitable, as successful decisions would have *erga omnes* effect – whether *de jure* or *de facto* – and, hence, benefit all the individuals affected by

[150] ILO, Committee of Experts on the Applications of Conventions and Recommendations, Observation on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), United Kingdom of Great Britain and Northern Ireland (2009).
[151] Schmitt, *cit.*, 217.
[152] Garben, *cit.*,

austerity measures – and not exclusively the parties of the relevant dispute. Additionally, the possibility to limit the temporal effects of declarations of annulment and of rulings on interpretation (or validity) of EU acts may serve the purpose of preserving the public finances of the State that enacted the relevant austerity measures.

Moving to the assessment of their successfulness from a victim-centred standpoint, none of these three proceedings proved to be effective due to the adjudicative approach of the ECJ – as already pointed out in the brief remarks at the end of each sub-section. As for the action for compensation, the Court's conclusion that the CFREU applies to the EU institutions also where those acts outside the Union legal framework should be welcomed, since it contributes to avoid legal accountability gaps – at least in principle. However, the reasoning underpinning the ECJ's decisions limits the effects of this statement. Besides the superficial proportionality test performed in *Ledra Advertising* and *Sotiropoulou* (which is opposed to the detailed analysis carried out in *Chrysostomides*), the Court's stance shows that the aim of preserving "the economic stability of the banking system of the euro area as a whole" outweighs the need to respect human rights.

Regarding the action for annulment, the ECJ dismissed all the applications. In the case of *Mallis and Others* and *Ledra Advertising*, the Court considered the cases outside its *ratione materiae* competence since the ESM-Cyprus MoU was not attributable to the Union and the Eurogroup Statement of 25 March 2013 did not produce legally binding effects. In the two *ADEDY* cases the Court dismissed the actions on procedural grounds: the trade union lacked standing because it failed to prove the "direct concern" requirement – i.e. that the contested Council decisions addressed to Greece negatively affected its legal position. The ECJ observed that the Greek Government enjoyed a wide margin of discretion in the identification of the specific means to implement the Council decisions and, thus, it would have been the national legislation that, possibly, would have directly affected the applicants legal positions. In light of this, the trade union could have challenged the relevant domestic measures before national courts and triggered the referral for a preliminary ruling. The stance of the Court in these cases confirms the extremely strict interpretation of the admissibility conditions for actions for annulment brought by non-privileged applicants – i.e. natural and legal persons. At the same time, the ECJ suggested an alternative path – namely, the reference for a preliminary ruling – that run into a dead end regarding the interpretation of workers' rights.

The preliminary ruling proceeding confirmed the outranked role of human rights in the EU legal order. The Court dismissed all the referrals from Portuguese courts concerning employment relationships and trade unions because, according to the ECJ, the orders did not contain evidence that Portugal was "implementing" EU law within the meaning of Art. 51(1) CFREU. The Court adopted a formalistic stance that is inconsistent with its previous broader interpretation of the scope of application of Charter, in general, and with the suggestions set out in the decisions dismissing the actions for annulment brought by the Greek trade union ADEDY. Quite the reverse, the ECJ's interpretation of the Unfair Contract Terms Directive upon referrals from Spanish Courts led to several reforms of the Spanish system of mortgage proceedings and, ultimately, to an improvement of the procedural aspect of the right to housing in favour of all individuals residing in Spain. Thus, it provided a legal consequence that is in line with the collective dimension of socio-economic rights, including the right to housing. However, it should be stressed that this successful proceeding is related to EU

secondary law which safeguard specific aspects of the Union internal market (as consumer protection provisions), rather than from referral straightforwardly based on the fundamental rights enshrined in the CFREU.[153]

The recent stance of the ECJ in relation to socio-economic rights is not a deviation from its previous case-law, rather it is the legacy of the "Laval Quartet". During the Eurozone sovereign debt crisis, the Court confirmed that general interests of the Union connected with the functioning of the European internal market and the European Monetary Union prevails over fundamental rights and freedoms, even if these are currently enshrined in the CFREU, i.e. a primary source of EU law. A corollary of this approach concerns the relationship between EU law and the European Social Charter: following the ECJ's approach in the context of the euro area turmoil, it is extremely unlikely that the European Committee of Social Rights will review its assessment on a possible presumption of conformity between the two systems.

Ultimately, although EU law provides for many proceedings to those affected by austerity measures, none of them led to a successful result. In light of the above, it is necessary to turn to the legal avenues available at the national level.

[153] Claire Kilpatrick, 'Are the Bailouts Immune', *cit.*, 419-420.

CHAPTER V

CRISIS LITIGATION BEFORE CONSTITUTIONAL COURTS

SUMMARY 1. Challenging conditionality measures before constitutional courts 2. A comparative analysis of the Greek, Portuguese and Spanish case-law on austerity measures in the context of the Eurozone crisis 2.1. The inconsistent stance of Greek courts 2.1.1 From deference to cautious activism: the case-law of the Greek Council of State 2.1.2 The protective role of Greek lower courts 2.1.3 Brief remarks on the Greek case-law 2.2. The 'judicial activism' of the Portuguese Constitutional Court 2.3. The restrained approach of the Spanish Constitutional Court 2.4. Common trends and differences in the adjudicative approach: the minor role of international human rights sources 3. Socio-economic rights under international treaties and domestic courts 3.1. Domestic legal force, direct applicability and other effects of international treaties in national law 3.2. The effects of international treaties on socio-economic rights in domestic law 3.3. Rights-based constitutional review of austerity measures and the authoritative interpretation of supervisory bodies 4. Preliminary conclusions on crisis litigation before constitutional courts

1. Challenging conditionality measures before constitutional courts

The political discretion of national legislators (whether the Parliament or the Executive) is not boundless. Their margin of manoeuvre encounters the limits set forth in domestic constitutions and international law. During the past decades, international law has begun governing areas which were traditionally beyond its reach, including the relationship between State authorities and individuals, which currently is influenced by international human rights law.[1] Thus, policy choices which may affect individuals no longer completely fall within States' domestic jurisdiction.[2]

This assumption stands untouched with regard to municipal provisions implementing austerity measures, which must comply with both constitutional provisions and international obligations binding upon the forum States. Against this background and according to the relevant national procedural rules, domestic courts have the competence to assess whether State authorities overstepped their discretion and, in specific contexts of responses to sovereign debt crisis, whether the macro-economic adjustment programmes violate constitutional norms and international rules safeguarding the enjoyment of socio-economic rights. In the event of a breach, judicial organs may afford a redress to the victims or, more

[1] Malcolm N. Shaw, *International Law* (8th Ed., 2018), 485; Yuji Iwasawa, *Domestic Application of International Law* (2015), 378 *Collected Courses of The Hague Academy of International Law*, 21; Yuval Shany, 'Should the Implementation of International Rules by Domestic Court be Bolstered?', in Antonio Cassese (eds), *Realizing Utopia. The Future of International Law* (2012), 200, 203.
[2] Shaw, *cit.*, 485.

generally, indicate the legal consequences of the infringements, such as repealing the contested statute.

Constitutional courts of the European Union (EU, the Union) Member States issued a mass series of judgments concerning the effects of austerity measures on the enjoyment of socio-economic rights. In line with the scope of the present dissertation, this Chapter addresses the case-law concerning three Eurozone States which required and obtained international financial assistance, namely Greece, Portugal and Spain (Section 2).[3] This comparative analysis outlines common trends and differences among their adjudicative approaches and assesses whether these courts indicated appropriate legal consequences when declaring the unconstitutionality of the provisions. The parameters to verify such adequateness are those proposed in Chapter II. [4] First, legal consequences of violations of socio-economic rights in the context of sovereign debt crisis should benefit the victimized class as a whole, so as to meet the collective dimension of ES rights. At the same time, legal consequences should safeguard public finances of the forum State, so as to avoid the risk of preventing national authorities from progressively achieving the full realization of socio-economic rights or even securing their minimum content.

Following the survey of the crisis-related constitutional case-law, the Chapter attempts to propose alternative approaches that domestic constitutional courts may adopt when asked to adjudge on alleged violation of socio-economic rights by national austerity measures enacted in a context of sovereign debt crisis. The suggested approach focuses on the effects that international human rights treaties may have in domestic legal systems (Section 3).

Two preliminary remarks on the scope of the present Chapter are necessary. First, the Chapter does not address the possible abuse of procedures established under national constitutions concerning legal norm production and, specifically, the alleged misuse of emergency decree-laws. This is a purely domestic issue and, as such, is not covered by the ambit of the present dissertation. The Chapter focuses on the content of austerity measures and, hence, on the substantive evaluation performed by the competent national authorities. Second, although Ireland and Cyprus received aid as well, the Irish bail-out was not subject to constitutional review and the Cypriot Supreme Court issued only two judgments on reductions of salaries and pensions.[5] The Chapter does not address these rulings since they do not constitute enough practice to identify a trend.[6]

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[3] Three non-Eurozone States received international aid, namely Romania, Latvia and Hungary. The constitutional courts of these states issued several judgments on the compatibility of austerity measures and the constitution of the forum State. The Chapter does not address this case-law since, at the relevant time, those countries did not adopt the Euro as a currency – i.e. they received the aid according to Art. 143 TFEU and not from the mechanisms specifically established for Eurozone States. On this case-law, see e.g. Claire Kilpatrick, 'Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry', in Thomas Beukers, Bruno De Witte, Claire Kilpatrick (eds), *Constitutional Change Through Euro-Crisis Law* (2017), 279, 284 [Kilpatrick, 'Constitutions']

[4] Chapter II, Section 4.3.

[5] For the reasons underpinning the lack of constitutional case-law on austerity policies adopted in Ireland, see Claire Kilpatrick, 'Constitutions', *cit.*, 284; Giorgio Barucchello, Ágùst Þór Arnason, *Europe's Constitutional Law in Times of Crisis: A Human Rights Perspective* (2016), 10 *Nordicum-Mediterraneum* 3, 1, 15.

[6] Supreme Court of Cyprus, *Giorgos Charalambous et al v. The Minister of Finance and the Auditor General* (Joined Cases Nos. 1480-4/2011, 1591/2011, 1625/2011), 11 June 2014; *Maria Koutselini-Ioannidou et al. v. the Republic*, 7 October 2014 (Joined Cases Nos. 740/211 – 587/2012). The first judgment declared the cuts of salaries and pensions (Law No. 112(I) of 2011) in compliance with the principle of equality as enshrined in the Cypriot constitution. The second judgment declared the cuts of salaries of civil servants (Law 88(I) of 2011) in

2. A comparative analysis of the Greek, Portuguese and Spanish case-law on austerity measures in the context of the Eurozone crisis

Victims of socio-economic rights violations and other specially designated actors requested the constitutionality review of austerity measures adopted in Greece, Portugal and Spain, according to the procedural rules in force in the respective forum State. This Section outlines and compares the stance of these courts in order to identify common trends and different features, with particular regard to the use of international human rights sources. Moreover, taking into account the suggestion that violations of socio-economic rights in contexts of sovereign debt crisis require legal consequences that are consistent with the collective nature of such rights and, at the same time, preserve the budgetary soundness of the State,[7] the Section assesses whether declarations of unconstitutionality of austerity measures issued by the courts of these three Eurozone States fulfil such requirements. Before moving to the survey of the case-law, each of the next Sections briefly recap the key features of Greek, Portuguese and Spanish constitutions, as well as the functioning of the system of constitutional review in force in these countries.

2.1. The inconsistent stance of Greek courts

The Greek Constitution was adopted in 1975, within a year after the fall of the military dictatorship known as "the Colonels' regime". The Constitution entails a detailed and comprehensive list of fundamental rights, including both civil and political rights and socio-economic rights.[8] The Constitution also sets forth a claw-back clause according to which these rights may be restricted only according to the law and subject to the proportionality principle.[9]

Art. 28 of the Greek Constitution recognizes that general international law and international conventions, once ratified and in force, become "an integral part of domestic Greek law and shall prevail over any contrary provision of the law."[10] According to legal Scholars and case-law, international law ranks between the Greek Constitution and ordinary national statutes.[11] This is true also for international human rights sources,[12] including

violation of the Cypriot constitution and Art. 1, Additional Protocol No. 1 to the European Convention on Human Rights (right to property). On these judgments, see e.g. Corina Demetriou, 'The impact of the crisis on fundamental rights across Member States of the EU - Country Report on Cyprus' (2015), Study for the LIBE Committee, 66-67; Costantinos Kombos et al., 'The Cypriot Constitution Under the Impact of EU Law: An Asymmetrical Formation', in Anneli Albi, Samo Bardutzky, (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law - National Reports* (2019), 1373, 1396-1397.

[7] Chapter II, Section 4.3.

[8] See e.g. Arts. 4-25, art. 29. On these rights, see e.g. Prodromos D. Dagtoglou, 'Constitutional and Administrative Law', in Konstantinos D. Kerameus, Phaedon John Kozyris (eds), *Introduction to Greek Law* (2007), 23, 57-59.

[9] Art. 25(1) Greek Constitution: "Restrictions of any kind which, according to the Constitution, may be imposed upon these rights, should be provided either directly by the Constitution or by statute, should a reservation exist in the latter's favour, and should respect the principle of proportionality."

[10] Art. 28(1) Greek Constitution.

[11] Mariela Apostolaki, Antonios Tzanakopoulos, 'Greece', in Fulvio M. Palombino (eds), *Duelling for Supremacy. International Law vs. National Fundamental Principles* (2019), 106, 109-111.

[12] Apostolaki, Tzanakopoulos, *cit.*, 111-117.

conventions enshrining socio-economic rights.[13] In this regard, it is necessary to recall that Greece lacks a constitutional court and constitutionality review is diffuse and incidental – i.e. each Greek court may assess the compatibility of national statutes with the Constitution pending cases in which the judges are called to apply the contested domestic provisions.[14] Thus, constitutional review is *ex post* (after the enactment of national legislation) and *in concreto* (concerning a particular situation, which is the object of the main judicial proceeding).[15] According to the Greek Constitution, ordinary courts must disapply a law whose content is contrary to the Constitution itself. However, such judicial organs are not empowered to annul the unconstitutional statute, which simply does not apply to the main dispute – i.e. the judgment produces *inter partes* effects, rather than *erga omnes* ones.[16] The Supreme Administrative Court (the Council of State), the Supreme Civil and Criminal Court, and the Court of Audit are among such ordinary courts.[17] This diffuse and incidental system of constitutional review "often works against a unified, coherent jurisprudence",[18] including on the use of international human rights sources as parameters of constitutionality. The austerity-related case-law confirms such inconsistency.

National implementation of conditionality attached to international financial assistance resulted in a wealth of judgments and advisory opinions of several Greek Courts.[19] Since the

[13] Christina Deliyanni-Dimitrakou, 'Les Transformations du Droit du Travail et la Crise: Les Réponses du Droit Grec' (2015), 5(2) *Lex Social* 52, 77-80; Matina Yannakourou, 'Challenging austerity measures', in Claire Kilpatrick, Bruno De Witte (eds), *Social rights in times of crisis in the Eurozone: The role of fundamental rights' challenges* (2014), EUI Department of Law Research Paper 2014/05, 19, 28; Chronis Tsimpoukis, 'Some Brief Notes on Decision Nº 3220/2017 Of Piraeus' Single-Member Court of First Instance' (2018), 8 *Revista Jurídica de los Derechos Sociales* 18; Nikolaos A. Papadopoulos, 'Paving the way for effective socio-economic rights? The domestic enforcement of the European Social Charter system in light of recent judicial practice' (2019), available at www.academia.edu.

[14] Xenophon Contiades, Charalambos Papacharalambous and Christos Papastylianos, 'The Constitution of Greece: EU Membership Perspectives', in Albi, Bardutzky (eds), *cit.*, 641, 652.

[15] Akritas Kaidatzis, 'Greece's third way in Prof. Tushnet's distinction between strong-form and weak-form judicial review, and what we may learn from it' (2014), 13 *Jus Politicum*, 1, 5 [Kaidatzis, 'Greece's third way'].

