Global Campus
of Human Rights

Volume 1 No 1
2017

Global Campus Human Rights Journal

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European Inter-University
Centre for Human Rights
and Democratisation

Global Campus Human Rights Journal (GCHRJ) is a peer-reviewed scholarly journal, published under the auspices of the Global Campus of Human Rights (see http://www.eiuc.org/education/global-campus-regional-masters.html) as an open-access on-line journal. It is supported financially by the European Union Commission and appears twice annually.

This journal should be cited as (2017) 1 *Global Campus Human Rights Journal*

ISSN: 2532-1455

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https://www.eiuc.org/education/global-campus-regional-masters.html

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Global Campus Human Rights Journal (*GCHRJ*) is a peer-reviewed scholarly journal, published under the auspices of the Global Campus of Human Rights as an open-access on-line journal.

Aim: *Global Campus Human Rights Journal* aims to serve as a forum for rigorous scholarly analysis, critical commentaries, and reports on recent developments pertaining to human rights and democratisation globally, particularly by adopting multi- and inter-disciplinary perspective, and using comparative approaches. It also aims to serve as a forum for fostering interdisciplinary dialogue and collaboration between stakeholders, including academics, activists in human rights and democratisation, NGOs and civil society.

Publication details: It is published under the auspices of the Global Campus of Regional Human Rights Masters (see http://www.eiuc.org/education/global-campus-regional-masters.html), and is supported financially by the European Union Commission. It appears twice annually, in July and in December.

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- be concise.
- be written in UK English, or in French or Spanish. If submitted in French or Spanish, an abstract in English (of between 750 and 1000 words) has to be submitted together with the article.
- for English language style, follow the University of Oxford Style Guide (www.ox.ac.uk).
- be between 6 000 and 8 000 words in length, references included.
- (for submissions in English) include an abstract (summarising the article as a whole, including its aim, a clear description of its findings) of between 250 and 300 words. The abstract should include at least five key words.
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Style guidelines: Detailed style guidelines are on the journal's website, https://globalcampus.eiuc.org/human-rights-journal

Layout and typesetting: Lizette Hermann, Pretoria University Law Press (PULP), Centre for Human Rights, Faculty of Law, University of Pretoria.

The Global Campus of Human Rights

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The Global Campus of Human Rights is a unique network of one hundred participating universities around the world, seeking to advance human rights and democracy through regional and global cooperation for education and research. This global network is promoted through seven Regional Programmes:

- **European Master's in Human Rights and Democratisation (E.MA)** https://www.eiuc.org/education/ema.html
- **Master's in Human Rights and Democratisation in Africa (HRDA)** http://www.chr.up.ac.za/index.php/llm-hrda.html
- **Master's Programme in Democracy and Human Rights in South East Europe (ERMA)** www.cips.unsa.ba and https://www.facebook.com/erma programme/
- **Master's in Human Rights and Democratisation in Asia-Pacific (MHRD)** http://www.ihrp.mahidol.ac.th and http://sydney.edu.au/arts/human_rights_democratisation/
- **Master's in Human Rights and Democratisation in the Caucasus** http://www.regionalmaster.net/
- **Master's in Human Rights and Democratisation in Latin American and the Caribbean (LAT.MA)** www.unsam.edu.ar/ciep/ and https://twitter. com/Ciepoficial
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These Regional Programmes offer specialised post-graduate education and training in human rights and democracy from a regional perspective and interdisciplinary content as well as a multiplicity of research, publications, public events and outreach activities. The Global Campus integrates the educational activities of the Regional Programmes through the exchange of lecturers, researchers and students; the joint planning of curricula for attended and online courses; the promotion of global research projects and dissemination activities; the professional development of graduates through internships in inter-governmental organisations; and the strong focus of networking through the Global Campus Alumni Association, as well as support to the alumni associations of the Regional Programmes.

The wealth of human resources connected by global and regional alliances fostered by the Global Campus and its Regional Programmes, offer remarkable tools and opportunities to promote human rights and democracy worldwide.

The Global Campus of Human Rights develops its activities thanks to the significant support and co-funding of the European Union – through the *European Instrument for Democracy and Human Rights 2014-2020* and its partner universities around the world. The Global Campus equally boasts many joint institutional agreements and strategic alliances with inter-governmental, governmental and non-governmental organisations at the local, national and international level.

Global Campus of Human Rights

Europe
South-East Europe
Latin America-Caribbean
Asia-Pacific
Caucasus
Arab World
Africa

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Editorial

This is the inaugural issue of *Global Campus Human Rights Journal* (*GCHRJ*).

GCHRJ is an open-access journal, established and published under the auspices of the Global Campus of Master's Programmes and Diplomas in Human Rights and Democratisation (Global Campus of Human Rights). The Global Campus of Human Rights is a framework of collaboration between seven Regional Master's programmes in Human Rights and Democratisation, taking place on each of the five continents. It is a unique network of more than 100 universities with the overall aim of educating human rights defenders committed to upholding the universal values of human rights and democracy. The seven programmes are the European Master's Degree in Human Rights and Democratisation; the Master's Degree in Human Rights and Democratisation in Africa; the European Regional Master's Degree in Human Rights and Democratisation in South Eastern Europe; the Master's in Human Rights and Democratisation in Latin America and the Caribbean; the Master's of Human Rights and Democratisation in Asia and Pacific Regional Programme; the Regional Master's Programme in Human Rights and Democratisation in the Caucasus; and the Master's Programme in Democratic Governance, Human Rights and Democratisation in the Middle East and North Africa (MENA) region. For more information, see http://www.eiuc.org/education/global-campus-regional-masters.html. The European Union Commission supports this network financially.

Against the background of an ever-globalising world, in which regionalism has gained much traction, this journal invites focus on regions – rather than the nation states of which they are comprised – as the units of analytical comparison. Its aim is to shed light on the trends, currents and developments within regions, and across regions. From various regional perspectives, articles will no doubt interrogate trends towards both global diversification and homogenisation. This journal's aim is to stimulate the emerging discourse on comparative regionalism.

The term 'region' is open to contestation, and is for our purposes left open, so as to allow flexibility. A 'region' may, for example, be geographic in scope (such as the continent of Africa; or the 'Caribbean'); it may coalesce around membership to a particular inter-governmental organisation (such as the Council of Europe, the Association of South-East Asian Nations (ASEAN) and the League of Arab States); it may refer to a group of states sharing a particular history and contemporary challenges (such as the Eastern Partnership countries); or it may cohere around an ideology or idea (the 'Muslim' or 'Arab' region). Increasingly, regional interests are also co-ordinated around particular thematic concerns such as trade, environmentalism and human rights.

In coming to grips with issues related to human rights and democratisation in these 'regions', the list of important role players extends beyond states and constellations of states (such as inter-governmental organisations), to also include the likes of multinational companies, civil society organisations and social movements.

Representing scholars and students from all five continents, the Global Campus of Human Rights partners are very well placed to spearhead

research of this nature. Given their academic focus and network of partners focused on issues pertaining to human rights and democratisation in various parts of the world, this journal aims at stimulating the fledgling field of comparative regional human rights and democracy studies. Although the inaugural issue consists of contributions mainly by partners or associates of the Global Campus of Human Rights partners, *GCHRJ* aims at being a mouthpiece for scholarship of a much broader background. In other words, contributions to the journal are by no means restricted to those institutions forming part of this network.

GCHRJ is a peer-reviewed publication dedicated to serving as a forum for rigorous scholarly analysis, critical commentaries, and reports on recent developments pertaining to human rights and democratisation globally, particularly by adopting a multi- and interdisciplinary perspective, and by using comparative approaches. *Regional Perspectives* also aims at serving as a forum for fostering interdisciplinary dialogue and collaboration between stakeholders, including academics, activists in human rights and democratisation, non-governmental organisations and civil society.

This journal is a bi-annual publication, with issues appearing in July and December. Unsolicited manuscripts are invited and may be submitted electronically. All submissions are reviewed by the editors, and may be rejected on the basis of focus, style and depth of analysis and research. Screened submissions are subjected to peer review by at least two experts in the field. An interdisciplinary International Editorial Advisory Board, comprising not only experts from each of the Global Campus of Human Rights programmes, but also experts from outside the Global Campus, assists the editors in the review process and in guiding policy.

This inaugural issue consists of two sections: the first containing articles, and the second regional developments.

The majority of articles in this issue deal with the economic crisis of 2007-2008 and its impact on human rights. These articles largely draw on papers presented as part of the 'Global Classroom', a joint annual event bringing together students and professors from the Regional Master's programmes of the Global Campus of Human Rights as well as international experts. The Global Classroom aims at fostering closer interaction between students of the different programmes, by organising dedicated activities and providing a virtual environment, a forum for discussion and additional tools of academic interaction. By doing so, this activity intends to develop a more integrated and multilateral form of academic co-ordination across the different curricula of the programmes.

In 2015, the Global Classroom was devoted to the theme 'Economic crisis, debt and the impact on human rights'. The event took place from 11 to 15 May, in Venice, where the European Master's is based. This broadly-formulated topic provided an opportunity for researchers from different regions of the globe to explore the nexus between issues of economics, finance, development and human rights and to do so in a way most meaningful for their region. In order to provide flexibility to researchers while also creating an overall unifying structure for the different contributions, the methodology asked researchers to consider the norms, processes and the actors at play within their chosen topics and to

conclude with recommendations on how to improve the situation under review.

Articles focusing on the theme 'Economic crisis, debt and the impact on human rights' include, in respect of the African region, Orago's contribution entitled 'The impact of the global financial crisis on the realisation of socio-economic rights in sub-Saharan Africa: An analysis based on the Millennium Development Goals framework and processes'. Orago explores in both statistical and real human terms the negative consequences for the Millennium Development Goals of the global financial crisis, as well as ancillary problems of insufficient political will and corruption. In contrast, in respect of the Asian region, Mullen and his colleagues chose to bring to light an uneasy, *realpolitik* balancing of interests and power between labour, business and the state, set against the backdrop of crisis and through the lens of labour rights. The research team studying the European Union's Easter Partnership region elected to survey the interplay between the economic crisis and debt, and their negative implications for development as it relates to socio-economic rights as per the states of the Eastern Partnership. For Europe, Ginsborg focused on underlying human rights values such as participation, transparency and accountability in the context of Europe's adoption of austerity measures in reaction to the economic crisis and debt. For the Southeast European region, Kurian and Charkiewicz surveyed the repercussions of the economic crisis and debt in the region, but focused on the unique response of people who united around their common economic woes and dismissed the parameters of previous enmity. Finally, for the Latin-American region, Kampel explored the economic crisis and debt through the lens of sovereignty and states' obligations to promote and protect human rights. In this way the overarching theme was explored, but in a context that made the most sense for each region.

However, not all articles are devoted to the global economic crisis. Abramovich's contribution – in Spanish – deals with a much broader issue of global relevance.

The second section, 'Recent regional developments', aims at providing an insight into selected developments in the area of human rights and democracy, with a regional scope, taking advantage of the worldwide presence and expertise of the Global Campus of Human Rights partners. The contributions aim at providing a picture of the most salient developments during 2015, and the way in which they have (re)shaped each region. This issue starts off by covering only four regions (Asia-Pacific, Africa, the Americas and the Middle East-North Africa (MENA) region). In subsequent issues the ambition is to provide comprehensive coverage of all the regions in which the seven programmes are presented.

We thank the reviewers who have dedicated their time to assist in ensuring the quality of this fledgling journal.

Editors

D Kampel 'Sovereign debt restructuring and the right to development: Challenges from an incomplete framework' (2017) 1 *Global Campus Human Rights Journal* 1-16

Sovereign debt restructuring and the right to development: Challenges from an incomplete framework

Daniel Kampel*

Abstract: *The article reviews the link between human rights and foreign debt, by highlighting the validity of the right to development, as stated and confirmed by different declarations made by international organisations in the last three decades. The right to development is understood as a human right. The lack of proper institutions to deal with debt problems and crises has in the past been hard on emerging countries, halting growth and retarding development in the affected countries and societies, as clearly exemplified by the Latin American debt crisis of the 1980s. It is contended that creating proper institutions to deal with debt issues at the international level will help resolve these crises and will contribute to the continued realisation of human rights.*

Key words: *debt; development; human rights; institutions; Latin America*

1 Worlds apart come together: Foreign debt and human rights

At first glance, foreign debt and human rights may appear to belong to two separate and unrelated fields of study. After World War II, when the question of human rights emerged, scholars and practitioners were reluctant to embrace these two subjects as a single academic pursuit. Some pioneering and isolated efforts were carried out in the mid-1970s, but the trend lagged until the mid-1990s. During the last two decades, however, many have started to explore the wide range of connections between foreign debt and human rights. The intersection between these areas appears as soon as one extends the scope of consideration beyond the contractual duties that exist between a debtor state and its creditors, and a more comprehensive and holistic approach takes shape, considering other effects of over-indebtedness on economic and socially-relevant aspects. In fact, a debt overhang or a high debt trap – the prolonged situation where an unresolved debt problem restrains growth – may result (as has in the past been the case in numerous countries) in the undermining of human rights.

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The connection between debt and human rights is certainly not novel but, during the 1970s, its significance was either neglected or simply ignored.[1] The first wave of financial globalisation in the post-war era was contemporaneous to numerous authoritarian regimes in Latin America. It was fostered by highly-liquid financial markets in the United States and Europe, after the recycling of dollar reserves by oil export countries, which were in turn favoured by increases in the oil price as a result of the oil crises of 1973 and 1979. International banks with aggressive lending policies found in Latin American economies – constantly lacking capital – prospective customers willing to take all funds offered, especially in the region's southern cone. The process – which also involved some economies in other regions of the world – forced many developing countries in Latin America into a position of intense indebtedness. The fact that the region was ruled mostly by unelected military rulers who violated the most basic human rights was certainly not an obstacle for lenders to carry on their business as usual.

The connection between debt and human rights also went unnoticed during the 1980s, when countries regained democracy and struggled with unsustainable debt burdens that delayed their development processes for around a decade (the 'lost decade for development', as it was later labelled by the United Nations (UN) Economic Commission for Latin America and the Caribbean). International financial institutions, fully involved in the long and arduous, yet unsuccessful renegotiation process, completely disregarded any consideration of the impact of adjustment programmes on the enjoyment of human rights, and promoted structural reforms and stabilisation policies which even further affected the social situation.

More recently, however, several studies have begun to focus on the connection between debt and human rights. Some have examined the origin of debt and questioned the legitimacy of debt incurred by non-democratic governments. As stated earlier, indebtedness in Latin America grew substantially during the rule of autocratic governments and dictatorships. The current UN Independent Expert on Foreign Debt and Human Rights has even introduced the concept of 'financial complicity' with reference to the lending to states involved in gross human rights violations. Indeed, the UN expert, Mr Bohoslavsky, has argued that '[f]oreign financial assistance might prolong the life of regimes engaged in severe, large-scale violations of human rights' (Bohoslavsky & Cernic 2014). Such characterisation of the past is indeed a lesson for the future. However, despite this international recognition, there was no compensation for societies that suffered through such processes.

During the 1980s, the continuous over-indebtedness in developing economies had wide effects. The debt problem – represented by high debt stocks and protracted debt-servicing difficulties, together with rationed foreign credit – conditioned and determined the prevailing economic policies of highly-indebted countries. It severely restrained policy space and narrowed the range of policy options available to governments, including many newly-elected democratic authorities in Latin America. The debt issue undermined the long-standing national development

1 One exception may be the 'Study on the impact of foreign economic aid and assistance on respect for human rights in Chile' prepared for the UN's Sub-Commission on Human Rights by Cassese in 1979.

strategies of affected countries and weakened the enforcement of the human rights of their citizens.

Since the end of the 1980s, many researchers have thoroughly reviewed the links between debt, its effects on economic policy and human rights. Özden, for example, makes a detailed assessment of how foreign debt and the subsequent IMF-supported adjustment programmes implemented in the mid-1980s through the early 1990s have caused or aggravated human rights violations among the affected nations (Özden 2007). According to this author, the list of these rights is long and impressive. It includes the right to self-determination; various economic, social and cultural rights; the right to live in a healthy environment; and other civil and political rights. It even goes as far as including the introduction of legislation restraining basic freedoms that result in the repression of organised labour in some less-developed countries. However, serious and relevant as they are, both at individual and social levels, we will narrow our analysis to focus on the impact of excessive debt service burdens on a single right, the right to development, recently recognised as such by international human rights organisations.

The rest of the article is organised as follows: After the introduction, section 2 examines the concept of development and the interaction with human rights. Section 3 reviews the Latin American experience in the 1980s, with special emphasis on the macro-economy of the largest regional debtors of that time, Argentina, Brazil, Chile and Mexico, highlighting the similarities and differences. Section 4 deals with the concept of debt overhang, and section 5 presents the successive attempts to introduce innovations in the restructuring mechanisms to deal with sovereign debt problems. The final section presents the conclusions.

2 Rescuing development as a human right

The Declaration on the Right to Development, adopted by the UN General Assembly, almost 30 years ago, in mid-1986,[2] at the same time that Latin America was suffering from a debt crisis which inhibited its development for almost a decade, states as follows:

> The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.

It was at this plenary meeting that consensus was reached on the fact that the right to development belongs to the set of human rights.

As Villaroman points out: 'As originally envisaged, the right to development is not a human right which is claimable by individuals against their own state, but a people's right' (Villaroman 2011). It is, therefore, a collective right, and not an individual right affirmed and stressed by international instruments.[3] Collective rights cannot legally be

2 Resolution 41/128, art 1, para 1, available at http://www.un.org/documents/ga/res/41/a41r128.htm.

3 The UN declaration alludes that the right to development is dual in its nature and both a collective and an individual right.

asserted by an individual. Also, Sanders reminds us that collective rights have not achieved the level of acceptance and recognition usually rendered by individual rights (Sanders 1991). Collective rights frequently involved promises that were not upheld. However, far from being disregarded as a transient trend, the concept of the 'right to development' evolved and maintained issues related to development in the international agenda. In fact, the 1986 Declaration was later recognised and endorsed in significant world conferences, and it was reaffirmed by the Vienna Declaration (1993), the Millennium Declaration (2000) and the Monterrey Consensus (2002).

Since its inception, the right to development has been challenged from many different perspectives, not only regarding the span and scope embodied in the concept but also with reference to the legal obligations that such a right – if enforced – would entail. Furthermore, diverging standpoints on this matter among developed and emerging countries turned discussions in international fora around the practical implications of the right to development into highly-politicised debates. But where do we stand at this point? Our own stance is in agreement with Kirchmeier: The exercise and enjoyment of the right to development presupposes compliance with more basic rights contained in the International Bill of Rights (Kirchmeier 2006).[4] In this context, the right to development requires an additional component: an enabling environment which should be conducive to the realisation of such a right. The responsibility for creating and maintaining such an environment belongs to both the state and the international community. Throughout this article, we emphasise the lack of international institutions to deal with debt issues as a major problem and as a serious global obstacle to the right to development. In the past, the failure to address this issue had an adverse effect on the growth of highly-indebted countries, and retarded development in Latin America for about a decade.

Nevertheless, the concept of the right to development lacked a more precise definition. What is meant by 'development'? What does this right really entail? What is its precise content? Where can it be claimed, or is it merely declaratory? It is this lack of precision that grounded reservations by academics and practitioners. Scholars and officials, especially from international organisations and development agencies, attempted to fill in the gap in order to overcome the threat of skepticism raised by its critics. An expert, the late Arjun Sengupta, for example, in numerous papers highlighted the right to development as a human right. He described it twofold as (Sengupta et al 2005: 67):

> (a) a particular process of economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised; (b) ... a human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy that particular process of development.

Some scholars have elaborated on the idea of development, expanding its definition from the narrow economistic characterisations previously used.

4 The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

Understanding development as a mere increase in national output or a surge in the material resources of a country are now considered outmoded and inadequate. Prof Amartya Sen, a winner of the Nobel Memorial Prize for Economics, for instance, has advocated that development should be understood as the 'expansion of the real freedoms that people enjoy' (Sen 1999), adopting a perspective that undoubtedly coupled the goal of development with the improvement in the human condition. He also advocated that development required the removal of major sources of non-freedom, including poor economic opportunities. Furthermore, he defined the right to development as 'a conglomeration of a collection of claims, varying from basic education, health care and nutrition to political liberties, religious freedoms and civil rights for all' (Andreassen & Mars 2007).

The process of development and the realisation of human rights are thus intrinsically connected (Buckley 2009). The road to development faces multiple obstacles of a diverse nature. Heavy debt burdens are certainly a major obstacle, especially when refinancing terms are unattainable and servicing conditions become insurmountable. Furthermore, as will be emphasised in this article, there is a clear lack of institutions that can deal with debt crises, such as an international lender of last resort or a widely-recognised framework for an orderly restructuring of sovereign debts in distress. Thus, debt crises disrupt growth processes and negatively affect the right to development. As mentioned earlier, in Sen's view the crisis reduces freedom, and in Sengupta's view it directly hampers the pursuit and enforcement of human rights.

In the last two decades, the issue of foreign debt and human rights has also been addressed by international organs with explicit mandates and competence in the promotion and protection of human rights. In 1998, the UN Human Rights Commission (which would in 2006 be replaced by the UN Human Rights Council) appointed a Special Rapporteur on the Effects of Foreign Debt on the Full Enjoyment of Economic, Social and Cultural Rights.[5] In 2004 the Commission requested the expert to draft general guidelines to be followed by states and by private and public, national and international financial institutions in decision making and the execution of debt repayments and structural reform programmes, including those arising from foreign debt relief, to ensure that compliance with the commitments derived from foreign debt will not undermine the obligations regarding the realisation of fundamental economic, social and cultural rights, as provided for in the international human rights instruments' (Resolution 2004/18). In 2012, after a long delay, discordant debates and numerous consultations, the UN Human Rights Council adopted the Guiding Principles on Foreign Debt and Human Rights (Guiding Principles 2012).

The adoption of the Guiding Principles constituted an important step forward in the recognition of the impact of debt on human rights. However, a more comprehensive effort is still needed in order to institutionalise a restructuring framework. The 2012 Guidelines

5 The Special Rapporteur was later renamed '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'.

acknowledge that previous official initiatives failed to deliver a sustainable framework, affecting the development perspectives of highly-indebted economies. It reminded member states of their human rights obligations in the context of external debt negotiations. It stressed that the economic, social and cultural rights of the most vulnerable sectors of society should not be undermined under any restructuring arrangement. In line with our research, the report of the Independent Expert enumerates the declarations, resolutions and decisions of major UN conferences that have confirmed the link between debt, human rights and development (Lumina 2011: 5). However, it is still too early to measure the impact, if any, of these Guidelines on the international lending and debt restructuring practices in the medium and long term.

In the meantime, countries affected by sovereign debt issues, notably Argentina and Greece, still contend with the fact that there is no institutional framework or legal mechanism to resolve this problem quickly and systematically. Greece appears to be in a deadlock. Having defaulted in 2001-2002, Argentina restructured the majority (but not all) of its outstanding liabilities with private creditors in 2005-2010. It is still dealing with unsettled disputes before US courts with speculative hedge funds, and facing law suits from hold-out investors in other jurisdictions.

3 Latin America's debt crises: Lessons unlearned

Developed and emerging markets have in recent history experienced numerous debt crises. Taking a historical perspective, Reinhart and Rogoff compile all known episodes from the early financial history of the Middle Ages to more current events, such as the US financial crisis that followed the implosion of the housing bubble in 2007, and the still unresolved sovereign debt crisis that has affected the periphery of the European Union (EU) (Reinhart & Rogoff 2009). At the time of writing, the Greek debt problem was still unresolved. It has not been properly addressed in a reliable and timely manner. The approach implemented under the auspices of the International Monetary Fund (IMF) and European institutions has allowed the country to replace its private creditors by official creditors, simply exchanging one type of debt for another. However, this has not reduced the unsustainability of the debt, which has now reached the intolerable level of nearly 180 per cent of its gross domestic product (GDP). Such a debt level is inconsistent with the flow of income produced by the economy, and the country has now registered 24 consecutive quarters of constant decline. The engagement of indebted European economies to aggressive austerity programmes has placed these countries on the verge of their very own 'lost decade', and reveals that important lessons from major past events, such as the Great Depression or the Latin America debt crisis, still remain unlearned.

Latin American countries frequently appear among the catalogue of financial crises of the post-war era. Between the mid-1950s and the mid-1960s, countries in the region suffered from frequent balance-of-payment crises associated with stop-and-go cycles that characterised their economic evolution during that period. Expansions were concomitant with the accumulation of successive current account deficits. The external imbalance was later corrected by stabilisation policies based on strong exchange rate depreciations and contractionary demand policies that

compressed economic activity and imports. With the following expansion, the cycle tended to repeat itself. During those decades, funding for Latin America was unavailable in the voluntary international capital markets.

This state of affairs changed in the 1970s after the first oil shock in 1973 paved the way for high liquidity petrodollar recycling. Incentives for indebtedness developed from a combination of highly-liquid international contexts and aggressive bank lending policies by American and European institutions. Latin American countries, especially those in the Southern Cone, followed debt-prone (and unsustainable) macro-economic programmes. These programmes essentially combined the openness of the capital account and some sort of fixed exchange rate arrangement that appreciated the real exchange rate.

It must be stressed that not all debt was originally incurred by the public sector. In many instances, the non-financial corporate sector was a relevant actor in the process. However, once the crisis had been triggered, the private sector pushed to socialize, at least partially, its own liabilities. During the 1980s in Argentina, Chile and Mexico, important transfers were observed through different mechanisms, and contributed in this way to increasing the sovereign debt.

In the late 1970s and early 1980s, the macro-dynamics were upset by successive negative external shocks: the rise in international interest rates in 1979 and the decline in the terms of trade. Such shocks deeply affected both the balance of payments and the fiscal accounts. Prior to 1979, borrowings by Latin American countries were associated with financing the deficit in foreign trade. Gradually, under new financial conditions, new external obligations were increasingly directed towards covering the payment of interest from previously-contracted financial liabilities.

Furthermore, after Mexico's default in August 1982, voluntary credit to the region became highly rationed. It was no longer possible to finance those imbalances using external funding. In turn, those marked imbalances in the external and fiscal accounts eroded the stability and growth potential of the affected countries. Latin American economies were forced into drastic adjustment processes based on massive devaluations and reduction in public expenditures. The continuity of state-led import substitution industrialisation (ISI) growth strategies, which had been implemented throughout the region from the mid-1950s, ended.

We will not detail the events of that period here. In fact, several narratives and analyses exist about the economic process that slowly evolved with the implosion of the debt crisis until growth was eventually resumed after major delays (Ocampo 2014). However, by taking such a historical experience from today's perspective, we can extend our objective to draw some potentially-useful lessons, especially regarding the lack of an international lender of last resort and a sovereign debt restructuring mechanism.

Once the crisis had been triggered and countries became credit-rationed in voluntary capital markets, they engaged in policies aimed at generating significant external surpluses in order to perform their debt obligations. The debt then became the economic policy's primary concern, at the expense of all other policy objectives, including the obligation of states to provide minimum essential levels for each economic, social and cultural

right. As was recognised by the UN expert in the field, in a country with limited resources, debt repayments compete with much-needed public expenditures for social services, including education, health and housing, worsening access to basic public services and, thus, reducing the economic, social and cultural rights of their citizens.

The scope and persistence of the above-mentioned imbalances over time must be stressed if we wish to find a clearer picture of that period. A persistent imbalance may operate through price mechanisms and financial relations, affecting the economic structure and leading to additional imbalances. In fact, inflation may affect tax revenues, or speed up a demonetisation process of the economy, making even small fiscal deficits – under external credit rationing – difficult to finance. This is a situation which differs from transitory imbalances that may be met with traditional stabilisation policies. Persistent imbalances may affect growth capacity, as they induce changes in the structure of the economy and agents' decisions on savings and investments.

Indeed, one of the basic problems in the 1980s was the incorrect assessment both local authorities and international financial institutions made regarding the severity of new imbalances. At first, imbalances were addressed with traditional stabilisation tools. However, these kinds of adjustment programmes, which provided insufficient credit support, were better suited to tackling liquidity problems and not major gaps in the external and fiscal accounts. The prescription of the IMF and other institutions was later transformed to promote structural reforms in line with the Washington Consensus. Initiatives, such as the Brady Plan and the change in the prevailing conditions in international capital markets, provided greater access to credit. However, by the time this occurred, macro-economic instability, a shortage in external financing and weak national savings rates had already acted, halting growth and damaging the existing economic structure. In fact, most Latin American countries were only then able to resume growth (albeit modestly, in most cases).

The debt crisis of the 1980s halted growth for almost seven years. Growth was resumed only after some favourable changes in the international context and some sort of debt restructuring programme relieved, at least partially, the debt burden. Unfortunately, Argentina yet again repeated the debt cycle in the following decade. It underwent a severe macro-economic and financial crisis and defaulted once more at the turn of the century. Economist Ocampo calls the debt crisis the most traumatic economic event in Latin America's economic history. During the 'lost decade' it generated, the region's *per capita* GDP experienced a drop of nearly 8 per cent, poverty increased, and the already-widening gap between the rich and the poor further widened (Bértola & Ocampo 2012).

So far we have described the stylised facts of the process shared by the region. While these experiences share a common pattern, there are also some differences between the various cases. An in-depth analysis of the macro-economic particularities of the evolution of the different countries involved should take into account (a) each country's degree of indebtedness at the beginning of the period; (b) the changes in the terms of trade; (c) the relative amount of external assistance from international organisations perceived throughout the adjustment process; (d) the degree of success of the policies implemented to promote exports (or replace imports), including the exchange rate policy; and (e) the introduction (or

not) of some sort of debt-restructuring mechanism. Damill et al follow that line of research for Argentina, Brazil, Chile and Mexico (Damill et al 2014 and 2015).