[16] Article 93(4) of the Constitution of Greece. See also Dagtoglou, *cit.*, 61.

[17] The Greek Constitution also provides for the establishment of the Supreme Special Court. According to Art. 100(1)(e) Greek Constitution: "A Special Highest Court shall be established, the jurisdiction of which shall comprise: […] settlement of controversies […] on the interpretation of provisions of such statute when conflicting judgments have been pronounced by the Supreme Administrative Court, the Supreme Civil and Criminal Court or the Court of Audit". This Court cannot strike down a national provision contrary to the Constitution – or to an international norm. This competence belongs to the Parliament only. See Apostolaki, Tzanakopoulos, *cit.*, 107.

[18] Contiades, Papacharalambous, Papastylianos, *cit.*, 652.

[19] A plethora a Scholars addressed the crisis-related litigation before Greek courts. See e.g. Contiades, Papacharalambous, Papastylianos, cit; Deliyanni-Dimitrakou, cit; Yannakourou, cit; Tsimpoukis, *cit.*; Papadopoulos, *cit.*; Afroditi Marketou, 'Greece: Constitutional Deconstruction and the Loss of National Sovereignty', in Beukers, De Witte, Kilpatrick (eds), *cit.*, 179; Michelle Iodice, '*Solange* in Athens' (2014), 32 *Boston University International Law Journal* 101; Evangelia Psychogiopoulou, 'Welfare Rights in Crisis in Greece: The Role of Fundamental Rights Challenges', Kilpatrick, De Witte (eds), *cit.*, 5; Styliani Kaltsouni, Athina Kosma, Nikos Frangakis, 'The Impact of the Crisis on Fundamental Rights across Member States of the EU - Country Report on Greece - Study for the LIBE Committee' (2015); Kyriaky Pavlidou, 'Social Rights in the Greek Austerity Crisis: Reframing Constitutional Pluralism' (2018), 10(2) *Italian Journal of Public Law* 287; Dafni Diliagka, 'The Legality of Public Pension Reforms in Times of Financial Crisis. The case of Greece' (2018); Akritas Kaidatzis, 'Socio-economic rights enforcement and resource allocation in times of austerity: The case of Greece 2015-2018' (2020), in *Populist Constitutionalism - Working Papers No. 2*, 1 [Kaidatzis, 'Socio-economic rights'].
The present Section is based upon the survey of the Greek case-law reported in this literature, as well as on the available English translation of the relevant judgments. See e.g. The e-Bulletin of the Venice Commission,

detailed analysis of each of these rulings is unfeasible, the following lines intend to outline the principal traits with a specific focus on the courts' approach towards international human rights sources. The survey hence focuses on the judgments of the Greek Council of States and of lower courts concerning cuts to pensions and salaries (regardless of the different ways in which the reductions took place, e.g. elimination of benefits or decrease of the monthly wage), alongside reforms of labour law.[20]

2.1.1 From deference to cautious activism: the case-law of the Greek Council of State

In a series of judgments of 2012, the Highest Administrative Court deemed that cuts of salaries and pensions adopted to comply with the conditions attached to the first MoU were in compliance with the right to property enshrined in Art. 17 of the Greek Constitution, interpreted in light of Art. 1, Additional Protocol No. 1 of the European Convention of Human Rights (ECHR).[21] The Court affirmed that none of these provisions establish the right to a certain amount of salary or pension and that national authorities may adopt restrictive measures if these were provided by law, pursued a legitimate aim and were proportionate to the identified goal. The Council of State recalled that the Greek Government enjoyed a wide margin of appreciation in the assessment of the public interest underpinning the adoption of the contested measures, which were meant to tackle the unprecedented economic crisis and to consolidate public finances in the long term. According to the Court, this objective could in principle justify the contested reductions, thus the judges assessed whether these cuts were proportionate to such aim. The Council of State considered them suitable and necessary, in light of the peremptory economic interest of the Greek government and of the urgency of the situation, which did not allow a thorough and comprehensive assessment of the existence of less restrictive means. Moreover, the Council of State declared that the applicants failed to prove that the cuts jeopardised their minimum standards of decent living conditions, hence the reductions did not violate their right to human dignity.[22] In this occasion, the Court also dismissed claims based on the European Social Charter and the International Covenant on Economic, Social and Cultural Rights (ICESCR) because the pleas were too vague.[23] The Council of State rejected the claim based on the Charter of Fundamental Rights of the

available at: www.venice.coe.int.

[20] For the case-law of the Greek Court of Audit and of the Special Court under Art. 88 of the Greek Constitution, see e.g. Iodice, *cit.*, 126-128; Psychogiopoulou, *cit.*, 12.

[21] Council of State, Judgment No. 668 of 20 February 2012; Judgments Nos. 1285-1290 of 2 April 2012. See also judgment 1972/2012 concerning an extraordinary property tax (imposed by Law 4021/2011), which the Council of State considered in compliance with Art. 17 of the Greek Constitution and with Art. 1, Add. Prot. 1 ECHR. In its judgment No. 293/2012, the Council of State reversed its stance and deemed the very same measures as contrary to Art. 1, Add. Prot. 1 ECHR. On these judgments see e.g. Apostolaki, Tzanakopoulos, *cit.*, 119; Contiades, Papacharalambous, Papastylianos, *cit.*, 668.

[22] Council of State, Judgment No. 668 of 20 February 2012, specifically paras. 35-28 on the right to property under Art. 17 of the Greek Constitution and Art. 1, Add. Prot. 1 ECHR; Judgment No. 1285 of 2 April 2012, specifically paras. 15-17 on the right to property under Art. 17 of the Greek Constitution and Art. 1, Add. Prot. 1 ECHR.

[23] Council of State, Judgment No. 1285 of 2 April 2012, specifically: para. 18 on the violation of the right to social security under Art. 12 ESC, together with Art. 30 and Art. 31; para. 19 on the violation of the right to social security and to adequate standard of living under the International Covenant on Economic, Social and Cultural Rights, together with Art. 2(1) on the obligation to take steps to the progressive achievement of the full realization of the rights enshrined in the Covenant.

European Union (CFREU, the Charter), since the judges deemed that the contested provisions were not "implementing" EU law within the meaning of Art 51 of the Charter.[24] Notably, the plaintiffs of the first of this series of judgments submitted their claim before the European Court of Human Rights (ECtHR), which dismissed their application as inadmissible on the grounds of reasons similar to those of the Greek Council of State.[25]

The Highest Administrative Court slightly changed its position in subsequent judgments issued between 2013 and 2014, although in an inconsistent manner.

A set of judgments concerned salary cuts of people serving in the armed forces and of university professors. The judges considered such reductions unconstitutional on the basis of general principles of domestic law. Namely, the Court affirmed that the income of people employed in these sectors should be adequate to the importance of their occupation. Moreover, the Court stressed that, where the Government implemented the contested cuts, the threat to preserve public solvency was not as peremptory as it had been where the Government implemented conditionality attached to the first MoU.[26]

The Council of State ruled also on two labour law issues.[27] The first matter concerned a mandatory pre-retirement scheme according to which public servants who had fulfilled more than thirty-five years of service were automatically dismissed, together with the abolition of their occupational position. Those who did not fulfil this requirement were placed in a non-active status for up to twenty-four months, with a reduction of their basic wage, after which they were dismissed.[28] The Council of State considered that this scheme amounted to a mandatory dismissal without just cause and based merely on grounds of age. This criterion was contrary to the principle of equality and was irrelevant for the achievement of the objective of the contested provision – namely, promoting the effective functioning and rational organization of the public sector through its restructuring.[29] The second labour issue related to the reduction of the minimum wage of young workers, the freeze of salaries and the prohibition of unilateral recourse to arbitration in matters of employment relations. In its judgment, the Council of State declared that the provisions challenged did not breach the right to property under Art. 17 of the Greek Constitution, interpreted in light of Art. 1, Additional Protocol 1 ECHR, since the measures were proportionate – i.e. pursued the legitimate aim of safeguarding public finances and did not hamper the applicants' right to decent standards of

[24] Council of State, Judgment No. 1285 of 2 April 2012, specifically paras. 20-21.
[25] *Koufaki and ADEDY v. Greece*, Application Nos. 57665/12 and 57657/12, Decision of 7 May 2013. See Chapter III, Section 3.1.1.
[26] Council of State, judgments 2192-2196 of 13 June 2014 concerning cuts of salaries of people serving in armed forces under Law 4093/2012; judgment 4741 of 29 December 2014 concerning university professors. Notably, the Council of State in judgment 1125 of 13 May 2016 considered that the raise of wages of armed forces personnel through Law 4307/2014 (which was adopted to abide by the judgments of the same year) were not sufficient and, hence, issued another declaration of unconstitutionality.
[27] The same issues were also contested before the ILO Committee on Freedom of Association and the European Committee of Social Rights. See Chapter III, Section 2.2 and 2.3.
[28] ILO, Committee of Experts on the Application of Conventions and Recommendations, Observations on Greece - Labour Administration Convention, 1978 (No.150), adopted in 2012, published 102nd ILC session (2013), available at: www.ilo.org.
[29] Council of State, judgment no. 3354 of 18 January 2013. The Council of State also deemed the retirement scheme in violation of Art. 103 of the Greek Constitution, which provides that working positions of civil servants "shall be permanent" and that, with few exceptions, "servants may not be […] dismissed without a decision of a service council" – a decision that, in the case at stake, was missing.

living.[30] The only norm that the Council of State declared unconstitutional was the prohibition of determining general working conditions by means of unilateral recourse to arbitration.[31] This statement was not based on international human rights sources. Notably, the Court stated that ILO Conventions and the European Social Charter only contain "directions" for Contracting Parties.[32] Hence, according to the Council of State, their non-directly applicable nature precluded any declaration of unconstitutionality of the relevant national law for breaching the provisions thereby enshrined.[33]

In this regard, it is noteworthy that the ILO Committee on Freedom of Association and the European Committee of Social Rights both reached the opposite conclusion – each of which is addressed in greater detail in Chapter III. On the one hand, the ILO Committee on Freedom of Association considered that the prohibition of unilateral recourse to arbitration in matters of employment relations was in line with its principles and practice and, hence, in compliance with freedom of association principles.[34] On the other, the European Committee of Social Rights declared the reduction of the minimum wage of young workers in violation of the European Social Charter.[35]

In 2014, the Council of State issued judgments concerning the Greek Bondholders Act as well.[36] The Court considered that the modality of the involvement of the private sector in the restructuring of the Greek public debt was in compliance with the right to property under Art. 17 of the Greek Constitution, interpreted in light of Art. 1, Additional Protocol 1 ECHR.[37] On this occasion, the Council of State also declined the invite of the parties to request a preliminary ruling of the Court of Justice of the European Union, as according to the judges the act in question was not "implementing" EU law under Art. 51 CFREU.[38] The parties of these proceedings lodged an application before the European Court of Human Rights, which dismissed their claim as manifestly inadmissible.[39]

The last rulings worthy of attention are those issued in 2015 in relation to further reductions of pensions.[40] In these cases, the Council of State found a violation of Art. 22(5) of the Greek Constitution, which establishes the right to social insurance, interpreted in light of Art. 1, Additional Protocol 1 ECHR.[41] The judges recalled that national authorities may reduce the amount of monthly retirement pension, provided that such interference is lawful, pursues a legitimate aim and is proportionate to the identified objective. According to the

[30] Council of State, judgment no. 2307 of 12 June 2014. para. 41.
[31] Council of State, judgment no. 2307 of 12 June 2014. paras. 31-32.
[32] Namely, ILO Convention Nos. 87, 97 and 154.
[33] Council of State, judgment no. 2307 of 12 June 2014. para. 40. On this judgment, see e.g. Apostolaki, Tzanakopoulos, *cit.*, 120.
[34] ILO, 365th Report in which the committee requests to be kept informed of development, Case No 2820 (Greece), November 2012, para. 1000.
[35] European Committee on Social Rights, *General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*, Complaint No. 66/2011, Decision of 23 May 2012, 57-65.
[36] On the Greek Bondholders Act, see Chapter I, Section 3.1.
[37] Council of State, judgments nos. 1116-1117 of 21 March 2014; judgments nos. 1506-1507 of 28 April 2014.
[38] The Greek Bondholders Act was enacted to receive the loan from the European Financial Stability Facility, which fell outside the EU legal framework because it was a special purpose vehicle with its own personality under private law. On this institution, see Chapter I, Section 3.1.
[39] *Mamatas and Others v. Greece*, Application Nos. 63066/14, 64297/14 and 66106/14, Judgment of 21 July 2016. See also Chapter III, Section 3.1.2.
[40] Council of State, Judgments Nos. 2287-2290 of 10 June 2015.
[41] See e.g. Council of State, Judgment 2287 of 10 June 2015, para. 24.

Council of State, the additional cut to pensions did not respect the proportionality principle since it was neither suitable nor necessary to reach the end of preserving the sustainability of the public pension system and, more generally, the solvency of Greek finances. As for the suitability, the judges noted that similar restrictive measures had been enacted in the previous year, yet without success, as shown by the ongoing economic recession. Regarding necessity, the Court observed that the Government had not carried out an impact assessment of the contested measures in order to verify the existence of less restrictive means. Notably, the Council of State noted that the contested cuts were enacted in a period where the public interest of avoiding economic breakdown was no longer peremptory and urgent as at the moment of the implementation of the first round of reductions. For this reason, the legislator had no justification for the non-performance of the evaluation concerning the necessity of the measures. Moreover, the Council of State affirmed that the further decreases impinged on the applicants' essential level of living conditions and, hence, was in contrast with their right to human dignity. Since the judgment could have involved millions of pensioners, the Greek Council of State limited the effects of the declaration of unconstitutionality *pro futuro*.[42]

2.1.2. The protective role of Greek lower courts

Contrary to the Council of State, lower courts declared austerity measures contrary to the Greek Constitution and to international human rights sources from their early judgments and decisions on requests for interim measures.

On reductions of salaries related to the first rescue package, in 2012 the Athens Court of Peace analysed whether such measures contrasted with the right to bargain collectively and the principle of proportionality in matters of fiscal burden sharing. As for the former, the Court analysed whether the reductions of wages defined in collective agreements breached Art. 22(2) of the Greek Constitution, together with ILO Conventions No. 151 and No. 154,[43] the European Social Charter and the ECHR. The judges declared that these provisions were not violated, mostly due to the importance of the aim pursued and the temporary nature of the restrictions. On the second aspect, the Athens Court of Peace stated that the contested cuts violated the principle of the equitable repartition of public burdens through the fiscal system, according to which citizens should contribute in proportion to their means.[44]

Between 2013 and 2014, quite a number of lower courts addressed the second labour reserve scheme, under which public servants were placed in a non-service status and, at the end of this period, they were dismissed without compensation.[45] This reform to some extent

[42] See e.g. Council of State, Judgment 2287 of 10 June 2015, para. 26.

[43] Convention Concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service, Convention concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service (27 June 1978, entry into force 25 February 1981) 1218 UNTS 87 [ILO Convention No. 151]; Convention Concerning the Promotion of Collective Bargaining (3 June 1981, entry into force 11 August 1983) 1331 UNTS 267 [ILO Convention No. 154].

[44] Art. 4(5) Greek Constitution: "Greek citizens contribute without distinction to public charges in proportion to their means." See also European Union, Reflects - Legal developments of interest to the European Union, No. 2/2013, 24-26, available at: www.curia.europa.eu.