4 The debt overhang problem

When an emerging country faces a large debt burden and market participants question its ability to repay, its access to international capital markets is greatly restrained and the country cannot take on any further debt to finance expenses or future projects. From here on, it must live with a debt overhang problem. Even if the overhang is revealed suddenly, it is the result of a long and persistent course. It is, indeed, a legacy from both the large capital inflows that fuelled the indebtedness process and from the sudden end to those flows. The latter factor is obviously very disruptive to the economy.

Debt overhang inhibits investment, both from the public and the private sector, through different channels, as is explained below. Debt then becomes a significant factor negatively affecting growth. The debt burden (and the inability to access the market in order to refinance financial obligations) inhibits growth. As Reinhart and Rogoff note, once the public (or private) debt overhang emerges, countries with a slower growth will take longer to escape from this (Reinhart & Rogoff 2012). Investment will not improve until the uncertainty caused by the debt overhang problem is, at least partially, erased or mitigated. Both the Latin American debt crisis of the 1980s and the problems currently faced by the European periphery perfectly illustrate this position: Removing the overhang, that is, aligning the debt obligations with the debtors' ability to pay, is a long and complicated process, because of the numerous actors involved and the lack of a proper institution to deal with the problem.

In this unfavourable environment, at least two connecting channels link public debt and economic growth. Given the fact that the government finds itself unable to borrow from international capital markets, it turns to domestic markets for funds. However, financial domestic markets of emerging economies are usually small and underdeveloped and lack sufficient depth to meet the funding required by the government (as was the case in many Latin American countries in the 1980s). The public sector would end up absorbing all available investment funds and would tend to crowd out private investment. If, instead, the government imposes higher taxes to finance its heavy financial obligation, the other classic debt overhang arises: Investments are discouraged because there is a risk that profits will be taxed heavily in this kind of situation.

As stated earlier, eradicating the debt overhang is difficult. It requires the reduction of the debt burden accumulated in the past and the debtor country should be allowed to re-enter the financial circuit. It is always tempting to favour a faster growth route in order to reduce the real burden of debt, but such an option, while desirable, is not a generally agreed available policy choice. A second option is debt restructuring (or, as it is now known in IMF jargon, reprofiling). The need for restructuring must be acknowledged by the different parties. No lender would voluntarily allow large nominal debt write-offs in order to bring down debt overhangs. As the Latin American experience of the 1980s shows (a history now

repeated in the case of Greece), a successive round of negotiations that does not include some sort of debt restructuring is unlikely to succeed. Debt must be dealt with in a definitive and timely manner, despite resistance of creditors to suffering losses. Financial obligations must be aligned with debtors' ability to service the debt. Bretton Woods institutions have not been helpful in that respect. Based on traditional moral hazard concerns, they have constantly refused to act as international lender of last resort,[6] or as a bulwark for indebted countries seeking protection from creditors. This renders desirable a new and stable institution to level the path.

5 Institutions for a more efficient restructuring

There is one aspect where sovereign debt restructuring does not differ significantly from the treatment of other important global issues, such as climate change or the eventual threat from future pandemics, receive in international arena. The world's existing institutions still have trouble dealing comprehensively with particular kinds of problems and have failed to provide lasting solutions. No mechanism or framework for debt restructuring was introduced at Bretton Woods in 1944 or later by the two institutions created at that international conference for post-war economic management.

As was clear from the Latin American experience of the 1980s, the lack of a proper channel to tackle sovereign debt issues delayed the resolution of the crisis, harming both debtor nations and creditor banks. Individual negotiations between debtor countries and creditor banks (even with the participation of international financial institutions) proved to be drawn out and uncertain. The economic prospects of indebted countries did not improve and creditors' claims lost value in secondary markets. *Ad hoc* individual negotiations did not compensate for the absence of an institutionalised mechanism for the treatment of debt. Instead, they exhibited numerous shortcomings.

It took seven years to break the Latin American deadlock. When the Brady Plan finally recognised that debt could not be served at face value, it proposed a 'too little, too late' debt relief scheme. Despite some initial reluctance, banks were forced to participate. After its implementation, capital markets were reopened for the affected countries and growth could be resumed, albeit at a slow pace.

A slightly modified scenario has in recent years recurred. As already mentioned, Argentina once again defaulted on its liabilities to private creditors in late 2001 following the collapse of the macro-economic regime that predominated in the country during the 1990s. In 2005 (and again in 2010), Argentina offered an exchange for defaulted debt with large reductions. The vast majority of creditors (both domestic and foreign) accepted such offers. However, the exchange failed to deliver final closure to the debt issue. Argentina is still involved in litigation before US courts, as well as in other jurisdictions, with holdout creditors who have refused

6 There are a few exceptions to this rule, for example, the assistance package Mexico received from the IMF after the Tequila crisis.

to accept Argentina's restructuring offers. Current holdouts represent only a minor proportion of the debt defaulted in 2001 and 2002.

In 2014, the US Supreme Court turned down the consideration of a case, thus confirming the ruling of lower courts validating an odd legal interpretation of the *pari passu* clause – included in the original bonds – that not only favoured the plaintiffs, but also obstructed payments from Argentina to creditors who had accepted the restructured bonds. As Stiglitz and others have observed (Stiglitz 2014), such interpretation (now confirmed) has a negative long-term consequence: It creates incentives for non-participation by creditors in any future debt restructuring process. The judicial recognition of the right to interfere with payments to restructured creditors will hinder any future debt restructuring process for any sovereign borrower facing solvency issues.

The unresolved Argentinian situation illustrates, in our view, the unfortunate standing of sovereign debt restructuring today and confirms the need for remedies. The Euro crisis has also triggered a rapid increase in proposals in this area from diverse groups, including development experts and human rights non-governmental organisations (NGOs). Target 15 of the internationally-established framework Millennium Development Goals (MDGs) aimed at 'dealing comprehensively with the debt problems of developing countries through national and international measures in order to make debt sustainable in the long term'. Still, despite the time and effort of different fora to reach consensus, sovereign debt appears to have little influence on the political agendas of high-level international bodies, such as the G-20. No applicable law exists and there is always a legal loophole for speculative hedge funds.

The rest of this section reviews different initiatives that have contributed, to varying degrees, to the debate about establishing some sort of framework for an orderly restructuring of sovereign debt in distress. As stated above, during the last few years, there has been a 'one-step-forward and two-steps-back' kind of progress regarding this issue. Each initiative signified a move forward, but not enough to produce a policy shift. We have not been short of ideas, but of progress. As a result, an international legal framework that would facilitate an orderly, timely and speedy debt restructuring process still does not exist.

5.1 Proposals by human rights organisations and development-oriented experts

A few proposals have been put forward by different sectors of civil society. All seem to follow Raffer's assertion that '[s]afeguarding human rights makes it necessary that such arbitration mechanism includes some form of debtor protection' (Raffer (undated)). Among these initiatives is Raffer's widely-discussed proposal, as well as the following ideas developed by Paulus and Kargman (2008):

- Raffer suggests extending procedures from the US Insolvency Code to sovereign debtors. Taking into account that countries cannot be put under receivership, as that would contradict sovereignty and democracy, his scheme emulates chapter 9 of the Law, which regulates the insolvency of US municipalities, rather than chapter 11, which is generally applied for corporate insolvency. Raffer's initiative favours substituting the usual insolvency judge with an *ad hoc* arbitration panel with the agreement of affected parties, instead of introducing a new international legal

institution. Hence, the process becomes an arbitration process that follows predefined rules and principles. It would provide bankruptcy protection and would be binding for all creditors. According to Raffer, the procedure would also open the process for the broad participation of civil society and would foster the affected parties' 'right to be heard'.[7]

- In contrast, the Paulus and Kargman initiative consists of establishing a sovereign debt tribunal under the auspices of the United Nations with the creation of an Insolvency Chamber in the International Court of Justice.

5.2 Proposal by the International Monetary Fund

In 2003 the IMF proposed a twofold procedure for adjudicating sovereign debts. On the one hand, it promoted a contractual approach based on collective action clauses (see below); on the other, it favoured the adoption of a statutory approach, titled the Sovereign Debt Restructuring Mechanism (SDRM), which would have established a separate entity to facilitate the restructuring process.

SDRM would have consisted of an independent bankruptcy forum, created by an amendment to the articles of agreement that originated from and rules the IMF. Such a forum would have been vested with the jurisdiction to facilitate the restructuring process and would have been binding on all its members.

The bankruptcy forum would have established a bankruptcy system derived from insolvency law. There were three particularities to the proposed system. First, the debtor could, upon request, secure a stay on all creditor claims. Second, the creditors would have the power to extend the length of the stay should extra time be needed to break an impasse. Third, creditors would be encouraged to subordinate their outstanding claims to any new loans in order to encourage fresh lending.

The initiative lacked the necessary political acceptance. As Rogoff described, the proposal faced sharp opposition not only from creditors who feared that the IMF would be too friendly to problem debtors, but also from emerging markets that foresaw no near-term risk to their perceived creditworthiness (Rogoff 2012). Healthy borrowers were concerned that creditors would demand higher rates if the penalties for default were relaxed.

5.3 Innovation in contractual technology: Collective action clauses

A valuable (but limited) instrument consisted of introducing collective action clauses (CACs) in bond contracts. CACs made it possible to amend contract terms if a majority of holders agree to a new term for that particular commercial paper. The purpose of these clauses is to reduce the incentive for individual creditors to hold out and not to participate in a restructuring process in the hope that they are paid in full agreement with the original terms of the debt contract. In recent years, the use of CACs in sovereign bonds has become much more common.

Partly as a reaction to the Argentinian and Greek cases (discussed above), the International Capital Market Association (ICMA) has

7 In the same vein as Raffer, but with a more private orientation, Richard Gitlin and Brett House (2012) outlined a 'non-statutory, non-institutional, un-codified sovereign debt forum' as a venue for debtors and creditors to negotiate.

published, revised and updated the recommended text for collective action clauses to include the terms and conditions of sovereign debt securities. The use of these new terms in sovereign notes is intended to facilitate future sovereign debt restructuring and avoid the flaws raised by such cases.

Under the new standard model of CACs, the issuer can – as always – ask the holder of each bond series to change the prevailing terms. (If three-quarters of the holders of a particular bond series agreed to the new terms, it would be binding on the remaining minority.) The issuer would now be able to survey the holders of multiple series all at once. If at least half of each series and two-thirds of all outstanding debt agreed to the new terms, the remaining creditors would be bound. Finally, the issuer could interrogate holders of multiple series at once but take only a single vote across all affected series. If three-quarters of the total approved the new terms, the remainder would be bound. That is, the agreement would bind all holders, regardless of whether they voted in favour of or against the new terms. Consequently, dissenting holders would be barred from taking private actions to court. Greece used a similar procedure to restructure its domestic debt.

The widespread inclusion of new CAC terms is a step in the right direction and significantly mitigates the problem. However, they have been oversold in the financial media. There are still limitations on the generalised use of CACs: They do not provide for co-ordination across asset holders (for example, bondholders versus syndicated loans claims) as would a comprehensive framework. They only cover a certain segment of the external debt and do not solve over-indebtedness problems (Galpern 2014).

On 9 September 2014, the UN General Assembly approved Resolution 63/304 which supported a new bankruptcy process for sovereign debt restructuring and set up an *ad hoc* committee to draft a proposal. A year later, the Assembly fully endorsed the report elaborated by this committee and adopted a resolution unfolding nine Basic Principles on Sovereign Debt Restructuring Processes intended to guide future debt restructuring processes.[8] Certainly, the resolution does not go as far as proposing a definitive legal multilateral framework, but lists the principles of sovereignty, good faith, transparency, impartiality, equitable treatment, sovereign immunity, legitimacy, sustainability and majority restructuring as the pillars that should guide these kinds of processes. While all seem to be both important and subject to further interpretation, the principle of majority restructuring has to be highlighted. The long Argentinian saga against speculative hedge funds before US courts – including the US Supreme Court – provides a starling reminder of how certain groups representing a minority of the creditors can completely disrupt a restructuring process agreed to by 92 per cent of creditors. Furthermore, they may also harm the interests of third parties, such as those of creditors that initially agreed to restructuring proposals or financial institutions that operate as intermediaries in the process. It is important to stress that, unlike the Security Council, resolutions adopted by the UN General Assembly are legally non-binding. They do carry political weight, but do

8 http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/319 (last visited 30 June 2015).

not trigger further consequences. This point is significant here: Although the vote was overwhelmingly in favour of the resolution, it was rejected by, among other states, the US, Japan, Germany and the UK, while the remaining European Union members abstained. The fact that neither the US nor the UK is willing to admit these kinds of guidelines downplays the importance of the resolution. New York and London are the centres of international capital markets and any disagreement between creditors and debtors still has to be settled in the legal jurisdiction of those countries. Progress in this line of work still needs to be seen.

6 Conclusion

The prudent use of loan funds and effective debt management can effectively contribute to a country's development. In economic policy, prudence has to rule over the tendency of excessive loan taking by debtors and aggressive lending policies undertaken by creditors in liquid markets. As there are no institutionalised mechanisms to deal with sovereign over-indebtedness, debt negotiations are excessively lengthy: They prolong economic crises and their outcome is uncertain. Experience shows that, under the prevailing non-system, by the time an agreement has finally been reached, both debtors and creditors have accumulated great losses. There is a problem of co-ordination among creditors, leading to the existence of holdout agents. Thus, an international debt workout mechanism, which is absent in the current international financial architecture, must be created.

Different approaches have been proposed to establish such mechanisms, but the lack of political support for their adoption has led to the current situation. One of the main criticisms against such mechanisms is that they would encourage more opportunistic behaviour by debtor nations. However, as past experience shows and leading institutions have recognised, the problem historically has not been that countries have been too eager to renege on their financial obligations, but that they have often been too reluctant (Blustein 2006). Policy makers often have incentives to postpone the moment of recognising that they do not have alternative choices (Levy-Yeyati & Panizza 2010).

The lack of an international lender of last resort and the lack of an internationally-recognised restructuring framework worsens the situation for countries facing distress. The review and reform of the current situation are essential in order to eliminate uncertainties and to keep sovereign lending operational. The introduction of such a mechanism would be a step forward in respect of the current *status quo*.

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N Orago 'The impact of the global financial crisis on the realisation of socio-economic rights in sub-SaharanAfrica: An analysis based on the Millennium Development Goals framework and processes' (2017) 1 *Global Campus Human Rights Journal* 17-46

The impact of the global financial crisis on the realisation of socio-economic rights in sub-Saharan Africa: An analysis based on the Millennium Development Goals framework and processes

Nicholas Orago*

Abstract: *The global financial crisis, which affected global trade and investment, did not leave sub-Saharan Africa untouched. The region registered a decline in economic growth in the period after the crisis and experienced ongoing impacts. The article looks at these impacts, focusing on the realisation of socio-economic rights in sub-Saharan Africa using the mechanism of the Millennium Development Goals. It begins by describing the major actors that have played a leading role in economic growth in the region, and the realisation of socio-economic rights. It then focuses on the pre-crisis growth period of 2000 to 2007, examining the drivers of growth in sub-Saharan Africa and how this growth impacted the realisation of socio-economic rights. The article uses the mechanism of the Millenium Development Goals framework and process to measure the achievement of each goal within a high growth period. It finds that while this growth created more resources for the realisation of socio-economic rights, little progress was made in achieving the Millennium Development Goals within that period: The socio-economic conditions of poor, vulnerable and marginalised individuals and groups remained the same. The article then looks at the effects of the global financial crisis on sub-Saharan African economies after 2007, indicating that the crisis had an adverse impact on economic growth, with growth declining to 5.5 per cent in 2008, 3.5 per cent in 2009 and then rebounding slightly to 5.1 per cent between 2013 and 2014 and further to 5.8 per cent in 2015. It says that, although the reduction in economic growth had a great impact on the availability of resources for the realisation of socio-economic rights, an analysis of the MDG progress after the crisis does not show a marked difference from the MDG progress prior to the crisis. The article concludes that, even though the crisis had some impact on the realisation of socio-economic rights, its impact would have been greatly lessened if these sub-Saharan African countries had shown political commitment and developed proper mechanisms for the realisation of these rights.*

Key words: *sub-Saharan Africa; economic growth; global financial crisis; economic and social rights realisation; Millennium Development Goals*

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1 Introduction

Since pre-colonial times, Africa has suffered as a result of events and decisions from outside the continent. Examples include the slave trade, which led to the abduction and trading in Africans for labour purposes; colonisation, which led to the heavy plunder of Africa's natural resources; global warming and its attendant climate change, which have had major adverse impacts in African people's ability to feed themselves; the debilitating foreign debt, which has been detrimental to development and the realisation of the fundamental rights of the African peoples; and, finally, the global financial crisis (GFC), which has had an adverse socio-economic impact on Africa's populace due to its dire impact on global trade, investment and growth. The effect of the latter is primarily due to Africa's dependence on external actors for resources to enhance growth, the consequence of which is that African countries are vulnerable to the vagaries of the global financial system. This vulnerability meant that the GFC led to a decline in economic growth in Africa, a situation that is expected to continue given the consistently low global growth projections forecast by the International Monetary Fund (IMF 2014: xv).[1]

Crises like the GFC have necessitated countries' adoption of austerity measures and cuts in government expenditure, with social spending being the first to suffer. In many circumstances this has led to the denial or infringement of socio-economic rights[2] (Alston (undated)) with adverse consequences for marginalised and vulnerable groups. The poor, women, children, young people and people with disabilities, for example, suffer decreasing access to work and social welfare programmes as well as reduced affordability of food, housing, healthcare, water and other basic necessities (Pillay 2012). In general, austerity measures are retrogressive. They are also contrary to the obligations relating to socio-economic rights that state parties have undertaken to respect, protect, promote and fulfil under the International Covenant on Economic, Social and Cultural Rights (ICESCR) and other international legal instruments that entrench socio-economic rights (Bilchitz 2014: 719).

In the face of continued abdication of their responsibilities to the poor through austerity measures enacted during the GFC, the Committee on Economic, Social and Cultural Rights (ESCR Committee), through its Chairperson, Ariranga Pillay, guided member states of the ICESCR to take a list of requirements into account when adopting measures to deal with the crisis. These requirements included the need to demonstrate the existence of a compelling state interest to be protected by the measures; to demonstrate the exhaustion of alternative and less restrictive measures; to ensure that austerity measures are only temporary; to ensure that austerity

1 Where global growth projections for 2015 have been revised to 3.8%.

2 Socio-economic rights are defined as the rights concerned with the material bases of the well-being of individuals and communities, that is, rights aimed at securing the basic quality of life for the members of a particular society. They include the right to shelter, food, water, healthcare, education, work and social security. These rights are pertinent in the protection of poor, marginalised and disadvantaged groups because of the material deprivation of these groups, as well as their lack of political voice. Therefore, socio-economic rights dovetail closely with the objectives entrenched in the Millennium Development Goals (MDGs) to reduce extreme poverty and to enhance human development. Alston elaborates on the link between MDGs and socio-economic rights.

measures are necessary, reasonable and proportionate; to ensure that austerity measures are not discriminatory and are supportive of social transfers so as to mitigate inequalities; to ensure that disadvantaged groups are not disproportionately affected; to ensure that austerity measures identify the minimum core content of rights and affirm their protection at all times; and, finally, to ensure genuine participation of affected groups in the decision-making process (Pillay 2012: 2; Bilchitz 2014: 714). In effect, the Chairperson was advocating that states and other stakeholders adopt a 'rights-based approach' for tackling the effects of the GFC. She was also highlighting the need for states to focus their policies and expenditure on the creation of employment and social welfare, and to observe human rights in general. The rights-based approach requires countries to put in place sufficient safety nets and other social assistance programmes to protect disadvantaged and marginalised groups who are bound to feel the adverse consequences of the GFC the most. It also calls for countries to enhance these groups' access to basic socio-economic goods and services.

However, to what extent did states take these measures into account and adopt a rights-based approach to the GFC? To answer this question, the article looks at the impact of the GFC on the realisation of socio-economic rights in sub-Saharan African countries,[3] and how these countries responded to the crisis. Section 2 of the article details the major actors involved in the enhancement of economic growth in sub-Saharan African countries and in the implementation of policies and programmes for realising socio-economic rights. Section 3 entails an analysis of the sustained economic growth witnessed in Africa between the years 2000 and 2007, the drivers of that growth and its impact on the realisation of socio-economic rights in sub-Saharan African countries. Section 4 analyses the GFC and its impact on economic growth in Africa. It focuses on the effect of the crisis on the factors that led to the increased growth of economies in sub-Saharan African countries described in the previous section. It then examines the impact of the GFC on the achievement of the Millennium Development Goals (MDGs) in sub-Saharan African countries. Section 5 contains the conclusion.

Here a caution is necessary. Although the study looks at the impact of the crisis on 'sub-Saharan African countries' as a whole, the socio-economic conditions among these countries vary widely. The sum GDP of the ten wealthiest sub-Saharan countries, for example, is 2.2 times the sum GDP of the poorest ten sub-Saharan countries. Therefore, the impact of the GFC on the realisation of socio-economic rights in the different sub-Saharan countries varies considerably. Dependent factors include countries' national legal frameworks and their macro-economic policies, as well as the state-specific safety nets available to cushion their populace(s) against financial shocks. To surmount this challenge, this research is based on an analysis of the framework and processes created by the Millennium Development Declaration regime that applies uniformly in all sub-Saharan African countries. It relies heavily on statistical data and analysis from the MDGs' monitoring and reporting mechanisms put in place by the African Union (AU); the United Nations Development Programme (UNDP); the United Nations Economic Commission for Africa (UNECA); the World Bank; the African Development Bank and the IMF. It also uses secondary

3 African countries that lie south of the Sahara desert.

materials from other analysts. The rationale for relying on the MDG process is the close link between the MDGs and socio-economic rights entrenched in international, regional and national legal instruments that have been ratified or enacted by sub-Saharan African countries.

2 Major actors in the enhancement of economic growth, development and the realisation of socio-economic rights in sub-Saharan Africa

The primary obligation of any state is to ensure the security and the well-being of its citizens. One of the major ways in which a state can realise this obligation is by respecting, protecting, promoting and fulfilling the entire corpus of human rights and fundamental freedoms, especially socio-economic rights. However, the state is also expected to put in place sufficient legal, policy, institutional, infrastructural and programmatic frameworks to achieve its obligations. This requires resources, both financial and technical.

Sub-Saharan African countries have generally been unable, on their own, to realise sustained economic growth and, therefore, raise sufficient revenue to implement measures to achieve sustainable development and enhance the realisation of socio-economic rights (Ranis & Stewart 2000: 197-219). Accordingly, sub-Saharan African countries have been principally reliant on resources from external actors to achieve their goals. This reliance is discussed more elaborately in section 3. It shows that in the period preceding the GFC, the major sources of resources that have contributed to economic growth, development and the realisation of socio-economic rights in Africa, are the same as those that many of the sub-Saharan African countries relied on to enable transcendence of the GFC's adverse effects. These sources include international trade through the export of primary goods such as minerals and agricultural products; tourism; official development assistance; direct foreign investments; remittances from Africans in the diaspora and direct borrowing through facilities provided by the international financial institutions and financial markets in the developed countries (the 'Eurobond phenomenon').[4] Apart from sub-Saharan African countries themselves, the sources of resources lead us to surmise that the major actors in the realisation of socio-economic rights in sub-Saharan Africa before, during and after the GFC are donor countries (such as the European Union countries, the United States of America and the Scandinavian countries); private investors such as multi-national corporations, foreign individual investors and other foreign investment groups; Africans living and working in the diaspora, mainly in Europe, the United States of America, Asia and other African countries; international financial institutions such as the World Bank, the International Monetary Fund (IMF) and the African Development Bank; United Nations (UN) agencies and other related agencies such as the UNDP, UNICEF, UNECA, the World Health Organisation (WHO), the World Trade Organisation (WTO), the International Labour Organisation

4 For a more elaborate analysis of these resources and their contribution to economic growth and development in sub-Saharan Africa, see section 3 below.

(ILO); and international and national non-governmental organisations (NGOs), among other actors.

3 Economic growth and the realisation of socio-economic rights in sub-Saharan Africa before the global financial crisis – 2000 to 2007

3.1 Economic growth in sub-Saharan Africa

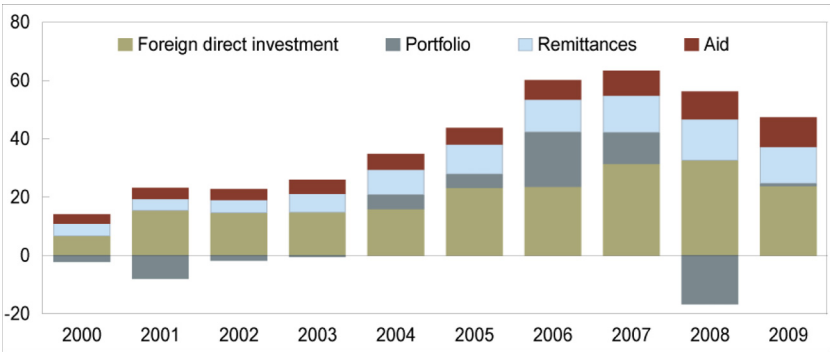
Further to the reliance on external actors, Africa has been bedevilled with several political and socio-economic challenges, among them a lack of access to education and skills development; bad governance; insufficient infrastructural development; protracted armed conflicts; corruption and the theft of public resources (World Economic Forum for Africa 2009: 5).[5] Despite these challenges, most economies of sub-Saharan Africa enjoyed robust growth in the years preceding the GFC (Olamosu & Wynne 2015). For example, between 2000 and 2007 real GDP rose by 4.9% (Leke et al 2010). This sustained economic growth had the effect of enhancing the attractiveness of sub-Saharan African countries to private foreign investors looking for high returns on their investments; private capital inflows became the most important source of external finance for sub-Saharan African countries during the period (Macias & Massa 2009: 1). The increased investment attractiveness was attributed to 'pull factors' that included improved governance and a reduction in armed conflict leading to political and macro-economic stability; improved macro-economic performance; the global commodity and consumption boom; external debt relief and the availability of natural resources in vast quantities (Macias & Massa 2009: 1; Arieff et al 2010: 5-6).

Sub-Saharan Africa's improved economic outlook saw private capital inflows into the region grow from $8.9 billion in 2000 to a peak of around $54.8 billion in 2007 (Macias & Massa 2009: 2; Arieff et al 2010: 11). As a result of these increased investments, net foreign direct investments grew from $13 million in 2004 to over $33 billion in 2007. This growth accounted for between 2.5 and 5 per cent of annual gross domestic product (GDP) of sub-Saharan African countries between 2001 and 2007 (Arieff et al 2010: 11). Portfolio equity flow reached $15 million in 2006 and international banking activities significantly increased, with the debt flow to sub-Saharan Africa reaching $205 billion by the end of 2007 (Macias & Massa 2009: 1 & 3). Diaspora remittances also formed a key source of capital for sub-Saharan African countries, with an estimated inflow of $18.59 billion in 2007 accounting for about 3.7 per cent of the GDP of sub-Saharan African countries (Arieff et al 2010: 113-114; Anyanwu 2011: 59).[6] Further, many sub-Saharan African countries were able to issue international investment bonds in the Eurozone, with the bond value growing by $7.13 billion between the year 2006 and 2007 (Macias & Massa 2009: 3). Increased capital inflow into sub-Saharan

5 These were the challenges voted by African leaders and stakeholders at the 2009 World Economic Forum for Africa.

6 However, Anyanwu documents that diaspora remittance into sub-Saharan Africa grew from $11.2 billion in 2000 to $40.8 billion in 2008.

Africa prior to the GFC and the decline in the flow during the crisis is demonstrated by the following table.



Source: IMF Regional Economic Outlook: Sub-Saharan Africa, April 2009 (Arieff et al 2010: 11).

One of the enduring justifications for the lack of realisation of socio-economic rights in many sub-Saharan African countries has been the lack of resources available to states to put in place measures for their realisation. However, with the improved capital inflow and its attendant economic growth in many sub-Saharan African countries which increased the amount of resources available to the states, it would have been expected that more substantive and robust mechanisms for the realisation of the obligations relating to socio-economic rights of sub-Saharan African countries would be put in place with the aim of eradicating poverty and marginalisation, enhancing social justice and improving the living standards of the populace of sub-Saharan African countries. How, then, have sub-Saharan countries fared in the realisation of socio-economic rights with the improved economic growth prior to the GFC? This question is the subject of analysis in the following sub-section.

3.2 Socio-economic indicators and the realisation of socio-economic rights in sub-Saharan Africa in the context of increased economic growth

Many sub-Saharan African countries ratified international human rights law instruments at the global and regional level that entrench socio-economic rights. These include the ICESCR;[7] the Convention on the

7 Sub-Saharan African countries that have ratified or accented are Angola, Benin, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Congo, Côte d'Ivoire, Democratic Republic of Congo, Djibouti, Eritrea, Ethiopia, Gabon, Ghana, The Gambia, Guinea, Guinea Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Namibia, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Togo, Uganda, Tanzania, Zambia and Zimbabwe. Data on ratification of international human rights instruments available at http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx (last visited 28 January 2015).

Rights of the Child (CRC);[8] the Convention on Elimination of All Forms of Discrimination against Women (CEDAW);[9] the Convention on the Rights of Persons with Disabilities (CRPD);[10] the International Convention on the Protection of Migrant Workers and Members of their Families (CMW);[11] the African Charter on Human and Peoples' Rights (African Charter)[12] and its Optional Protocol on the Rights of Women in Africa (African Women's Protocol);[13] and the African Charter on the Rights and Welfare of the Child (African Children's Charter).[14] These international human rights instruments entrench several socio-economic rights, such as the rights to housing, food, health, water, education, social security and social assistance. In signing and ratifying these instruments, the sub-Saharan African countries have undertaken the tri-partite obligation to respect, protect and fulfil these rights.[15]

One of the main factors in the realisation of socio-economic rights is the availability of resources, a factor which led to the adoption of the standard for the progressive realisation of socio-economic rights as opposed to the more immediate realisation of civil and political rights.[16] The rapid economic growth pre-GFC meant that sub-Saharan African countries had increased resources available for the realisation of socio-economic rights. However, to what extent did these countries use the available resources to enhance human development, to improve the living standards of their people and to achieve the general realisation of socio-economic rights? An analysis of the MDGs between their adoption in 2000 up to 2007 may provide clarity.[17]

8 All sub-Saharan African countries that have ratified the ICESCR have also ratified the CRC except Somalia. Botswana, Mozambique and South Africa have ratified the CRC but not the ICESCR.

9 All sub-Saharan African countries that have ratified the ICESCR have also ratified CEDAW except Somalia and Sudan. Botswana, Mozambique and South Africa have ratified CEDAW but not the ICESCR.

10 All sub-Saharan African countries that have ratified the ICESCR have also ratified CEDAW except Cameroon, Central African Republic, Chad, DRC, Equatorial Guinea, Eritrea, The Gambia, Madagascar and Somalia. Botswana has ratified neither the ICESCR nor the CRPD. South Africa has ratified the CRPD but not the ICESCR.

11 Sub-Saharan African countries that have ratified the CMW are Burkina Faso, Cape Verde, Ghana, Guinea, Lesotho, Mali, Mauritania, Mozambique, Niger, Nigeria, Rwanda, Senegal and Uganda.

12 All sub-Saharan African countries have ratified the African Charter. Data on ratification of legal instruments in the African human rights system available at http://www.achpr.org/instruments/ (last visited 28 January 2015).

13 Sub-Saharan African countries that have ratified the African Women's Protocol include Angola, Benin, Burkina Faso, Cameroon, Cape Verde, Congo, Côte d'Ivoire, DRC, Djibouti, Equatorial Guinea, Gabon, The Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Lesotho, Liberia, Malawi, Mali, Mauritania, Mozambique, Namibia, Nigeria, Rwanda, Senegal, Seychelles, South Africa, Swaziland, Tanzania, Togo, Uganda, Zambia, and Zimbabwe.

14 The African Children's Charter has been ratified by 41 African countries. sub-Saharan African countries that have not ratified are Central African Republic, DRC, Djibouti, Guinea Bissau, Liberia, Somalia, South Sudan, Sudan, Swaziland and Zambia.

15 For an elaboration of these obligations, see *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) paras 44-48.

16 International legal instruments adopting progressive realisation of socio-economic rights include art 2(1) ICESCR; art 4 CRC; and art 4(2) UNCRPD.

17 The MDGs contained in the UN Millennium Declaration are as follows: eradicating extreme poverty and hunger; achieving universal primary education; promoting gender equality and empowering women; reducing child mortality; improving maternal health; combating HIV, malaria and other diseases; and ensuring environmental sustainability.

3.2.1 Poverty reduction under the first Millennium Development Goal

Despite the bright economic indicators, sub-Saharan African countries have struggled to realise socio-economic rights, with the achievement of the MDGs remaining varied and other human development indicators being abysmal. Efforts at poverty reduction have not borne the desired results at the expected rate in sub-Saharan Africa, with World Bank data indicating that over 50 per cent of the population of these countries lived below the poverty line of less than $1.25 per day and those in absolute poverty had increased from 200 million people in 1981 to 380 million people in 2005 (United Nations 2009: 7; Anyanwu 2011: 55). A slight improvement in the reduction of poverty occurred between 2005 and 2007 with data indicating that the number of extremely poor people in sub-Saharan Africa had levelled off and the poverty rate had declined by 6 per cent (United Nations 2007: 4). The data thus indicates that the improved economic upturn between 2000 and 2007 may have had a positive impact on the reduction of poverty in sub-Saharan Africa, but the rate of reduction has been much slower than would have been expected if the sub-Saharan African states had adopted inclusive poverty reduction strategies and put in place substantive rights-based mechanisms for the reduction of poverty, the enhancement of human development and the improvement of the standards of life of their populace.

For example, the creation of employment and improved income conditions, which tie in closely with MDG 1 on the eradication of extreme poverty and hunger, play a very important role in enabling households to access basic socio-economic goods and services, to improve their living standards and generally to move out of poverty. Despite the economic growth, sub-Saharan African countries had not created sufficient employment opportunities to cater for the increase in the working age population, with statistics indicating that in the majority of the countries the employment-to-population ratio had stagnated between 2000 and 2007 (UNDP 2010: 9). The only countries that posted an increase in the employment-to-population ratio over 5 per cent were Ethiopia (12.2), Lesotho (10.8) and Zambia (7.0); while countries that posted a decline in the employment-to-population ratio of over 5 per cent were Mauritania (13.8), Tanzania (10,6), Rwanda (8.1), Swaziland (6.1), Botswana (5.9) and Ghana (5.1) (UNDP 2010: 9). In Kenya, for example, the ESCR Committee found that, even though between 2004 and 2007 2.4 million jobs had been created in the state, only 1.8 million people were employed in the formal sector, with over 6.4 million workers working in the informal sector (ESCR Committee 2008: 4-5). Several challenges face employees in the informal sector, as labour regulations are largely ignored, no social security schemes or pension rights are provided, and poor working conditions are prominent, with workers being forced to work overtime, paid less than the minimum wage and forced to forgo maternity protection (ESCR Committee 2008: 4-5).

Due to the importance of employment in enabling families to access socio-economic goods and services such as housing, food, healthcare, education and social security, it would have been expected that many sub-Saharan African states would have invested in programmes aimed at the creation of employment at the national level. However, the reality has been that most of the benefits of the increased economic growth have been enjoyed by only a few of the elites of these countries, with the majority of

the resources disappearing into private coffers through corruption, to the detriment of the majority of the populace who have either remained unemployed or have had to seek employment in the informal economy with no labour protection.

3.2.2 Education under the second Millennium Development Goal

Apart from employment, the second most prominent factor in the eradication of poverty and the improvement of living standards is education, which is also entrenched as a socio-economic right in many international and national legal instruments.[18] This right ties in closely with MDG 2, the objective of which is the achievement of universal primary education. Data indicates that many sub-Saharan African countries made significant progress in enhancing access to basic education between 1991 and 2007, with countries like Ethiopia, Guinea, Malawi, Mali, Madagascar and Mauritania achieving an improvement of 30 to 50 per cent in relation to the net enrolment in primary education (UNDP 2010: 14). Others with a net enrolment of 10 to 30 per cent were Burkina Faso, Djibouti, The Gambia, Ghana, Niger, Senegal, Rwanda, Swaziland and Togo (UNDP 2010: 15). Some sub-Saharan African countries had, however, witnessed a reduction in the levels of enrolment, with Congo registering a reversal from 85 per cent enrolment in 1991 to 60 per cent enrolment in 2007, while Equatorial Guinea registered a reversal from 98 per cent in 1991 to 70 per cent in 2007, which is a serious concern as public primary education was supposedly free and compulsory in both countries (UNDP 2010: 15). The fall in the levels of enrolment in the two countries was mainly due to low government expenditure in basic education, civil unrest and the resultant armed conflict that led to the deterioration of the educational infrastructure (UNDP 2010: 15).

MDG 8 on global partnership for development had played a prominent role in the realisation of increased access to education in sub-Saharan African countries, as more funds had been made available through official development assistance, with the United Kingdom government having committed £8.5 billion towards international aid for primary education (UNDP 2010: 16). The challenge facing many sub-Saharan African countries in relation to basic education had been the low rate of completion of primary education, meaning that many of the students who enrolled in primary schools dropped out of school without completing the requisite number of study years (UNDP 2010: 16). Statistical data indicates that of the 24 sub-Saharan African countries with available data on primary school retention, 31 per cent had an improved completion rate of 25 to 47 per cent, 30 per cent had an improved completion rate of 10 to 25 per cent, and the remaining 39 per cent had a completion rate of less than 10 per cent. These are dire completion rates if one takes into account the importance of education to human development and the achievement of the potential of each person (UNDP 2010: 18). Further, data between 2005 and 2007 showed a decline in completion rates among some sub-Saharan African countries, with Chad, Eritrea, Malawi, Mauritius, Namibia, São Tomé and Principle, Seychelles, Senegal, South Africa and Togo regressing in primary school completion rates (UNDP 2010: 18). If sub-Saharan

18 See art 26 of the Universal Declaration of Human Rights, art 13 of the ICESCR, arts 28 & 29 of the CRC, and art 10 of CEDAW, among others.

African states are to have sustained economic growth and improved living standards, the need to increase access to education and to enhance the quality of that education cannot be overemphasised.

3.2.3 Gender equality and women's empowerment under the third Millennium Development Goal

Education and employment play key roles in the empowerment of women and the overall achievement of gender equality. Education as a right, therefore, dovetails closely with MDG 3 that relates to the promotion of gender equality and the empowerment of women. Most sub-Saharan African countries showed progress in achieving gender equality and empowering women, with actual or near gender parity being achieved in primary school enrolment and levels of youth literacy in most countries, although secondary and tertiary enrolment rates were still skewed to the detriment of girls and women (UNDP 2010: 19-22). In 26 sub-Saharan African countries with available data, indications were that 19 countries had been able to reduce gender disparity by a range of 0.03 to 0.04, while some countries, such as Ethiopia, Swaziland, Madagascar and South Africa, had generally regressed in reducing gender parity in secondary school enrolment (UNDP 2010: 23).

Gender equality and women's empowerment also relate closely to employment and the participation of women in leadership in different sectors of society. Data is scarce on women's participation in employment in sub-Saharan African countries, but the limited data available indicated that women were still discriminated against in accessing employment opportunities in the non-agricultural sectors. The share of women's employment in some of the best-performing sub-Saharan African countries was as follows: Ethiopia and CAR had 47 per cent, while South Africa and Botswana had 44 per cent (UNDP 2010: 24). The poor performers on this front were Senegal and Liberia at 11 per cent (UNDP 2010: 24). There had also been a general improvement on women in leadership with several countries having a good percentage of women representatives in parliament, with Rwanda leading at 56.3 per cent followed by South Africa at 45 per cent, Angola at 37.3 per cent, Mozambique at 43.8 per cent and Uganda at 30.7 per cent (UNDP 2010: 25).

The empowerment of women and the improvement of their education levels are important in the overall realisation of socio-economic rights and the enhancement of sustainable development because of the important roles women play in enhancing the well-being of the family, communities and societies in general. Efforts aimed at empowering women and improving their participation in all sectors of society should, therefore, be enhanced to ensure the improvement in the realisation of socio-economic rights such as the right to food and nutrition, the right to healthcare and the right to education, among others.

3.2.4 Hunger reduction under the first Millennium Development Goal

Freedom from hunger and the right to adequate food and nutrition are important socio-economic rights, the realisation whereof is measured by the MDG 1 target of halving the proportion of people who suffer from hunger by the year 2015. Prior to the GFC, progress had been made in achieving this target by many sub-Saharan African countries, with Ghana

achieving the target of halving its population that suffers from hunger (UNDP 2010: 10). Despite these efforts, the absolute number of undernourished people in sub-Saharan Africa increased on average from 172.8 million in 1990 to 1992 to 217.2 million in 2004 to 2006 (UNDP 2010: 13). The proportion of the population below the minimum level of dietary energy consumption fell slightly from 34 to 30 per cent (UNDP 2010: 13). Acute and chronic malnutrition of children below the age of five years had marginally reduced in sub-Saharan Africa between 1990 to 1999 and 2000 to 2009, with 12 countries recording a decrease of over 5 per cent, while a further 16 countries recorded a decrease of less than 5 per cent (UNDP 2010: 12). Six countries had, however, posted an increase in the prevalence of underweight children in that period, being Djibouti, Burkina Faso, Comoros, Lesotho, Zimbabwe and Madagascar (UNDP 2010: 13). The challenge in the realisation of the right to food in sub-Saharan Africa during this period was affirmed by the Global Hunger Index which indicated that sub-Saharan Africa registered the lowest reduction of hunger at just 14 per cent as compared to Latin America and the Caribbean which registered a 40 per cent reduction in hunger (IFPRI 2009: 10-12). Further, according to the Global Hunger Index, nine of the ten countries that saw increased hunger between 1990 and 2009 were in sub-Saharan Africa: DRC, Burundi, Comoros, Guinea Bissau, Zimbabwe, Liberia, Sierra Leone, Swaziland and Zambia (IFPRI 2009: 10-12). These high hunger indices in sub-Saharan Africa are due to low effectiveness of governments in tackling the problem, prevailing conflicts, political instability and the prevalence of HIV/AIDS (IFPRI 2009: 10-12).

3.2.5 Health under the fourth, fifth and sixth Millennium Development Goals

The right to health is another important socio-economic right that closely matches with the MDGs, especially MDGs 4, 5, and 6, for the reduction of child mortality, the improvement of maternal health and the combating of HIV/AIDS, malaria and other diseases respectively. The effort that has been expended by sub-Saharan African countries in the realisation of the right to health can, therefore, be analysed using indicators that have been developed for the monitoring of these three MDGs. The progress in the reduction of infant mortality had been slow in sub-Saharan Africa, with data indicating that the under five mortality rate (U5MR) declined by 21 per cent from 168 deaths per 1 000 live births in 1990 to 132 deaths per 1 000 live births in 2008, although this may not be representative of the actual state of affairs, as 66 per cent of children under five in sub-Saharan Africa were not registered at birth (UNDP 2010: 28). Based on data available, the only sub-Saharan African countries that were on track to reduce the U5MR by two-thirds were Cape Verde, Eritrea, Mauritius and Seychelles; with some sub-Saharan African countries registering an increase in U5MR, being Chad, Kenya, South Africa and Zimbabwe (UNDP 2010: 29). The U5MR can be reduced by concerted action by sub-Saharan African countries, as most of the major causes of under five mortality (diarrheal diseases, pneumonia, measles and malaria) are preventable and treatable using low-cost preventive and treatment measures (UNDP 2010: 30). What would be needed here is more political will to prioritise social spending for the realisation of the right to health through the improvement of the health infrastructure and available

personnel and medication to respond effectively to the treatable causes of under five mortality.

Additionally, maternal health is an important indicator of the availability and accessibility of the healthcare infrastructure, medicines and sufficiently-qualified personnel, as most maternal deaths occur from preventable causes that can be adequately tackled if sufficient healthcare resources are made available. The maternal mortality rate (MMR) had generally reduced in sub-Saharan Africa because of the higher average age of marriage and child bearing, the drop in average family size, and the decrease in fertility with data indicating that the total fertility rate had fallen from 6.5 during 1970 to 1975 to 4.6 during 2005 to 2010 (UNDP 2010: 35). Sub-Saharan African countries accounting for the highest percentage of maternal mortality were Nigeria, Ethiopia and the DRC. One of the major causes of maternal mortality, especially in Southern Africa, was the prevalence of HIV (UNDP 2010: 35). The link between the high MMR and the prevalence of HIV is affirmed by data which indicates that in countries with a HIV prevalence of between 5 and 10 per cent, the MMR declined by 36 per cent, while in countries with a HIV prevalence of between 10 and 15 per cent, the MMR declined by only 20 per cent (UNDP 2010: 35). One of the ways of reducing the MMR is by ensuring that child delivery is attended by skilled health personnel or trained midwives, and the number of attended births in sub-Saharan Africa was averaging at about 47 per cent (UNDP 2010: 36). The AU has provided political leadership in enhancing maternal health through its Campaign on Accelerated Reduction of Maternal Mortality in Africa (CARMMA) with the focus on reducing maternal and associated child deaths in Africa.[19]

In summary, combating poverty-related diseases such as HIV, tuberculosis, malaria and other related diseases has been a challenge for many sub-Saharan African countries, mainly due to the failure of these countries to allocate sufficient resources to adequately improve the health infrastructure and preventive programming (UNDP 2010: 41). The other factor that has led to the failure of sub-Saharan African countries to respond to these health challenges has been the lack of prioritisation of social spending, with available resources being diverted into military spending due to the prevalent conflicts or lost through public theft and corruption by African leaders. The lack of political will for the realisation of the right to health in the period prior to the GFC could be seen in the failure of most sub-Saharan African countries to allocate the required 15 per cent of their budgets to the health sector as per the Abuja Declaration (UNDP 2010: 41). Due to the failure of prioritisation and the lack of political will to tackle health challenges by sub-Saharan African countries, most of the interventions in healthcare were donor supported with continuous resources being made available by the international community to tackle HIV, malaria, tuberculosis and other related diseases. With a heavy dependence on international aid, health is one sector that is bound to suffer greatly should the GFC affect the amount of official development assistance flowing to sub-Saharan African countries.

19 For more information on CARMMA, see their website at http://www.carmma.org/ (last visited 10 February 2015).

3.2.6 Summary: A general failure to enhance the realisation of socio-economic rights despite positive economic growth indicators

The above analysis indicates that even though sub-Saharan African countries had experienced continued economic growth in the period between 2000 and 2007, not much had changed in relation to investment in human development, improvement in the standard of living of African people and the overall realisation of socio-economic rights. This has been affirmed by the ESCR Committee in its Concluding Observations to the DRC in its consolidated second to fourth periodic report, where the Committee noted that there had been a continuous decrease in resources allocated to social sectors such as health and social protection, with even the budgetary resources allocated to social spending never fully disbursed to the relevant ministries (ESCR Committee 2009: 6-7). This indicates that, even though the availability of resources is always the excuse given by many sub-Saharan African countries for their failure to realise socio-economic rights, sub-Saharan Africa is lagging behind in the realisation of socio-economic rights due to a lack of political will to implement and enforce these rights, a lack of prioritisation of social spending and investments in adequate social safety nets to cushion vulnerable groups from falling into poverty, and continued conflicts and political instability necessitating the diversion of resources meant for social spending into military spending. Lastly, the theft and plunder of state resources through corruption is named. If these challenges had been adequately dealt with by sub-Saharan African countries, the realisation of socio-economic rights through the implementation of the MDGs could have been achieved, considering the increased economic growth, had revenues been adequately prioritised and utilised for the improvement of the living standards of sub-Saharan African people.

4 Economic growth and the realisation of socio-economic rights in sub-Saharan Africa after the global financial crisis

Having reviewed the political and socio-economic conditions of sub-Saharan African countries and their efforts in realising socio-economic rights with the increased economic growth prior to the GFC, this section analyses the impact of the GFC on sub-Saharan African economies and how it interfered with the realisation of socio-economic rights. In this section, data generated through the MDG process between 2008 and 2015 will similarly be used to establish how sub-Saharan African countries have fared in the achievement of the MDGs and the correspondent realisation of socio-economic rights post-GFC. The aim of this section is to determine whether, and to what extent, the GFC impacted adversely on the realisation of socio-economic rights in sub-Saharan Africa.

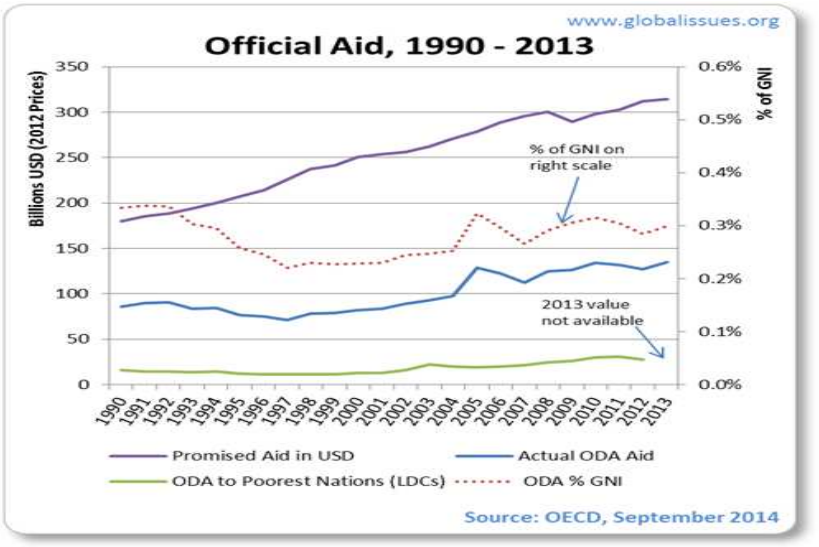
4.1 The global financial crisis and declining sub-Saharan African economies

The GFC placed a dampner on sub-Saharan Africa's growth trajectory in several pertinent ways. First, the pre-crisis high food and fuel prices drastically affected many sub-Saharan African countries, especially the countries that are net importers of food and those who rely for their fuel needs on the international crude oil market (IMF 2009: 2). The impact

was not as severe when compared to some of the developed countries that were at the epicentre of the crisis, which experienced budget deficits of more than 10 per cent of GDP in 2009) (World Economic Forum for Africa 2009: 13; IMF 2009: 2). This was mainly because the financial sector in the sub-Saharan African region is less developed and thus less integrated with the global financial markets (IMF 2009: 4; African Development Bank 2009: 5 & 11-14), and also because African banks were relatively unexposed to the mortgage meltdown that triggered the crisis (World Economic Forum for Africa 2009: 13).

4.1.1 Decreased assistance from donor countries

The impact of the GFC has, however, been felt in various ways in sub-Saharan Africa. One major way in which the crisis will affect sub-Saharan Africa in the long term is the projected reduction in official development assistance which many sub-Saharan African countries rely on for budgetary support (African Development Bank 2009: 5 & 11). This is clearly affirmed by data which indicates that official development assistance accounted for 10 per cent of the Gross National Income (GNI) for 23 sub-Saharan African countries and 20 per cent of GNI for another 10 countries in the period 2004-2008 (Anyanwu 2011: 58). Cumulatively, sub-Saharan African countries received a total of about $27.19 billion in 2006-2007 (Arieff et al 2010: 14-15). Donor aid to sub-Saharan Africa was expected to almost double due to the commitment made by the Group of Eight (G-8) in 2005 to raise the amount of official development assistance to sub-Saharan Africa by $21.48 billion by the year 2010 (Arieff et al 2010: 14-15). However, the resultant inward focus by developed countries caused by the shocks of the GFC on their national economies, and on other countries' economies in their regional blocks, official development assistance decreased by $22 billion in 2009 (Anyanwu 2011: 59). The trend persisted in subsequent years, with official development assistance declining by 3 per cent in 2011 and 5 per cent in 2012, and is expected to continue through to 2016 (UNDP 2013: 4 & 7). Between 2011 and 2012, sub-Saharan African countries such as the DRC, Congo, Côte d'Ivoire, Eritrea and Togo witnessed an official development assistance reduction of more than 50 per cent. Little improvement was expected due to the slow recovery of the economy of the USA and other donor countries and the huge bail-outs in Europe due to the Eurozone debt crisis (UNDP 2014: 89). The trend in official development assistance from 1990 to 2013 covering the period prior to the GFC, during the GFC and after the GFC is presented in the graph below (Shah 2014).



Two things are clear from the graph. First, the percentage of official development assistance to poor countries, most of which are in sub-Saharan Africa, has been consistently low (only a quarter of the Development Assistance Committee (DAC) aid). Second, these percentages have decreased even further due to the effects of the GFC, to the detriment of sub-Saharan African countries that are reliant on them. As most of the social infrastructure, services and social safety nets are in a large proportion supported by donor countries, through official development assistance, it can be concluded that this decrease has a direct effect on the realisation of socio-economic rights in the region. This conclusion is affirmed by the table below which is populated with data from the Organisation for Economic Co-operation and Development (OECD) website. The table shows that most official development assistance goes to support mechanisms aimed at the realisation of socio-economic rights:[20]

Countries	Education %	Health & population %	Other social infrastructure %	Total ODA directed to SERs %
Benin	18	17	29	64
Burkina Faso	13	10	20	43
Cameroon	18	11	21	50
DRC[a]	7	17	14	38

20 See OECD website http://www.oecd.org/dac/stats/aid-at-a-glance.htm (last visited 18 February 2015).

Ethiopia	11	23	7	41
The Gambia	5	51	5	61
Ghana	10	18	23	51
Guinea Bissau	29	7	18	54
Kenya	5	31	11	47
Liberia	7	12	22	41
Madagascar	18	25	11	54
Malawi	7	35	10	52
Mozambique	7	29	15	51
Nigeria	6	63	14	83
Rwanda	15	24	18	57
Senegal	21	14	10	45
Sierra Leone	6	14	37	57
South Africa	4	44	9	57
Tanzania	4	30	16	50
Uganda	6	39	17	62
Zambia	6	33	35	74
Zimbabwe	8	26	33	67

a. For the DRC, 25% of official development assistance goes to humanitarian aid, while 20% goes to debt relief.

4.1.2 Reduction in capital inflows and repatriations

The next major way in which the GFC affected sub-Saharan Africa was the general reduction of investment capital inflows and the repatriation of foreign capital flow. Direct private foreign investment in Africa dwindled due to reduced capacity and propensity of foreign investors to invest in sub-Saharan Africa as a result of tighter credit conditions in their countries as well as increased risk aversion due to the dampened growth prospects globally (Macias & Massa 2009: 5; Arieff et al 2010: 9; Anyanwu 2011: 58). Foreign direct investment dropped by around 26.7 per cent in 2009, with the country worst affected being the DRC,[21] where foreign direct investment decreased sharply from $1.713 million in 2008 to $374 million in 2009. This necessitated a World Bank support grant package of $100 million, a $195 million Exogenous Shocks Facility grant from the IMF as well as a $97.18 million budget support grant from the African

21 For an elaboration of the challenges that led to DRC's drastic situation, see ESCR Committee Concluding Observations on the 2nd to 4th periodic report of the DRC E/C.12/COD/CO/4 (December 2009) 2-11.

Development Bank to help finance the country's emergency crisis mitigation programme (Arieff et al 2010: 24 & 26; ODI 2010: 6 & 23).

Cross-border bank lending contracted sharply by about 50 per cent and portfolio investments drastically reduced from investment inflows of $18.7 billion in 2006 to estimated capital outflows of $16.7 billion in 2008 (Arieff et al 2010: 11-12). This is exemplified by the Kenyan situation where a net portfolio equity outflow of $48 million was recorded, leading to a 46 per cent decline in the Nairobi Stock Exchange 20 Share Index in 2009 (ODI 2010: 4). Similarly, in Sudan, the Sudanese Stock Market Capitalisation contracted by 16 per cent and portfolio investments fell from $30.5 million in 2007 to $33.4 million in 2008, indicating a drastic capital flight due to the fall in global oil prices that forms 95 per cent of Sudan's exports (ODI 2010: 4). The high risk aversion to investing in sub-Saharan Africa due to the GFC has also made sub-Saharan African investment bonds and equity markets less attractive to foreign investors, who have chosen supposedly safer assets in their own countries. This led to many sub-Saharan African countries either withholding or totally cancelling their planned issuance of infrastructure bonds in the Eurozone region (Macias & Massa 2009: 5).

In addition, the GFC led to a considerable reduction in remittances from Africans in the diaspora. This was especially true for those in the USA and in the Eurozone, which are the sources of about 75 per cent of the remittances and that were the epicentres of the GFC. In total, remittances declined by about 7 per cent in 2009, although it then recovered, recording a growth rate of 4.1 per cent in 2010, 4.5 per cent in 2011 and 6.2 per cent in 2013, a cumulative total of $32 billion (World Economic Forum for Africa 2009: 5; World Bank 2013: 3). However, this was still $6 billion lower than the figures recorded at the end of 2007 ($38 billion) (African Development Bank 2009: 21-22). Projections estimated that remittances would grow by 8.6 per cent in 2014 towards 9.5 per cent in 2016, amounting to a cumulative total of about $41 billion (World Bank 2013: 3).

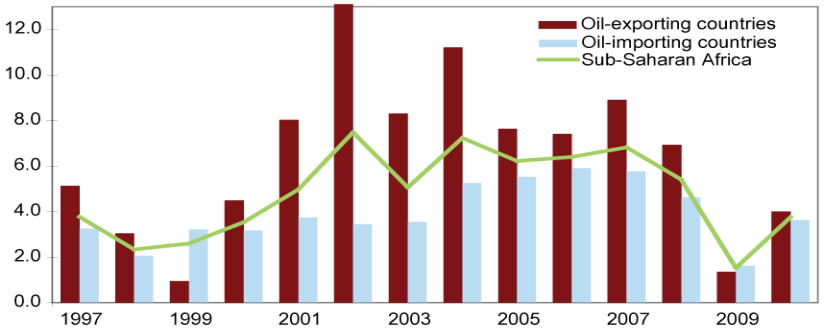
4.1.3 Reduction in demand for sub-Saharan natural resources and commodities

Further, there was a general decrease in demand for natural resources and other commodities from sub-Saharan African countries due to the 12.4% contraction in global trade and dwindling markets in crisis-hit countries (Anyanwu 2011: 57). This led to a considerable fall in the global prices of sub-Saharan African products, with adverse consequences to sub-Saharan African countries, especially those reliant on mining (African Development Bank 2009: 17 & 25), tourism (ODI 2010: 24), agriculture and manufacturing (Arieff et al 2010: 2-3; African Development Bank 2009: 17-19). Sub-Saharan African countries worst hit by the contracting global markets were the oil and metal-exporting countries, with oil prices falling by 60 per cent from the peak prices in 2008 (IMF 2009: 6). Oil importers enjoyed a reprieve from the fallen oil prices but, similarly suffered from the fall in prices of their exports, with coffee, cocoa, cotton, tea and horticulture all being affected (IMF 2009; ODI 2010: 13-14). Ethiopia, for example, witnessed a massive decline in the market prices of cut flowers, earning only 47 per cent of the projected $280 million from flower exports in 2008 to 2009. This had adverse effects on the country's economy in

general, and on flower farmers in particular (ODI 2010: 12). Similarly, Kenya experienced a 35 per cent decline in the volumes of horticultural exports, almost leading to the closure of many of the flower farms (ODI 2010: 12). The challenges of trade contraction and fallen global commodity prices were exacerbated by protectionism and restrictive trade policies in African countries that restrict regional integration and inter-regional trade between African countries. These policies led to an overreliance on international markets for African commodities (Arieff et al 2010: 7). Data indicates that 70 per cent of the African export market is provided by the USA, European Union and China cumulatively, and that the market for sub-Saharan African products in the USA declined by 57 per cent in 2009 (Arieff et al 2010: 8-9).