[45] The literature reports the following decisions and judgments: First Instance Court of Xanthi, decision no. 90/2013; First Instance Court of Athens, decision no. 1759/2013; First Instance Court of Thessaloniki, decision no. 4916/2013; First Instance Court of Piraeus, decision no. 2700/2013; First Instance Court of Patras, decisions nos. 494/2013 and 202/2014; First Instance Court of Athens, decision no. 13915/2013, 13917/2013, 7809/2014;

differed from that which was challenged before the Greek Council of State, since the former does not provide for a pre-retirement mechanism. The greater part of the employees placed on labour reserve collectively initiated actions against the orders of the public authorities which implemented the legislation. In some proceedings, the applicants requested the adoption of interim measures in order to suspend the application of the contested orders pending the outcome of the main dispute. The invested courts upheld the majority of such requests and affirmed that the labour reserve scheme was contrary to several provisions of the Greek Constitution, among which the right to property under Art. 17 of the Greek Constitution taken together with the general constitutional principle of proportionality.[46] In this regard, the Court also found the measures in breach of Art. 1, Additional Protocol 1 ECHR.[47] The courts also stated that the reform was contrary to the European Social Charter, namely to the rights to work and to a remuneration such as to give workers' and their families a decent standard of living.[48] Notably, in at least one of these cases, the judges also referred to the decision of the European Committee of Social Rights which found Greece in violation of Art. 4(1) of the European Social Charter on the right to a fair remuneration.[49] In some cases, lower courts found that these measures violated the protection of human dignity as well,[50] since these policies turned the individuals affected into "the means to achieving the desired goal", namely the reduction of State spending.[51] The main proceeding ended with the declaration of unconstitutionality of the contested provisions. As correctly pointed out by Pavlidou, these decisions resulted in a double-track situation: on one side, there were employees who requested and obtained the interim measure; on the other, there were employees who did not seek, or sought but did not obtain, the interim measure. Still, these decisions boosted the adoption of a national reform (the so-called "Law of return") which repealed the labour reserve scheme and benefitted all the workers negatively affected.[52]

2.1.3 Brief remarks on the Greek case-law

The Greek decentralised system of constitutional review resulted in a multi-faced case-law on austerity measures, since both the Council of State and lower courts decided on incidental and concrete requests.

The Council of State moved from a deferential approach to a more protective one, although in an inconsistent way. One of the main changes concerned the assessment of the necessity of the contested legislation, which was influenced by considerations on the degree

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First Instance Court of Chios, decisions no. 37/2013, 33/2014; First Instance Court of Preveza, decision no. 117/2014.

[46] Art. 25(1) Greek Constitution

[47] The lower courts also found the contested reforms contrary Art. 4(5) on equitable distribution of fiscal burden and Art. 22(5) on social security.

[48] Art. 1 and Art. 4(1) ESC.

[49] First Instance Court of Chios, decisions no. 37/2013 referred to Art. 4(1) of the European Social Charter, with reference to the European Committee of Social Rights' decision in *General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*, Complaint No. 66/2011, Decision of 23 May 2012. See Chapter III, Section 2.3.

[50] Art. 2(1) Greek Constitution.

[51] See e.g. First Instance Court of Chios, decision no. 33/2014; First Instance Court of Preveza, decision no. 117/2014. Translation reported in Pavlidou, *cit.* 296.

[52] Pavlidou, *cit.*, 299.

of urgency underpinning the decision-making process. On the contrary, lower courts immediately adopted a more protective stance towards individuals affected by austerity measures.

The use of general constitutional principles in declaration of (un)constitutionality, such as the equitable sharing of fiscal burden, is a mutual feature of such judgments. Quite the reverse, reliance on international human rights sources predominantly characterises the rulings of lower courts, which took into account as parameters of constitutionality a number of treaties – namely, the European Convention of Human Rights, the European Social Charter and ILO Conventions.

In this regard, the Council of State considered Art. 1, Additional Protocol ECHR on the right to property as a directly applicable rule and, thus, as a suitable criterion to assess the constitutionality of austerity measures. On the opposite side, the Council of State affirmed that the European Social Charter and ILO Conventions only contain "directions" for Contracting Parties, i.e. their non-self-executing nature excludes their application as criteria to assess the constitutionality of austerity measures.[53] Notably, this statement contradicts not only the stance of lower judges, but also the previous approach embraced by the Council of State itself: according to all these rulings, municipal law could be declared invalid for infringing the provisions of the European Social Charter.[54]

Remarkably, the human-rights based reasoning of the Greek lower courts led the legislators to repeal the contested measures (namely, the labour reserve scheme) to the benefit of all the individuals affected, which were reintegrated in the occupation positions. This result emerged from the taking into account of a plurality of normative and interpretative sources, such as general constitutional principles, human rights treaties, and the practice of the relevant supervisory organs.[55]

2.2. The 'judicial activism' of the Portuguese Constitutional Court

The Portuguese Constitution was enacted in 1976, following the fall of the *Estado Novo* right-wing authoritarian regime, and contains an extensive and detailed bill of rights, which also includes a wide range of socio-economic rights.[56] The Constitution also entails a general

[53] Council of State, Judgment 2307/2014, para. 40. The judgment also found the contested policy in compliance with Art. 1, Add. Prot. 1 ECHR (para. 41). See also Judgment 1285/2012, in which the Council of State dismissed the pleads claiming the violation of the European Social Charter and the ICESCR because too vague (paras. 18-19).

[54] See Council of State, Judgment 1571/2010, paras. 5 and 7; Xanthi Court of First Instance, Decision 90/2013, *cit.* 122. On this issue, see Yannakourou, 'Challenging austerity measures', *cit.* 41, 19, 28; Deliyanni-Dimitrakou, *cit.*, 78-80; Papadopoulos, *cit.* See also recently First Instance Court of Piraeus, decisions no. 3220/2017 which declared that Art. 24 of the Revised European Social Charter has direct and horizontal effects. On this decision: Tsimpoukis, 'Some Brief Notes on Decision Nº 3220/2017 Of Piraeus' Single-Member Court of First Instance' (2018), 8 *Revista Jurídica de los Derechos Sociales* 18.
Besides, the justiciability and direct application of treaty-based socio-economic rights is confirmed by a statement of the delegation of Greece before the CESCR. The delegation stated that: "All courts had the power and the duty not to apply any legislative decision contrary to the Covenant. The provisions of the Covenant were justiciable and could be used as norms of reference for the application of economic, social and cultural rights". See CESCR, Press release, 6 October 2015, available at www.ohchr.org.

[55] Pavlidou, *cit.*, 308-310.

[56] Francisco Pereira Coutinho and Nuno Piçarra, 'Portugal: The Impact of European Integration and the Economic Crisis on the Identity of the Constitution', in Albi, Bardutzky (eds), *cit.*, 591, 592, 606. The Portuguese Constitution general principles and specific fundamental rights (Arts. 12-76).

claw-back clause according to which restrictions on rights may be imposed if these falls within the cases expressly provided for in the Constitution, pursue the need to safeguard other rights and interests protected by the Constitution, are not retroactive and no not reduce "the extent and the scope of the essential content" of the constitutional provisions.[57]

Art. 8 of the Constitution establishes that international treaties form part of the Portuguese legal system once concluded and in force.[58] Moreover, Art. 16 states that the constitutional provisions concerning fundamental rights "must be interpreted and completed in harmony with the Universal Declaration of Human Rights." The Constitution does not provide guidance as to the hierarchy of international conventions, but legal doctrine and domestic case-law consider that treaty law ranks above ordinary law and below the Constitution.[59]

As for judicial control, the system of constitutional review in Portugal is a mixed one and provides for four types of procedures.[60] The first is a preventive review, which could be performed solely by the Portuguese Constitutional Court upon request of, among other actors, the President of the Republic before the enactment of a legislative decree. If the Portuguese Constitutional Court deems the statute contrary to the Constitution, the President of the Republic must veto that act, which hence could not be issued unless the legislature expunges or amends the unconstitutional norm. A further prior review of the modified legislative text may be requested.[61] The second is a concrete review of constitutionality. Any ordinary court may refuse to apply a norm on the grounds of its unconstitutionality, or may apply such norm even if a question of unconstitutionality has been raised during the proceeding. An appeal to the Portuguese Constitutional Court may be lodged in either case. The decision has *inter partes* effects.[62] The third type is the abstract review of constitutionality, which could be lodged by specified actors after the promulgation of a legislative act.[63] The Constitutional Court may also declare the unconstitutionality of any norm that it has already held unconstitutional in three concrete cases. The declaration of abstract unconstitutionality has *erga omnes* and retroactive effects,[64] but the Portuguese Constitutional Court may limit its temporal effects "when required for the purpose of […] an exceptionally important public interest".[65] The last kind is unconstitutionality by omission, which assesses the "failure to

[57] Portuguese Constitution, Art. 18(2) and (3).
[58] Art. 8(2) Portuguese Constitution: "The norms contained in duly ratified or approved international conventions come into force in Portuguese internal law once they have been officially published, and remain so for as long as they are internationally binding on the Portuguese state."
[59] Coutinho, Piçarra, *cit.*, 633; Francisco Ferreira de Almeida, 'Portugal', in Dinah Shelton (eds), *International Law*
and Domestic Legal Systems. Incorporation, Transformation, and Persuasion (2011), 508-512.
[60] See e.g. Jorge Bacelar Guavera, *Constitutional Law in Portugal* (2015), 129-130.
[61] Arts. 278-279 Portuguese Constitution. Depending on the type of act, prior review of constitutionality may be requested by the President of the Republic, representatives of the Republic, the Prime Minister, or one fifth of all the Members of the Assembly of the Republic.
[62] Art. 280 Portuguese Constitution.
[63] Art. 281 Portuguese Constitution. The action could be launched by: the President of the Republic; the President of the Assembly of the Republic; the Prime Minister; the Ombudsman; the Attorney General; one tenth of the Members of the Assembly of the Republic; Representatives of the Republic, Legislative Assemblies of the autonomous regions, presidents of Legislative Assemblies of the autonomous regions, presidents of Regional Governments, or one tenth of the members of the respective Legislative Assembly.
[64] Art. 281(1) and Art. 282(1) Portuguese Constitution.
[65] Art. 282(2) Portuguese Constitution.

comply with the Constitution due to the omission of legislative measures needed to make constitutional norms executable."[66]

The Portuguese Constitutional Court issued several judgments on the constitutionality of pay cuts and tax hikes enacted both before and after receiving international financial assistance. Those belonging to the former group were meant to avoid the rescue package and were all deemed in conformity with the Portuguese Constitution.[67] Austerity-driven reforms belonging to the latter category were mostly implemented through State Budget Laws from 2011 to 2014,[68] which imposed salary and pension cuts, tax hikes, and labour law reforms. Starting from 2012, the Portuguese Constitutional Court reviewed macro-adjustment programmes following prior or abstract proceedings. The Court's attitude has been characterized by a progressive – although not always consistent – evolution towards a rigorous approach critically labelled as judicial activism.[69]

The first of this set of rulings declared the 2012 Budget Law unconstitutional since the suspension of annual leave and other allowances was not temporary and did not allocate the public burden accordingly with the principle of equitable sharing of fiscal burden.[70] However, since the retroactive effects of this judgment could have endangered the State's solvency, the judges decided not to apply them retrospectively – i.e. with regard to 2012.[71]

This ruling could be considered as a (unheeded) warning toward the Portuguese government: in almost all its subsequent judgments, the Constitutional Court adopted similar grounds of review and attributed retroactive effects to its declarations of unconstitutionality concerning cuts to the pensions of former public servants, to public servants' wages, to unemployment and sickness benefits, as well as the granting of social benefit conditional to one-year minimum legal residence in the Portuguese territory.[72]

In more detail, the Portuguese Constitutional Court based its conclusions on the violation of the principles of proportional equality ensuring the fair and equitable repartition of public burdens through the fiscal system. In this regard, the Court also noted the cumulative and combined effects of austerity measures upon public servants, which amounted

[66] Art. 283(1) Portuguese Constitution. This procedure could be initiated by: the President of the Republic; the Ombudsman; presidents of the Legislative Assemblies of autonomous regions. If the Constitutional Court verifies that such unconstitutionality exists, it notifies the competent legislative entity (Art. 283(2) Portuguese Constitution).

[67] See e.g. Portuguese Constitutional Court, judgment no. 399 of the 27 October 2010 on the increase of personal income tax (under Law No. 11/2010, as amended by Law No. 12-A/2010); judgment 396 of 21 September 2011 on temporary cuts of public servants wages under State Budget Law for 2011 (Law No. 55-A/2010).

[68] Law No. 64-B/2011 of 30 December 2011, 'Orçamento do Estado para 2012', Diário da República No. 250/2011, 1º Suplemento, Série I de 2011-12-30 [Budget Law 2012]; Law No. 66-B/2012 of 31 December 2012, ''Orçamento do Estado para 2013', Diário da República No. 252/2012, 1º Suplemento, Série I de 2012-12-31 [Budget Law 2013]; Law No. 83-C/2013 of 31 December, 'Orçamento do Estado para 2014', Diário da República No. 253/2013, 1º Suplemento, Série I de 2013-12-31 [Budget Law 2014].

[69] See e.g. Roberto Cisotta, Daniele Gallo, 'Il tribunale costituzionale portoghese, i risvolti sociali delle misure di austerità ed il rispetto dei vincoli internazionali ed europei' (2013), 7 *Diritti umani e diritto internazionale* 2, 465; Cristina Fasone, 'Constitutional Courts Facing the Euro Crisis. Italy, Portugal and Spain in a Comparative Perspective' (2014), *EUI Working Paper MWP 2014/25*, 24-30; M. G. Pascual, 'Constitutional Courts before Euro-crisis law in Portugal and Spain; A comparative prospect' (2017), 4(1) *e-Pública* 110, 123-125.

[70] Portuguese Constitutional Court, Judgment No. 353 of 20 July 2012, para. 5.

[71] Portuguese Constitutional Court, Judgment No. 353 of 20 July 2012, para. 6.

[72] Fasone, *cit.*, 27; Mariana Canotilho, Teresa Violante, Rui Lanceiro 'Austerity measures under judicial scrutiny: the Portuguese constitutional case-law' (2015), 11 *European Constitutional Law Review* 155; Coutinho, Piçarra, *cit.*, 618-621. Among these rulings, only judgment 413 of 30 May 2014 limited the scope of the effects of the declaration of unconstitutionality to the future.

to a differential treatment no longer justified in light of the aim of reducing the public deficit and preserving State solvency.[73] Moreover, the Portuguese Constitutional Court observed that the continuing imposition of transition cuts resulted in the imposition of measures which, *de facto*, could no longer qualify as temporary.[74] In cases concerning cuts to pensions, the Court drew upon the protection of legitimate expectations – this last one considered strictly connected to the principle of legal certainty.[75]

Among these judgments, two were grounded on the breach of labour rights enshrined in the Constitution, namely the prohibition of dismissal without just cause and the freedom to bargain collectively.[76] One of these rulings took into consideration the German legal system and Art. 1, Additional Protocol 1 ECHR to support the idea that the right to private property under Art. 62 of the Portuguese Constitution also covers pensions.[77] Lastly, it should be noted that in two cases the Portuguese Constitutional Court elaborated on the prohibition of unjustified retrogressive measures and on the essential level of socio-economic rights. In both occasions, the Court noted that the prohibition is not absolute, as the realization of ES rights also depends on available resources and, hence, the reduction of acquired levels of protection may be required to preserve the funds needed to maintain the essential content of these rights.[78]

The several declarations of unconstitutionality led to the amendments of legislation already in force and to the renegotiation of loan conditions.[79] Further, due to the evolution of the Court's approach regarding the non-limitation of the effects of its declaration of unconstitutionality, the Portuguese government has tried to mitigate the risks to the State's balance of payments caused by the retrospective effects of similar rulings: the lawmaker executed austerity measures through general legislative acts, whose constitutionality could be reviewed *before* their entry into force, thus "allowing the early reaction on the part of the government".[80]

[73] See e.g. Portuguese Constitutional Court, Judgment No. 187 of 5 April 2013 (para. 44)

[74] See e.g. Portuguese Constitutional Court, Judgment No. 574 of 14 September 2014, which declared the unconstitutionality of reductions of public servants' wages planned for three years (2016, 2017 and 2018).

[75] See e.g. Portuguese Constitutional Court, Judgment No. 862 of 19 December 2013; Judgment No. 575 of 14 September 2014.

[76] See Portuguese Constitutional Court, Judgment 474 of 28 August 2013, which also referred to Art. 53 of the Portuguese constitution as a basis to declare the unconstitutionality of the reforms of the labour code which, under the new wording, violate the prohibition of dismissal without just cause (paras. 29-34); Judgment No. 602 of 24 October 2013, which, similarly to Judgment 474 of 28 August 2013, referred to Art. 53 of the Constitution to declare the unconstitutionality of new grounds for dismissal, and referred to Art. 54 of the Constitution to declare the unconstitutionality of provisions which interfered with the freedom to bargain collectively.

[77] Portuguese Constitutional Court, Judgment No. 187 of 22 April 2013 (paras. 60-61).

[78] Portuguese Constitutional Court, Judgment No. 794 of 21 November 2013, para. 18; Judgment No. 862 of 19 December 2013, para. 20.

[79] For example, following judgment 413 of 30 May 2014, the legislator amended several provisions concerning the social security system. These reforms were subject to a constitutionality review and were declared in compliance with the Portuguese constitution (Judgment 572 of 30 July 2014). See also Antonia Baraggia, 'Conditionality Measures in the Euro area crisis: a Challenge to the Democratic Principle?' (2015), 4 *Cambridge Journal of International and Comparative Law* 2, 268, 285-286.

[80] IMF, 'Portugal: Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding' (12 June 2013), at 7, point 9. The document is available at www.imf.org.

2.3. The restrained approach of the Spanish Constitutional Court

The Spanish Constitution was adopted in 1978, following the death of Francisco Franco and, thus, the end of his dictatorship.[81] Part I of the Constitution entails a rich bill of rights, which also include socio-economic rights.[82]

Art. 96 of the Constitution provides that international treaties are part of the Spanish legal system once validly concluded and officially published. The same provision establishes that such treaties "may only be repealed, amended or suspended in the manner provided for in the treaties themselves or in accordance with the general rules of international law." According to Scholars, this provision means that international conventions enjoy "passive resistance" in relation to domestic legislation, meaning that national laws cannot modify them.[83] This view finds support in a recent reform, according to which international agreements "prevail over any other norm of the internal order in case of conflict with them, except for the norms of constitutional rank."[84] The same law clarifies that all public authorities must respect and ensure proper compliance with the obligations of international treaties, which are of direct application "unless it is clear from the text that such application is subject to the approval of the laws or pertinent regulations."[85]

In light of these provisions, international conventions have a sub-constitutional rank. According to legal doctrine and the case-law of the Spanish Constitutional Court, this relationship is somehow reversed where international conventions concern human rights. This position is based on Art. 10(2) of the Constitution – the opening provision of Part I on the bill of rights – which establishes that constitutional principles relating to the fundamental rights and liberties "shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain."[86] In this case, it is the Spanish Constitution that "shall be interpreted in conformity" with international human rights treaties, and not the other way around. In this regard, it is noteworthy that according to Spanish courts these entitlements must be construed consistently with the interpretation of the relevant international supervisory bodies.[87] This approach applies as long as treaty-based rules offer a higher standard of protection than that under the Constitution.[88] The Spanish Constitutional Court has held that international treaties on human rights are not by themselves parameters of constitutionality, but are interpretative criteria that "contributes

[81] Joan Solanes Mullor, Aida Torres Pérez, 'The Constitution of Spain: The Challenges for the Constitutional Order Under European and Global Governance', in Albi, Bardutzky (eds), *cit.*, 543, 544.
[82] Spanish Constitution, Arts. 10-55. Further rights are enshrined in other provisions of the Spanish Constitution. See Fernando Puzzo, 'The System of Fundamental Rights, Public Liberties and Duties', in Silvio Gambino et al. (eds), *The Spanish Constitutional System* (2018), 82.
[83] Mullor, Pérez, *cit.*, 578. See also Puzzo, *cit.*, 58.
[84] Art. 31, Law 25/2014, Of 27 November 2014 ('Treaties and Other International Agreements') (BOE No. 288 of 28 November 2014).
[85] Arts. 30- 31, Law 25/2014 of 27 November 2014 ('Treaties and Other International Agreements') (BOE No. 288 of 28 November 2014).
[86] Art. 10(2) Spanish Constitution.
[87] See e.g. Spanish Constitutional Court, Judgment No. 81 of 8 May 1989, para. 2; Judgment No. 16 of 24 April 2006, para. 5; judgment No. 31 of 10 April 2018, para. 4. See also Supreme Administrative Tribunal, Judgment No. 1263 of 18 July 2018, according to which the views of the UN Committee on the Elimination of Discrimination Against Women in individual complaints are binding on Spain, although neither the Convention nor its Optional Protocol establishes their binding character.
[88] Puzzo, *cit.*, 89.

to the better identification of the content of the rights" enshrined in the Spanish Constitution.[89]

The Spanish system of constitutionality review embraces three main types of proceedings. The first is the constitutional review of legislation, which could be either an abstract control by direct appeal or a concrete control requested by an ordinary court. The second is the conflict of competences between the State and the Autonomous Communities. The third is the *recurso de amparo* brought by persons affected by acts which allegedly violate fundamental rights and liberties set forth in the Constitution. The judgments of the Spanish Constitutional Court which declare the unconstitutionality of the contested provision generally have *erga omnes* effects and retroactive effects. The Court may moderate the consequences of its rulings by issuing declaratory judgments or by limiting the scope of the effects solely for the future. It could even acknowledge a time limit for the legislator to amend or repeal the unconstitutional norm.[90]

The Spanish Constitutional Court issued several rulings on the constitutionality of austerity measures enacted in the context of the excessive deficit procedure (EDP) started in 2009 and as conditions to obtain international financial assistance in 2011. The Court addressed issues related to labour rights, healthcare and housing.

As for the first category, the Labour Chamber of the National High Court considered that the cuts to the salaries of civil servants were contrary to the binding nature of the collective agreement in force and, hence, impinged upon the freedom of collective bargaining (Art. 37 of the Constitution), which is also a component of the right to freedom of association (Art. 28 of the Constitution).[91] The Court concluded that the reductions of wages complies with the Constitution because the contested provision did not affect the general regime of the right to bargain collectively, that does not encompass the inviolability of collective agreements among its essential elements. In this regard, the Court stated that the hierarchy of sources establishes the prevalence of legislative provisions over collective agreements.[92] In another case concerning the same rights, the Spanish Constitutional Court considered that allowing enterprises to suspend collective agreements and the prevalence of company-level agreements over higher-level collective agreements were in compliance with the Constitution. According to the judges, these measures pursued the legitimate aim of fostering productivity. In the case occasion, the Court ruled that the introduction of a one-year contract without severance pay did not violate the right to work under Art. 35 of the Constitution since this measure was meant to promote employment.[93]

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[89] Spanish Constitutional Court, Judgment No. 64/1991 of 22 March 1991 (BOE No. 98 of 24 April 1991), para. 4 (*Fundamentos jurídicos*).

[90] The rules on the constitutionality review are enshrined in the Spanish Constitution and in rules of the Constitutional Court (Organic Law 2/1979 on the Constitutional Court of 3 October 1979, BOE No. 239 of 5 October 1979). On the different proceedings, see e.g. Juan Jose Ruiz Ruiz, 'Constitutional Jurisdiction', in Gambino et al., *cit.*, 219; Marian Ahumada Ruiz, 'The Spanish Constitutional Court', in András Jakab, Arthur Dyevre, Katholieke Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (2017), 604, 611-615.

[91] Real Decreto-Ley 8/2010 de 20 de mayo, por el que se adoptan medidas extraordinarias para la reducción del déficit público (BOE núm. 126 de 24 mayo 2010)

[92] Spanish Constitutional Court, Order No. 85/2011 of 7 June.

[93] Spanish Constitutional Court, Judgment No. 119/14. The contested provisions were enacted through Royal Decree Law 3/2012 (then Law 3/2012). On the same line, see e.g. Judgment No. 8/2015 of 22 January; Judgment No. 81/2015 of 30 April.

Moving to healthcare, the Spanish Constitutional Court addressed two issues. The first is the so-called "co-payment" mechanism under the regional legislation of Catalonia[94] and Madrid,[95] both imposing an extra-charge of one euro on medical prescriptions. These cases were decided in the context of conflicts of competences between the State and the Autonomous Communities. According to the judges, such additional fee encroached upon the States' competence on the general coordination of health matters, and in particular with the principles underlying the functioning of the national healthcare system, since the citizens of the two autonomous communities would have access to basic services under more burdensome conditions compared to the citizens of the other Spanish regions.[96] The second health-related issue concerned the exclusion of undocumented migrants from the public healthcare system, with few exceptions – emergency situations, minors and pregnant woman.[97] The Government challenged the Basque and Valencian legislation which reinstated universal access to the national healthcare system.[98] According to the Court, both Autonomous Communities exceeded their competences by extending the standard of health protection to situations not covered by the State's basic law, which establishes the minimum level of healthcare applicable to the entirety of the Spanish territory. These basic conditions include the persons eligible to benefit from the healthcare service.[99]

Yet, due to the pressure of civil society, a few months later the Spanish Government restored universal access to the national healthcare system.[100] Quite interestingly and contrarily to the foregoing judgments, this decree-law explicitly refers to the prohibition of discrimination set forth in international human rights law. The statute recognises that the exclusion of irregular migrants constituted a retrogressive measure affecting the previous legal protection scheme and a more general violation of international commitments binding upon Spain – to which this recent reform aims to give effect.[101]

On the right to housing, the Government challenged the legislation of Andalusia which allowed the expropriation of uninhabited houses (i.e. apartments unused as residence for more than six consecutive months) in order to offer them to people in need of accommodation, also in light of the dire economic crisis that affected the population. Even if the Spanish Constitutional Court elaborated on and recognised the importance of the right to decent adequate housing under Art. 47 of the Constitution, the judges concluded that the legislation of the Autonomous Community was in contrast with the Constitutional provisions governing attribution of competences.[102]

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[94] Ley del Parlamento de Cataluña 5/2012, de 20 de marzo, de medidas fiscales, financieras y administrativas y de creación del impuesto sobre estancias en establecimientos turísticos.
[95] Ley de la Asamblea de Madrid 8/2012, de 28 de diciembre, de medidas fiscales y administrativas.
[96] Spanish Constitutional Court, Judgment No. 71/2014 of 6 May; Judgment No. 85/2014 of 29 May.
[97] Real Decreto-ley 16/2012, de 20 de abril, de medidas urgentes para garantizar la sostenibilidad del Sistema Nacional de Salud y mejorar la calidad y seguridad de sus prestaciones.
[98] Decreto del Gobierno Vasco 114/2012, de 26 de junio, sobre régimen de las prestaciones sanitarias del Sistema Nacional de Salud en el ámbito de la Comunidad Autónoma de Euskadi. Decreto-ley del Consell de la Generalitat Valenciana 3/2015, de 24 de julio, por el que se regula el acceso universal a la atención sanitaria en la Comunidad Valenciana.
[99] Spanish Constitutional Court, Judgment No. 134/2017 of 16 November; Judgment No. 145/2017 of 14 December.
[100] Real Decreto-ley 7/2018, de 27 de julio, sobre el acceso universal al Sistema Nacional de Salud.
[101] Real Decreto-ley 7/2018, *cit.*, Preamble.
[102] Judgment 93/2015.

Another issue related to the right to housing is forced evictions. In this regard, it should be recalled that the European Court of Human Rights adopted interim measures which suspended orders of evictions and that, following these cases, Spanish Court started suspending evictions as well.[103] Additionally, the Court of Justice of the European Union issued preliminary rulings on consumer protection which dealt with unfair clauses in mortgage contracts. The judgments of the Court resulted in legislative reforms and judicial responses which strengthened the guarantees recognised to the debtor.[104]

2.4. Common trends and differences in the adjudicative approach: the minor role of international human rights sources

The survey of the Greek, Portuguese and Spanish case-law points out similarities and differences among the standards of review and the adjudicative interpretative approaches adopted by national judiciaries.

The most evident common feature is the use of general constitutional principles as constraints to the legislators' discretion in matters concerning allocation of public resources. The national courts of these three States referred to the principle of proportional equality which imposes the fair distribution of the fiscal burden upon the individual and assessed the proportionality of the restriction. These general constitutional principles represent the counterweight to the legislator's room of manoeuvre.[105] Moreover, the courts identified the core content of social rights as "the ultimate limit to the balancing process" between such general constitutional principles and other relevant public interests – including the necessity to preserve States' solvency and avoid their economic default.[106]

The second common feature is the recognition of the relevance of preserving the respective forum State solvency, which in principle justifies the restriction of fundamental rights. On one hand, this led the courts to verify whether the contested measures had a temporary or permanent nature, either *de jure* or *de facto*.[107] On the other, it induced the judicial organs to adopt a cautious approach with regard to the temporal effects of their declarations of unconstitutionality, specifically by Portuguese and Greek courts. The courts took into due consideration the possible negative consequences that a retroactive judgment could have produced on the States' financial resources and opted for limiting the effects *ex nunc*. This stance is strictly linked to the polycentric aspect of judicial reviews in matters of allocation of economic resources, which is even sharper in the context of sovereign debt crisis.

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[103] Chapter III, Section 3.2; Dolores Utrilla, 'Spain', in Stefano Civitarese Matteucci, Simon Halliday (eds), *Social Rights in Europe in an Age of Austerity* (2018), 98, 113.
[104] Chapter IV, Section 4.2; Utrilla, *cit.*, 108, 113.
[105] Sara Cocchi, 'Constitutional courts in the age of crisis. A look at the European Mediterranean area' (2014), 21 *Federalismi* 1, 16-17; Cisotta, Gallo, *cit.*, 471-472.
[106] Cocchi, *cit.*, 22; Cisotta, Gallo, *cit.*, 476-477; Marchese, *cit.*, 43-44.
[107] Claudia Marchese, 'Vincoli di bilancio, finanza pubblica e diritti sociali. Prospettive comparate: Germania, Spagna, Portogallo e Grecia' (2016), in Corte Costituzionale – Servizio Studi (STU 273 - estratto), 32-37; Antonia Baraggia, *Ordinamenti giudici a confronto nell'era della crisi. La condizionalità economica in Europa e negli Stati nazionali* (2017), 104-114.

In Fuller's well-known definition, a polycentric situation is "many centred" as it "will normally involve many affected parties and a somewhat fluid state of affairs".[108] Judicial review of domestic laws affecting socio-economic rights falls within this definition, since the decision may "affect an unknown but potentially vast number of interested parties" and may cause "complex and unpredictable social and economic repercussions".[109] In the context of adjudication of ES rights, polycentricity is connected with the impossibility of foreseeing each and every consequence of any judgment which causes a change of policy in the distribution of public funds.[110] Ultimately, polycentricity represents the main objection against the justiciability of socio-economic rights.[111]

The chief counterargument to this position rests on the constitutional nature of socio-economic rights or other general principles that may serve the purpose of softening the negative impact of austerity measures on the enjoyment of these rights. Courts empowered to assess the constitutionality of national legislations cannot be deprived of the competence to perform the review of issues related to the allocation of resources, not even in periods of sovereign debt crisis. Asserting the contrary would divest constitutional provisions of their binding nature.[112] Nonetheless, these courts should duly consider the distributional and other possible united consequences of a declaration of unconstitutionality stemming from the (still) polycentric nature of the situation. In light of these factors, the restriction of the temporal effects of declarations of unconstitutionality may pursue the aim of avoiding the production of collateral aftermath which may cause, by itself, violations of constitutional guarantees – as paradoxical as it sounds.[113] In contexts of sovereign debt crisis, retroactive declarations of unconstitutionality affect States' economic and fiscal soundness, which represents an autonomous relevant public interest that in some cases is even recognised in constitutional provisions. Additionally, the need to face the additional balance of payments problems caused by the striking out of laws on economic and fiscal matters may lead the legislator to e.g. impose tax hikes, which will further hamper the enjoyment of socio-economic rights.[114]

Ultimately, the declaration of unconstitutionality with limited temporal effects may be considered an adequate legal consequence of violations of ES rights in contexts of sovereign debt crisis. First, due to their *erga omnes* scope of application, their wide-ranging effects

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[108] Lon L. Fuller, Kenneth I. Winston, 'The Forms and Limits of Adjudication' (1977), 92(2) *Harvard Law Review* 353, 395, 397. According to the Author "the more interacting centers there are, the more the likelihood that one of them will be affected by a change in circumstances, and, if the situation is polycentric, this change will communicate itself after a complex pattern to other centers" (*id.* 397).