4.1.4 Economic resilience and recovery

These challenges led to the slowing of the economies of most sub-Saharan African countries, with the general economic growth in sub-Saharan Africa declining from 6.9 per cent in 2007 to 5.5 per cent in 2008, then to 3.5 per cent in the first half of 2009, and finally to 1.6 per cent by the end of 2009 (Macias & Massa 2009: 1; Anyanwu 2011: 56). The median annual economic growth, which averaged 4.75 per cent between 2002 and 2007, also depreciated to 2.5 per cent in 2009 (Arieff et al 2010: 15). Sub-Saharan Africa's declining economic growth was graphically illustrated by the IMF in the following data table:



Source: IMF sub-Saharan Africa Regional Economic Outlook Database, April 2009 (Arieff et al 2010: 5)

However, recently sub-Saharan African economies have shown some resilience by recovering from the slow levels of growth. They have started on a path of steady economic growth of 5.1 per cent in 2013 and 2014, with the growth projection for 2015 at 5.8 per cent (IMF 2009: 65; IMF 2015: 1).[22] This projection is further affirmed by data which indicates that between 2012 and 2013, 33 per cent of sub-Saharan African countries grew at an annual average of 6 per cent, a growth rate only second to East Asia (UNDP 2014:) 16). This positive economic growth projection is mainly due to increased investment in infrastructural development; the

22 However, the IMF in 2015 stated that the sub-Saharan African growth had declined to about 3.75% in 2015 and was projected at 4.25% in 2016.

expansion of productive capacity; a growing service sector; and increased agricultural production (UNDP 2014: 16). Sustained growth in economies is important as it fosters the creation of wealth and job creation, although the challenge remains of ensuring that economic growth is inclusive and equitable. The challenges of inclusivity and equity persist in many sub-Saharan African countries, a fact reflected in the continuing challenges experienced by these countries in the achievement of the MDGs and in the overall realisation of socio-economic rights. This is discussed more elaborately in section 4.2 below.

4.2 Socio-economic indicators and the realisation of socio-economic rights in sub-Saharan Africa in the context of declining economic growth after the global financial crisis

It is generally accepted that the GFC had a major impact on the poverty reduction strategies and efforts of many sub-Saharan African countries. with adverse consequences for the socio-economic well-being of poor, vulnerable and marginalised sectors of their societies. Analyses indicate that in order for sub-Saharan African economies to outpace population growth, to enhance the reduction of poverty, to ensure the creation of employment and to spur general human development, steady economic growth of at least 7 per cent per annum is needed (Arieff et al 2010: 3). How, then, has the GFC and its attendant decline in economic growth of sub-Saharan African countries affected poverty reduction, access to socio-economic goods and services and the overall realisation of socio-economic rights?

4.2.1 Poverty reduction under the first Millennium Development Goal

Globally the world achieved the aim of the first MDG (MDG 1) of halving poverty in 2010 when poverty globally reduced to 22 per cent, and then to 14 per cent in 2015. However, sub-Saharan Africa did not meet the target even after the 2015 cut-off point. While some progress was made in trying to reduce poverty in the region, data indicates that, despite the GFC and its attendant high food and fuel prices, poverty levels continued to decline in sub-Saharan Africa. The proportion of people living below the poverty line decreased from 56.5 per cent in 1990 to 48.5 per cent in 2010, and projections foretold that extreme poverty would decline to around 42.3 per cent by 2015 (UNDP 2013: 9; UNDP 2014: xiv). This, in general, is good progress, taking into account the high levels of extreme poverty in sub-Saharan Africa at the commencement of the MDGs. However this decline is still about 20.3 per cent off the achievement of the MDG 1 target of eradicating extreme poverty and hunger by 2015 (UNDP 2013: 9; UNDP 2014: 12). The statistics further indicate that poverty declined faster between 2005 and 2008, a period of higher economic growth prior to the GFC (UNDP 2013: 9; UNDP 2014: 12)., but, in actual terms, extreme poverty has increased in Africa despite MDG efforts aimed at reducing it. The absolute population living below $1,25 per day increased from 289.7 million in 1990 to 376.8 million people in 1999, 394.9 million in 2005, 399.3 million in 2008, 413.8 million in 2010 and will reach a projected 408 million people in 2015 (UNDP 2013: 9; UNDP 2014: 12). This, therefore, means that the general decline in economic growth experienced during the GFC adversely affected efforts at poverty reduction. People living below the poverty line generally increased by

about 14 million in sub-Saharan Africa between 2008 and 2010, compared to an increase of around 4 million between 2005 and 2008 (Arieff et al 2010: 20).

Even though the GFC was partly to blame for the increase in poverty after 2008, the other part of the blame should go to sub-Saharan African countries for not showing political commitment and investing in social safety nets and other social protection mechanisms to cushion vulnerable households from falling into poverty or extreme poverty at that time (UNDP 2014: 12). Less than 20 per cent of the poorest quintile in sub-Saharan Africa access any form of social assistance as compared to 50 per cent in Eastern Europe and Central Asia, as well as 55 per cent in Latin America and the Caribbean (UNDP 2014: 17). Even the available social safety nets are mostly externally funded, with countries like Liberia, Sierra Leone and Burkina Faso being the most dependent with approximately 94, 85 and 62 per cent external support for social safety net spending respectively (UNDP 2014: 17). These externally-funded social safety nets further suffered a decline in funding due to the general reduction in official development assistance in the face of the GFC and the subsequent Eurozone debt crisis (UNDP 2014: 90). Locally-funded social assistance programmes, such as targeted cash transfers, subsidisation of basic commodities for the poor, healthcare subsidies, cash for work, voucher systems and such similar programmes, would have gone a long way towards stabilising poor families during the crisis, and ensured that the gains made in poverty reduction are not lost due to the crisis. These programmes would also have ensured that the benefits of the continued economic growth were spread equally across the population of the countries, thereby reducing extreme poverty and enhancing a more sustainable, inclusive and people-centred growth that promotes a harmonious citizen-state relationship, and contributes to the building of more cohesive societies (UNDP 2014: 17). Due to the failure to put such measures in place and to adequately target them to the poor and vulnerable with proper state-based budgetary financing, sub-Saharan Africa's share of global poverty rose from 15 per cent in 1990 to 34 per cent in 2010 (UNDP 2014: 12). It grew further, to 50 per cent, in 2015 (World Bank & IMF 2016: xviii).

Employment is one of the key mechanisms to reduce household poverty and enhance access to socio-economic goods and services at the household level. The GFC has had a major impact on employment, with loss of employment being experienced in all major sectors of society in sub-Saharan Africa (UNDP 2014: 23). At the onset of the GFC, the International Labour Organisation (ILO) predicted that unemployment would increase by 8.5 per cent with an additional 3 million people becoming unemployed. They also said that vulnerable employment would increase from 77.4 per cent in 2007 to 82.6 per cent in 2009, meaning that over 28 million people would join the rank of those in vulnerable employment. The number of the working poor earning less than $1.25 per day was predicted to increase by an additional 36 million people (Owoye 2009: 11; Devarajan & Kasekende 2011: 249). These estimates have been borne out through the crisis with data indicating that in many sub-Saharan African countries the rate of employment has either declined (Devarajan & Kasekende 2011: 249) or remained constant at 2.9 per cent. with the majority of people, around 77.6 per cent, being employed in vulnerable informal sectors (UNDP 2014: xiv). Widespread informal employment in

sub-Saharan Africa is affirmed by data which indicates that in most of the countries, between 25 to 65 per cent of workers are employed in the informal sector (UNDP 2014: 19). The situation has adversely affected women, who are found in vulnerable employment more often than men, with data indicating that over 85 per cent of women are employed in these vulnerable jobs as compared to 70.5 per cent of men (UNDP 2014: 19). The other group that has equally suffered due to the shrinking of sub-Saharan African countries' economies are young people, who have not been absorbed in the labour markets due to the few available job opportunities (UNDP 2014: 23). Young people constitute 60 per cent of those unemployed in sub-Saharan Africa, and in many countries the rate of youth unemployment is double that of unemployed adults; resultingly young people are left out of the processes of economic development (UNDP 2014: 23-24). This has led to youth dependency and an increase in the levels of insecurity, social disunity and armed conflict, with adverse consequences to social cohesion and political stability in the region. It is recommended that sub-Saharan African countries adopt policies aimed at creating employment in the formal sector so as to enhance access to employment, to increase the general tax base and generally to spur a rapid reduction in poverty and inequality.

4.2.2 Education under the second Millennium Development Goal

Education is the key to accessing employment and realising other socio-economic goods and services, including health, proper nutrition and adequate housing. Despite the GFC and the resultant decline in economic growth in sub-Saharan Africa, many countries have continued with programmes to enhance access to free and compulsory basic education in the region (UNDP 2013: 10). Data indicates that primary school enrolment increased from 58 to 76 per cent between 2000 and 2010, at an annual rate of 1.5 per cent (UNDP 2013: 10). Subsequent statistics show an improvement in the net primary school enrolment, with 25 sub-Saharan African countries having achieved the net enrolment ratios of 80 per cent or more and only 11 countries reporting a ratio of below 75 per cent (UNDP 2014: xv).[23] Despite the constant improvement in enrolment numbers, planning has not taken into account the increased pressure new quantities of enrolment place on available infrastructure and human resource capacity. As a result the quality of education has plummeted drastically in public primary schools, so that education no longer has the capacity of enhancing functional learner literacy, numeracy and the development of life skills. Low completion rates, high dropout and high repetition rates have been experienced in public schools, with the consequence that inequality between the poor and the rich is propagated as the rich are able to enrol their children in better-quality private schools (UNDP 2013: 10). The low completion rates are affirmed by data which indicates that 28 per cent of sub-Saharan African countries (with available data) post a completion rate of below 60 per cent; over 22 per cent of children of school-going age in sub-Saharan Africa are out of school; and one-third of enrolled children drop out of school without acquiring the minimum basic competencies in reading and mathematics (UNDP 2014: xv & 36). Therefore, despite high enrolment numbers and improved

23 These countries are Burkina Faso, Central African Republic, Côte d'Ivoire, Djibouti, Equatorial Guinea, The Gambia, Liberia, Mali, Nigeria and Niger.

completion rates generally, more can be done to improve the quality and skill content of education in sub-Saharan Africa. This may partly require increased resources to be channelled towards education, but partly also needs commitment at the political and governmental level to enhance the quality of education in public schools, with the aim of enhancing equality between the rich and the poor and reducing the inequality gap in the region.

It is accepted that, related to the need for more resources to maintain the current levels of enrolment and retention in schools, investment in infrastructure and human resources is also needed to improve the quality of education. The impact of the GFC is still being felt in some sub-Saharan African countries, a clear indication of the adverse impact of the GFC on education in sub-Saharan Africa (UNDP 2014: 36). Further, the 6 per cent decrease in official development assistance to education in sub-Saharan Africa has exacerbated the general lack of funding for education by sub-Saharan African governments, as most of the free primary and secondary education budgets of most countries were supported by donors who have reduced funding to these programmes since the GFC (UNDP 2014: 90). If sub-Saharan African governments do not prioritise education and find alternative sources of funding from their own budgets, skill and human capital development will be adversely affected. This will have dire consequences for labour productivity and sustainable human development.

4.2.3 Gender equality and women's empowerment under the third Millennium Development Goal

Gender parity in primary school enrolment continued to improve despite the GFC. This was especially due to the free universal primary school programmes adopted by many sub-Saharan African governments and which have been supported by gender-responsive policies and interventions that have advocated girl-child education (UNDP 2015: xiv). This result is important for the overall growth in human development indicators in sub-Saharan Africa, as gender equality and women's empowerment have attendant benefits in relation to reducing poverty and mitigating hunger, improving health and educational outcomes in families and communities, as well as ensuring environmental sustainability (UNDP 2015: 15). Primary school completion rates and transition to post-primary education – secondary and tertiary levels – is still low at 76 girls per 100 boys (UNDP 2015: 18; Africa Renewal 2010). While sub-Saharan Africa has continued to make progress in women's representation in political spaces, with the number of women in parliament and high government positions rising steadily as a result of constitutional or legislative provisions on gender equality and the representation of women (UNDP 2015: 15).

The region has continued to struggle to ensure equal access to non-agricultural employment opportunities, with women still lagging behind in access to these employment opportunities (UNDP 2015: 16). The major challenges limiting access have been low educational attainment due to low transition rates to post-primary education; large wage differentials; the time burden relating to domestic tasks; the limited availability of child care services; and constraining customary laws and practices which limit the chances of women working outside the family home, among other

constraints (UNDP 2015: 16). Efforts and resources should have been expended at creating a conducive environment for women to equally participate in society by creating more employment opportunities; providing basic services to enable women to engage in other productive work away from the home; and developing relevant laws and policies to ensure equality and non-discrimination in the areas of political, social, economic and cultural life. Some of these measures would not have required much resources, and the fact that little has been done shows that the failure to achieve MDG 3 in sub-Saharan Africa was not due to the GFC, but mainly due to lethargy and a lack of political will among leaders at different levels in the region to create a level playing field for women in all sectors of life.

4.2.4 Hunger reduction under the first Millennium Development Goal

Food is fundamental to human survival and well-being. However, increasingly, many people in sub-Saharan Africa are unable to access an adequate amount of food to meet their basic nutritional needs and enable them undertake their daily activities. Data indicates that globally about 795 million people do not have access to adequate food to lead healthy and active lives. This translates to about one in nine people in the world (FAO, IFAD & WFP 2014: 4 & 8). The majority of these people live in developing countries, with Asia and sub-Saharan Africa bearing the burden of hunger, with data indicating that in sub-Saharan Africa at least one in four people is perennially undernourished (FAO, IFAD & WFP 2014: 9). Data further indicates that more than a quarter of the world's chronically undernourished people live in sub-Saharan Africa, where the number of hungry people increased by over 38 million people between 1990 and 1992 (FAO, IFAD & WFP 2014: 12). The food security situation in this region has over the years scarcely improved. In the period between 2011 and 2013, 25 per cent of the population of the region faced hunger and malnutrition, a mere 8 per cent improvement on the 1990 to 1992 period, when 33 per cent of the population was hungry (UNDP 2015: 2). When the MDGs finished in 2015, undernourishment had fallen slightly to 23 per cent, way below the 16.5 per cent required to meet the MDG target (UNDP 2015: 21). This compares adversely to other regions, especially Asia and Latin America that reduced hunger by 45 per cent in the same period (UNDP 2015: 2). Data further indicates that in real numbers, the total number of chronically underfed in sub-Saharan Africa has consistently increased from 176 million in 1990 to 1992, 202.5 million in 2000 to 2002, 205.3 million in 2005 to 2007, 211.2 million in 2008 to 2010 and 214.1 million in 201 to -2014, an increase of 38.1 million people (FAO, IFAD & WFP 2014: 8). This number has further increased to around 44 million people in 2015, which shows that the level of people suffering extreme hunger and malnutrition in sub-Saharan Africa is increasing, not reducing (UNDP 2015: 21).

The above data indicates that despite the economic growth experienced between 2000 and 2007, there has not been much emphasis placed on reducing poverty and inequality through the creation of employment and the establishment of social safety nets that would have cushioned the vulnerable population from hunger and malnutrition. Although exacerbated by the GFC, the high hunger and malnutrition incidences in sub-Saharan Africa were mainly the result of entitlement failures among vulnerable populations in the region. These failures may be attributed to a

lack of government investment in agriculture and the livelihoods of smallholder farmers and farm workers; a lack of investment in rural development and poor access to basic services in informal urban settlements; and the general failure to invest in social protection mechanisms, such as social safety nets to enhance the reduction of poverty and cushion the food-poor populations from shocks such as the GFC.

4.2.5 Health under the fourth, fifth and sixth Millennium Development Goals

Regarding the realisation of the right to health, sub-Saharan African countries have made progress in the reduction of the U5MR in accordance with the available data, which indicates that the numbers reduced from 132 deaths per 1 000 live births in 2008 to 98 deaths per 1 000 live births in 2012 (UNDP 2014: 56; UNDP 2013: 13). The reality, however, varies widely between the different sub-Saharan African countries, with a 46 per cent reduction in Southern Africa and a 42 per cent reduction in East and West Africa in 2011 (UNDP 2013: 13). A greater challenge has been encountered in Central Africa which still experiences 139 deaths per 1 000 live births (UNDP 2013: 13). Slow progress has similarly been witnessed in the achievement of MDG 5 on the reduction of maternal mortality, with sub-Saharan Africa still accounting for 56 per cent of global maternal deaths by 2010 (UNDP 2013: 14). Sub-Saharan Africa has managed to reduce the maternal mortality rate from 870 deaths per 100 000 live births in 1990 to 460 deaths per 100 000 live births by 2013, at an annual rate of 2.7 per cent, although the reduction still witnessed over 164 800 maternal deaths in the year 2010 alone (UNDP 2013: 14; UNDP 2014: 61). Progress in the reduction of maternal mortality varies between the different regions, with East Africa registering a reduction of 56 per cent; a 46 per cent reduction in West Africa; 38 per cent in Central Africa; and 20 per cent in Southern Africa (UNDP 2014: 61). At the country level, only Equatorial Guinea has achieved MDG 5 with a 81 per cent reduction, and Eritrea is also in the process of achieving the same by 2015 (UNDP 2013: 14). Although most sub-Saharan African countries have made progress towards reducing maternal mortality, others, such as Botswana, Chad, Cameroon, Congo, Lesotho, Somalia, South Africa, Swaziland and Zimbabwe have unfortunately experienced an increase (UNDP 2013: 14-15). Since the major causes of maternal mortality are preventable, these countries must put in place an adequate health infrastructure and build the capacity of the health systems generally to deal with causes and reduce the high rates of maternal mortality. In relation to malaria and HIV, sub-Saharan African countries have made progress in the reduction of incidences and deaths related to malaria by an average percentage of 31 and 49 per cent respectively (UNDP 2014: xvii). Similarly, good progress has been made in the fight against HIV and its effects, with the prevalence rate falling from 5.8 to 4.7 per cent in the period 2000 to 2012, and the proportion of the infected population on ARV treatment increasing from 48 to 56 per cent between 2010 and 2011(UNDP 2014: xvi & 68). As a result, there has been a decline in AIDS-related deaths among adults and children from 1.8 million in 2005 to 1.2 million in 2012 (UNDP 2014: 68).

The reason for the slow progress in the reduction of the U5MR, the MMR and the other health indicators in sub-Saharan Africa has been poor health systems due to low investments in healthcare, contrary to the undertakings under the Abuja Declaration which required that, in order to

improve the health sector, healthcare expenditure should form at least 15 per cent of a country's annual budget (Kiragia et al 2011: 4; USAID 2010: 1). According to WHO, only two sub-Saharan African countries, Rwanda and South Africa, have met the 15 per cent requirement (WHO 2011: 3), although the AU has indicated that six of its members have reached the target, namely, Rwanda (18.8 per cent), Botswana (17.8 per cent), Niger (17.8 per cent), Malawi (17.1 per cent), Zambia (16.4 per cent) and Burkina Faso (15.8 per cent) (PPD ARO (undated) 1). WHO has warned that without increased financial investment in the health sector, most of the sub-Saharan African countries will not achieve the target of MDGs 4, 5 and 6 as well as the other health-related MDGs (WHO 2011: 3). The other factor leading to the slow progress in achieving the reduction of the U5MR, MMR and the other health-related MDGs is the poor condition of the other determinants of health, such as household education, income and housing, and insufficient and inappropriate nutrition practices as well as poor sanitation facilities (UNDP 2013: 13). If all sub-Saharan African countries are to achieve the MDG target of reducing the U5MR by two-thirds by 2015 as well as the other health-related MDGs, there needs to be more political will and commitment to investment in the healthcare infrastructure and other health-related systems, as well as an increased investment in the other determinants of health discussed above. This need for greater budgetary investment has been increased by the continued GFC-induced decrease in official development assistance from donor countries. This was directed mostly at the improvement of the health sector and the provision of essential medication, especially the free ARV programmes, in the many sub-Saharan African countries (Kiragia et al 2011: 3; USAID 2010: 4-5). It is, therefore, imperative that if the gains made in the realisation of the right to health are to be maintained, an increased budgetary allocation that meets the obligations of the Abuja Declaration must be achieved and reinforced domestic resource mobilisation strategies must also be adopted by all sub-Saharan African countries (Kiragia et al 2011: 8).

5 Conclusion

The article undertook an analysis of the effect of the GFC on the realisation of socio-economic rights in sub-Saharan Africa. The data analysed indicates that the GFC markedly reduced capital inflows to sub-Saharan Africa through the reduction in official development assistance, direct foreign investments, portfolio investments, the prices of African products in the global market, cross-border bank lending and diaspora remittances. The reduction in employment opportunities and the purchasing power of citizens at the national level also impacted negatively on the tax revenue collected by governments. As a result of these challenges, many sub-Saharan African countries experienced a contraction of their economies, necessitating the adoption of policy measures such as economic stimuli packages aimed at arresting the decline; stimulating domestic demand; improving production capacity; supporting long-term economic growth; and creating employment opportunities. These findings are not controversial, and have been affirmed by many international organisations that work in Africa, such as the World Bank, the IMF, the African Development Bank, UNECA and the UNDP. What has not been addressed elsewhere and which formed the core of this research relates to

the impact that the GFC has had on the realisation of socio-economic rights. According to the findings of the research, the GFC might have exacerbated the socio-economic conditions of poor and vulnerable groups and communities in sub-Saharan Africa, but it was not the main cause. This is affirmed by data on the processes of the achievement of the MDGs, which have a close connection with the realisation of socio-economic rights, and which show that even though sub-Saharan Africa experienced increased economic growth between the periods of 2000 and 2008, this was not met with the commensurate eradication of poverty, the improvement in the living conditions of the majority of the population and the enhancement of access to employment and other socio-economic goods and services. This is mainly due to two reasons: first, the extreme inequality in sub-Saharan Africa, which meant that the benefits of the economic growth were not equitably distributed among the population, and, second, the lack of political commitment to increase social spending and to establish social safety nets to cushion poor and vulnerable communities from exogenous shocks such as high food and fuel prices, adverse weather conditions and financial shocks, such as the GFC.

The above findings are affirmed by the analysis of the post-GFC data on the achievements of the MDGs, which does not show a marked reduction in the process of the realisation of the MDGs subsequent to the GFC. The data shows that the GFC had a relatively adverse impact on employment creation and adversely impacted on strategies for the reduction of poverty, with the result that more people fell into poverty between 2008 and 2010 as compared to those who fell into extreme poverty between 2000 to 2008 (a difference of 10 million people). However, regarding the other MDG indicators, such as achieving universal primary education, promoting gender equality, reducing maternal and child mortality, combating HIV, malaria and other diseases, and ensuring sustainability of the environment, the progress has remained almost the same, an indication that the GFC did not have a great impact on their achievement, or lack thereof. Even regarding poverty reduction and unemployment, which were adversely affected by the GFC, the research found that the drastic effect was partly contributed to by the failure of sub-Saharan African countries to put in place social safety nets and other social assistance measures to cushion vulnerable households from falling into poverty in instances of financial shocks, such as the GFC.

The conclusion that may be drawn from the research is that, even though the GFC had some impact on the realisation of socio-economic rights in sub-Saharan Africa, its impact would have been greatly lessened if sub-Saharan African countries had shown political commitment and developed proper mechanisms for the realisation of these rights. The research noted the general apathy of these countries towards social spending and the amelioration of the conditions of the poor and vulnerable in society. It can, therefore, be said that the reason for the failure of sub-Saharan African countries to achieve the MDGs, which have a very close link with the realisation of socio-economic rights, has not been due singularly to the GFC, but has been due mainly to inequality, an attitude of indifference towards the poor, the lack of political will by sub-Saharan African governments to ameliorate the conditions of the poor and vulnerable in society, and the siphoning off of available public resources to the pockets of the elite in society through corruption and other economic malpractices. This conclusion is affirmed by the findings of the ESCR

Committee in its analysis of the combined second to fourth report of the DRC, one of the sub-Saharan African countries that was worst hit by the GFC, where the Committee states that the slow progress in the realisation of socio-economic rights was not due to instability and armed conflict, but impunity for human rights violations, corruption and the illegal exploitation of the country's vast natural resources (ESCR Committee 2009: 2 & 4-6).

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M Mullen, P Santosa, J Tapiheru & E Valiente-Riedl 'Market might in Factory Asia: The struggle to protect labour' (2017) 1 *Global Campus Human Rights Journal* 47-70

Market might in Factory Asia: The struggle to protect labour*

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Abstract: *'Factory Asia' pejoratively frames a situation of oversupply in low-skilled and underpaid wage labour, where people work in immiserating conditions, deprived of essential opportunities for political organising and the right to freedom of association. The context is such, in part, because the market enjoys considerable leverage and might over states and labour in the region. A range of factors, including capital mobility, the 1997 Asian financial crisis and global neo-liberal pressures, combine to dislocate the state from its role as protectorate and provider, and foreclose on conventional channels that offer protection for workers. This article frames and illustrates these dynamics, and argues that labour encounters a myriad of challenges, but also new opportunities for re-articulation, mobilisation and protection around labour rights. Two case studies, those of Indonesia and Thailand, provide empirical grounding for this thesis and convey both commonalities and contrasts in local labour struggles. In Indonesia, the increasing dislocation of the state needs to be understood in the context of the manifestation of a dual labour market. This has produced contrasting experiences of informal and formal workers. Accordingly, the resilience of traditional models of labour mobilisation (such as unions) diminishes compared to the growing relevance of informal and collective social protection systems. In Thailand, union advocates remain adamant about the need to realise international labour rights norms precisely because of deepening union restrictions and the state's reluctance to fulfil its duties. Meanwhile, other labour rights groups have sought space, protection and action from duty bearers through non-traditional methods. Relations between these networks can be tense, but they combine into a formidable, even if uncertain, force. In both case*

* Authors listed in alphabetical order. The team wishes to acknowledge the support of Professor Nicola Piper (University of Sydney) for her contributions to research design and editing, and Lilly Moody (Australia), Primi Suharmadi Putri (Indonesia), Tasha Nastiti Waris (Indonesia), Syed Mahmood (Thailand) and YaTu (Thailand) for their research assistance. Paper prepared for the Global Classroom project, organised by the European Inter-University Centre for Human Rights and Democratisation (EIUC) in Venice, Italy, from 11 to 15 May 2015.

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studies, the dislocation of the state has led to new and thickening vulnerabilities for labour working in the shadow of the market, but also to unconventional opportunities for protection and mobility.

Key words: *labour rights; labour mobilisation; Asia; Indonesia; Thailand*

1 Introduction

Asia has infamously gained status as the 'World's Factory', characterised by an oversupply in low-skilled and underpaid wage labour, where people work in immiserating conditions, deprived of essential opportunities for political organising and the right to freedom of association. This has produced a veritable 'crisis of labour' within which traditional methods of advocacy and organising have been unreliable in raising the conditions on the factory floor. This is due in large part to the rising might of the market in Asia which, for better or for worse, sets clear challenges for labour rights advocacy. With the international human rights regimes relying on a 'state champion', and the market-based economic system increasingly bereft of meaningful state leverage, alternative approaches for protecting labour have become necessary. Those working to protect labour must invent innovative methods of prompting forces within and around the market to act as a protective force.

Using a desk-based analysis and several in-depth interviews with practitioners in the field,[1] this research led us to conclude that, while the market seems to rule the political economy in Asia, resulting in a myriad of challenges for labour protection, significant opportunities for re-articulating and mobilising protection have emerged. After a theoretical framing and regional snapshot, the article deconstructs this dynamic using the contrasting case studies of Indonesia and Thailand. Along the way, our analysis produces the following key observations, namely, that (i) the market increasingly dominates the political economy of Asia; (ii) this dislocation of power compromises formal state-based protection systems; (iii) the result is a labour protection crisis in Asia; and (iv) rights groups have turned to alternative approaches for protection, and see both challenges and opportunities.

2 The crisis of labour protection in Asia: Contesting actors and systems of protection

The experience of a deep and escalating labour rights crisis in Asia must be located in an increasingly global production system ('the market'), characterised by the advent of mobile capital and the phenomenon of an increasingly surplus labour force. Within a marketised global economy, Asia's labour force is increasingly understood to feed the factory floor of global production (commonly referred to as the 'Factory Asia' phenomenon). Here, 'market-friendly' conditions have spurred the relocation of a flood of low wage and 'no-frills' manufacturing jobs to the

1 As this juncture between market-based advocacy and traditional collective action offers an emerging advocacy dynamic in Thailand, interviews with practitioners engaged in the field provide grounded insights. A full list of practitioners interviewed can be found in Annex 3.

region, wherein states compete in a 'race-to-the-bottom' at labour's expense to maintain their appeal to mobile capital in this sector. The analysis that follows explores the relative role of the state and market in development in this context, noting the increasing dislocation of the state and its capacity to buffer the negative impacts of the market in the region. The rise of 'market-led' development and the associated labour rights crisis in Asia then leads to a discussion of alternative systems of labour rights protection and advocacy.