[109] Marius Pieterse, 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights' (2004), 20(3) *South African Journal on Human Rights 20*, 383, 392-393.

[110] Jeff King, *Judging Social Rights* (2012), 20. The Author identified also three other reasons against judicial adjudication of socio-economic rights, namely the courts lack of: i) democratic legitimacy; ii) the required expertise; iii) flexibility, i.e. the possibility to change positions *ex officio* as a response to unforeseen consequences. The legislators do not suffer the same shortcomings.

[111] Sandra Liebenberg, 'The Protection of Economic and Social Rights in Domestic Legal Systems', in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights* (2nd ed, 2001), 55, 59-61.

[112] Bruno Brancati, 'Decidere sulla crisi: le Corti e l'allocazione delle risorse in tempi di "austerità"' (2015), 16 *Federalismi* 1, 22.

[113] Brancati, *cit.*, 24; Octavio Luiz Motta Ferraz, 'Between Activism and Deference. Social rights adjudication in the Brazilian Supreme Federal Tribunal', in Helena Alviar Garcìa, Karl Klare, Lucy A. Williams (eds), *Social and Economic Rights in Theory and Practice. Critical Inquiries* (2007), 121, 125-126; Dennis M. Davis, 'The scope of the judicial role in the enforcement of social and economic rights. Limits and possibilities viewed from the South African experience', in *id*, 197, 212.

[114] See e.g. Italian Constitutional Court, Judgment No. 10 of 9 February 2015.

benefit entire classes of victims, thus such judgments meet the collective dimension of ES rights. Secondly, their restricted scope preserves States' budgetary soundness, hence avoiding possible major repercussions which could severely worsen their solvency and, consequently, their ability to comply with their international commitments – *viz.* the obligation to ensure the enjoyment of the minimum essential level of ES rights and the duty to progressively achieve their realization. This power is intertwined with the task of domestic constitutional courts, which must guarantee the safeguarding of fundamental rights by also taking into account other relevant general interests that may be at stake, including States' budgetary balance and the protection of the rights of others – which may depend on the availability of economic resources.[115]Notably, constitutional courts of different States determine the temporal scope of their declarations of unconstitutionality, regardless of whether this competence is expressly provided in their rules of procedure.[116] Lastly, the binding nature of declarations of unconstitutionality should ensure their effectiveness.

Undoubtedly, a judgment which strikes down a national law implementing austerity measures has a certain impact on public finances, at the very least because the forum State will no longer be able to achieve the economic goals outlined in the MoU and will be obliged to re-allocate resources though amendments to the existing legislation.[117] On the other side of the coin, such a declaration of unconstitutionality may lead to the renegotiation of loan conditions *vis-à-vis* international lenders, as occurred with regard to Portugal.

All the above standing untouched, the great absentee in these considerations is international human rights law. The highest judicial organs of Greece, Portugal and Spain referred just a few times to international ES rights. The Greek case-law is partly different, since lower courts relied more on treaty-based socio-economic entitlements. Still, the Council of State based its rulings mostly on general principles. Yet, as mentioned in the previous sections, treaty-based provisions form part of the Greek, Spanish and Portuguese legal systems and prevail over ordinary statutes – such as the ones executing austerity measures. The Spanish and Portuguese constitutions prescribe that rights and freedoms thereby enshrined must be construed according to international human rights law, and in Spain these entitlements must be granted in conformity with the interpretation of the relevant international supervisory bodies.[118]

The attitude of Spanish, Portuguese and Greek courts towards the domestic application of treaty-based ES rights leads to a wider reflection on the role of international human rights treaties before national courts, especially in times of sovereign debt crisis.

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[115] Carmela Salazar, 'La Crisi ha…"Sparigliato le Carte"? Note sulla Tutela Multilivello dei Diritti Sociali nello "Spazio Giuridico Europeo"', in Claudio Panzera et al (eds), *La Carta Sociale Europea tra universalità dei diritti ed effettività delle tutele* (2016), 53, 64.

[116] On the power of Constitutional Courts in determining the temporal scope of declarations of unconstitutionality, see e.g. Allan R. Brewer-Carías, *Constitutional Courts as Positive Legislators. A Comparative Law Study* (2011), 103-114; Francesco Gallarati, 'La Robin Tax e l'"incostituzionalità d'ora in poi": spunti di riflessione a margine della sentenza n. 10/2015' (2015), 19 *Federalismi*, 1.

[117] On the impact of declarations of unconstitutionality, see e.g. Kilpatrick, 'Constitutions', *cit.*, 319; Kaidatzis, 'Socio-economic rights', *cit.* ,25-29.

[118] Spanish Constitutional Court, Judgment No. 81 of 8 May 1989, para. 2; Judgment No. 16 of 24 April 2006, para. 5; judgment No. 31 of 10 April 2018, para. 4. See also Supreme Administrative Tribunal, Judgment No. 1263 of 18 July 2018, according to which the views of the UN Committee on the Elimination of Discrimination Against Women in individual complaints are binding on Spain, although neither the Convention nor its Optional Protocol establishes their binding character.

3. Socio-economic rights under international treaties and domestic courts

Three fundamental principles provide for the general framework governing the relationship between international human rights law and domestic legal systems: the principle of freedom of implementation (or principle of neutrality), the principle of effectiveness, and the principle of subsidiarity. International law does not dictate the means through which States must implement international obligations (principle of freedom of implementation or principle of neutrality), as long as national authorities take all the necessary steps in their legal order to comply with their international treaty obligations (principle of effectiveness).[119] These two principles are rooted in the *pacta sunt servanda* principle and on the irrelevance of internal law for the purpose of the international responsibility of States' for internationally wrongful acts.[120] The principle of effectiveness is particularly relevant in international human rights law and is related to the teleological interpretation of treaties – i.e. in light of their object and purpose.[121] Thus, Contracting States must guarantee compliance with their provisions, namely their *effet utile* within domestic legal orders.[122] Lastly, according to the principle of subsidiarity, as already recalled in Chapter III, national authorities are primarily responsible for safeguarding the rights set forth in international human rights treaties and conventions, whilst the judicial and quasi-judicial review of supervisory mechanisms in the context of complaint procedures at the international level is subordinate to the States' failure in complying with such obligation at the domestic level.[123] The principle of subsidiarity is

[119] Matthew. C.R. Craven, 'The Domestic Application of the International Covenant on Economic, Social and Cultural Rights' (1993), 40(3) *Netherlands International Law Review* 367, 370-371; Claudia Sciotti-Lam, *L'applicabilité des traités internationaux relatifs aux droits de l'homme en droit interne* (2006), 33-36,65, 70, 85; Pierre-Marie Dupuy, 'Relations between the International Law of Responsibility and Responsibility in Municipal Law', in James Crawford et. al. (eds), *The Law of International Responsibility* (2010), 173; André Nollkaemper, *National Courts and the International Rule of Law* (2011), 68-73 [Nollkaeper, *National Courts*]; James Crawford, *Brownlie's Principles of Public International Law* (8th Edn, 2012), 148-149; André Nollkaemper, 'The effects of treaties in domestic law', in C. J. Tams et al (eds), *Research Handbook on the Law of Treaties* (2014), 123, 131 [Nollkaemper, 'The effects"].

[120] Vienna Convention on the Law of Treaties (23 May 1969, entry into force 27 January 1980) 1155 UNTS 331 [VCLT]. Article 26 VCLT (*Pacta Sunt Servanda*): "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". Article 27 VCLT (Internal Law and Observance of Treaties): "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. […]".
International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', *Report of the International Law Commission on the work of its fifty-third session* (Fifty-third session, 2001), UN GAOR Supplement No.10, UN Doc. A/56/10 [ARSIWA]. Art. 3 ARSIWA (Characterization of an act of a State as internationally wrongful): "The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."

[121] VCLT, Art. 31(1).

[122] On the principle of effectiveness, see e.g. David Harris et al (eds.), *Harris, O'Boyle and Warbrick. The Law of the European Convention of Human Rights* (4th ed, 2018), 18-19; Ludovic Hennebel, Helene Tigroudja, *Traité de droit international des droits de l'homme* (2018), 640-642. See also See also CESCR, *General Comment No. 9: The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24, para. 5: "The Covenant does not stipulate the specific means by which it is to be implemented in the national legal order. And there is no provision obligating its comprehensive incorporation or requiring it to be accorded any specific type of status in national law. Although the precise method by which Covenant rights are given effect in national law is a matter for each State party to decide, the means used should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the State party."

[123] Chapter III, Section 3.3. See also Nollkaeper, *National Courts, cit.*, 25-26; CESCR, *General Comment No. 9,*

linked, on one side, to the right to an effective remedy and to the admissibility requirement of the previous exhaustion of effective and adequate domestic remedies (addressed in Chapter II)[124] and, on the other, to the role of the judiciary, including constitutional courts, as States' organs which must comply with international treaty law in order to avoid the responsibility of the forum State for internationally wrongful acts.[125]

These considerations notwithstanding, international human rights treaties bore little or no relevance before Greek, Portuguese and Spanish courts, as shown above. In order to assess what (if any) role international human rights treaties could have played before such courts – or before other national domestic courts in contexts of possible future sovereign debt crisis – it is necessary to briefly recall four key concepts, namely: i) domestic legal force (or validity) and individual enforceability; ii) direct application; ii) international law as standard of review; iv) consistent interpretation (or indirect interpretation). The following Section does not deal in detail with these notions, but simply recaps their main features, as developed by highly qualified Scholars in light of the case-law of national courts. This brief survey allows the subsequent focus on their application to human rights treaties enshrining socio-economic rights.

3.1. Domestic legal force, direct applicability and other effects of international treaties in national law

Domestic legal force (or domestic validity) is the prerequisite for international treaties to be directly applicable or serve as standards of review of national statutes. International treaties acquire domestic legal force once validly ratified and incorporated into national law, i.e. international conventions are valid in national orders after they become part of the law of the State.[126] Although the specific rules governing internal validity of international treaties are set forth in national orders, international treaties acquire legal force in domestic law *regardless* of the way in which the specific State systems adapts to international law – i.e. irrespective of whether the State embraces a (mainly) monistic or dualistic approach,[127] or the specific manners of incorporation of international conventions.[128]

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cit., para. 4: "The existence and further development of international procedures for the pursuit of individual claims is important, but such procedures are ultimately only supplementary to effective national remedies."

[124] Chapter II, Section 4.1.

[125] ARSIWA, Article 4 (Conduct of organs of a State): "1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State."

[126] Iwasawa, *cit.*, 141; Nollkaemper, *National Courts*, *cit.*, 68; 130-134.

[127] See e.g. James Crawford, *cit.*, 145: "Dualism emphasizes the distinct and independent character of the international and national legal systems. […] Neither legal order has the power to create or alter rules of the other. When an international law rule applies, this is because a rule of the national legal system so provides. In the case of a conflict between international law and national law, the dualist would assume that a national court would apply national law, or at least that it is for the national system to decide which rule is to prevail. Monism postulates that national and international law form one single legal order, or at least a number of interlocking orders which should be presumed to be coherent and consistent. On that basis, international law can be applied directly within the national legal order." See also Shaw, *cit.*, 97-100.

[128] Luigi Condorelli, I*l giudice italiano e i trattati internazionali: gli accordi* self-executing *e non* self-executing *nell'ottica della giurisprudenza* (1974), 29-32; Benedetto Conforti, Angelo Labella, *An Introduction to International Law* (2012), 7; Roberto Baratta, L'effetto diretto delle disposizioni internazionali *self-executing*, in

International treaties in force in domestic legal orders may have three main effects before national courts: i) direct applicability; ii) standards of judicial review; iii) indirect application.[129]

The notion of direct applicability (or self-executing or direct effect) still lacks a universally accepted agreement among Scholars and case-law. For the sake of clarity, the present thesis refers solely to the concept of direct applicability and conceives a treaty as directly applicable where it is "susceptible to be applied without further measures",[130] including by national judicial organs.

Uncertainly characterises also the method for determining whether a (part of a) treaty is directly applicable.[131] The main discussion concerns the need to adopt a subjective criterion or objective parameters. The former is rooted in the advisory opinion of the Permanent Court of International Justice in the *Danzig* case, in which the Court stated that "the very object of an international agreement, *according to the intention of the contracting Parties*, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts." According to the Court, whether such intention exists "can be established by reference to the terms" of the treaty.[132] On the basis of this opinion, Scholars supporting the subjective criterion have affirmed that an international treaty is directly applicable depending on the intention of the contracting Parties, as expressed in the text of the treaty (provision) invoked.[133] The present dissertation endorses the opposite view, as expressed by other Authors who have sustained that "the inferred intention is a purely fictitious intention."[134] In most cases there is no conclusive evidence on the intention of the Contracting Parties with regard to the direct applicability of a treaty, essentially because – as mentioned above – States are free to choose the means to implement international obligations in their legal order, including the direct applicability of a treaty.[135] Doubts mark the objective criteria, since there are no unequivocally accepted parameters.[136] For example, according to some Scholars and courts, a treaty provision must be sufficiently precise in its substantive content to be applied directly in domestic legal orders.[137] Other Authors contest this position and claim that a treaty provision is *non* directly applicable only in two main cases: i) where the rules do not create obligations, but "merely allows for discretionary powers"; ii) where the

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Giuseppe Palmisano (ed), *Il diritto internazionale ed europeo nei giudizi interni* (2020), 75, 76-79; Iwasawa, *cit.*, 23-25. Iwasawa distinguishes three systems of incorporation: i) automatic incorporation; ii) by law of approval; iii) individual incorporation.

[129] Iwasawa, *cit.*, 86-90.

[130] Iwasawa, *cit.*, 26.

[131] Anthony. Aust, *Modern Treaty Law and Practice* (2nd ed, 2007), 159.

[132] Permanent Court of International Justice, *Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials who have Passed into the Polish Service, against the Polish Railways Administration)*, Advisory Opinion of 3 March 1928, PCIJ (Ser. B) No. 15, 17-18 (emphasis added).

[133] Mark Bossuyt, 'The Direct Applicability of International Instruments on Human Rights (With Special Reference to Belgian and U.S. Law)' (1980), in 15 *Revue Belge de Droit International* 317, 319-320. For an extensive analysis of the subjective criterion, see Iwasawa, *cit.*, 158-171; Sciotti-Lam, *cit.*, 357-434.

[134] Iwasawa, *cit.*, 48.

[135] Iwasawa, *cit.*, 47-48; Sciotti-Lam, *cit.*, 435.

[136] For an extensive analysis on the objective criteria, see Iwasawa, *cit.*, 172-184; Sciotti-Lam, *cit.*, 438-499.

[137] See e.g. Bossuyt, *cit.*, 318-319; André Nollkaemper, 'The Duality of Direct Effect of International Law' (2014), 25(1) *The European Journal of International Law* 105, 112, 115-117 [Nollkaemper, 'The Duality'].

rules create obligations that cannot be immediately implemented due to the lack of the necessary organs or mechanisms.[138]

The notion of individual enforceability should be distinguished from that of direct applicability. The former entails the suitability of the international rule to be relied upon by individuals before domestic courts as cause of action, in cases where national courts are empowered to directly apply the invoked provision.[139] Direct applicability is a condition for the individual enforcement of international law before domestic courts, but direct applicability concerns also international rules that do *not* confer rights and *cannot* be pleaded by individuals before domestic courts.[140] Moreover, it is possible that national courts consider international law creating rights as not directly applicable (e.g. because not sufficiently precise) and, as a consequence, not susceptible to be invoked by individuals as cause of action.[141]

The second effect of international treaty law in domestic legal orders is its use as a standard for judicial review, which occurs if the convention is valid in national law and if the internal order prescribes the supremacy of international treaty law over ordinary statutes. This is a negative form of application of international law because the relevant rule prohibits the enforcement of domestic norms contrary to its terms and principles. In this regard, domestic courts may act in two different ways, according to the relevant rules of the forum State. Judges may disapply national law inconsistent with international law, which becomes the rule governing the case on the merit (*invocabilité de substitution*), or judges may strike down the contrasting national provision without directly applying the contrasting international rule (*invocabilité d'exclusion*).[142] The latter hypothesis is feasible also where treaty provisions are not directly applicable. In this case, conventions may work as parameters of judicial review in the same way as constitutional provisions which are not directly applicable.[143]

The third and last effect of international treaties on domestic legal systems requires national courts to interpret municipal law in conformity with the forum States' international treaty obligations (also known as indirect effect).[144] Conventions may be relied on as means of interpretation even if they are not valid in the national system or are not in force at the international level (e.g. due to the lack of exchange or deposit of instruments of ratification, acceptance, approval or accession).[145] Consistent interpretation applies to constitutional provisions and ordinary statutes, and is independent from the issue of direct applicability (and individually enforceability) before domestic courts. Through consistent interpretation, courts

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[138] Benedetto Conforti, 'National Courts and the International Law of Human Rights', in Benedetto Conforti, Francesco Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (1997), 3, 8 [Conforti, 'National Courts'].
[139] Craven, *cit.*, 379; Harris et al., *cit.*, 30.
[140] Iwasawa, *cit.*, 147-148; Craven, *cit.*, 392, according to which: "[N]ot all directly applicable provisions may be relied upon by individuals as a cause of action."
[141] Craven, *cit.*, 388.
[142] Iwasawa, *cit.*, 122-129; 148-149.
[143] Iwasawa, *cit.*, 186-187; Sciotti-Lam, *cit.*, 342-344.
[144] Condorelli, *cit.*, 66; Iwasawa, *cit.*, 192; Sciotti-Lam, *cit.*, 601-605; Gerrit Betlem, André Nollkaemper, *Giving Effect to Public International Law and European Community Law before Domestic Courts: A Comparative Analysis of the Practice of Consistent Interpretation* (2003), 14 *The European Journal of International Law* 3, 569, 574-579.
[145] See e.g. Fulvio Maria Palombino, *Introduzione al diritto internazionale* (2019), 167-171; Nollkaemper, *National Courts*, *cit.*, 139, 143-145, 155-157. Consistent interpretation on persuasive authority of the (non-binding) pronouncements of human rights treaties bodies is also addressed in the Section 3.2. below.

can secure States' compliance with international commitments, including human rights in cases where these cannot be directly invoked by individuals before as cause of action before national courts. Consistent interpretation may be grounded on explicit legal provisions, as Art. 10(2) of the Spanish Constitution and Art. 16 of the Portuguese Constitution, or on the hierarchy of sources in the domestic legal order. In regard to the latter, it is the material (and not the formal) rank that should be taken into account.[146] According to Scholars, there is a presumption of coherence between national law and international law, which requires the former to be interpreted in conformity with the latter,[147] also in order to avoid the international responsibility of the forum State. Consistent interpretation is applied by national courts world-wide, but there are major substantial differences in its application in different forum States.[148]

Direct applicability, the role of international treaty law as standards of judicial review and consistent interpretation contribute to enhance the effectiveness of international law at the domestic level, besides avoiding the responsibility of the forum State for internationally wrongful acts.[149] Moreover, these three effects comply with the general constitutional principles of legal certainty and separation of powers. As for the former, once international law becomes "part of the law of the land", national courts should apply its rules (including treaty norms) as domestic law – as far as possible.[150] This includes assessing whether the legislators have overstepped the limits of their political discretion. Indeed, the principle of separation of powers does not require constitutional courts to abdicate from their task "to protect individual rights and, more in general, to preserve the effectiveness of the legal order", which includes international norms which had acquired domestic legal force. Indeed, the principle of separation of powers is not "a wall" preventing any contact among the various branches of the State, but quite the reverse it "implies a reciprocal influence and control with a view to ensuring that each branch does not act in an arbitrary manner."[151]

3.2. The effects of international treaties on socio-economic rights in domestic law

The considerations of the previous Section apply also to international treaties safeguarding socio-economic rights. Before moving to this analysis, it may be appropriate to outline the distinction between direct application and justiciability. As stated above, the present dissertation assumes that a treaty provision is directly applicable where it is susceptible to be applied without further measures, including by national judicial organs. On the contrary, the notion of justiciability has a broader scope and refers to "those matters which

[146] Sciotti-Lam, *cit.*, 508-509.
[147] Nollkaemper, *National Courts*, *cit.* 152.
[148] Nollkaemper, *National Courts*, *cit.*, 150.
[149] Iwasawa, *cit.*, 243.
[150] Iwasawa, *cit.*, 191-193.
[151] Daniele Amoroso, 'Judicial Abdication in Foreign Affairs and the Effectiveness of International Law' (2015), 14 *Chinese Journal of International Law* 99, 107 [Amoroso, 'Judicial Abdication']. See also Massimo Iovane, 'Domestic Courts Should Embrace Sound Interpretative Strategies in the Development of Human Rights-Oriented International Law', in Antonio Cassese (ed), *cit.*, 607, 622, according to which "[T]he separation of powers is a key element of democratic regimes the advancement of which is advocated by international law itself. At the same time, the existence of some forms of checks and balances between different powers […] are also part of a rule-of-law-based system."

are appropriately resolved by courts".[152]Accordingly, this dissertation assumes that treaty-based socio-economic rights are justiciable where these are directly applicable (including where individually enforceable as cause of action), where these may be invoked as standards of judicial review, and where these represent interpretative parameters of domestic provisions (indirect application).

In the case of human rights conventions, direct applicability also entails individual enforceability – i.e. the possibility for individuals to vindicate such rights before national courts and seek a redress in case of violations.[153] Due to the above-mentioned unsuitability of the subjective criterion, it is necessary to assess whether objective criteria could clarify whether ES rights are directly applicable. The first parameter requires the substantive content of the provision to be sufficiently clear and precise, which leads courts to deny the direct applicability of socio-economic rights due to their vague and indeterminate wording.[154] The argument against this objection highlights that (at least some) treaty-based provisions on ES rights indeed are sufficiently precise and clear – e.g. provisions that require equal remuneration for work of equal value. Moreover, supervisory organs established at the international level have extensively interpreted their substantive content of the relevant treaty-based provisions, which can no longer be deemed as vague and indeterminate.[155]

The second objective criterion excludes the direct applicability of international rules if those confer faculties (rather than imposing obligations) and where the domestic law lacks the necessary organs and mechanisms to implement them. International human rights treaties grant rights to individuals and establish obligations upon Contracting States, hence the statement that those merely recognise faculties runs contrary to their scope and objective.[156] Some authors and national courts stress that the programmatic nature of socio-economic rights preclude their direct applicability, since the principle of separation of powers prevents

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[152] CESCR, *General Comment No. 9*, *cit.*, para. 10.

[153] Liebenberg, *cit.*, 57.

[154] Nollkaemper, *National Courts*, *cit.*,136-138.

[155] Matthew C.R. Craven, 'The Domestic Application of the International Covenant on Economic, Social and Cultural Rights' (1993), 40(3) *Netherlands International Law Review* 367, 389; Pietro Gargiulo, 'Il Protocollo Facoltativo al Patto sui Diritti Economici, Sociali e Culturali', in G. Venturini, S. Bariatti (eds.) *Liber Fausto Pocar - Vol.1: Diritti individuali e giustizia internazionale* (2009), 339, 344-346. See also the case-law reported in Iwasawa, *cit.*, 41-43. Sigrun Skogly, 'The Requirement of Using the 'Maximum of Available Resources' for Human Rights Realisation: A Question of Quality as Well as Quantity?' (2012), 12(3) *Human Rights Law Review* 393, 395-396; Asbjørn Eide, Allan Rosas, 'Economic, social and cultural rights: a universal challenge', in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights* (2nd ed, 2001), 3, 24-25.
See also CESCR, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23, para. 5: "The Committee notes, for example, that the enjoyment of the rights recognized, without discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies. […] In addition, there are a number of other provisions in the International Covenant on Economic, Social and Cultural Rights […] which would seem to be capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain."; CESCR, *General Comment No. 9: The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24, para. 11: The Covenant does not negate the possibility that the rights it contains may be considered self-executing in systems where that option is provided for. […] In most States, the determination of whether or not a treaty provision is self-executing will be a matter for the courts, not the executive or the legislature. […] It is especially important to avoid any a priori assumption that the norms should be considered to be non-self-executing. In fact, many of them are stated in terms which are *at least as clear and specific* as those in other human rights treaties, the provisions of which are regularly deemed by courts to be self-executing" (emphasis added).

[156] Gargiulo, *cit.*, 343-344; Baratta, *cit.*, 88.

judicial organs from taking the necessary affirmative steps by themselves and from ordering specific actions to be adopted by the legislator – or by other national authorities. In this regard, Chapter II already clarified that there are socio-economic rights that are immediately and directly enforceable (such as the right to form and join trade unions).[157] Additionally, Chapter II outlined that each socio-economic right entails obligations to respect, i.e. the duty to abstain from unjustified interference, which could be enforced before national courts. So, for example, national courts could grant a redress in case of evictions contrary to the obligation to respect the right to adequate housing. Or, again as an example, domestic courts may strike down a statute which adopts unjustified retrogressive measures in health-related issues, since State authorities have the duty to refrain from arbitrarily lowering the achieved standards of protection.[158] Judges cannot (and must not) replace the legislator in the determination and implementation of public policies (e.g. in matters of social housing), but national courts could still stress the forum State's failure in complying with its international obligations.[159] Lastly, the establishment of supervisory mechanisms in the international legal order, alongside the growing body of national case-law relying upon ES rights, supports the idea that at least some socio-economic rights are directly applicable.[160] These very same arguments concerning direct applicability of treaty-based socio-economic rights are upheld also in relation to comparable provisions of national constitutions.

Ultimately, in theory the direct applicability of socio-economic rights seems adequate to ease the protection of treaty-based socio-economic rights before national courts, whichever the objective criterion used. Nonetheless, Authors highlight that direct applicability heavily depends on the attitude of domestic judicial organs. Rather than enhancing effectiveness, direct applicability may serve as a justification for national courts not to enforce immediate obligations (or the obligation to respect).[161] So, for example, the degree of precision that an ES right must attain varies from State to State, and sometimes not even just the tribunals belonging to the very same forum State adopt an identical stance. The Greek case-law is an example of such inconsistency. As outlined above, while Greek lower courts considered socio-economic rights set forth in international instruments as directly applicable rules, the Council of State refused to recognise such character and affirmed that ILO Conventions and the European Social Charter only contain "directions" for Contracting Parties. The unpredictability surrounding judicial outcomes and the resulting lack of legal certainty leaves doubts as to whether direct applicability represents the most suitable technique to foster the protection of ES rights before national courts.

The second effect that international human rights treaties may have is working as standards of judicial review of ordinary statutes. Once international conventions become part of the national legal system and the forum State prescribes their supremacy over ordinary laws, constitutional courts can (and should) use treaty provisions as parameters of

[157] Chapter II, Section I.
[158] Liebenberg, *cit.*, 63.
[159] Motta Ferraz, 122-124.
[160] See e.g. Aoife Nolan, Bruce Porter, Malcols Langford, *The Justiciability of Social and Economic Rights: An Updated Appraisal*, CHRGJ Working Paper No. 15 (August 2007), available at: www.socialrightscura.ca; Malcolm Langford, 'Judicial Review in National Courts. Recognition and Responsiveness', in Eibe Riedel, Gilles Giacca, Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (2014), 417-447.
[161] Iwasawa, *cit.*, 174-177; Craven, *cit.*, 388; Nollkaemper, *National Courts*, *cit.*, 138.

constitutionality of municipal statutes.[162] If the provision is directly applicable and the procedural rules allow for it, the courts may disapply the internal statute and apply the international norm as the rule governing the merits of the case (*invocabilité de sustition*). Regardless of their directly applicable character, domestic courts may rely on treaty-based ES rights to strike down the contrasting internal norm (*invocabilité d'exlusion*). In greater detail, the parameter of constitutional review (or to be applied as the rule governing the specific dispute) is the treaty-based provision, as interpreted by the relevant supervisory body.[163]

The literature has proposed several arguments supporting this idea. The first theory affirms that such pronouncements may be deemed as subsequent practice of Contracting States under Art. 31(3)(b) VCLT, that *shall* be taken into account by domestic courts when interpreting a treaty.[164] As noted by other Scholars, whether pronouncements of treaty bodies are "subsequent practice" within the meaning of Art. 31(3)(b) VCLT is a matter under debate, as confirmed by States' comments and observations to the work of the International Law Commission (ILC) on subsequent agreements and subsequent practice.[165] The second view qualifies these pronouncements as supplementary means of interpretation under Art. 32 VCLT.[166] According to this theory, national courts *may* consider the pronouncements of treaty-bodies, but are not bound to them.[167] The third and last view affirms that domestic courts have the *duty to take into account* such pronouncements due to either the impartiality and independence of the organs or the existence of a States' duty to cooperate with such bodies.[168] In the context of the Council of Europe, and with specific reference to the pronouncements of the European Committee of Social Charter, States are explicitly obliged to "collaborate sincerely and effectively in the realisation of the aim of the Council", including "the maintenance and further realisation of human rights and fundamental freedoms."[169]

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[162] André Nollkaemper, 'The effects', *cit.*, 142-143; Riccardo Pisillo-Mazzeschi, 'Sulla natura degli obblighi internazionali di tutela dei diritti economici, sociali e culturali', in Gabriella Venturini, Stefania Bariatti, *Liber Fausto Pocar, Diritti individuali e giustizia internazionale* (2009), 715, 723-725; Daniele Amoroso, 'Inutiliter Data? La Convenzione delle Nazioni Unite sui Diritti delle Persone con Disabilità nella Giurisprudenza Italiana' (2017), available at: www.sidiblog.org [Amoroso, 'Inutiliter Data'].

[163] Craven, *cit.*, 389-390; Iwasawa, *cit.*, 232-242.

[164] Art. 31(3)(c) VCLT (General rule of interpretation): "There *shall* be taken into account, together with the context: […] any *subsequent practice* in the application of the treaty which establishes the agreement of the parties regarding its interpretation" (emphasis added).

[165] Deborah Russo, 'I trattati sui diritti umani nell'ordinamento italiano alla luce delle sentenze n. 120 e 194 del 2018 della Corte costituzionale' (2019), 13 (1) *Diritti umani e diritto internazionale* 155, 163.

[166] Art. 32 VCLT (Supplementary means of interpretation): "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable."

[167] Leonardo Borlini, Luigi Crema, 'Il valore delle pronunce del Comitato europeo dei diritti sociali ai fini dell'interpretazione della Carta Sociale Europea nel diritto internazionale', in *La normativa italiana sui licenziamenti: quale compatibilità con la Costituzione e la Carta sociale europea?* (2018), 86.

[168] Russo, *cit.*, 166-168; Serena Forlati, 'Corte costituzionale e controllo internazionale. Quale ruolo per la "giurisprudenza" del Comitato europeo dei diritti sociali nel giudizio di costituzionalità delle leggi?', in *La normativa italiana sui licenziamenti: quale compatibilità con la Costituzione e la Carta sociale europea?*, *cit.*, 67,76; Daniele Amoroso, 'Sull'obbligo della Corte Costituzionale italiana di "prendere in considerazione" le decisioni del Comitato europeo dei diritti sociali', in *id.*, 81 [Amoroso, 'Sull'obbligo'].

[169] Statute of the Council of Europe (5 May 1949, entry into force 3 August 1949), ETS No.001, Art. 3 and Art. 1(b). On the value of the pronouncements of the European Committee of Social Rights, see e.g. Lorenza Mola, 'Oltre la CEDU: la rilevanza della Carta sociale europea e delle decisioni del Comitato europeo dei diritti sociali nella recente giurisprudenza costituzionale', in Palmisano (ed), *cit.*, 409.