2.1 Debating state versus market-led development in Factory Asia

The expansion of the capitalist system of ownership and production[2] sees economic activities evolve as regional and global enterprises where 'mobile' capital manifests a global division of labour. This veritable eradication of borders in an emerging 'global economy' does not assume the eradication of the state in economic management. Wolff (2010: 133) contends that capitalism oscillates between 'two forms': 'private capitalism', which is characterised by free market policies and minimal state intervention; and 'state capitalism', which is characterised by Keynesian economic policies, within which the state intervenes to buffer the impact of the market. This tension over the primacy of the state versus the market in capitalist systems of production is clearly manifest in debates over economic development.

Development economics only emerged as a branch of economics after World War II. However, a consideration of how economies prospered had been a key concern of the social sciences long before that (Szentes 2005: 146). A pioneer of this new branch of economics was Arthur Lewis, who in the 1950s argued that development as a concept was fundamentally tied to aspirations of 'economic growth', a clear departure from the emphasis on (re)distribution policies that were espoused in the welfare economics of the time (Esteva 1992: 12). Under a growth-oriented development paradigm, there were key implications for the perceived role of government (Frankovits 2002: 1). There was a clear shift in expectations where '[f]rom redistributors, governments are being transformed into regulators' (Frankovits 2002: 1). This approach gained momentum and was rearticulated through the rising authority of neo-classical economics, which emphasised the free market as the key engine for development, espousing a minimal role for government. This absolute faith in the logic of the market and the importance of growth came to form the basis of a neo-liberal ideological platform, upon which the structure for a new global economy would be built.

Neo-liberalism gained a foothold as the global development orthodoxy in the 1980s, promoting the advantages of a private capitalist model for development. It advanced the importance of 'market-led development', typically on the basis of privatisation, deregulation and an 'export-led growth' model (penned the 'Washington consensus' (Williamson 1990)). It later evolved to concede a minimal role for the state to promote 'good governance', but only for creating market-enabling institutions (penned

2 Capitalism refers to 'a system in which ownership or control of the means of production, including land, labour, and capital, by individuals and/or organisations is employed to create a profit, some of which is reinvested to increase profit-generating capital and accumulate further capital' (Stubbs 1995: 787).

the 'post-Washington consensus' (Carroll & Jarvis 2014: 11)). This agenda was pushed heavily through the funding and conditionality of the World Bank and International Monetary Fund (IMF), and also via trade negotiations through the World Trade Organisation (WTO). However, it was also met with strong counter-narratives and strategies. For example, 'dependency theorists', pioneered by the work of Gunder Frank in the 1960s, argued that in a global economy, development in the 'first world' was actually causing 'underdevelopment' in the 'third world', with first world economies rising through the exploitation of so-called 'developing' countries (Gunder Frank 1966). It is perhaps not surprising that in Asia, states for some time retained an active role in the management of their integration into the global market.

Asia as a region boasts a unique political economy, featuring a variety of political systems and economic management models (Carroll & Jarvis 2014: 2-3). Importantly, the 'developmental state' has featured strongly in comparison to other regions (Stubbs 1995: 79).[3] The achievements and success of the Asian development state model are contested, particularly regarding any claims that these produced strong systems of rights protection. However, this phenomenon demonstrated the scope for a strong state mechanism to play a central role in emerging regional markets. Gray (2015: 102) defines the developmental state 'as autonomous bureaucracies formulating industrial policies for the wider purpose of national development'. Yet, the experience of the developmental state phenomenon in Asia did not imply a rejection of integration into the global capitalist value chain, with the region consistently opening its markets over time. For example, strong developmental states actively pursued foreign direct investment (FDI) in their economies (Stubbs 1995: 790-91). Looking at the region as a whole, Annex 1 shows the phenomenal sustained growth of FDI inflow into Asia across three decades, which grew to 22.9 per cent in the year before the Asian financial crisis (AFC) hit, and achieved 30 per cent by 2013. Looking at the significance of trade in the region, between 1980 and 1996 trade in East Asian and Pacific countries rose from just over 30 per cent of gross domestic product (GDP) to nearly 90 per cent (ILO Global Wage Report 2008/9: 4). However, largely as a direct result of the AFC in 1997, the legitimacy and influence of the Asian development state would wane.

Quite apart from the dramatic human impact, financial crises strongly inform debates over economic management, leaving their impression on the prevailing economic orthodoxy and providing opportunities for new policies to be swept in with full force. The 1997 AFC has been described as 'the first crisis of globalisation' (Higgott 1998: 334 in Carroll & Jarvis 2014: 5). Carroll and Jarvis (2014: 12) explain that it brought with it renewed debate over Asia's development and, more importantly, it allowed 're-entry and/or increased involvement of the World Bank and the International Monetary Fund (IMF) into the policy space of some of the region's developmental superstars'. Effectively, it armed a strong defence of neo-liberal ideology, which would be pushed through in practice by the escalated involvement of the international financial institutions (IFIs) in

3 Notably, the performance of the regions rising developmental states (Japan, Hong Kong, the Republic of Korea, Singapore, Taiwan, Indonesia, Malaysia and Thailand) prompted the World Bank's 1993 *East Asian Miracle* report and fuelled growing interest in an alternative state-led model for development (Carroll & Jarvis 2014: 6-9).

the region (Carroll & Jarvis 2014: 12; Gray 2015: 114). For example, the IMF immediately delivered austerity packages to Thailand, Indonesia and South Korea (Carroll & Jarvis 2014: 12), through which its influence in those states was increased. More broadly, sovereign debt grew exponentially, sealing the growing incapacity of the state (see Annex 2). Indeed, in Asia the AFC served as a 'game changer' for development policy in the region. Along with it, an onslaught of 'market-correcting' neo-liberal policies simultaneously strengthened an emerging free market in the region, while also rolling back the market-mediating capacity of the state.

2.2 A growing 'labour rights crisis' in Asia

Within a Marxist critique,[4] 'economic crises' are not merely temporal and situational phenomena, but structurally wedded to the (dis)function of the market itself and deeply connected to the tension between the forces (and interests) of labour and capital. Marxian critique famously provides a 'class' analysis, which observes that the capitalist system of production is based on the commodification of labour. Wolff (2010: 133) provides a very basic explanation of a key truism in economics, originally formulated in classical economics and firmly embraced by Marx: the 'labour theory of value':

> A small group of people oversees the production and sale of commodities produced by a large group of hired labourers. That small group appropriates and distributes the surplus – the excess of the value added by workers over their wages – embodied in those commodities.

In the context of a globalising capitalist system, and particularly in conditions of private capital where the interests of labour and capital are not mediated by an interventionist state, the scope to maximise surplus value from labour is heightened.

For Marxists, the exploitation of labour is central to understanding recurrent crises. For example, assessing the recent financial crisis in the United States of America, Wolff (2010: 138) observed the increasing capacity for capital to stall wage rises in the US, through displacement of labour with technology, shifting production to source lower-wage labour, and also through the 'reserve army of labour' forming through the entry of women and migrants into the labour force. This led to the accrual of household debt as workers supplemented low wages with credit lines, and the realisation of super profits by capital, providing a money pot that fuelled 'poor investments and financial speculations' (Wolff 2010: 142). Explanations of financial crises vary;[5] however, the Marxian explanation points to the reality of a 'labour crisis' embedded in the very logic of the capitalist market economy. This 'economic' crisis of labour is crucial to understanding the condition of labour rights abuse in Asia and, connected to this, the challenges for labour rights advocacy.

4 Note that Marxist literature is not homogenous with Marxian ideas highly contested and prone to multiple interpretations (Wolff 2010: 130). This article refers to foundational concepts that underpin Marxian economic analyses.

5 For example, Keynesian and neo-classical economists remain in a permanent 'tug-of-war', the former claiming the need for state intervention to discipline private capitalism and avoid/manage crises while the latter blame state interventions for creating market distortions (Wolff 2010: 134).

In the context of a globalising capitalist system, the increasing mobility of capital has been associated with the phenomenon of the 'global factory' (De Angelis 2000 in Chang 2009: 162). This, in turn, is characterised by the rising informalisation of labour (Chang 2009: 165). Here it is important to differentiate between the traditional concepts of the 'informal sector' (referring to the 'self-employed' undertaking work outsourced from the formal sector (Chang 2009: 172-174)) to that of the 'informal economy'. The latter spans the informal sector but also the increasing 'informality' of the formal sector, within which flexibilisation and outsourcing of work encroach on the provision of formal protections (Chang 2009: 170). Certainly, the global factory phenomenon has manifested the rise of 'informality' in Asia. In 2002, the ILO estimated that the informal sector accounted for 41 per cent of GDP in Asia and also for 65 per cent of its work force (ILO 2002: 19 & 24). Specifically in India, Indonesia and the Philippines, the proportion of informal non-agricultural employment was 83, 78 and 72 per cent respectively (ILO 2002 in AMRC 2014: 89). In Indonesia and Korea, the rates of informality grew after the AFC (Chang 2009: 171-2). The changing condition of labour in a 'global factory', within which capital commands super profits and surplus labour searches for space, sets important challenges for the advocacy of labour rights, particularly given the diminishing legitimacy and capacity of a 'state champion' to address the rising precariousness of labour.

2.3 Opportunities and challenges for labour rights advocacy in the region

Sen defines development as 'the expansion of the 'capabilities' of people to lead the kind of lives they value – and have reason to value' (Sen 1998: 18), whereby the market serves as only one of many mechanisms that may advance the freedoms of individuals (eg Sen 1999: 3). In the context of mobile capital in the 'global factory' and its implications for 'Factory Asia',[6] the means of expanding the capabilities of the labour force continue to be debated. The traditional 'champions' of workers' rights (either states, once legitimately working as 'welfare states', or unions, which have their origins advocating in the context of domestic supply chains) lack leverage in the context of a global capitalist economy, where mobile capital increasingly dictates the conditions of labour. There is clearly a need to (re)articulate actors and mechanisms to 'champion' the advancement of labour rights in the region. Sen's work points to 'a need to develop and support a plurality of institutions' (Sen 1999: 53). However, with an emphasis on individual freedoms and agency, Sen's discussion on enabling institutions is thin. For example, Evans (2002) points to the neglect of the role of collective agency.

A pragmatic approach to the realities of a global economy suggests the need to turn to market actors and market mechanisms, fuelling the popularity of 'market-based advocacy'. If the crisis of labour is due to exploitation by private capital, then, surely, the answer to advancing labour rights is to appeal to private capital to raise its standards. Moreover,

6 Asia Development Bank (2013: iv) describes it as follows: 'Factory Asia' – these two simple words help define Asia's phenomenal economic growth over the past two decades. A growing population eager to earn more provided relatively cheap and abundant labor in the last decade of the 20th century and the early part of the current century, producing many of the manufactured consumer goods the world needed.'

while 'mobile capital' undermines leverage of the state or labour, through its ability to threaten to move production and associated jobs away, again, surely the answer to advancing labour rights is to appeal to private capital as a means of raising standards without chasing business away. Arguably, business has revised its 'bottom line'. Elkington (1999) contends that the need for 'sustainable capitalism' has re-defined business's 'bottom line', inserting environmental and social justice concerns among traditional economic imperatives. The demands are not just posturing, according to Elkington (1999: 2), but rather

> [t]o refuse the challenge implied by the triple bottom line is to risk extinction … These challenges flow from a profound reshaping of society's expectations and, as a result, of the local and global markets business serves.

However, this 'revision' of business's bottom line relies very much on assumptions about business's changing 'self-interest', whereby concerns about sustainability (for instance environmental) but also consumer preferences[7] compel a changing business agenda, and raise questions regarding a new corporate ethic.

Corporate social responsibility (CSR) serves as a flagship for market-based rights protection, instituting the redefinition of business's bottom line. It may be defined as 'a company's responsibility beyond return to shareholders to include an acknowledgment of its responsibilities to a broad range of stakeholders throughout society including employees, customers, business partners, communities and the environment' (Business for Social Responsibility 1 in Baughn, Bodie & McIntosh 2007: 191). It is supported globally by a range of initiatives, including the United Nations (UN)'s Global Compact, which was established at the turn of the century. However, it has evolved as a typically voluntary mechanism through which businesses commit to raising standards within their supply chains.[8] The lack of enforceability points to the continuing tensions in how a business defines its bottom line and its relative commitment to human rights. Chan (2010), in a qualitative study of workers' representation in corporate China, found a clear disconnect between the underlying imperative toward profit maximisation and the new-age concerns with human rights. In a case study of Reebok, the researcher observed that 'Reebok's production department does not know, and does not much care, what its human rights department is doing' (Chan 2010: 216). For example, efforts made by the disconnected human rights department to spur workers' representation were seen as 'top-down', leading to a recommendation by the author that the CSR model would benefit from engagement with national and international trade unions. However, unionisation also faces important challenges before it can serve as a conduit between workers and corporations.

According to Wong and Chang (2005: 128), 'capital mobility' serves as the central threat to the labour movement, both serving as the 'greatest fear for worker organisations' and as 'a good excuse for governments to introduce anti-labour policies in many countries'. However, the labour

7 See Harrison, Newholm & Shaw (2005) for a comprehensive discussion of the phenomenon of 'ethical consumption' and how it is re-shaping business imperatives.

8 There are important regional differences here, with the advent of regulatory measures in and across countries in Europe strengthening the CSR model in this region (Baughn, Bodie & McIntosh 2007: 191).

movement faces challenges from within as well, with the increasing 'informality' of labour proving divisive. This is due to a range of factors, including the lack of protection afforded informal workers (Chang 2009: 176) and the tensions between formal and informal workers, with formal workers traditionally organising to protect jobs in a domestic context, not identifying shared interests with the informal workforce (Chang 2009: 168). The tensions in the labour movement itself, as well as its lack of leverage in the face of capital mobility, suggest the need for the labour movement to (re)articulate itself in and across borders in 'solidiarity' with other interest groups (Wong & Chang 2005; Chang 2009). Indeed, in the same way that CSR may benefit from engagement with labour rights movements, the latter may benefit through more co-ordinated engagement with both business and consumer interest groups. To move this discussion from the abstract, the following case analyses will begin to map some of the constraints and opportunities for institutionalising labour's capabilities through contrasting discussions of collective action-based (Indonesia) and market-based (Thailand) strategies.

3 State dependency and its alternatives in Indonesia

3.1 Context

When the Asian financial crisis (AFC) hit Indonesia in the late 1990s, Indonesia was under Suharto's authoritarian 'New Order' regime. The regime promoted technocratically-formulated industrialisation policies within a developmental state structure, a structure which would immediately collapse under the weight of the AFC. Not only did the crisis force Suharto to end his more than three-decade reign, but the political and economic landscapes in Indonesia would also dramatically transform. Severe crises justified the drive toward a more liberal political orientation, but, along with this, intense political control by the state was no longer acceptable. Indonesia in the post-Suharto era is arguably best understood as market-driven. Indeed, with the exception of the years of severe financial crisis, the business community regularly exerts political control. Facing the reality of an increasingly dislocated and non-provisioning state as well as the rising might of the market, traditional and grassroots communal systems of public governance have re-emerged as communities vie to find solutions for their own problems.

In this context, the responsibility for labour rights in Indonesian society is heavily contested. Competing discourses formulate varying responsibilities for the state, market and society itself (Santoso et al 2014; Aspinall & Sukmajati 2014). On the one hand, there is the traditional view that positions the state as the central institution in dealing with public matters. However, the emergence of neo-liberalism as a global hegemonic discourse pushes the state to play a rather peripheral role and to relegate many public matters to market mechanisms. The result in Indonesia has been a situation where some labour groups continue to turn to the state to safeguard their well-being, and others put their welfare in the hands of informal communal social structures. These debates are best examined through a closer look at the evolving role of the state in relation to the market, as well as the emerging structure, precariousness and commensurate creativity of Indonesia's growing informal labour force.

3.2 Re-articulation of the state, market and labour

The post-AFC 1997 economic recovery serves as a vehicle for deepening market liberalisation in Indonesia. As such, it also produced a swift re-articulation of the position and role of the state. Effectively, the AFC delivered a resolute commitment to Indonesia's limited initiation of market-enabling policies in 1988.[9] This comes through the IMF's intervention, which was symbolised with the signing of the Memorandum of Economic and Financial Policies on 15 January 1998, followed by the issuing of a letter of intent. One important point in this letter of intent is the government's commitment to further minimise obstructions toward foreign investment in Indonesia, which resulted in the enactment of Law 25/2007 on investment (Aswicahyono, Hill & Narjoko 2010: 1087; Daeng 2014).However, the breadth of economic reform is also seen to impact the post-crisis social reform agenda, within which a commitment to market-enabling policies was also evident. Under Habibie's short-lived administration, Indonesia ratified ILO Convention 87 on Freedom of Association and Protection of the Right to Organise (Hadiz 2003: 109). While it provides broader scope for advocates to insert labour rights issues into the policy process, the conventions still hold relatively little weight in government policies regulating industrial relations. Generating economic development through creating a favourable environment for market actors remains the nodal point. Yet, arguably, the relative position of labour *vis-à-vis* business has always been weak.

Under both regimes, the state has favoured business in their relations with labour. This has important implications for the evolution of welfare provisioning. Workers and their interests are determined by overarching economic development policies, in which business entities have more to say and stronger bargaining power to influence government policies, which in turn are in dire need of investment. This process has been taking place since the eradication of socialism and communism in 1965, and has deepened along with, first, state-led economic development during the New Order and, subsequently, market-led economic development post-1998 (Hadiz 2003: 100-101). This was accompanied by a hand-over of issues of labour rights and welfare in general, from the state to the market mechanism (Hadiz 2003). Thus, one's welfare is determined singularly by the capacity to compete in the labour market. Since the labour-political movement was incorporated under the state during the New Order era, there is little formal recourse for labour to lobby the state. It is in this context of both crisis and aggressive marketisation that dual socio-economic structures have thrived in Indonesia – both in terms of employment and provisioning.

An immediate impact of the AFC in 1997 was the dismissal of many labourers in urban economic centres. These labourers turned to informal economic activities in their rural native homeland, which in turn led to the growing importance of informal systems of provisioning. The Power, Welfare and Democracy Baseline Survey in 2013 provides a picture of how expectations for an active and welfare-provisioning state have diminished in the post-1998 democratic regime, which partly explains the tendency of

9 From 1988, under the New Order regime, Indonesia started to ease regulation, which had limited investment in Indonesia. The regime, however, did this with much reluctance and chose to work with the liberalisation project rather gradually.

the Indonesian public to resort to available informal structures and institutions (Santoso et al 2014). This includes the revival of many customary or traditional institutions through which some members of the Indonesian public, including labourers, articulate their demands both toward the state and business entities. Manning (2000) provides an analysis of the way in which these informal socio-economic structures worked to empower workers who had lost their employment during the AFC in 1997. When displaced from the formal economic sector, workers resorted to the informal sector, which in many ways were closely linked to informal social structures (Manning 2000). These informal socio-economic structures persisted despite the New Order's determination to fully consolidate various non-state entities of Indonesian society under the state's control, including labour unions (Hadiz 2004: 213). They also grew during the transition to a market-led economic development framework, with key implications for welfare and labour rights advocacy.

3.3 Traditions of collective advocacy: Labour unions and their informal counterparts

The roots of Indonesia's labour movement may be traced back to the colonial period and the establishment of the politically-active Train and Tram Labour Union or *Vereniging van Spoor en Tramwegpersoneel* (VSTP) in 1908. This deep tradition of collective advocacy continues today, but its evolution has been anything but linear. Hadiz (2002) argues that, despite the apparent resurgence of the labour movement in post-1998 Indonesia, it has been unable to significantly influence national policies or facilitate other substantive shifts. Hadiz offers a few explanations for this. First, massive unemployment due to the 1997 crisis greatly changed the political economy. In times of crisis, as shown in 1997, both state and business entities failed to ensure the welfare of Indonesian workers and the broader public (Wanandi 2002; Robertson-Snape 1999). Unemployment increased and there was a shift in the concentration of the labour force from the formal to the informal sector (Manning 2000). Indeed, today the informal sector is reported to account for over 70 per cent of Indonesia's work force (Sedane Labour Information Centre 2004 in Chang 2009: 171). Second, the institutionalised movements have been fragmented. Co-operation between various unions and other labour rights groups does exist, but lacks clear structure. Initially, this fragmentation was strategic, allowing these groups to 'avoid the full brunt of state repression during much of the New Order' (Hadiz 2002: 130). Yet, Indonesia's increasingly informal economy demands a plurality of actors and institutions to champion labour rights in the country.

The recognition of dual structures in Indonesia is hardly novel. During the first half of the twentieth century, the works of Furnivall (1939) and Boeke (1953) explain relations between the formal state system and informal social systems. More recently, Aspinall and Van Klinken (2011) have illustrated how the persistence of the seemingly loose yet influential informal societal structures reproduce in almost every aspect of social, economic and political life in Indonesia. At some point, the informal societal structures enable the formal structures to function. Indeed, this co-existence of multiple structures was recognised by Suharto's New Order regime. In order to manage this co-existence and produce political stability, the regime adopted a state-corporatism political strategy. This strategy did not necessarily eliminate these informal social structures, but

rather re-configured them under the regime's control and turned them into dependents of the regime. In turn, the regime granted them a relative degree of power, as part of the regime, for their obedience. By doing so, the regime tried to control a diverse Indonesian society by re-structuring particular social formations, and ensuring their dependency (MacIntyre 1994; Hadiz 2004).

The labour unions in Indonesia also underwent the same process of state-corporatism. After the demise of the Communist Party in 1965-66, the ideological struggle over the discourse of labour and its supposed role was won by the ideology of *Karyawan*, endorsed by the *Sekretariat Bersama Golongan Karya* (*SEKBERGOLKAR*) (Joint Secretariat), which later evolved into the main political machinery of Suharto's regime (Reeve 2013). This ideology of *Karyawan* denounces the Marxist notion of class struggle and the role of labour therein, and redefines labour as one of many other elements that should work and contribute positively to national development and prosperity. Instead of a class struggle, the ideology of *Karyawan* projects a social reality in which labour and other elements contribute to construct harmoniously and collaboratively under the state's leadership. However, these efforts fell short of eliminating or effectively penetrating the informal society-based structures that many labourers in Indonesia continue to turn to for their welfare and as a framework for collective advocacy (Reeve 1985). This underscores the declining relevance of formal advocacy structures in the Indonesian context, and the growing importance of informal collective strategies.

3.4 Power of informal forces in relation to state and market

The state and market, in formal character, have never been able to fully structure the social reality in Indonesia. For those union groups that see the state as the guarantor of well-being, this is an unfortunate dynamic. However, for those in Indonesia who have little hope of or interest in a guardian state and limited identification with or recourse to formal union advocacy, the might of informal forces hold significant appeal. The ability of informal forces to penetrate the state apparatus and to exert leverage over market actors is well documented in Indonesia. A powerful example is the community organisation model known as *Organisasi Kemasyarakatan* or Ormas (Hadiz 2003: 108).[10] Primarily, Ormases aim to effect solutions at the community level and, as such, labour rights become subsumed in a broader community advocacy strategy within this model. Ormases run a significant portion of education (from the elementary to the university stage) and health services (from small clinics to large hospitals). Irrespective of state capacity, they work to maintain strategic control over public affairs. However, they have also gained considerable leverage in relation to both state and market actors, through which they strengthen their position to advocate labour rights.

Indonesia's state structure is porous and capitalism itself is not impenetrable. There are various cases that show how informal social structures have been able to penetrate the state and wield influence over

10 Hadiz uses the term NGO to refer to the Ormas model. For some of the more conventional labour unions' activists the existence of these NGOs and their engagement in labour issues has disuniting effects among workers. Though their engagement might be prompted by sincere motives of solidarity. (Hadiz 2003: 108).

market actors to mobilise resources to further the interests of labour. The issues are broader than those articulated in traditional labour politics, with Ormases regularly advocating matters such as land tenure, access to business, revenue sharing and the recognition of particular identities. Across these issues, they often draw on political and commercial networks. For example, there are two large Islam-based Ormases, namely, *Nahdlatul Ulama* and *Muhammadiyah*. Judging from their networks, the former has links with the Nation Awakening Party (*Partai Kebangkitan Bangsa*) (PKB), and the latter has links with the National Mandate Party (*Partai Amanat Nasional*) (PAN), though neither declare that they are the political wing of these Ormases. Ormases sometimes stage their 'struggle' to gain access to welfare sources, employment opportunities, revenue shares, and even political positions. It is evident how they orchestrate popular protests, mobilise their networks and, sometimes, resort to intimidation and racketeering activities to safeguard their interests. While these actions do not receive praise on the international stage and also among labour union circles (Hadiz 2004: 218), the reality is that these informal structures are institutions capable of protecting the well-being of workers in Indonesia in contrast to traditional champions such as states and unions.

A recent study on citizenship in resource-rich regions found that in two regions with established and institutionalised extractive industry activities, the district of Bojonegoro in East Java Province and the district of Kutai Kertanegara in East Kalimantan, issues of labour rights emerge with strength outside the conventional language of labour rights politics (Tapiheru et al 2015). Here, the discourse of indigenous rights becomes divisive in platforming the plight of informal workers. Instead of organising themselves into labour unions, communities in these two regions have formed Ormases based on indigenous identity. Indeed, the impotence of formal unions is well recognised by industry informants. It is through such Ormases that local communities have strengthened their position in the labour market for this sector, either directly advocating for workers in the mines or representing informal workers seeking access to employment in the industry.[11] This is largely possible because in post-1998 Indonesia, democratisation and decentralisation policies have worked to strengthen the position of local and indigenous communities. This is evident in the willingness of local communities to put forward their own interpretation of the Indonesian Constitution and challenge the state apparatus. In a recent land dispute between a member of an indigenous group and a corporation in the extractive industry sector, a community leader explained the community's position in a legal case against a corporation as follows:[12]

> It is their [the community's] rights to maintain their customs. It is a customary right. If you, the prosecutor and the police say that you act on the behalf of the state so you are wrong. The state recognises it [customary rights and laws], so why don't you recognise it? You insist to criminalise people. So if this [case] is on the behalf of the corporation, in what right does the corporation make use of you as state apparatus?

11 Interview with Rifqi, Yamto and Novel, CSR officers of PT Adimitra Baratama Nusantara-ABN, Sanga-sanga, 7 April 2015.

12 Interview with Elisasson, Great Tribal Chief of Dayak in East Kalimantan Province, 7 April 2015 (Tapiheru, Lestariningsih, Capriati & Nudia 2015).

The growing and prominent discourse on indigenous rights also becomes the repertoire of these groups, to enhance their bargaining position before the state and corporations.

While the phenomenon of the Ormas enables labour to gain political leverage, it is a double-edged sword and significant challenges are foreseen. Recourse to the indigenous identity discourse has also manifested in workers pitted against fellow workers who come from other regions (Tapiheru et al 2015). The overall process of solidarity mobilisation has further been a breeding ground for local elites, which are shaped and maintained through clientelistic structures (Cribb 2009: 14-15). While currently there is a level of tolerance of Ormases by state and market actors, it is not clear whether this will endure in the changing regional landscape. Presently, Indonesian politicians need Ormases for political mobilisation in exchange for favourable policies related to access to welfare. Corporations accept Ormases as the best possible option among less favourable alternatives as long as their business operations continue. However, soon all these arrangements may have to be adjusted, since Indonesia has become part of the ASEAN Economic Community (AEC). The current administration has started a campaign to rectify perceived issues of informal socio-economic practices by evaluating existing regulations, including local regulations, in an effort to eradicate those considered to be not business-friendly. The main motive, however, is rather to further facilitate business investment. The President claims that the local regulations that will be annulled are those that

> [f]irst, obstruct local economic development; second, lengthening the bureaucratic procedures; third, local regulations that obstruct investment licensing and facilitation of business operation, and those that contradict the [national] law (Alvin 2016).

Thus, the tensions between the state, the market and labour persist in Indonesia with ongoing implications for labour rights struggles; struggles which also in a contrasting way manifest in Thailand.

4 Striving for control in Thailand

4.1 Context

In Thailand's business-friendly political economy, there is constantly uncertainty as to who is in control. From one perspective, it seems as though the market has to answer to the state. From another perspective, the state shows a propensity to cater to the whims of the market. Yet another interpretation could be that both the state and market depend on a work force that has the collective might to tear down the machine demanding high outputs for low wages. The landscape could be interpreted in any number of ways. Nevertheless, predatory practices remain prevalent in Thailand's political economy, and human rights groups believe that the situation has worsened during more than a year of military rule (HRW 2015). What is not clear in Thailand is whether the predations of the market are due to a lack of capacity or will. Thailand, being one of the founding members of the International Labour Organisation (ILO), is yet to ratify two core ILO conventions providing for freedom of association and collective bargaining, C87, and the right to organise and to collective bargaining, C98. Recently, speaking about an

influx of reports on human trafficking in Thailand's seafood industry, Thailand's military leader 'warned that if any news reports cause Thailand's seafood industry to lose customers, the people who published the news will have to be held responsible' (Khaosad 2015). As in large parts of South-East Asia and elsewhere, many of the political elites in Thailand are economic elites. Put another way, those governing have incentives to ensure that Thailand remains business-friendly (World Bank Group 2014).[13] During in-depth interviews with labour practitioners, one person spoke of the tripartite situation in Thailand being false: 'The ILO tripartite in Thailand, in particular, is not a tripartite at all. It is the state, business, and worker representatives who are selected by the state and business all on one side.'[14]

In this vein, a business solutions consultancy, Bangkok Base (2015) advertises the attractive nature of Thailand's market, explaining that 'Thai labour laws provide for considerable freedom in managing labour, and unions are not very effective'. Concomitantly, numerous practitioners referred to situations where Thai courts and authorities issued rulings and directives that were simply ignored by businesses. The lack of enforcement in such cases suggests that capacity is also an issue. It may be a lack of will or capacity or, probably, a combination of both. Nevertheless, the outcome is the same: Business has significant leverage. Assessing the relationship between politics and economic growth in Thailand from 1976 to 2010, Kijkul (2013: 1) locates trade as the main driver of the Thai economy, with political instability perceived as being inconsequential provided it 'does not disrupt the flow of exports', which would impede economic growth. Of particular interest is the way in which labour advocacy strategists navigate this landscape. More specifically, against this backdrop, what challenges and opportunities are perceived by those working towards ensuring protection?