According to Scholars, the duty to take into account ultimately stems from the general principle of interpreting and applying treaties in good faith and compels national courts to duly consider the pronouncements of treaty-based bodies and to provide a reason in case they decide to depart from it.[170]

The taking into account doctrine could serve the purpose of enhancing the effectiveness of socio-economic rights at the domestic level. According to the ILC, these pronouncements cover "all relevant factual and normative assessments by such expert bodies",[171] including general comments, views, reports, and decisions. Since the duty to take into account is ultimately grounded on the general principle of good faith in interpreting and applying treaties, its scope of application is not limited to the Council of Europe but embraces every convention binding upon the forum State. To confirm the broad ambit of the doctrine, sufficient is to recall that also the International Court of Justice acknowledged the interpretative value of the pronouncements of treaty bodies and affirmed its duty to take them into account on several occasions.[172]

The third and last effect that treaties may have in national legal orders is that of requiring domestic courts to construe as far as possible municipal law (including constitutional provisions) in conformity with the standards and conditions laid down in treaty-based provisions enshrining socio-economic rights (consistent interpretation, or *invocabilité d'interpretation*).[173] Consistent interpretation concerns both the substantive content of the provisions and claw-back clauses. The "taking into account" doctrine applies in this case as well. Hence, national tribunals should duly consider the pronouncements of supervisory bodies and provide the reason of any deviation. Indirect application of treaty-based socio-economic rights may assist national courts in clarifying and reinforcing domestic law where it essentially overlaps with international parameters, or it may fill gaps and complete the system of protection provided at the national level.[174]

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[170] Amoroso, 'Sull'obbligo' *cit.*, 81; Eckart Klein, 'Individual Reparation Claims under the International Covenant on Civil and. Political Rights: The Practice of the Human Rights Committee', in Albrecht Randelzhofer, Christian Tomuschat (eds), *State Responsibility and the Individual. Reparation in Instances of Grave Violations of Human Rights* (1999), 27, 34. On the taking into account doctrine, see also Fulvio Maria Palombino, *Fair and Equitable Treatment and the Fabric of General Principles* (2017), 144-155; Pierfrancesco Rossi, L'interpretazione conforme alla giurisprudenza della Corte EDU: quale vincolo per il giudice italiano? (2018), 1 in *Osservatorio sulle Fonti* 1.

[171] International Law Commission, Sixty-eighth session, Fourth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties by Special Rapporteur Georg Nolte, 7 March 2016, A/CN.4/694, para. 14.

[172] Danae Azaria, 'The Legal Significance of Expert Treaty Bodies Pronouncements for the Purpose of the Interpretation of Treaties' (2020), 22 *International Community Law Review* 33, 37-46; Iwasawa, *cit.*, 223-234. See e.g. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, paras. 109-110 (on the UN Human Rights Committee); *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 639, paras. 66-68 (on the UN Human Rights Committee, the African Commission on Human and Peoples' Rights, the ECtHR and the Inter-American Court of Human Rights); *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422, at para. 101 (on the UN Committee against Torture).

[173] CESCR, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23, paras. 14-15. Bruce Porter, 'Inclusive interpretation. Social and economic rights and the Canadian charter', in Helena Alviar Garcìa, Karl Klare, Lucy A. Williams (eds), *Social and Economic Rights in Theory and Practice. Critical Inquiries* (2007), 215, 220-222; Craven, *cit.*, 395-400.

[174] Francesco Francioni, 'The Jurisprudence of International Human Rights Enforcement: Reflections on the Italian Experience', in Benedetto Conforti, Francesco Francioni (eds), *Enforcing International Human Rights in*

3.3. Rights-based constitutional review of austerity measures and the authoritative interpretation of supervisory bodies

As shown in the previous Section, direct application of socio-economic rights is not the most successful method to enhance the effectiveness of socio-economic rights at the domestic level and to avoid States' responsibility for internationally wrongful acts. Rather the opposite, the use of socio-economic rights as standards of constitutional review of ordinary legislations and consistent interpretation seem both suitable means to achieve both aims.

In contexts of sovereign debt crisis, Constitutional courts could declare the invalidity of austerity measures for infringing general constitutional principles (e.g. proportionality, human dignity) and socio-economic rights listed in national constitutions, construed in accordance with the international instruments binding upon the forum State and taking into account the pronouncement of supervisory mechanisms.[175] A strict proportionality test and the reference to provisions setting forth socio-economic rights under both domestic and international law could avoid confining their safeguarding solely to situations where individuals are deprived of their minimum subsistence – as occurred, for example, in the case-law of the Greek Council of State, which considered the right to human dignity as the ultimate constraint on legislators' discretion.[176]

Moreover, ES rights could – and should – work as parameters of constitutionality, regardless of their qualification as directly applicable norms and provided that national orders recognise the supremacy of international law over ordinary statutes. Once again, the standard of review is the treaty provision as interpreted by the relevant supervisory body. This is a suitable alternative irrespective of whether constitutions contain a bill of rights. In the absence of such a list, there is no constitutional provision that could be construed consistently with international law but constitutional courts could still strike down (or disapply) ordinary statutes for infringing a superior rule. The opposite outcome would deprive ES rights of their binding nature and of their higher ranking in the national legal system.[177]

Had the national courts of Spain, Portugal and Greece adopted one of these two approaches, the outcome of their rulings could have been different and, ultimately, more protective toward victims. This is confirmed by the Greek case-law. Lower courts declared the unconstitutionality of statutory laws imposing austerity measures due to their contrast with – among other grounds – treaty-based socio-economic rights. The human-rights-oriented approach of the lower courts resulted in more protective outcomes even during the first phase of the crisis, where the Council of State grounded its decision on the so-called emergency

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Domestic Courts (1997), 15, 30-32; Nollkaemper, 'The effects', *cit.*, 148.

[175] See e.g. the case-law of the Belgian Council of State in Sciotti-Lam, *cit.*, 352; Italian Constitutional Court, judgment 194/2018, as briefly commented in Giulia Frosecchi, *European Social Charter in the Constitutional Review of National Laws: the Decisive Application of Art. 24 by the Italian Constitutional Court* (2019), 5 *International Labor Rights Case Law* 2, 182. On this judgment, see also: Claudio Di Turi, 'Libertà di associazione sindacale del personale militare e Carta sociale europea nella recente giurisprudenza della Corte costituzionale' (2018), in 3 *Diritti umani e diritto internazionale* 615; Amoroso, 'Sull'obbligo', *cit.*; Borlini, Crema, *cit.*; Russo, *cit.*

[176] See e.g. Council of State, judgment 668/2012, *cit.* 125, where the right to a dignified life appears to be the extreme limit to the State's wide discretion in shaping the content of financial reforms (paras. 34-36).

[177] See e.g. Pisillo-Mazzeschi, *cit.*, 723-725; Daniele Amoroso, 'Inutiliter Data?', *cit.*

doctrine. According to this theory, in assessing the proportionality of the disputed measures the urgent and peremptory need to ensure the State solvency overrode individual rights – a stance rather identical to the ECtHR's one towards crisis litigation. In such a situation, the right to a dignified life appears to be the extreme limit to the State's wide discretion in shaping the content of financial reforms.[178] This attitude confined the protection of socio-economic rights solely to cases where individuals were deprived of the minimum subsistence – i.e. from the viewpoint of international law, where the State does not provide an essential level of protection in violation of the minimum core obligation. Besides, even when the crisis was no longer so severe and the Council of State began performing a more rigorous balance between the general interest and the individuals' entitlements, this highest administrative court continued to base its rulings mostly on general principles and refused to rely on ILO Conventions and on the European Social Charter.

The approach of the Greek lower courts could have been embraced also by the Spanish and Portuguese Constitutional Courts. As an example, the Spanish Constitutional Court could have relied on the provisions of the ICESCR, as interpreted by the UN Committee of Economic, Social and Cultural Rights, as a reason to uphold the constitutionality of the Basque and Valencian regulation on health-related issues: in particular, the judges could have argued that the national legislation limiting access to the public healthcare system on the basis of the (un)documented status of foreigners was in violation of the prohibition of discrimination and impaired the core of the right to health.[179] Instead, the Spanish Constitutional Court declared the unconstitutionality of the contested regional legislation due to the breach of the constitutional rules governing attribution of competences between Autonomous Communities and the central Government. Incidentally, the preamble of the 2018 reform restoring universal access to the national healthcare system has expressly recalled the prohibition of discrimination stemming from Spain's international commitments.[180]

The Spanish Constitutional Court could have relied on the principle of non-discrimination also with regard to the regional legislation of Catalonia and Madrid imposing an extra-charge of one euro on medical prescriptions. The relevant judgment of the Spanish Constitutional Court – which declared the unconstitutionality of the contested laws – stressed that the measure resulted in an unjustified different treatment between, on the one hand, the citizens of the two autonomous communities and, on the other, the citizens of the other Spanish regions. In light of this, the ruling seems already grounded on the principle of non-discrimination, although the Court did not refer to this norm. The event that the judgments were issued on actions launched by political actors does not justify the absence of references to the principle of non-discrimination either. Constitutional Courts are called to assess the constitutionality of domestic legislation against the whole set of provisions set forth in national constitutions, including socio-economic rights. This conclusion is valid even in cases

[178] See e.g. Council of State 668/2012, paras. 34-36.
[179] See CESCR, '*General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*', 11 August 2000, E/C.12/2000/4, para. 34; CESCR, *'General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)'*, 2 July 2009, E/C.12/GC/20, para. 30.
[180] Real Decreto-ley 7/2018.

where the review is not abstract and concrete – i.e. triggered by the (potential) contrast with constitutional ES rights claimed by alleged victims.

4. Preliminary conclusions on crisis litigation before constitutional courts

Courts in Greece, Portugal and Spain have been vested in proceedings calling for the constitutional review of austerity measures enacted in the forum State. These courts adjudged on conditionality impinging upon a wide range of socio-economic rights, including on the right to property, alone or as a component of the right to social security, labour legislations, health-related issues and forced evictions without alternative accommodation. The chief common features among their rulings is the use of general constitutional principles (such as the principle of proportional equality) as parameters to assess compliance of macro-economic adjustment programmes with constitutional provisions. The main exception to this trend is the case-law of the Greek lower courts, which took into due consideration international human rights treaties binding upon Greece and struck down national provisions in contrast with the obligations and standards thereby enshrined.

The limitation of the temporal scope of declarations of unconstitutionality, whose effects were restricted *pro futuro,* is another noteworthy aspect. This adjudicative technique allows the preservation of States' solvency *vis-à-vis* major distributional or other unintended consequences of judgments relating to polycentric situations, such as those involving the allocation of public finances. Ultimately, some of these rulings prompted amendments to current national laws and led to the renegotiation of the MoUs with the international lenders, as in the case of Portugal.

Putting aside the already recalled case-law of Greek lower tribunals, the survey of the jurisprudence of the highest courts of Greece, Portugal and Spain points to very limited attention given to international treaties on socio-economic rights. This attitude blatantly disregards the binding nature of these conventions and their rank in the relevant domestic legal order. Each of their constitutions prescribes that treaty-based provisions (including those on ES rights) form part of their internal system and prevail over ordinary statues – such as those implementing austerity measures. Additionally, the constitutions of Spain and Portugal, as interpreted by the respective constitutional courts, expressly provide that the rights and freedoms thereby enshrined must be construed according to international human rights law. Notably, the Greek Council of State also failed to consider that the purpose of international human rights treaties – including those enshrining ES rights – is to confer entitlements to individuals.[181] Therefore, asserting that these rules provide mere "directions" to State parties is defective and in tension with the principle of effectiveness.[182]

Even if the principle of neutrality recognises that Contracting Parties enjoy discretion as to the manner of implementation of international commitments in their respective legal

[181] Massimo Iovane, 'Domestic Courts Should Embrace Sound Interpretative Strategies in the Development of Human Rights-Oriented International Law', in Antonio Cassese (eds), *Realizing Utopia. The future of International Law* (2012), 607, 608.

[182] Langford, *cit.*, 416; Craven, '*cit.*, 376; Giovanni Zarra, 'La Carta Sociale Europea tra unitarietà dei diritti fondamentali, Drittwirkung e applicazione da parte dei giudici interni' (2020), in 4 *Annali della SISDiC*, 19.

systems,[183] once international human rights conventions acquire formal validity within municipal legal orders, States must respect, protect and fulfil such rights.[184] This duty binds domestic public organs, including the judiciary: indeed, courts and tribunals are those primarily responsible for the effective enforcement of these guarantees.[185]

This consideration is intimately linked to the principle of subsidiarity, which governs the functioning of the majority of individual and collective complaint procedures at the international level. According to this principle, international human rights law must be primarily enforced before domestic judicial organs. Thus, domestic courts are still keystones in enhancing the effectiveness of international human rights, including socio-economic rights.[186] In this regard, national tribunals have three alternatives. First, judges may directly apply ES rights where the domestic legal order allows for it and its judicial organs adopt this attitude, even if this approach is not frequent in the case-law. Second, judicial organs (including constitutional courts) may use them as standards of judicial review of ordinary legislation. Third and last, national tribunals may interpret national law consistently with treaty-based socio-economic rights. In each case, the pronouncement of expert bodies set up at the international level must be taken into account and any departure should be accompanied with duly reasons.

This conclusion stands untouched in contexts of sovereign debt crisis. In these situations, references to international treaty-based standards and constitutional adjudicative techniques may concur in the identification of adequate legal consequences for violation of socio-economic rights. In greater detail, relying on ES rights under international conventions may clarify and boost the guarantees provided under national law – as shown for example by the case-law of the Greek lower courts, or even complete the system of protection by adding safeguards that are not expressly provided for in domestic law. Moreover, judgments declaring the unconstitutionality of austerity measures meet the collective dimension of socio-economic rights thanks to their *erga omnes* consequences: these rulings repeal the contested legislative provision from the national legal order and, hence, remove the structural cause(s) of the breach. Such general scope benefits the victimized class as a whole. Moreover, declarations of unconstitutionality should have no (or limited) retroactive effects in order to avoid unintended repercussions on weighty general interests (such as the solvency of the forum State) or on the enjoyment of other socio-economic rights. This consideration stems from the general obligations stemming from international treaties safeguarding these guarantees, namely the obligation to progressively achieve their full realization and the minimum core obligation. A severe budgetary gap caused by *ex tunc* declarations of unconstitutionality could hamper States' ability to comply with these commitments and,

[183] Nollkaemper, 'The effects of treaties', *cit.* 131.
[184] Kirsten Schmalenbach, 'Article 27. Internal law and observance of treaties', in Oliver Dörr, Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties. A Commentary* (2018), 493, 495, according to which the freedom of implementation "is circumscribed by the principle of effectiveness, which gains special importance in the context of human rights […] treaty law". See also Conforti, 'National Courts', *cit.*, 7; Nollkaemper, 'The effects of treaties', *cit.*, 132; Craven, *cit.* 139, 377.
[185] Conforti, Labella, *cit.*, 3; Betlem, Nollkaemper, *cit.* 574; Sciotti-Lam, *cit.*, 353; Craven, *cit.* 139, 367-368; Iovane, *cit.*, 608; Conforti, *International Law and the Role of Domestic Legal System* (1993), 8-10 [Conforti, *International Law*]; Anastasia Poulou, 'Austerity and European Social Rights: How Can Courts Protect Europe's Lost Generation?' (2014), 15(6) *German Law Journal* 1145, 1171.
[186] Conforti, 'National Courts', *cit.*, 3; Iwasawa, *cit.*, 244-246.

hence, to respect, to protect and to fulfil socio-economic rights. Lastly, these rulings may reinforce the position of borrowing States *vis-à-vis* international lenders following the repeal or amendment of austerity measures, as the renegotiated MoU could no longer attach loan conditions similar to those struck down by the constitutional courts of the beneficiary State and, hence, will necessarily be more human-rights oriented.

Concluding remarks

In his speech on the occasion of the opening of the 2012 judicial year, Judge Bratza solemnly stated that "human rights are not a luxury".[1] The President of the European Court of Human Rights was referring to the combined repercussions of the sovereign debt turmoil and austerity measures, which at that time started becoming overwhelming. His statement notwithstanding, Eurozone States kept implementing macro-economic adjustment programmes, whose cumulative effects severely hampered the enjoyment of socio-economic rights.

The present dissertation attempted to spotlight these violations and to suggest alternative approaches to enhance the effectiveness of socio-economic rights in times of budgetary imbalance. The thesis looked at the Eurozone sovereign debt crisis as a case-study but aimed at proposing solutions that could be applied also in the event of future similar scenarios. In this regard, the recent Covid-19 pandemic outbreak constitutes a threat not only to health, but also the economic interests of the private sector and a factor that could toss national public finances into disarray. Sufficient is to recall that EU Member States deployed considerable fiscal packages to cushion the impact on their respective private sectors,[2] whilst the Union activated the "escape clause" of the Stability and Growth Pact,[3] hence allowing States to depart from the EU law rules on fiscal discipline.[4] Moreover, the European Central Bank activated the Pandemic Emergency Purchase Programme and two safety nets have been put forward: i) "SURE", a temporary support scheme to mitigate unemployment risks; ii) the Pan-European Guarantee Fund provided by the European Investment Bank at the advantage of small and medium-size enterprises.[5] Moreover, the European Stability Mechanism (which was also involved in the Eurozone crisis) activated the Pandemic Crisis Support, which could grant loans to all euro area Countries of up to 2% of their GDP, without attaching austerity measures but conditional on the use of this credit line to support domestic financing of direct and indirect healthcare and cure and prevention related costs of the COVID-19 crisis.[6] Further, the establishment and the details concerning the functioning of the so-called "Recovery Fund" are a matter of debate and negotiation among Union institutions and Member States, as well as between the latter ones. The scenario that is taking shape presents several analogies with that outlined in Chapter I of the present dissertation.

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[1] Sir Nicolas Bratza, President of the European Court of Human Rights, Solemn hearing of the European Court of Human Rights on the occasion of the opening of the judicial year, Friday 27 January 2012, 2, available at: www.echr.coe.int.

[2] International Monetary Fund, Regional economic outlook - Europe. Whatever it takes: Europe's response to COVID-19 (October 2020), available at: www.imf.org.

[3] Articles 5(1), 6(3), 9(1) of Regulation 1466/97 of the Council of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, 2 August 1997, OJ L 209/1, as amended by Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 (23 November 2011, OJ L 306/12); Article 10(3) Regulation 1467/97 of the Council of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, 2 August 1997, OJ L 209/6.

[4] Council of the EU, Statement of EU ministers of finance on the Stability and Growth Pact in light of the COVID-19 crisis, Press release of 23 March 2020.

[5] Council of the EU, COVID-19: the EU's response to the economic fallout, available at: www.consilium.europa.eu.

[6] European Stability Mechanism, ESM Pandemic Crisis Support, available at: www.esm.europa.eu.

Undoubtedly, the optimal choice in scenarios of sovereign debt crisis is to avoid violations of socio-economic rights through a human rights impact assessment *before* the implementation of austerity measures, as suggested by the UN Human Rights Committee.[7] As pointed out in Chapter II, Governments could legitimately restrain the enjoyment of ES rights in the event of resource constraints, provided that such retrogressive measures respect certain standards.[8] Unfortunately, assuming their intention to strike a balance between opposing interests, Governments often are not in the position to carry out a prior detailed and comprehensive evaluation of the negative effects of their reforms due to the pressure of lending institutions, which may even result in undue restrictions of borrowing States' fiscal and economic sovereignty.[9]

Against this background, the dissertation explored whether adjudicative bodies could indicate adequate legal consequences in case of (almost inevitable) violations of socio-economic rights in contexts of sovereign debt crisis. Chapter II proposed two main parameters to perform the adequacy assessment. The first stems from the collective dimension of socio-economic rights, which requires legal consequences to tackle the structural causes of the breach, which usually correspond to general laws on allocation of public resources. The second flows from the obligation to progressively achieve the full realization of these rights, alongside the corresponding prohibition of unjustified retrogressive measures, and the minimum core obligation. Often compliance with such duties relies upon the availability of funds, as recognised also by international treaties and bodies. Taking into account these two factors, Chapter II suggested that legal consequences for violations of socio-economic rights in contexts of sovereign debt crisis should repeal the domestic legislations imposing austerity measures without worsening the States' solvency, which is already jeopardised due to the budgetary imbalances. An opposite conclusion would seriously impair Governments' ability to secure the satisfaction of minimum essential levels of ES rights as well as their progressive realization. Adequate legal consequences fulfilling these parameters are already provided for in international rules on States' responsibility for internationally wrongful acts, namely cessation and guarantees and assurances of non-repetition.

Later, the study moved to testing whether judicial and quasi-judicial organs of the multi-level system of protection of the Eurozone identified such legal consequences. Chapter III stressed the advantages and disadvantages characterizing the justiciability of socio-economic rights at the international level. The UN Committee on Economic, Social and Cultural Rights, the International Labour Organization's Committee on Freedom of Association and the European Committee of Human Rights recommended measures that might be potentially relevant to the victimised class as a whole, hence they match the

[7] Human Rights Committee, Res. 40/8, 21 March 2019, which adopted the *Guiding principles on human rights impact assessments of economic reforms* (A/HRC/40/57).

[8] To be justified, retrogressive measures must: i) be temporary, i.e. covering only the period of crisis; ii) be necessary and proportionate, *viz.* any other alternative would be more detrimental to ES rights; iii) not be discriminatory, mitigate increasing inequalities, and ensure enhanced protection to disadvantaged and marginalised individuals and groups; iv) identify and secure the protection of the minimum core content (or a social protection floor, according to ILO's parameters) of each right.

[9] See Kaarlo Tuori, Klaus Tuori, *The Eurozone Crisis. A Constitutional Analysis* (2014), 188-192; Michael Ioannidis, 'EU Financial Assistance Conditionality after "Two Pack"' (2014), 74 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 61, 91-100; Pia Acconci, 'Participatory Democracy within the Revision of the European Economic Governance Due to the Euro-Zone Crisis', in Elena Sciso (ed), *Accountability, Transparency and Democracy in the Functioning of Bretton Woods Institutions* (2017), 107, 117

collective dimension of ES rights. However, their pronouncements lack legally binding force, which severely weaken their enforceability, a shortcoming that characterises also the repeals suggested in the context of the Eurozone crisis. On the other side, the judgments of the European Court of Human Rights are binding upon the respondent State, but the Court considered all the contested measures as in compliance with the right to property under the Convention. The Court relied on the States' wide margin of appreciation in allocating limited budgetary resources, alongside a weak proportionality test. This stance is in line with the Court's cautious attitude towards issues involving budgetary implications and significant economic burdens upon responding States, although its emphasis on economic considerations to the detriment of the applicants' interests is still questionable. Chapter III also stressed that this self-restrained approach is in tension with the Court's emerging trend to include socio-economic rights in the scope of the Convention and proposed different litigation strategies in the attempt to obtain a more favourable outcome. Notably, the Court could order general measures, such as the cessation of the wrongful conduct (e.g. through the repeal or amendment of national legislation) and guarantees of non-repetition, hence it could play an important role in enhancing the effectiveness of socio-economic rights.

Turning to the case-law of the Court of Justice of European Union (ECJ), Chapter IV highlighted that, although EU law provides for many proceedings to those affected by austerity measures, none of them led to a successful result. The action for compensation for non-contractual liability of the EU is theoretically inappropriate, since it is a remedy of an individual character whose aim is awarding monetary compensation to the parties of the relevant proceeding before the ECJ. Even putting aside this consideration, none of the applications proved successful for the applicants. Actions for annulment and requests for preliminary rulings are theoretically suitable, as successful decisions would have *erga omnes* effect to the benefit of all the individuals affected by austerity measures – and not exclusively of the parties of the relevant dispute. Additionally, the possibility to limit the temporal effects of declarations of annulment and of rulings on interpretation (or validity) of EU acts may serve the purpose of preserving the public finances of the State that enacted the relevant austerity measures. However, the ECJ dismissed all the applications for annulment and the referrals for preliminary rulings, except for those from Spanish Courts on the interpretation of the Unfair Contract Terms Directive in matters concerning mortgage contracts. The ECJ's rulings on this matter led to several reforms of the Spanish system of mortgages proceeding and, ultimately, to an improvement of the procedural aspect of the right to housing in favour of all individuals residing in Spain. Chapter IV stressed that this successful proceeding is related to EU secondary law which safeguards specific aspects of the Union internal market (such as consumer protection provisions), rather than from referrals straightforwardly based on the fundamental rights enshrined in the CFREU. The stance of the ECJ towards crisis-related litigation is in line with the ECJ's previous attitude shown with regard to the "Laval Quartet", where the Court confirmed that general interests of the Union connected with the functioning of the European internal market prevail over fundamental rights and freedoms.

The last floor of the multi-level system of protection to be addressed was the constitutional review of austerity measures before national courts. Drawing from the case-law of Greek, Portuguese and Spanish courts, Chapter V concluded that declarations of unconstitutionality with limited temporal scope represent adequate legal consequences of

violations of socio-economic rights in contexts of sovereign debt crisis. These rulings strike down the cause of the violation and have *erga omnes* effects to the advantage of the victimised class as a whole. Thus, these rulings meet the collective dimension of socio-economic rights. Moreover, the possibility to limit the effects of the judgments *pro futuro* allows the preservation of States' solvency *vis-à-vis* major distributional or other unintended consequences of judgments relating to polycentric situations, such as those involving the allocation of public finances. Besides, the Portuguese experience shows that some of the declarations of unconstitutionality prompted amendments to current national laws and led to the renegotiation of the loan conditions with the international lenders – i.e. they re-balanced the different "contractual powers" between State and assistance mechanisms. However, in order to truly strengthen the effectiveness of socio-economic rights at the national level, constitutional courts should enforce international provisions enshrining such rights. Direct applicability before domestic courts is not the most suitable path to reach such a goal, as it heavily depends on the attitude of each tribunal and could represent a comfortable justification to deny any role to international socio-economic rights in the main dispute. On the contrary, treaty-based ES rights may serve either as parameters of constitutional review or as means to interpret municipal legislations, including constitutional provisions. The dissertation concludes that these two approaches (namely, socio-economic rights as standards of review and consistent interpretation) may clarify and boost the guarantees provided under national law and, hence, result in a more protective stance towards victims. This consideration also relies on general principles and rules governing the relationship between international law and domestic legal systems and, consequently, stands almost untouched in contexts of sovereign debt crisis – as proven by the case-law of Greek lower courts.

Against this survey, it is necessary to test the two research hypotheses outlined in the introduction.

The first hypothesis contended that the adequacy of legal consequences of violations of socio-economic rights in contexts of sovereign debt crisis ought to be assessed in light of standards that are based both on the collective dimension of ES rights (i.e. to the benefit of the victimised class as a whole) and the general obligations set forth in international treaties. In other words, legal consequences of violations of socio-economic rights should, on the one hand, benefit the victimised class as a whole and, on the other, preserve the solvency of the borrowing State – as sound public finances are often pivotal to progressively realize ES rights and to secure their minimum content. This first hypothesis seems confirmed. Chapter II provided the normative framework, supported by legal literature, which corroborates the validity of these two parameters. These standards may also find application before each of the venues composing the multi-level system of protection characterising the Eurozone. However, the relevant supervisory mechanisms did not adopt such approach at all, or solely in rare occasions – such as in the cases of declarations of unconstitutionality with limited temporal scope issued by the Greek Council of State and the Portuguese Constitutional Court.

The second hypothesis argued that the structural features of international mechanisms and the adjudicative approach of the Court of Justice of the EU work against their ability to effectively safeguard socio-economic rights in case of violations. In view of this, domestic courts represent the keystone of the multi-level system of protection of ES rights – and of international human rights more in general. This second assumption is only partly proven

here. Chapter III showed that, as for the international level, committees vested with the competence to assess States' compliance with treaty provisions specifically enshrining socio-economic rights may issue merely non-binding pronouncements. Although these play a pivotal role before domestic judicial organs in shaping the interpretation of international treaties, these findings of violations, taken by themselves, are not as muscular as to urge national authorities to take the appropriate steps and ensure compliance with their international commitments. Besides, the European Court of Human Rights has the competence to appraise States' compliance with the European Convention of Human Rights, which is mostly a treaty encompassing civil and political rights. Hence, its *ratione materiae* jurisdiction in the field of socio-economic rights is very limited. Chapter IV moved to the EU level and stressed that the Union legal order focuses on the protection of the proper functioning of the internal market and of its components, including the European Monetary Union. Thus, where it had to balance between one of these general interests of the EU and socio-economic rights, the Court of Justice of the European Union favoured the protection of the former over the latter. Lastly, Chapter V showed that, although incoherently, national courts provided the most effective protection to victims of violations of socio-economic rights through declarations of unconstitutionality of the contested legislation. However, the case-law of the Greek, Portuguese and Spanish judiciary shows inconsistencies, and their adjudicative approaches could improve towards a more victim-centred and human-rights-oriented attitude. Should national courts use socio-economic rights as standards of review or as means of interpretation of domestic legislation, their role as primary guardians of the protection of fundamental rights and freedoms would certainly be boosted also in scenarios of sovereign debt crisis.

The assessment of whether the present dissertation met the goals mentioned in the introduction complements the hypotheses testing.

The first goal meant to examine whether one (or more) of the venues composing the multi-level system of protection of human rights which operate in the Eurozone indicated adequate legal consequences of violation of socio-economic rights set forth in international treaties. This aim is intertwined with the first research hypothesis concerning the parameters to assess the adequacy of such legal consequences in scenarios of sovereign debt crisis – beneficial effects for the victimised class as a whole and avoidance of a further aggravation of the public imbalance. Chapter III showed that international bodies (namely, the UN Committee on Economic, Social and Cultural Rights, the ILO Committee on Freedom of Association and the European Committee of Social Rights) suggested general measures to the advantage of the victimised class as a whole – at least, in the majority of cases. This notwithstanding, their aptitude to concretely foster the enjoyment of ES rights is severely impaired by the non-binding nature of their pronouncements. Chapter IV proved the potentiality of preliminary rulings issued by the Court of Justice of the EU, since those on consumer protection resulted in the enhancement of the procedural guarantees of the right to housing to the benefit of all individuals residing in Spain. Lastly, the (admittedly, not so many) declarations of unconstitutionality of austerity measures with limited temporal effects proved to be the most appropriate means to ensure adequate legal consequences of violations of socio-economic rights in contexts of sovereign debt crisis, as supported in Chapter V.

The second goal was to study whether these bodies could have adopted different adjudicative approaches and, specifically, a more human-rights oriented attitude with the view of enhancing the effectiveness of socio-economic rights enshrined in international treaties – in cases where these mechanisms had not already shown such attitude. This objective relates mostly with the European Court of Human Rights, the Court of Justice of the EU and domestic judicial organs. Chapter III observed that the European Court of Human Rights could have embraced its emerging trend to include ES rights in the scope of application of the Convention via two interpretative criteria – namely, the teleological and effective interpretation of the Convention, and the taking into account of other relevant instruments of international law. Chapter IV recalled that the safeguard clause enshrined in the Charter of Fundamental Rights of the EU could have led the Court of Justice of the European Union to adopt a more protective stance by considering ILO Conventions in its austerity-driven rulings. However, the same Chapter IV relied on the famous "Laval Quartet" to highlight that the mere invocation of international treaty-based provisions is insufficient to ensure a more extended protection to socio-economic rights by the Court of Justice of the EU, specifically where those are in tension with other general interests of the EU (including the stability of the banking system of the euro area as a whole). Lastly, Chapter V demonstrated that international conventions on socio-economic rights and the interpretation provided by their monitoring bodies may serve to boost the protection of fundamental rights before domestic judicial organs. National courts may either apply these treaties as parameters of constitutionality or construe municipal provisions (including the Constitution) in compliance with such conventions. These schemes result in a more human-rights oriented approach and, ultimately, in a more effective protection of socio-economic rights.

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