What follows is an attempt to show the real-time implications of having no clear protection champion from above, particularly for those in the front lines of business and human rights in the world's factory. Indeed, one of the first themes coming into focus during in-depth interviews with labour practitioners was the might of the market.

4.2 Business in the driver's seat

There is a perpetual line of workers outside factory doors in Thailand waiting for low-wage vacancies. Thailand remains the second-biggest economy in the region. Three of Thailand's four neighbours – Laos, Myanmar and Cambodia – are least-developed countries. The flow of migrants in search of employment, therefore, is massive – estimates vary from two to four million – and constant. Combined with the high numbers of indebted young Thais, Thailand becomes a portrayal of Kaur's utilisation of the Lewis model to explain the growth of low-wage labour in South-East Asia. Kaur (2004: 10-11) points to three 'crucial points' from

13 The World Bank raised Thailand from the 28th to 26th most business-friendly environment in the world: The report finds that Thailand ranks among the top 30 economies in the world in five areas: dealing with construction permits (at 6th in the global ranking); getting electricity (12th); protecting minority investors (25th); enforcing contracts (25th); and registering property (28th).

14 As part of this research, in-depth interviews with labour practitioners were conducted. These sources wish to remain anonymous.

the model: (i) 'a pool of 'surplus' labour with low marginal productivity'; (ii) 'low wages in the modern sector, ensured by the continued flow of labour from rural areas (or from immigration)'; and (iii) 'the significance of capital investment in raising productivity and job opportunities in the capitalist sector.'

Collective action by workers inside the factories is exceptional. Ussarin Kaewpradap of the State Enterprises Workers' Relations Confederation (SERC) described any space for organising and collective assertions as 'heavily controlled'. Kaewpradap explained that even legal Thai unions often have to organise underground, and cited a significant reduction in union membership and the demise of more than 1 000 unions. ITUC (2009) describes dismissals and retaliation against workers who organise activities. One of the reasons for the decrease in union membership is a change in the nature of contracts. Businesses in Thailand opt for short-term contracts, an impermanence that threatens unionisation or informal organisation.

Restrictions on unions, the perpetuation of low wages and lenient labour laws are some of the measures taken by the Thai state to accommodate business and to retain a competitive edge with its neighbours, who are also striving to maximise foreign direct investment. If business in Thailand becomes too costly or arduous, owners always have the option of shifting their operations across the border, or to Vietnam. The rise of the minimum wage to 300 baht (about $10) per day on 1 January 2013 was a victory for labour, but resulted in the exit of some businesses abroad, 'leading to thousands of lost jobs and revenue, and wrecking the local economies built around factories', Kaewpradap explained.[15] This is but one example of a situation where the state and the masses suffer as a result of their dependence on transnational business.

4.3 Business leverage as a challenge

Labour rights in Thailand are heavily reliant on the whims of business as a result of the markets' leverage in the political economy. Business leverage forces both the state, workers and advocates into a delicate balance. A human trafficking researcher explained that 'being too confrontational or too public may push businesses into hiding'. The interviewees were clear that the popular portrayal of their efforts was part of the problem: Their goal is to prompt change, not to punish business and certainly not to shut business down. Labour rights groups have to tread carefully to resist exploitation without legitimating accusations of being anti-business. Accordingly, labourers and those advocating on their behalf must be strategic in selecting issues on which to focus.

Practitioners from formal and informal unions were predictably critical of giving businesses a discretion with regard to collective action. Aung Kyaw explained that some owners in the fish factories of Samut Sakhorn allowed migrant and Thai workers to organise and collectively bargain. However, he noted that only the big companies who are subject to much

15 Kaewpradap proposed that the flows of dependency in the Thai political economy, even as undercurrents, have 'serious consequences'. The workers depend on their jobs. Their families depend on the money coming from that job. The state depends on the investment and revenue. In the end, the worker cannot turn to the state to break its dependency,' Kaewpradap noted.

public scrutiny have been open to such measures, and spoke of the struggle to make factories beyond Samut Sakhorn act without directives from the state. When businesses do not allow workers to organise and take collective action, labour is robbed of its best means of illustrating 'the state's and business's dependence on workers', as noted by Kaewpradap.

Beyond the propensity of business to limit collective organisation and action without state directives, practitioners in Thailand mentioned other inherent limitations to market-based advocacy. Businesses in Thailand regularly use corporate social responsibility as a marketing scheme, selling philanthropic efforts while not addressing the real issue. Asuncion noted that CSR was useful to the extent that it focused on accountability and how corporations make their money:

> CSR used to be about what corporations do with their profit. Now we are shifting the focus to how corporations made their money in the first place. Outdated notions of CSR are hanging around, and the challenge is exposing them.

The task of market-based advocacy is to compel action, and some businesses may not be compelled. Compelling action is particularly challenging in a context where an entire industry has a low standard. The business that takes the first step towards change runs the risk of not benefiting from adding costs or making itself vulnerable, or being sidelined within its own industry. As one informant put it, 'businesses want to be clean, but not alienated'. Additionally, there is the lack of sustainability in voluntary action. If models or commitments are not mandatory and regulated by law, they can be broken at any time. One informant described this as follows: 'All it takes is one group of investors who do not see the adding burdens and costs of getting clean as a smart business move, even when it is sold in terms of sustainability.' As Kaewpradap noted, market-based advocacy 'works within that arrangement of dependency that it is crucial to part with'. For this reason, labour groups reiterate that ratifying ILO conventions C87 and C98 is key to any sustainable shift in labour rights in Thailand. In addition to being unsustainable, market-based advocacy has a limited reach. While some organisations see in this an opportunity to change one factory at a time, others see the limits of this. Market-based advocacy struggles to reach those businesses that do not stand to profit from change. Aung Kyaw observed the contrasting imperatives of bigger and smaller factories in Thailand, the former being subjected to pressure from 'foreign governments, workers, consumers, and the Thai government', while the latter 'don't have the huge profit margins and thus lack either incentives or deterrents worth changing over'.

4.4 Seeing opportunities and promising drifts

Practitioners simultaneously spoke of breaking the state and public's dependence on business and the possibilities that come with a business that wants to change. Asuncion positioned business as a more expeditious catalyst of change:

> If you can effectively make the business case, business will make the change in their business processes and behaviour. When business starts to change, the state is more likely to pay attention because it responds more quickly to business imperatives.

For businesses, reputation is everything. Even in a context such as Thailand where surplus labour causes businesses to be less dependent on each individual worker, businesses are still dependent on profit. Profit is the central vein of business, and it can be tapped. Aung Kyaw declared:

> Owners have asked for direct engagement. They want to handle things in-house to avoid public fallout. We have found that they are willing to move quickly and strongly towards change to avoid what could be a lasting blow to their public profile.

Aung Kyaw and others spoke of the different ways in which businesses with ties to international export are now facing new pressures.

Three pressures, in particular, came into focus. First, the feeling was that foreign governments were increasing their pressure on Thai exporters. Foreign governments can be powerful allies in a number of ways, namely, by pressure and preference. Aung Kyaw addressed the power of foreign pressure on business and the Thai state, and the utility of having allies in foreign governments:

> Businesses will do whatever they can to avoid sanctions or lawsuits. They are terrified of being blacklisted by the EU, US, or other government. When we can combine this with ILO, Thai and Myanmar governmental support and co-operation between MWRN and other labour unions and groups throughout the world, MWRN becomes a serious force.

Kaewpradap echoed this notion and also pointed out the potential for preferential treatment, such as a generalised system of preference, as having the power to influence business and governmental behaviour.

This is perhaps occurring as a result of demands by their constituents: the international consumers. Thai and international consumers were seen as the second evolving pressure. Those interviewed saw the limits to consumer activism, as a large part of the world is not in a situation to vote with their wallets. However, they also saw much potential in the ability of local and global consumers to drive a change in attitudes and standards. Looking at the first and second pressures, it is evident that the easing of global communication has been a game changer. Kaewpradap explained how the ability to reach abroad is a boon for unions in Thailand:

> Now unions in Thailand are working very closely with buyers and unions together with NGOs elsewhere. Unions around the world combine into a massive customer community. We can go to our brothers and sisters and tell them about how different companies behave. This extends beyond unions to other workers and human rights organisations.

Perhaps related to the evolving pressure from foreign governments and consumers is the third evolving source of pressure – the reform-seeking forces within the Thai state. While the Thai state may be dependent on business, this does not mean that the state simply kowtows to business. Practitioners saw signs of the Thai state becoming more assertive in its role as regulator. One informant pointed out the downgrading of Thailand to Tier 3 in respect of human trafficking, and the subsequent urgency with which the Thai government responded as a sign that, as in the case of business, the Thai state holds tightly onto its reputation. A boycott of Thai products would prove devastating for the Thai economy, and the state is well aware of the severity of the situation.

It is in the best interests of business to get ahead of sea-changes. As Asuncion explained:

> Businesses are not NGOs. We shouldn't expect them to act like NGOs. They exist to provide services, make products, and turn profits. They don't want to be held back by social, political, and legal pressure. Businesses are constantly expressing a sentiment to states and NGOs following a line of 'just tell us what to do, be clear, and we'll do it'. They can't afford to guess and be wrong. This desire to get over the guessing games and get back to business is something NGOs and states can use.

Asuncion also noted the opportunities associated with business efficiency. Business wants to move fast; to stay ahead. In this sense, states may be more resistant to change than business. The evolution of ethical consumption manifests a new source of 'leverage' over private capital. Asuncion concluded that

> [b]usinesses are norm setters, and they are often progressive ones, because it is basically a creation of businesses' competitive advantage over other players in the market. But it works to meet societal demands for corporate responsibility to some extent.

Indeed, there is no one way of seeing the political economy and no one path to transforming governance. There was also unanimous agreement that neither states, nor workers, nor consumers need simply be obligated to the structuring of the market that may underlie many of the challenges relative to labour and human rights protection.

5 Conclusion

State subjugation to the market has obvious consequences for human rights. There are countless examples in Asia and throughout the world of states sacrificing the interests of citizens to satisfy the whims of the market. Yet, power is constantly shifting, and this is manifested in many ways. There is hope for accomplishing labour protection in ways never before possible. Informal approaches to protection may no longer be an option of last resort. There is also the prospect of reinvigorating formal, procedural protection in the region. Market shifts, such as the 2015 ASEAN Economic Community and the unfolding Trans-Pacific Partnership, will certainly lead to a relocation of states in the region, whether that be towards a more assertive or peripheral role. Practitioners addressed a combination of possibilities for expanding and embedding formal and informal protection. Informal approaches could leverage the market and use business to reinvigorate the state. In other words, businesses exhausted by the burdens of self-regulation, auditing and uncertainty may pressure states to govern. Asuncion offers some concluding reasons for optimism:

> We can see success stories throughout the region. Certainly, many challenges remain, but attitudes are changing rapidly. Advocacy strategies are strengthening. Sensitisation is underway. Communication and information is now readily available. The timing works. Far more change has been made in the last ten years than from 1970-2000. Even in the last six years you could argue that exponential change is underway. Businesses are trying to predict what kind of future consumers, like the millennials or the Z generation, will be, and anticipate their expectations. Changing business may not directly

change the market, per se. But consumer demands and responsive states can change the market itself.

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Annex 1: FDI Inflow: Asia 1981-2013 (Selected years)

Year(s)	Billions (USD)	% of total global FDI inflow
1981-1985	-	8.5 (average)
1986-1990	-	8.7 (average)
1992	21	-
1993	-	23.3
1994	59	26.2
1995	65	20.7
1996	81	22.9
1997*	87	20.6
1998	85	13.2
1999	106	-
2000	134	10
2001	102	14
2002	95	-
2003	107	-
2004	148	22.7
2005	165	18
2006	200	-
2007*	249	-
2008	300	-
2009	233	-
2011	-	22
2013	-	30

*1997 and 2007 mark the commencement of the Asian Financial Crisis and the World Economic Crisis respectively.

Annex 2: External debt/debt servicing in Asia: 1995-2000 (Selected sub-regions/ countries)

External Debt (US$ millions)						
Regions/ Selected countries	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**
*East Asia	260596	310737	358563	649541	599139	524330
China	118000	129000	147000	144000	152000	146000
Korea	85810	115803	136984	139097	130316	134417
**S-East Asia	342134	371471	389992	652231	606418	568228
Thailand	100000	113000	110000	105000	96770	79710
Indonesia	124398	128937	136273	151347	151332	144159
Total Debt Service Paid (US$ millions)						
	1995	1996	1997	1998	1999	2000
*East Asia	58842	70351	75692	378843	347184	258608
China	15066	15756	18445	18435	26862	27092
Korea	11870	13562	13865	20624	43020	23217
**S-East Asia	38387	47753	46274	44461	46687	45587
Thailand	8586	9524	11810	12752	16230	13991
Indonesia	16416	21543	19737	18310	17665	16622

*East Asian countries not displayed: Hong Kong (China), Mongolia, Taipei (China) (NB: Japan not included as it is not a Developing Member Country)
**South-East Asian countries not displayed: Brunei Darussalam, Cambodia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore and Vietnam
Source: Asian Development Bank 2007, *Key Indicators 2007*, vol 38 151

Annex 3: Practitioner interviews

Practitioner	**Organisation**	**Interview Date**
Aung Kyaw	Migrant Worker Right Network (MWRN)	29 March 2015
Ussarin Kaewpradap	State Enterprises Workers' Relations Confederation (SERC)	18 March 2015
Melizel Asuncion	Verité Southeast	30 March 2015
Anonymous	Human Trafficking Researcher	24 March 2015

V Bournazian, M Torosyan, J Staselyte, B Banjac & O Chertilina 'The economic crisis, debt and the impact on human rights: Eastern Partnership countries' (2017) 1 *Global Campus Human Rights Journal* 71-95

The economic crisis, debt and the impact on human rights: Eastern Partnership countries

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Abstract: *The article explores the nexus between the economic crisis, foreign debt and the impact on human rights as it has manifested in the Eastern Partnership (EaP) region since the beginning of the 2008 'global economic crisis'. That an economic crisis requires states to borrow internationally is not novel. By researching and developing case studies for all but one of the EaP countries, and then engaging in a comparative analysis of the case studies, the article seeks to explore, in the EaP context, the extent and legitimacy of borrowing, the impact on human rights of the economic crisis and/or debt, and the degree to which national debt frameworks of EaP countries comply with the UN Guiding Principles on Foreign Debt and Human Rights. As for the nexus between human rights, economics and debt, this dynamic is founded in the fact that human rights values the equality of individuals and, in the socio-economic context, this may be expressed in terms of equal opportunity, which must be ensured and fomented by the state – often through the expenditure of public resources. As a developed society is best conceived of as a collective of developed individuals, and as equal opportunity is foundational to individual development, phenomena which curtail the equal opportunity of individuals necessarily impact negatively on the human rights regime. It is generally accepted that several factors influence an individual's equal opportunity for development: civil and political rights; economic facilities (for instance employment opportunities,*

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fair remuneration); social opportunities (for instance education); transparency/ accountability (for instance the rule of law); and protective securities (for instance healthcare and social welfare). It is in this broad context that the article considers increasing poverty and the degradation in socio-economic rights as having a negative impact on equal opportunity and on human rights, and explores this impact as a derivative of the economic crisis and foreign debt.

Key words: *Eastern Partnership; economic crisis; foreign debt; human rights; UN Guiding Principles on Foreign Debt and Human Rights*

1 Introduction

The article explores the nexus between the economic crisis, foreign debt and the impact on human rights as it has manifested in the Eastern Partnership (EaP) region since the beginning of the 2008 global economic crisis. That an economic crisis requires states to borrow internationally is not novel. However, by researching and developing the case studies for all but one of the EaP countries, and then engaging in a comparative analysis of the case studies, the article seeks to explore, in the EaP context, the extent and legitimacy of borrowing, the impact on human rights of the economic crisis and/or debt, and the degree to which national debt frameworks of EaP countries comply with the UN Guiding Principles on Foreign Debt and Human Rights. As for the nexus between human rights, economics and debt, this dynamic is founded in the fact that the notion of human rights values the equality of individuals, often expressed in terms of equal rights against the state, but in the socio-economic context also expressed in terms of equal opportunity for individuals, which must be ensured and fomented by the state - often through the expenditure of public resources. As a developed society is best conceived of as a collective of developed individuals, and as equal opportunity is foundational to individual development, phenomena which curtail the equal opportunity of individuals necessarily impact negatively on the human rights regime (Sen 2000). It is generally accepted that several factors influence an individual's equal opportunity for development: civil and political rights; economic facilities (for instance, employment opportunities, fair remuneration); social opportunities (for instance, education); transparency/accountability (for instance, the rule of law); and protective securities (for instance, healthcare, social welfare) (Sen 2000). It is in this broad context that the article considers increasing poverty and the degradation in socio-economic rights as having a negative impact on equal opportunity and on human rights in general, and explores this impact as a derivative of the economic crisis and foreign debt.

2 Eastern Partnership countries under review

The EaP is a construct of the European Union (EU), engendered to facilitate its relations with the post-Soviet states of Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine. Although an EaP country, Azerbaijan was not included in this study because its vast petroleum reserves and sales render it a unique and distinct economic model not readily comparable to the other EaP countries, especially considering the topic of this research. As for the other EaP countries – and apart from Ukraine's distinction with regard to size of territory and population – all

are relatively comparable, especially with regard to the economic and governance challenges of post-Communist transition, as well as the geopolitical concerns which require each state to negotiate and balance its ties and interests between Russia and the West.

In this regard, it is noteworthy that Armenia was pursuing EU integration until September 2013 when its President, while in Moscow, suddenly announced that Armenia would instead enter the Eurasian Economic Union (EEU), of which Russia is the prominent economic actor. Armenia entered the EEU in 2014, closing its path to EU integration, but both Armenia and the EU are currently seeking new platforms for co-operation. While Belarus maintains close ties with Russia and is a member of the EEU, it also engages with the EU and receives EaP support for social inclusion, environmental issues and local and regional development. In 2014 Georgia and the EU adopted an Association Agreement with a Deep and Comprehensive Free Trade Area (AA/DCFTA) and the parties are now pursuing visa liberalisation. Moldova and the EU also agreed to an AA/DCFTA in 2014 and are currently pursuing visa liberalisation (EEAS 2015). In the case of Ukraine, when the government started to withdraw from EU integration in 2013, protests erupted in favour of EU integration. By early 2014, protesters had brought about a change of government, but eastern sections of the country with high Russian-speaking populations sought ties with Russia, resulting in the secession/annexation of Crimea to Russia, as well as other secession movements, periods of armed conflict and general instability in Eastern Ukraine. Despite this, by July 2014 Ukraine's new government and the EU had entered into an AA/DCFTA (EEAS 2015)). In ways such as these, politics tie in with economics and impact on human rights in the EaP.

3 Setting the stage: The economic crisis and foreign public debt in the Eastern Partnership

In the context of this research, and as EaP countries in many ways still are economies and democracies in transition from the Soviet experience, it was valid to explore to what extent the global economic crisis affected foreign public debt, and to consider whether there were also other extraneous factors which contributed to the increase in debt experienced in the EaP.

In Armenia, which typically borrows for development projects and to cover constant current account balance deficits (for example trade imbalances) and budget deficits, public debt doubled in 2009 from US $1.4 to $2.4 billion (World Bank Data). At the same time, a review of the annual percentage change in real gross domestic product (GDP) shows a steady decrease from a positive 13.7 per cent in 2007 and 6.9 per cent in 2008 to 14.1 per cent in 2009, followed by years of modest recovery and now a forecast 1 per cent for 2015 (World Bank Outlook 2015: 174). This contraction of the economy reduced tax revenues, which as a ratio to GDP fell by 20.5 per cent in 2009, while expenditures to GDP grew 30.2 per cent as the government borrowed from international financial institutions (IFIs) and Russia so as to maintain economic activity through government expenditure and lending to private economic actors (Armenian Development Strategy 2014: 22). Also, current account balances as percentage of GDP went from 8.5 per cent in 2007 to 17 per cent in 2008

to 17.6 per cent in 2009, and despite modest recovery in intervening years was projected at 8.6 per cent for 2015 (World Economic Outlook 2015: 189). This imbalance continuously depletes central bank reserves and necessitates borrowing. Additionally, according to one source the refusal by Armenia's Central Bank to allow for currency devaluation – which might increase exports – also factors in to the size of the debt and is symbolic of corruption because the fixed exchange rate benefits import businesses of oligarchs (Policy Forum Armenia 2012). In response, the government claims the fixed exchange rate to be an anti-inflationary measure. Another issue is whether authorities have borrowed from Russia and issued Eurobonds at unfavourable rates because such monies come without restrictions, unlike funds from international financial institutions (Artak Kyurumyan interview). Questions of corruption, as discussed below in the section on Guiding Principles, may also have disproportionately increased debt. While it is estimated that public debt will reach 50 per cent of GDP by the end of 2015 (WB Country Programme Snapshot Armenia 2015), others estimate that if privately-held but publicly-guaranteed debt is also included, the public debt is already 100 per cent of GDP (Samson Avetyan interview, Civilnet 2015).

As for Belarus, the GDP growth of 8.3 per cent per year on average ended in 2008 (WB Country Programme Snapshot Belarus 2015) with a decrease in demand for Belarusian exports and increasing limits on attracting foreign capital (both as external debt and direct investments) (Semak 2011). By 2009, external trade was down by 69.3 per cent and between 2009 and 2013, on average the pace of foreign trade growth decreased by a factor of two or more (Statistical Yearbook Republic of Belarus 2014: 488). This new reality created budget deficits until 2011. However, later surpluses were not the result of increased state revenues, but rather the underfunding of planned state expenditures and high inflation (Struk 2014: 58). As a result, between 2009 and 2013 foreign public debt increased by a factor of 2.6, reaching 54.3 per cent of GDP (Struk 2014: 55). Worse still, the foreign public debt of Belarus has an unfavourable structure because of a high percentage of short-term loans, rendering expenditures to service debt of a high cost. This is complicated by past currency devaluations and instability which increase foreign public debt in relative measure (Struk 2014: 55). Also, devaluation pressures on Belarus's currency are increasing as of 2014 due to the weakening Russian Ruble and a decline in foreign trade demand from Russia, Belarus's main trading partner (WB Snapshot Belarus 2015: 2).

In the case of Georgia, the economic crisis was compounded by a short-term armed conflict with Russia in 2008. By 2009, both domestic and foreign investment had fallen from 17.2 per cent of GDP in 2007 to 7.1 per cent (Edilashvili 2011). The downturn manifested in a sharp fall in GDP during 2009 of 15.9 per cent (Trading Economics 2015). Also in 2009, budget revenues fell below budget expenditures creating deficits, and the current account balance showed trade deficits which continue today and are in the negative by a factor of four (Papava 2008). Although after the conflict Georgia received a recovery package, approximately half of the aid was in the form of loans, adding to the foreign public debt. As a result of all these factors, foreign public debt increased from 16.8 per cent of GDP in 2007 to 31.7 per cent in 2009 and 33.6 per cent in 2010 (World Bank Data). Recent years, however, have seen a decrease in debt to GDP which as of 2014 stands at 26.8 per cent (World Bank Data).

The situation in Moldova in 2009 was also marked by a contraction in the economy. Within only the first quarter of 2009, the demand for Moldovan exports, principally agricultural products to the EU, decreased by 20 per cent, while remittances from Moldovans abroad decreased by one-third, corresponding also with a decrease in domestic demand and sales, despite the fact that Moldovan migrants were returning from abroad at the same time (Impact of the Global Financial Crisis on Local Communities in Moldova 2009). The first quarter of 2009 also reflected a three-fold contraction in foreign direct investment (FDI) (Impact of the Global Financial Crisis 2009). By the end of 2009, the GDP had contracted by more than 17 per cent (World Bank Data). One result was a decrease in tax revenues, but because of the upcoming elections there was a sharp increase in public sector spending as salaries were raised to promote goodwill on election day (Trading Economics 2015). Consequently, for the 2009-2010 period, foreign public debt increased by 10 per cent (Moldovan Government Debt to GDP 2015). Despite this, however, the foreign public debt did not reach, and has not reached, the 2006 high of 34.81 per cent of GDP, mostly because of the strong influence of the International Monetary Fund (IMF) over the government and its debt management. At present debt is not the issue, but the economy is weak, reliant on remittances, and facing an uncertain future.

With regard to Ukraine, 2009 was the end of steady economic growth. From a high of 8.2 per cent of GDP growth in 2007, Ukraine went to a low of 15.1 per cent by 2009 (World Economic Outlook 2015: 174). Concurrent with a falling GDP were increasing deficits in current account balances: 2.2 (2009); 6 (2011); 8 (2012); 9.2 (2013) (World Economic Outlook 2015: 174). This situation, coupled with the failure to modernise industry and to pursue concrete economic and governance reforms, as well as persistent corruption in government, led to declining tax revenues, budget deficits and increased debt (Valchishen 2015). From a rather substantial debt to GDP ratio of 56 per cent in 2008, the debt rose to 84.7 per cent in 2009 and 91 per cent in 2010 (Pynzenyk 2015). Although some economic recovery was made in succeeding years, the instability occasioned in 2014 brought renewed difficulties: a fall in GDP by 6.8 per cent for 2014 with an expected additional 5.5 per cent for 2015, along with a 85 per cent depreciation of national currency as measured against the US dollar (WB Country Programme Snapshot Ukraine 2015: 2). Considering declining tax revenues and increasing defence expenditures as conflict continues, budget deficits will necessitate more borrowing and the debt to GDP ratio will pass 100 per cent by the end of 2015 (WB Country Programme Snapshot Ukraine 2015: 2).

Thus, the general impact of the global economic crisis on EaP states was a decreased demand for EaP exports, which led to negative economic growth, increased current account balance deficits, reduced state revenues and budget deficits, and which cumulatively caused spikes in borrowing and debt. While amongst the countries studied Moldova may have experienced the least increase in debt, it continues to struggle with economic growth and remains remittance dependent. Armed conflict and instability were also significant in increasing debt in Georgia and especially in Ukraine. Also, close ties to Russia and Russia's current economic difficulties have impacted, and will continue to impact, negatively on economic recovery in Armenia and Belarus. Corruption issues, explored in

detail later, also increase the public debt in EaP states. How economics and debt impact on human rights follows.

4 Economic crisis and its impact on human rights: To what extent did the economic crisis impact on development and rights in the Eastern Partnership?

As explained by human development theory and as summarised in the introduction to this article, poverty and unemployment as well as other factors, such as poor education and poor health, restrict an individual's opportunity to pursue development, thus impinging on individual equality and human rights in general. Unfortunately, the economic crisis in the EaP and its aftermath coincide with increased poverty, increased unemployment and increased inequality as between rich and poor. These negative human development indicators thus allude to the negative impact of the crisis on human rights as well.

In Armenia, the economic crisis increased poverty, and continues to grow income inequality today as well as to negatively impact on employment and working conditions, all to the detriment of human rights. The percentage of the population living in poverty grew from 27.6 per cent in 2008 to 34.1 per cent in 2009 and levelled at 35 per cent for 2010 and 2011; despite poverty levels falling to 32 per cent in 2012 and 2013. In terms of shared prosperity, the lower 40 per cent of income earners were in real terms still worse off in 2012 to 2013 than they were in 2010 to 2011 (WB Snapshot Armenia 2015: 5). Income inequality indicators also show that the top 20 per cent of income earners were 7.8 times better off than the lowest 20 per cent in 2008, but 8.5 times better off in 2012 (Armenian Development Strategy 2014: 87). Also indicative of the situation is the working poor, whereby 26 per cent of the active working population which is employed still lives below the poverty line (WB Snapshot Armenia 2015: 6-7). Moreover, 50 per cent of employment is informal (unregistered) (WB Snapshot Armenia 2015: 6-7) and, in an economy where formal employees are expected to work overtime without overtime pay, and are paid late, informal employment not only leaves the worker unprotected under the law, but highly susceptible to the abuse of labour rights. Consequently, high poverty figures and income inequality, in addition to the working poor and high informal employment, reflect a heavy negative impact on equality and human rights as a result of the economic crisis.

As for Belarus, it was severe inflation related to the crisis, and principally in 2011, that impacted on poverty and equality, resulting in an increase in poverty from 5.2 per cent in 2010 to 7.3 per cent in 2011 (Zayats 2012), along with an increase in income inequality as represented by a decrease in the GINI index from 27.7 per cent in 2010 to 26.5 per cent in 2011 (World Bank Data). This was addressed by a government policy to index wages to inflation, which allowed for increases in wages, but more so for lower than for higher wage earners (Bornukova 2012). However, old age pensioners were left out and their real incomes decreased on average by 16.7 per cent (World Bank Data). Also, increasing wages may have high economic costs in terms of inefficiency due to low mobility and motivation, and wage increases without productivity gains

are unsustainable in the long term (Akulava et al 2013: 3). Related to this, recorded unemployment in Belarus is incredibly low, as low as 0.5 per cent in 2013 and 2014 (Trading Economics 2015). However, this figure is flawed in real terms because it reflects only the registered unemployed, and there are disincentives to register: bureaucratic procedures which try a person's patience and take up one's time, as well as an obligation to participate in poorly-paid public works programmes (Astapenia 2015). Consequently, in its last review before the UN Committee on Economic, Social and Cultural Rights (ESCR Committee), Belarus was criticised for issues of compulsory labour, inadequate protection of workers' rights and high rates of poverty in rural areas, among other things (ESCR Committee Concluding Observations Belarus 2013). Continued economic challenges will frustrate the enhancement in the provision of these rights.

In the case of Georgia, economic indicators for the post-crisis period actually showed signs of alleviation of poverty and inequality, most likely due to decreases in food prices (Asian Development Bank 2015) and an increase in social transfers, as 42 per cent of the post-conflict stimulus package was dedicated to social protection (Zhang et al 2010). However, this once-off measure questions efficiency and long-term impact, and income disparities may be rising as of late. Principally, more than half the population lives in rural areas, and in 2010 poverty affected 25 per cent of the rural population compared to 17 per cent of the urban population, while today poverty is a factor for 40 per cent of the rural population compared to 31 per cent of the urban (Asian Development Bank 2015). While officially unemployment stands at around 15 per cent, polls show that 68 per cent of respondents consider themselves unemployed, which may be due to differences in perspectives as to typical employment versus substance farming, Georgia's natural safety net (CRRC Georgia 2014). Officially, 52.3 per cent of people are considered self-employed, and the majority of the self-employed (44.1 per cent) are in the agricultural sector. Unfortunately, the families of more than half of those self-employed in agriculture are living on less than US $250 per month (Grigolia 2013). Therefore, although Georgia successfully weathered the global crisis, growth after the crisis fails to address balanced regional development, poverty alleviation and job creation (Melkadze 2013), all of which negatively impact on the development of rights.

As for Moldova, it is worth noting that the economic crisis reduced employment by 6 per cent, decreased worker productivity by 5 per cent and 4 per cent of employees were left unpaid, while at the same time migrants returned from Russia and remittances from Russia decreased (Impact of the Global Financial Crisis 2009). More than half of Moldovan households experienced some decline in income, which required 30.7 per cent to take immediate and future action to recover expendable income (Impact of the Global Financial Crisis 2009). By 2011, pensions fell below the poverty threshold (European Committee of Social Rights Conclusions 2013). Interestingly, perception surveys also showed a spike in corruption during the crisis period of 2008-2010 (Transparency International 2015). Thus, considering the nexus between economics, development and rights, this evidence suggests that the crisis negatively impacted on rights and freedoms via reduced equality, reduced self-sufficiency and reduced transparency.

In Ukraine, although poverty and unemployment have been a constant after independence, there was progress in poverty reduction until 2009 when official figures showed it at a low of 5.8 per cent of the population. However, as the crisis took hold, poverty grew to 7.8 per cent in 2011 and 9.1 per cent in 2012 (World Bank Data). Unemployment also grew from 6.4 per cent in 2008 to 8.8 per cent in 2009 (ILO Data). While unemployment figures started coming down in the following year, anecdotal information reported great difficulties for new graduates seeking employment. Other sources report employers placing persons on administrative leave, reducing working hours and even not paying salaries on time (wage arrears) as evidence of sharp underemployment (OECD 2011). Also, a depreciation in currency dramatically affected the purchasing power of the average individual. This situation is today further compounded by over one million internally-displaced persons (IDPs) from the east of the country, all of whom are struggling to secure employment, housing, healthcare and social protection benefits (OCHA 2015; Ogarkova interview 2015). What is not reported in statistics is the desperation of people like Tamara, who was forced to flee her apartment, leaving all her possessions behind while the building collapsed from artillery fire; she now lives in a dilapidated dormitory room and, after working her entire life, cannot collect her pension (UNHCR Stories from Ukraine 2015). Thus, not only did the crisis negatively impact on development and rights, but the continuing armed conflict will compound matters and make the restoration of rights more difficult.

Overall, a review of poverty, unemployment and income inequality shows the negative impact of the economic crisis on development and rights in the EaP. Depending on the country, issues of armed conflict and corruption often enhanced the negative impact, unless otherwise compensated for by social protection benefits. Also, while state borrowing and expenditures may alleviate impact issues in the short term, the later servicing of foreign debt also carries its own negative impact on rights, as is explored in the next section.

5 Debt servicing and its impact on human rights: To what extent does debt servicing impact on development and rights in the Eastern Partnership?

A combination of structural factors and economic circumstances makes debt repayment a priority over guarantees for socio-economic rights in the EaP. Debt servicing, thus, redirects public resources away from the protection and promotion of rights.

In Armenia, structural factors reaffirm accruing evidence that budgetary support for socio-economic rights will be sacrificed to repay debt. Armenian legislation specifies that (a) debt repayment is an absolute imperative; (b) once debt reaches 50 per cent of GDP, budget deficits may not exceed 3 per cent of GDP; and (c) no additional borrowing may occur after debt reaches 60 per cent of GDP (RA Law on Public Debt, articles 5 and 23). Without additional loans or increased tax revenues, debt repayments must come from expenditure cuts. Coincidentally, an analytical review of the 2014 national budget shows that, in real terms, funding for social protection has only increased by 1.7 per cent compared

to 2008 and, because much of the increase has gone to paying pensions, aid to poor families actually is 6 per cent lower than what it was in 2008 (EDRC 2014: 4 & 17). Additionally, standard unemployment benefits were discontinued in 2013, ostensibly as part of a reform to offer professional job training, self-employment support and compensation to employers for a minimum wage increase, but the new programmes are only calculated for 248 beneficiaries compared to the old programme, which covered 10 090 beneficiaries (EDRC 2014: 21). For these and other reasons, the ESCR Committee correctly criticised Armenia for not using the maximum available resources to support socio-economic rights in general and, specifically, with regard to healthcare, education, pensions and aid to poor families (ESCR Committee Concluding Observations Armenia 2014). Clearly, in Armenia debt repayment is prioritised at the expense of rights.

Similarly, structural factors in Belarus indicate that socio-economic rights will be sacrificed to service debt. First, like Armenia, Belarusian legislation gives priority to debt service over any other budgetary expenditure (RB Budget Code, article 57). Additionally, the traditional social state structure in Belarus makes the state the primary actor, as evidenced by the fact that one half of all state expenditures are dedicated to social needs (Medvetskiy 2015). For example, during the 2011 economic crisis year alone, social protection expenditures increased from 9.9 per cent to 15.8 per cent of GDP (ILO Data). Considering weak economic factors, borrowing is a necessity, but future borrowing is frustrated by the fact that a weakened Russia has less capacity to lend, and the IMF has stated that a new stand-by agreement is contingent on the initiation of structural reforms (Moody's Investor Service (2015)), which may well include dismantling social sector programmes or provisions. Thus, debt servicing will negatively impact on socio-economic rights in Belarus.

In the case of Georgia, the constantly-increasing foreign public debt is a looming threat to newly-reformed social services and may necessitate debt refinancing should development investment in other sectors fail to materialise (RT 2010). During post-crisis recovery, borrowed funds have been used for pensions, universal health coverage and targeted social assistance (WB Data 2014: 18). To offset poverty, pensions were raised in 2009, 2011, 2012 and 2013 (WB Snapshot Georgia 2015). Targeted social assistance to lift households out of poverty was doubled in 2013, and in the same year universal health coverage was initiated (WB Data 2014). As a result, social spending now amounts to one-third of all budgetary expenditures. With an ageing population and increasing social protection costs financed by debt, debt refinancing may not be enough without cuts to social services, which would infringe on socio-economic rights.

In contrast, Moldova's debt service is under control, but despite improvements and increases in expenditure for social protections and health care, socio-economic rights are under-funded and under-protected. A new targeted social service programme necessitated a 4 per cent increase in budgetary expenditure, but benefits such as pensions are still criticised as being wholly inadequate (European Committee on Social Rights Conclusions 2013). Mandatory health insurance as of 2004 covers 85 per cent of the population and is financed by 13 per cent of the state budget (WB Snapshot Moldova 2015), but insurance is incomplete, leaving 45 per

cent of costs to be covered by patients (WB Snapshot Moldova 2015), and services are inadequate, as evidenced by above-average infant and maternal mortality rates as compared to other European countries (European Social Committee Conclusions 2013). High rates of migration mean that less is collected in state revenues, and a Russian ban on Moldovan goods, along with declining exports to Ukraine, threatens recession. In this situation, debt service may be manageable, but socio-economic rights remain under-financed and under-protected.

While the current instability and chaos in Ukraine make forecasting debt management and its impact on socio-economic rights too speculative, in general the structural prioritisation of debt repayment over all other issues in the EaP, along with recent threats of renewed recession and the prospect of debt refinancing, cumulatively shows that rights in the EaP are infringed upon as a consequence of foreign public debt.

6 UN Guiding Principles on Foreign Debt and Human Rights compared to norms and process in the Eastern Partnership: To what extent is there compliance?

The UN Guiding Principles on Foreign Debt and Human Rights (Principles), endorsed by the UN Human Rights Council in July 2012, advocate prioritising and ensuring human rights over the service of debt, and principally focus on preventing debt problems through measures of transparency, participation and accountability, including the public sharing of information, the engagement of civil society and other stakeholders, and enshrining in national legal frameworks systems of checks and balances. The Draft Commentary to the Principles, published by the Independent Expert in March 2014, aids in interpreting the Principles (OHCHR 2015).

In terms of transparency and participation, the Principles call for legislation to clarify the role of state institutions in the debt process, for an annual debt strategy and needs assessment which is participatory, and for consultation with stakeholders (including civil society) when negotiating to borrow (Principles paragraphs 33, 36 and 42-43). As to the role of state institutions, the Draft Commentary argues that important factors include specifying in legislation who may encumber the state and how, and involving several different institutions through a system of information sharing to create oversight. As to accountability, the Principles envision (a) borrowing limits via budgetary legislation; (b) mandatory needs assessment and consideration of alternatives before borrowing; (c) specific purpose – rather than general purpose – borrowing; (d) holding officials to fiduciary duties under law; (e) assessments by independent bodies; and (f) ensuring that debt servicing does not divert resources from social services or require modification in the protection and promotion of human rights (Principles paragraphs 34, 37, 44, 66, 48 and 49, respectively). While legislation and process in EaP states comply to some extent with the Principles, gaps exist and borrowing practices of EaP states generally fall well below the standards set by the Principles.

In Armenia, the Law on Public Debt and its enacting regulations specify that the Ministry of Finance (MoF) and the Central Bank of Armenia (CBA) are charged with managing the debt, and both are 'competent to

timely execute obligations, if corresponding instruments are not prohibited' (RA Law on Public Debt, article 11). Unfortunately, as this vague provision does not specify that *only* the MoF and CBA may execute obligations, it is not a clear designation of who encumbers the state. Furthermore, evidence indicates that other state actors are encumbering the state. For example, the public debt strategy for 2015 to 2017, adopted on 3 July 2014, does not envision borrowing for the nuclear power plant renovation, but on 8 August 2014, the Ministry of Energy announced that it was borrowing US $300 million from Russia for nuclear power plant renovation. The one month difference indicates that the Ministry of Energy negotiated the loan independent of the MoF and outside of the state debt strategy (Artak Kyurumyan, interview 19 April 2015 and e-mail comments 4 May 2015). Transparency, participation and accountability were thwarted.

As regards other transparency and participation priorities, for example that a diversity of state actors be involved in debt management, two institutions in Armenia (the MoF and CBA) seem insufficient. Also, regarding the call by the Principles for an annual debt strategy and needs assessment, which the Draft Commentary interprets as an audit facilitating public debate, Armenian legislation only requires that the government's annual report on the budget to parliament includes state debt obligations (RA Law on Public Debt, article 13). Intuitively, and as was confirmed by one expert, this does not constitute sharing a debt strategy which is truly subjected to debate (Karine Harutyunyan, interview 20 April 2015). Moreover, even though Armenian legislation qualifies that 'the governance of the state debt is implemented through the principle of transparency, accountability, credibility and publicity' (RA Law on Public Debt, article 10), no provisions call for consulting with stakeholders, whether they be other state actors or civil society. Also, the debt strategy for 2015 to 2017, adopted on 3 July 2014, while referencing the possible issuance of Eurobonds, did not include how interest payments would affect the debt strategy, and subsequently Eurobonds were summarily issued at the beginning of 2015 (Artak Kyurumyan, e-mail comments 4 May 2015), thus circumventing public debate.

Perhaps the worst example of a violation of transparency is the ArmRosGazprom case of 2013, which revealed that Armenia had to cede to Russia its last remaining interest in the national supply system of natural gas in exchange for cancelling a debt to Russia, of which no one was aware, and which had accrued during the subsidising of gas prices during an election period:

> Energy Minister Armen Movsisyan did not hide the fact that if Armenia had not agreed to join the Customs Union and had not sold the remaining 20 per cent of ArmRosgazprom shares to Russia, it would have had to pay the debt of $300 million for natural gas accumulated since 2011. As it turned out, Russia actually raised gas prices for Armenia in 2011 but, by mutual consent, it was not declared in Armenia officially, because in 2012-13 Armenia held three national elections' (ArmeniaNow.com, 5 December 2013).

This was clearly a secret and politically-motivated act of encumbrance on the part of the state.

As to accountability, Armenian legislation limits borrowing by restricting the budget deficit to no more than 3 per cent of GDP after the debt to GDP ratio has reached 50 per cent, and by prohibiting debt

accumulation to GDP ratio of 60 per cent. However, in addition to restricting the budget deficit after the 50 per cent mark is reached, this provision and one other plainly guarantee debt repayment to creditors (RA Law on Public Debt, articles 5 and 23). In contrast, no legislative provisions protect social service expenditures or prohibit the modification of human rights provisions. Thus, the provision limiting debt and guaranteeing repayment acts to prioritise debt service over human rights, and makes it probable that when debt repayment difficulties arise, expenditures for social services and provisions for human rights will be curtailed to finance debt repayment, thus countering the last point (f) from the Principles outlined above.

Regarding the other factors, Armenian legislation does not require needs assessment or a consideration of alternatives ((b) above), and the government has borrowed funds when its treasury single account was full (Kyurumyan 2014: 15). Also, Armenian legislation specifies that borrowing is for the purpose of covering budget deficits, rebuilding reserves for current account balances, and to develop the local debt market (RA Law on Public Debt, article 8). However, the ArmRosGazprom and the nuclear power plant loan cases prove that debt is acquired for other reasons, compromising point (c) above. Lastly, no provisions specifically impose fiduciary duties on officials for debt malfeasance and no independent bodies are involved in debt assessment or management ((d) and € above). In general, Armenian compliance is poor.

In Belarus, legislative and regulatory compliance with the Principles is often lacking, and when there is formal compliance, it is often undermined by practice. For example, regulations appropriately designate three state actors and their separate functions with regard to debt: the National Bank is to oversee issues of monetary accommodation and banking in general; the Ministry of Finance oversees the public sector; and the Ministry of Economy oversees other sectors and co-ordinates debt analysis and strategy (Concept for the Management of Gross External Debt 2011). Furthermore, the capacity to borrow is reserved to the government through a decision of the President (Belarus Budget Code, article 52). Although the roles are designated, the reality is that no entity has sufficient independence from the executive to act as a true check against abuse. Additionally, borrowing limits are set annually in the budget law, which does little to limit future borrowing or create a debt strategy debate (Belarus Budget Code, article 55). Also, no legislation or regulation specifies any needs assessment process, nor any stakeholder participation. Although the Budget Code requires the source of debt to be listed, it does not require listing of the corresponding purpose, and the strategy is simply incorporated in the annual budget law, which does little to inform or foster debate (Belarus Budget Code, article 57). For these reasons, transparency, participation and accountability are extremely compromised in the debt management framework of Belarus.

Georgia's debt management framework also falls well below the UN standards. Legislation does specify that debt is managed by the Ministry of Finance and the National Bank, and provides for a subsidiary or oversight role for parliament, the government and the Ministry of Sustainable Economic Development (Georgian Law on Public Debt). However, legislation does not specifically regulate the process of borrowing and debt service, and there is no strategic document on debt management. There are

neither provisions for participation by stakeholders and civil society, nor provisions for transparency or debate. Experts argue that Georgia needs a holistic approach to identify, evaluate and manage risks, to co-ordinate debt management activities and decrease debt service costs, as well as to ensure transparency, participation and accountability (Economic Policy Research Centre 2014).

With regard to Moldova, 80 per cent of foreign public debt is owed to the World Bank or IMF and, based on a 20-year working relationship, a new partnership agreement with these IFIs was recently executed (IMF Country Report 2011; Documents and Reports Moldova 2015). Moldovan debt management scores well as per IMF criteria based on a manageable debt to GDP ratio and long-term, low-cost portfolio (IMF Country Report 2011). Also, Moldovan legislation designates the Ministry of Finance with sole jurisdiction as to debt, including borrowing, public guarantees and lending to public entities (Law on Public Debt and State Guarantees and on Lending from State Borrowings). However, when compared to the Principles, the Moldovan framework is significantly lacking, as (a) legislation does not include clear debt management objectives; (b) elaboration of debt strategies is not required (compromising parliament's oversight abilities); (c) local self-governing entities may borrow internationally independent of the Ministry of Finance even though they lack sophistication for loan negotiation; and (d) provisions to foster stakeholder and civil society participation, as well as general transparency, are absent (Law on Public Debt; Public Debt Management Reform Plan 2011). Moreover, accountability is weak and corruption in the banking sector endemic. Perhaps 70 per cent of banks are controlled by oligarchs connected to Russia, and the Moldovan National Bank governor has accused them of manipulating exchange rates which caused national currency devaluation (Soloviev 2015). Also, it is common for shell companies to sue Russian companies which do not defend and then transfer funds in payment of judgments, but such payments are quickly sent to off-shore accounts, meaning that this is a process of money laundering (Butin et al 2014). Thus, transparency, participation and accountability need greater attention through debt management reform.

Surprisingly, Ukraine neither has legislation dedicated to debt management nor any integrated debt regulatory system. Instead, relative provisions are found in the Constitution, budgetary code and other legislation. The Cabinet of Ministers is charged with setting borrowing parameters, and the Ministry of Finance elaborates the programme of borrowing and servicing of debt, which again is overseen by the Cabinet of Ministers. Although other actors include parliament, the national bank and treasury, the framework fails to produce true checks and balances. Although yearly borrowing limits are set via the annual budget law (Budgetary Code, article 16), this does little in terms of transparency and participation. Moreover, there are no specified aims for borrowing, which opens the door to abuse and corruption. No needs assessments, no consideration of alternatives, and no consultations with civil society or stakeholders are required. In many ways, the Ukrainian debt management framework is open to abuse and political manipulation, and reform as per the Principles is essential.

Considering the precarious economic environment of the EaP and the penchant for borrowing to finance both short-term and long term-social

and economic needs, more vigorous debt management is required in the EaP and the Principles are the most modern standard to which EaP states should aspire.

7 Primary actors and recommendations for decision makers

The dynamic between the economic crisis, foreign debt and human rights, as it unfolds in each EaP country, includes a broad range of actors, both domestic and international. However, those actors who are most directly involved and who can effect change through reform are considered the most primary for this study.

As for international actors in the EaP, many international financial institutions are involved, mostly through financing targeted projects or programmes: the World Bank Group; the European Bank of Reconstruction and Development; the EURASEC Anti-Crisis Fund; the Eurasian Bank; and the Asian Development Bank. In order to secure repayment of their project and programme loans, EaP states should be pressured to better conform to the UN Guiding Principles so that EaP states (a) become better-managed debtors that are better able to repay loans; and (b) become more democratic states pursuing a course of genuine development. After all, all IFIs in theory are development agencies. To this end, IFIs should monitor government spending of loaned monies and make such audit information public and transparent, as well as reconsider the potential negative impact on human rights of austerity measures or other restrictive terms they require as preconditions to lending.

Additionally, foreign states, such as Russia, China, Germany, Japan, the United States and others, are also involved in this dynamic in their individual state capacity. While foreign states may have ulterior motives for lending, inasmuch as the repayment of loans is also a priority, such foreign states would also serve their own best interests by pressuring EaP states to better conform to the Principles, so as to reduce the risk of default.

In terms of Armenia and its domestic context, the primary state actors include the Ministry of Finance and the Central Bank of Armenia, because legislation charges these entities with managing the debt. In terms of oversight, legislation requires the government to report to parliament on debt issues in its annual budget report, making parliament an oversight entity and a primary agent for change. Unfortunately, parliament has not proven itself to be an attentive oversight mechanism, principally for political reasons and/or questions of corruption. Worse still, political campaigning has not been responsive to economic and social issues, including rights, and questionable elections have severely undermined the oversight capability of the electorate. Considering these factors, without external pressure domestic-initiated reform seems unlikely.

In Armenia, the contrast between the Principles and examples of (a) secret debt in the ArmRosGazprom case; (b) debt incurred by unauthorised state actors as per the nuclear power plant renovation debt; and (c) unplanned debt acquisition as per the Eurobond issuance, suggests a number of measures that should be demanded of domestic actors:

- to investigate how debt was secretly incurred in the ArmRosGazprom case and to amend legislation to prevent this in the future;
- to clearly specify in legislation that only the MoF may negotiate and incur debt on behalf of the state so as to avoid debt incurred by other state actors as occurred in the nuclear power plant renovations case;
- through legislation to diversify the number of state bodies involved in decision making regarding debt, to create a mechanism for the independent auditing of debt, and to include civil society stakeholders in all processes so as to address unplanned or rash borrowing as per the Eurobond issuance, the interest payment of which is not foreseen in the debt strategy;
- through legislation to require a human rights assessment with regard to budgeting and debt; to specify that budgetary support for the fulfilment of human rights is superior to the debt repayment security in article 5 of the RA Law on Debt; and to prohibit regressive austerity measures as per real terms in budgetary allocations to the social protection sector; and
- through legislation to clarify the specific purposes for which debt may be acquired, and to require studies of alternative policies to debt acquisition, such as the frequent suggestion to allow currency devaluation.

For its part, civil society must actively demand these reforms from government and should monitor and report on this situation and Armenia's failures regarding the Principles during the Universal Periodic Review before the Human Rights Council.

In the Belarusian context, three main domestic actors are responsible for the foreign debt analysis, monitoring and control: the National Bank; the Ministry of Economy; and the Ministry of Finance. However, the exclusive capacity to borrow public debt belongs to the government either by the decision or consent of the President, and the role of parliament in the process is limited to the adoption of the law on Republican budget, which in fact contains the annual foreign debt strategy. Nevertheless, due to the high concentration of power in the executive, the role of the other actors is marginalised, thus frustrating transparency, participation and accountability. A comparison between the Belarusian framework and the Principles suggests the following recommendations:

- to enhance accountability with regard to budgeting and debt by ensuring independent domestic expertise and reporting mechanisms to the legislative branch;
- through legislation to guarantee mechanisms for civil society participation in budgeting and debt-monitoring processes;
- to include a human rights component in the state's concept of foreign debt management and through legislation to establish a human rights assessment with regard to budgeting and debt;
- to clarify the specific needs for which debt should be acquired, and to implement studies of alternative policies to debt; and
- to ensure a stable social expenditure level for poverty reduction and full employment, while making structural changes whereby subsequent wage increases relate to productivity gains and labour mobility is increased across sectors, while also affording opportunities to private sector initiatives.

Engaging in such reforms with a long-term perspective may allow Belarus to establish a more stable socio-economic environment and to sustain its high social protection in the long term.

In terms of Georgia and its domestic context, the primary actors include the Ministry of Finance and the National Bank of Georgia, because

legislation provides these institutions with an exclusive mandate to enter into agreements on borrowing. In addition, the Ministry of Justice issues legal opinions on public borrowing and state guarantee agreements. However, such a budget-monitoring and management process has not been fully responsive to economic and social rights, nor to the sustainability of external debt. Considering these issues, domestic proactive measures are necessary to improve the debt management capacity in Georgia. Therefore, in light of constantly-growing external debt, the Principles suggested certain measures that should be demanded of domestic actors:

- to develop a debt management strategy which would be an integral part of macro-economic policy;
- to ensure the sustainability of debt by defining criteria for borrowing and clearly identifying those projects and sectors for which the debt should be acquired;
- to implement the effective use and transparent spending of grants and preferential loans of international IFIs in order to assure sufficient returns to repay future obligations;
- to focus on equality, non-discrimination, participation, empowerment, accountability and transparency, because a rights-based approach would improve the sustainability and effectiveness of development policies;
- to improve public expenditure management systems that would ensure the efficiency of poverty-reducing expenditures;
- to establish a periodic review of the effectiveness of external financing, which could be done as part of the periodic public expenditure review; and
- to intensify efforts in improving the social conditions of citizens and to promote the realisation of human rights by ensuring that state public policies on foreign debt are in compliance with the Principles as well as with the state's obligations as laid out in the Constitution and the international human rights treaties ratified by Georgia.

Such reforms would enhance the long-term rights perspective necessary for future growth and development.

With regard to Moldova, it is clear that adequate compliance with IMF assessment criteria is wholly insufficient in terms of creating transparency, participation and accountability, the underlying values of the Principles. Considering the high level of corruption in general, and its prominence in the banking industry, Moldova should undertake reforms which mandate specifically-defined borrowing objectives and conditions, more detailed and prompt reporting mechanisms for parliamentary oversight and the adoption of other mechanisms, highlighted in the Principles, to implement checks and balances in relation to foreign debt.

As for Ukraine, despite the current instability and increasing need for economic and structural reforms, the 'silver lining in the clouds' is an active citizenry which, with proper orientation, can force positive change. In the sphere of foreign public debt, the Principles should serve as an orientation for both government and civil society as reforms are pursued. Starting with the basics, a dedicated law on public debt is required to comprehensively regulate debt and debt management, and all the mechanisms discussed before as part of the Principles should be considered and incorporated so as to guarantee the greatest degree of transparency, participation and accountability possible. The fact that Ukraine is currently engaging in reforms and that civil society is part of this engagement, and the fact that currently no dedicated law exists, seem

to coincide to create an opportunity for innovative legislation that conforms to the Principles. With sufficient support and encouragement from outside actors, this could be the case.

Therefore, it is for these reasons that the Principles are not only a relevant but also an essential guide to how debt management reforms should be pursued in the EaP if countries of the region are to follow a rights-based approach to development, which probably is the best approach for their current process of transition.

8 Conclusion

For better or for worse, EaP states are states in transition from a Communist past, and are in the process of global integration. Foreign public debt, often spurred on by all types of economic crises, has played, and continues to play, an important role in national development, in general, and in the promotion and protection of rights, in particular. All EaP states struggle to create a realistic balance between borrowing, debt servicing and the protection and promotion of rights, especially socio-economic rights. Most recently, the renewed economic crisis has impacted on debt portfolios and on the provision of rights, and debt servicing will impact on rights guarantees in the future. In the mist of this dynamic, it is the UN Guiding Principles which best illuminate a balanced, rights-based approach to debt management, development and rights protection, mainly because the Principles are founded in transparency, participation and accountability. Now that the tool is available, it is up to civil society – and hopefully also international actors – to persuade governments to employ the Principles for the well-being of all.

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Appendix: Experts consulted/interviewed

Armenia

Name	Date	Biography
Artak Kyurumyan	19, 20 April & 4 May 2015	Artak Kyurumyan holds an MBA from Tulane University and served in the Ministry of Finance and Economy of Armenia during the late 1990s. Currently he is engaged in consulting and research on public finance issues and is a fellow of the Open Society Foundation Armenia.
Karine Harutyunyan	20 April 2015	Karine Harutyunyan holds a PhD in Economics and serves as Chair of Mathematical-Economic Methods at the Yerevan State Economic University. Formerly employed at the Macroeconomics Department of the Ministry of Finance of Armenia, she now serves as a consultant there and has taken up the responsibilities of Executive Director of the Economic Development Research Center (EDRC).
Samson Avetian	28 April 2015	Samson Avetian holds an MBA from Harvard and an MS in Financial Management from the Gothenburg School of Business. He currently serves as the Managing Director of Arrow Global Ltd, an investment advisory and fund management firm, in Armenia.

Georgia

Name	Date	Biography
Maya Grigolia	17 April 2015	Maya Grigolia holds an MA in Economics from ISET and a BA in Mathematics from TSU. After graduating (in 2008), she started working at ISET as a research associate, specialising in macroeconomics. Ms Grigolia teaches macroeconomics, principles of economics, statistics and data analysis in TSU's Economics and Business Faculty. In 2011, she was accepted as a Senior Research Associate with the ISET Policy Institute. Ms Grigolia has been involved in independent studies of the effectiveness of the Georgian public sector in the wake of the 2008 war and global financial crisis as macroeconomics analyst. In addition, she is the co-ordinator and leading instructor in ISET's training programme for the banking sector. Maya Grigolia is a PhD student at Tbilisi State University's (TSU).

Nino Doghonadze	23 April 2015	Nino Doghonadze holds a Master's degree in economics from the International School of Economics at Tbilisi State University (ISET). She joined the ISET Policy Institute in July 2012. Ms Doghonadze is conducting research and providing economic policy consulting. Additionally, she also teaches Principles of Economics at Tbilisi State University's International School of Tourism.
Mariam Chachua	28 April 2015	Mariam Chachua received a BA in Business Administration from Tbilisi State University in 2010. In 2012-2014 she studied at the International School of Economics at TSU. In 2014 she received MA in Economics. She has four years of working experience in Revenue Service of Georgia. During 2014-2015 she was working as an economic-analyst at Georgian Reforms Associates. Currently she provides lectures in Georgian Institute of Public Affairs.

Ukraine

Name	Date	Biography
Tetyana Ogarkova	30 April 2015	Tetyan Ogarkova holds a PhD in literary studies, Universite Paris-XII Val-de-Marne, Paris, France. She is a fellow of the Fulbright Faculty Development programme (FFDP) University of Arkansas, USA. Currently she is a co-ordinator at Ukraine Crisis Media Centre, www.uacrisis.org and a free-lance journalist at Ukrainska Pravda (life.pravda.com.ua). She is also a senior lecturer at Kyiv-Mohyla Academy (NaUKMA), Department of literature.
Aleksandra Novitchkova	2 May 2015	Alexandra Novitchkova holds a MA in political science in Kyiv-Mohyla academy and later was a visiting scholar in EHESS (Paris, France) in 2005-2007 and Fulbright fellow in State University of Kansas (Lawrence, USA) in 2011-2012. She is an analyst in Centre for Civil Liberties and a senior lecturer at the University of Kyiv-Mohyla Academy Kyiv, Ukraine. Ms Novitchkova is a co-author of the book *Analysis, elaboration and realisation of public policies in Ukraine* (2005) and numerous articles on democracy and human rights. She has become actively involved in human right defence with the start of the Euromaidan in Kyiv.

L 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* 97-117

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

Lisa Ginsborg*

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

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

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

1 Introduction

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

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

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

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

2 Austerity measures in the Eurozone

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

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

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

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

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

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

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

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

2 Namely, 80 billion Euro from a number of Eurozone states and 30 billion Euro from the IMF. See http://ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/index_en.htm (last visited 30 May 2016).

3 See http://ec.europa.eu/economy_finance/eu_borrower/efsm/index_en.htm (last visited 30 May 2016).

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

5 See http://ec.europa.eu/economy_finance/assistance_eu_ms/index_en.htm (last visited 30 May 2016).

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

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

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

3 Human rights implications of austerity measures in Europe

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

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

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

3.1 Social and economic rights

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

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

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

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

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

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

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

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

Similarly, in 2014 the ESCR Committee expressed its concern in relation to Portugal:[12]

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

9 See http://ec.europa.eu/eurostat/statistics-explained/index.php/Unemployment_statistics (last visited 30 May 2016).
10 Spain, UN Doc E/C.12/ESP/CO/5 (6 June 2012) art 2, para 2 and art 6.
11 UN Doc A/HRC/17/34/Add.2, 7.
12 UN Doc E/C.12/PRT/CO/4, 5.

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

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

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

3.2 Civil and political rights

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

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

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

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

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

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

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

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

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

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

4 Relevant legal framework

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

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

> although we expect that this will be a political test rather than the strict legal standard.[15]

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

4.1 European Stability Mechanism

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

15 They continue: 'And finally, bank resolution attempts above all introduce a 'credible' legal framework for dealing with large banks, knowing that many legal rules only exist in the books and fail to be applied in practice.'
16 Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism.
17 See http://ec.europa.eu/economy_finance/eu_borrower/efsm/index_en.htm (last visited 30 May 2016).
18 http://www.efsf.europa.eu/about/index.htm (last visited 30 May 2016).
19 http://www.esm.europa.eu/index.htm (last visited 30 May 2016).
20 Treaty Establishing the European Stability Mechanism (ESMT), 2 February 2012.
21 See Case C-370/12 *Pringle v Ireland*, Judgment (Full Court) of 27 November 2012 (AG Kokott).

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

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

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

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

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

23 ESMT, art 5(1)

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

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

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

27 ESMT, art 13(3).

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

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

5 Problems relating to ESM accountability

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

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

28 ESMT, art 13(4).
29 ESMT, art 13(7).
30 'The tasks of the ESM are indeed carried out by a broad institutional network comprising a multitude of supranational, international and national actors, which raises numerous questions concerning the substantive authorship of acts formally attributed to the ESM as an independent legal body and, correspondingly, the political accountability for such actions.'
31 'Nevertheless, at this point in the history of European integration, the EU is undertaking a paradigm shift in the field of social policy. Without any formal change of its competences the EU has begun to intrude upon salient areas of domestic social policy, portraying its intervention as an inevitable part of financial condition-setting.'

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

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

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

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

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

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

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

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

35 Art 6(1) ESMT.

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

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

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

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

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

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

6 Human rights accountability of international institutions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 Conclusion

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

46 Although there has been an increasing tendency to bring cases before national courts.
47 GA Resolution 66/100, Articles on the Responsibility of International Organizations, New York, 9 December 2011.
48 Art 4, Articles on the Responsibility of International Organizations, New York, 9 December 2011.

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

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

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

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

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

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

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Violence in transition: Reforms and rights in the Western Balkans

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Abstract: *The 1990s saw the breakdown of the former Socialist Federal Republic of Yugoslavia which, since World War II, had developed a distinct economic system that included specific market and socialist self-management principles in production, distribution and decision-making processes. At the same time, the European Union opened up the possibility of full membership if these countries – now politically referred to as the Western Balkans – met the accession criteria claimed as essential to bring about fully-functioning and competitive market economies. The transition and accession processes were supported financially, politically and militarily by Western powers as a shift away from authoritarianism and poverty, while promoting democracy, human rights and individual freedom. This article argues that, contrary to this optimistic discourse, transition in the Western Balkans reflected and incorporated violence at different levels. The article shows that tensions between reforms and rights began in the 1970s, spurred by indebtedness and inequalities, pervading the transition process and deteriorating in the wake of the 2007-2008 global financial crisis. Social policy increasingly became framed along market-efficiency principles, challenging existing entitlements and rights, particularly with regard to education, social security and health. Vulnerable groups, such as the unemployed and the aged, experienced serious shortfalls in support and care. By the second decade of the twenty-first century, social protests against the deterioration in the levels of livelihood and the retrogression of social rights had erupted in several places. Violence was expressed not only in the form of direct bodily harm, but also in control exerted through indebtedness, the destruction of livelihoods, the denial of basic human rights, and the struggle for social justice.*

Key words: *Western Balkans; transition; debt; social rights; financial crisis*

1 Introduction

While transition involves complex and diverse transformations, the mainstream neoliberal discourse on transition in Eastern Europe in the late twentieth century has viewed it as a process of economic liberalisation

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and political democratisation associated with moving from planned socialism to free-market capitalism and democracy. The article analyses how key social rights were challenged and contested during the so-called transition in the Western Balkans, focusing on the experiences of Bosnia and Herzegovina, Macedonia, Montenegro, Serbia and Kosovo, which had formed part of former Socialist Federal Republic of Yugoslavia. While market principles had been incorporated at an earlier stage, the article deals mainly with the period from the 1990s to 2014. It is argued that the changes that took place in Yugoslavia and successor republics incorporated and reflected violence at different levels. While the 'Yugoslav wars' that formed part of the dissolution of the republic took their toll in terms of human suffering as well as the destruction of infrastructure and livelihoods, violence was also embedded in the unequal power relations associated with debt repayment and structural reforms of the subsequent periods. These unequal relations reframed social policy along market principles with severe consequences for basic labour rights and other social entitlements. Countering these deprivations were social protests that were suppressed by police and the army, reflecting increasing turmoil and confrontation in state-society relations in the transition process. The former Yugoslavia was one of the first test sites to design stabilisation and transition reforms later deployed in other former socialist countries. The analysis, therefore, contributes to recognising and interpreting tensions between reforms and social rights in other contexts of transition.

The argument is developed in the following order: Part 2 outlines the historical embedment of debt and inequality in the region that ultimately led to the dissolution of the Federation in the 1990s. Part 3 deals with the discourse and reality of reforms and rights, as countries attempted to meet donor requirements and to comply with criteria for membership of the European Union (EU). Part 4 focuses on reframing social policy along market principles and its implications for key social rights. Part 5 demonstrates how these problems were exacerbated after the global financial crisis of 2007-2008. Part 6 reviews some of the protests that erupted as individuals and groups demanded the restoration of these rights. Part 7 concludes by reflecting on how direct and structural forms of violence have permeated the transition process in the Western Balkans, and continue to generate tension between reforms and social rights. Throughout the article, attention is devoted to the pervasive role of debt as an enforcer of violence, in line with the observation by Lazzarato (2012: 29) that debt acts as a form of 'capture', 'predation', and 'extraction machine' on the whole of society and as an instrument of macro-economic prescription and management, while generating asymmetrical creditor/debtor power relations.

2 Indebtedness, inequalities and dissolution: A brief historical background

While Yugoslavia was ideologically and politically linked to the Soviet Union in the immediate aftermath of World War II, differences emerged shortly afterwards, and Yugoslavia, under the leadership of Josip Broz Tito, embarked on its own path of socialism. Since the 1950s, Yugoslavia enacted reforms decentralising political and economic power and decision making from the Federation to the Republics (although the leadership

remained within the Communist Party), and introduced a policy of self-management, which was later embedded as a political norm in the Constitution of 1974. In contrast to state ownership, the self-management model was based on social ownership of enterprises, and involvement of workers in management. However, power was held by the party elites in the republics (Malešević 2000: 150).

Yugoslavia also established trade and other relations with Western powers, while maintaining its independence by refusing to join the North Atlantic Treaty Organisation (NATO) and playing an important role in the Non-Aligned Movement. Yugoslavia's strategic positioning in the 'Cold War' context, however, made it a valuable ally. Between 1951 and 1959 Yugoslavia witnessed an inflow of US $1 billion in terms of foreign aid, a further $274 million in military aid as well as US $219 million in long-term credits and grants from other Western governments (Plestina 1992 cited in Bojicic 2014: 31). Yugoslavia also received $600 million in military aid from the USA (Pavkovic, cited in Botsma 2012: 39) In addition, between 1955 and 1964 the USA took care of 60 per cent of the deficits in the balance of payments, and from 1960 to 1990 Yugoslavia was supported with loans from the American Export Import Bank and World Bank in the amount of to $1,4 billion (Allcock cited in Botsma 2012: 40).

The inflow of funds resulted in an impressive annual growth rate of 8.6 percentage points between 1953 and 1964, although many real growth indicators, such as labour productivity and agricultural and industrial production, did not perform well, and even stagnated or declined after 1965 (Bojicic 2000: 30-33; Table 3.1). The system of 'integral self-management' enshrined in the 1974 Constitution did little to improve labour productivity, and the subsequent period was characterised by inflation and greater dependence on foreign borrowings to expand the investment base of the regions (Bojicic 2014: 33). No doubt the situation was also influenced by the volatile changes in the international environment (Boughton 2001: 269):

> [T]he termination of the fixed gold exchange standard and the adoption of flexible exchange rates, the oil price rises of 1973/74 and 1979/80, as well as the contraction of Western markets, led to a sharp rise in the interest rates and appreciation of the dollar.

All these factors contributed to the debt crisis of the 1980s, during which period the economic situation worsened with a low average growth rate (0.5 per cent per year), decreasing labour productivity and investment, an annual inflation rate of 108.7 per cent and increasing international debt (Bojicic 2014: 34). Unemployment increased over time, becoming a major source of tension in the system as the nature of the socialist workplace as a space of social, economic and political organisation meant that the unemployed were effectively 'excluded from full membership in society – a loss of full citizenship rights, a second-class status, a disenfranchisement' (Woodward 1995: 4).

The role of debt in informing the economic and social crisis in Yugoslavia during the 1970s and the 1980s should not be underestimated. Foreign debt in Yugoslavia, which had reached US $4.4 billion by 1973, reached $17 billion by 1980 (Bojicic 2014: 30-33; Table 3.1). With the exception of Albania, all countries in the Western Balkans had experienced the burden of foreign debt and rising debt servicing costs since the early

1980s. Many poorer households of the generation born in the 1970s experienced everyday life in the context of permanent financial crisis.

Since 1980, Yugoslavia had embarked on a series of reforms to address the economic and debt crises (De Rezende Rocha 1991: 27-32; World Bank 1989). These reforms included ceilings on credit and wages (indexation); the use of bankruptcy laws to close down economically-inefficient enterprises; changes to the bank law that required the republics to deposit foreign earnings with the National Bank (De Rezende Rocha 1991; Petak 2003; Crnobrnja et al 2007: 11; Murgasova et al 2014: 59). From 1980 to 1989, the ratio of external debt to gross domestic product (GDP) decreased from 30 per cent to 25 per cent (De Rezende Rocha: 1991: 10) By 1988, the government had achieved a current account surplus and initiated negotiations with private creditors (De Rezende Rocha 1991: 25). However, these gains took place in the context of rising inflation, and at substantial social costs in terms of declining employment, and a decline in real wages below the level of the 1970s (De Rezende Rocha 1991: 22). In 1988, the World Bank (1989) and the International Monetary Fund (IMF) (De Rezende Rocha 1991) began work on stabilisation and structural adjustment reforms. The message repeatedly conveyed in the World Bank report (1989) was that the measures thus far taken to stabilise the economy had not addressed the self-management system as the fundamental cause of the financial and debt crisis. To this extent, the Bank experts proposed to liquidate inefficient enterprises (in order to reduce domestic demand for credit); to impose financial discipline by eliminating ownership and management links between banks and borrowers (the self-managed enterprises were funders of the banks and their borrowers); to recapitalise banks (with public resources); and to restructure enterprises, as 'the current structure is not conducive to the mobility of capital' (De Rezende Rocha 1991: 59). The expenditure for all activities that do not have a higher priority than the recapitalisation of the banks should be curtailed (De Rezende Rocha 1991: 60). The reforms were funded with new loans (stand-by arrangement loans from the IMF and structural adjustment loans from the World Bank). The 'shock therapy' stabilisation reform was announced in December 1989. The World Bank report (1989) outlined the requirements for management of the transition: strong leadership; the establishment of interagency teams supported by task forces; agencies for restructuring banks and enterprises; training and skills in public finance management; and allocation of resources for international expertise 'to be paid on a scale unknown in Yugoslavia' (World Bank 1989: 180).

The protests against the reforms took place in the streets as well as in political fora. Slovenia and Croatia, the two republics with highest GDP, the lowest levels of unemployment and the highest volumes of external trade, and in close proximity to the EU, did not agree to sharing the costs of debt, structural reforms and social programmes, and decided to opt for what Petak (2003: 8) calls economic nationalism. Countering this position were Serbia, Montenegro and the Yugoslav Army (JNA), the single biggest political force in Yugoslavia, emphasising the need to strengthen the federal government, and maintain internal economic transfers (Petak 2003, 5-6). The conflict over the 1989/90 IMF/World Bank shock therapy reforms to stabilise public finance and debt and give more power to National Bank and federal government became one of the triggers of the dissolution in the 1990s.

While demands for greater autonomy and independence had begun in the 1970s, in the 1980s these demands increasingly assumed a more ethnic/nationalistic framing by groups and republics, responding to both the economic problems and the historical legacy whereby decentralisation reforms gave political power to the biggest ethnic group in the republic, while others were treated as minorities (Botsma 2012: 51). The 1990s witnessed the so-called Yugoslav wars, during which Slovenia, Croatia, Bosnia and Herzegovina, Kosovo and Macedonia were exposed to violent conflict and military interventions. These countries experienced, among other problems, the loss of lives, the devastation of livelihoods and infrastructure, civil unrest and migration. The brutality of these killings of civilians, the widespread use of rape and summary executions, the displacement of people and the destruction of infrastructure reflected a 'level and scope of torture and brutality in Europe [which] was unmatched since World War II' (Wilmer 1998: 10).

3 Rights and reforms in the post-conflict era

Transition from socialism to democracy has often been portrayed in the Western media as a move from authoritarianism, poverty and squalor to affluence, which would be accompanied by peace and individual freedoms. These ideas were reflected in the US Congress Act on Support for Eastern European Development (ASEED) of 1989 which aimed 'to promote democratic and free market transitions in the former Communist countries of Central and Eastern Europe, enabling them to overcome their past and become reliable, productive members of the Euro-Atlantic community of Western democracies' (US Department of State 2004). Similarly, a meeting in 1990, that included Margaret Thatcher and George W Bush and other Western leaders (the Head of State and Government of the Conference for Security and Co-operation in Europe), adopting the Charter of Paris for a New Europe, announced the end of the 'era of confrontation and division of Europe', and a 'new era of democracy, peace and unity' with 'steadfast commitment to democracy based on human rights and fundamental freedoms; prosperity through economic liberty and social justice; and equal security for all' (OSCE 1990a).

Human rights were reconfirmed at the 1993 EU Council meeting in Copenhagen which formulated accession criteria that included 'stable institutions, guaranteeing the rule of law, human rights and respect for and protection of minorities', followed by economic performance criteria (European Council 1993). The Thessaloniki Declaration (2003), more specifically aimed at the Balkans, reinstated the Copenhagen criteria for accession and included human rights criteria. The focus, however, was more on civil and political rights than on economic and social rights. However, the latter informed the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the European Social Charter of 1961, and the European Charter of Fundamental Rights and Freedoms that came into force under the Treaty of Lisbon in 2009 and which legally bound the institutions and national governments of the EU to uphold the protection of fundamental rights.

This optimistic discourse on democracy and freedom was, nevertheless, firmly underpinned by the requirement for countries in transition to deal

with the problem of indebtedness and undertake structural changes that would open up their economies to Western businesses.

The dissolution of Yugoslavia left successor countries with $15 988 billion inherited debt to be distributed among successor republics (World Bank internal document, cited by Stanič 2001: 758 & 759). While 50.4 per cent of this debt was owed to commercial institutions, the remaining debt holders were the World Bank, the IMF and 15 states which had lent funds to Yugoslavia. Debt restructuring took place within the framework agreements with Paris Club (state creditors) and London Club (commercial creditors) (Stanič 2001: 76-62; Buiter & Lago 2001). The inherited external debt of the Balkan Five (Bosnia and Herzegovina, FRY Macedonia, Serbia, Montenegro and Kosovo) was in the amount of $13.75 billion (Stanič 2001: 758). Some of this debt was written off or restructured. At the same time, new credit was required to finance old debt-servicing costs, deficits in the balance, as well as transition reforms (for instance, the debt to the IMF and the World Bank). By 2014, the external debt of the Balkan Five had quadrupled to $55.4 billion (calculation by the authors on the basis of World Bank International Debt Statistics tables).

The market-oriented reforms and public debt management have constituted two pillars of the transition agenda that displaced human rights, in particular social rights. The 1990 Bonn Conference on Economic Co-operation in Europe (CECE), which spelled out the programme of economic reforms for transition, mentioned human rights, but explicitly noted that the transition countries would need to include the right to freely sell, buy and utilise property and repatriate profits at convertible currencies, as well as an efficient public sector (OSCE 1990b: 3-4). Criteria for all candidates and potential candidates agreed upon by the European Council at the Copenhagen Summit of 1993 included the 'the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union; the ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union' (European Council 1993). In the late 1990s, the cessation of conflict opened the possibility of accession into the EU, and advanced the implementation of structural reforms in the Western Balkans in line with creating a free market economy, including opening up their economies to global trade and taking measures to promote private enterprise and export production and removing restrictive regulations (Murgasova et al 2015: 9).

The regional and country-specific Stabilisation and Association Process (SAP) of 1999 - reflected in the Declaration of the Zagreb Summit and the European Union-Western Balkans Summit at 2003 in Thessaloniki - set up the framework for EU accession (European Commission 2007, 2009, 2013). The European Commission monitored progress, identified weaknesses and required technical adaptations, introduced criteria and priorities, and directed EU funds towards relevant projects (Anastasakis & Bechev 2003: 7-8). The EU conditionality towards the Balkans was in effect 'a multi-dimensional instrument geared towards reconciliation, reconstruction and reform' that was 'regional, sub-regional and country-specific' and, at the same time, 'economic, political, social and security-related' (Anastasakis & Bechev, 2003: 8).

The Stabilisation and Accession Process entailed much closer co-operation between the European Commission, the IMF and the World Bank than during previous enlargements. This co-operation was institutionalised through various initiatives, such as the Joint Co-ordination Office established by the Commission and the World Bank, to co-ordinate donor assistance. Another case among the diverse co-operative arrangements between the three institutions is the recent programme for the management of public finance, 'Strengthening Economic Governance and Public Financial Management in South-East Europe', an EU and IMF-funded programme in the six countries of the Western Balkans.

In 2013, even stricter requirements and conditions were imposed for potential candidates from the Western Balkans to the European Union. The candidate countries were now required to prepare the same National Economic Reform Plans, Plans for Competitiveness and Growth, and public finance management plans as member states. The effective implementation of the public finance management plan is a precondition for budget support.

4 Social policy and social rights

A major area of international intervention in the Western Balkans was in respect of social policy, the latter also being influenced by changes in the EU which, since the 1980s, had witnessed an increased resort to the commercialisation of pensions, education and health care. Applying market principles to these provisions implied a reframing of social policy, viewing it rather as 'a productive factor contributing to economic growth and development', with the terms 'activation' and 'joined-up policy making and partnership' being used to suggest the inclusion of the people in solving social problems (Lendvai 2007: 32). Critics of these policies have suggested that this reframing of social policy was 'more a political act and discourse to subordinate social policy to economic growth and competitiveness' (Lendvai 2007). In the same vein, Böröcz (2001: 108) argued that

> [t]he essence of the European Union's strategy *vis-à-vis* the Central and Eastern European applicants is the integration without inclusion, participation in production systems and appendance to the consumption market of EU corporations without attendant political, economic, social and cultural rights conferred by the European citizenship.

Several international actors were involved in the implementation of social sector reforms in the Western Balkans, including the IMF, the World Bank, the EU as well as several United Nations (UN) agencies (for instance, the ILO, the United Nations Children's Emergency Fund (UNICEF) and the United Nations Development Programme (UNDP)). In 1992, the UNDP set up a Regional Directorate for Europe and the Commonwealth of Independent States (CIS). In 1993 the ILO established a country programme on decent employment in co-operation with the Council of Europe, and the European Commission conducted country peer reviews of employment policies in Balkan countries, the so-called Bucharest process, and analysed options in pension reforms (Hirose 2011). The note on pension reforms in post-socialist economies by the Directorate-General Economic and Financial Affairs in 1996 identified pensions and the development of market-based social policy as one of the

key challenges of the transition reforms (European Commission 1996: 1). Since the early 1990s, the World Bank has continuously been engaged in promoting, designing and monitoring the implementation of pension and health care reforms in the Balkans, aimed at enhancing efficiency to resolve the disease burden in the framework of fiscal space (Bredenkamp et al 2008: 158). To enable health care reforms, the World Bank projects introduced electronic management systems as well as costing procedures in health care. These reforms privatised primary health care, shifted the ownership of hospitals from the local communes (of the former Yugoslavia) to the state, and introduced systems of organising health care based on a private enterprise model ('marketisation'). The World Bank Department for Europe and Central Asia had teams of experts set up social safety nets and means-tested benefits in place of universal entitlements. According to Deacon and Stubbs (2007: 6), these international actors appeared to be 'scrambling for position' in social policy development.

These projects and policies resulted in contradictory and competing pressures on countries, as the fiscal surveillance procedures conducted by the European Commission and the Council towards EU member states and the acceding countries demanded cuts in public expenditures that affected the availability of funds for welfare expenses. In this way, this 'crowded arena' in social policy development had 'major implications for transparency and ownership with some countries' social affairs ministries confused and disempowered in these processes' (Deacon et al 2009: 290).

In all, these material and discursive international interventions constituted and co-shaped a parallel network of power that often superseded national governments. This situation was exacerbated by large numbers of people experiencing extreme poverty, while the number of households living just above the poverty line remained a serious concern in the region (Deacon & Stubbs 2007: 14-15). Inequality increased in the region and also in urban and rural areas, also with respect to access to health care facilities and treatment, affecting more vulnerable groups, such as the unemployed. The Roma minorities experienced graver problems in this area (Stubbs & Zrinščak 2009: 288-289 & 290).

5 The 2007-2008 financial crisis and its aftermath

The turbulence in the global financial system in 2007 and 2008, associated with unsustainable banking practices in supplying loans for housing in the USA (so-called 'sub-prime' lending) and questionable trading practices had an impact on global stock markets, with losses in the value of securities, as well as a downturn in the world economy. Europe was badly affected and, in turn, the Western Balkans, through its relatively high degree of *de jure* and *de facto* Eurosation, a process whereby countries either introduced the Euro as official legal tender, or linked the local currency strongly to the Euro. The Euro had been adopted as the official tender of Montenegro and Kosovo (without the permission of the European Central Bank), while the currencies of Bosnia and Herzegovina, Croatia and Macedonia were linked or pegged to the Euro. This process was stimulated not only by the uncertainties of war and inflation in the 1990s, but also by the extensive migration from the region to Europe, as well as by the EU integration process with the expectation that, once reaching full membership, the Euro would be the only currency.

The economies of the Western Balkans did not immediately experience the impact of the 2007-2008 global financial crisis as their counterparts did in the more industrialised countries (Shera 2015: 2-3). Many of the local banks, however, had received substantial assistance and involvement of foreign capital, ingraining a degree of instability into the financial systems (Impavido et al 2013: 38). The effect was somewhat staggered and largely felt through trade and commercial links with the Eurozone, where lending institutions, in contrast to the previous period, sharply reduced or froze credit to the region to avoid being exposed to a higher risk. These practices shortly thereafter led to a decrease in domestic industrial production with the tightening of available credit, leading to a decrease in domestic demand and consumption, as well as economic problems with key trading partners such as Italy, Germany and other Eurozone countries. This affected, among others, the productive sectors and reflected in the stagnation and decline in the growth of GDP from 2008-2009 onwards (Shera 2015: 2-3). Another important financial crunch emerged by way of a decline in remittances (Shera 2015: 6). A credit and real estate bubble and a decline in export and domestic demand led to the increase in non-performing loans (Murgasova et al 2015: 74). All these factors affected the fiscal balances of these countries with decreasing tax revenues and increased budgetary deficits (Murgasova et al 2015: 7). Raising the cost of servicing public debt with adjustable interest rates exerted further pressure and increased budgetary deficits.

Some of the most important consequences since 2007 included (a) a slowdown of growth including negative growth in industrial output, leading to unemployment and poverty; (b) deflation and fall in domestic demand; (c) a fall in imports, which was not always positive as people and firms were not buying goods as they could not afford them; (d) a decrease in foreign direct investment; and (e) a decrease in remittances. Since 2009, the region has also relied more on IMF loans. One consequence of the banking and financial crisis was the increased sovereign foreign debt in South Eastern Europe and the Western Balkans, which in 1989 amounted 32.89 billion. After the financial crisis, foreign debt skyrocketed from $99.4 billion in 2007 to $230.5 billion in 2009, reaching $258.7 billion in 2013. In the Western Balkans, foreign debt substantially increased in the period of transition reforms. In 2000 it amounted to $15.85 billion to reach $40.8 billion by 2007, and $57.97 billion by 2013.

Concerns about debt sustainability were often at the cost of established social rights. An IMF working paper on public debt in the Western Balkans noted that social expenditure and, particularly, expenditure on pensions posed a threat to debt sustainability, recommending cuts in public expenditure (and improvements in revenue collection) (Koczan 2015: 5) that were directly associated to the retrogression of social rights. The recommendations included, among others, the need to contain wages and benefits in Bosnia and Herzegovina; wage and benefit moderation in Kosovo; fiscal consolidation in the spending review in Macedonia (code word for cuts in public expenditure); 'fundamental expenditure reform, including on the public wages and pensions' for Montenegro; and 'curtailing mandatory spending (pensions and wages)' for Serbia (Koczan 2015: 12).

The IMF stand-by loan agreements, World Bank loans or credits, non-returnable grants from the United States Agency for International

Development (USAID) (USAID 2013: 13), as well as funding tied to progress in the EU accession, pressured countries to 'modernise' social security, the labour market and social protection. Several measures were taken to counter these problems, but these remained with the framework of promoting the role of the private sector in development. The financial crisis also triggered the need to develop a co-ordinated response to the possibility of a sudden withdrawal of funds from parent banks in Europe, as well as to support the co-ordination of host country authorities to deal with these challenges (Murgasova et al 2015: 81). Such a perspective was particularly important as European banks by 2012 accounted for some 75 to 90 per cent of the banking system assets in the region (Burder & Körner 2012: 1).

Significant in this regard were the 2009 Vienna I and 2012 Vienna II initiatives of the European Bank for Reconstruction and Development (EBRD) using its 'its unique relationships with the private sector as well as governments and its mandate to promote transition and development through the private sector' (EBRD 2012). The Vienna I and Vienna II Initiatives brought together, among others, the major financial institutions in the region, including the IMF, the EBRD, the European Investment Bank, the World Bank, key European institutions (the European Commission and the European Central Bank with observer status) and the largest banking groups in the region. According to the EBRD, the Vienna Initiatives were successful by retaining the engagement of many foreign banks, keeping the private sector involved in the stabilisation process, while informing and supporting home and host countries through sector packages support and loosening monetary policy tools to deal with the weak demand while taking care that capital flight would not occur (EBRD 2012).

All these reflected the cumulative pressure that was exerted to prevent contagious defaults, maintain sustainability of debt at huge social cost and enforce market-oriented reforms in the public sector, including health care, education, the labour market, as illustrated below. Between 2008 and 2012, the contraction in the Serbian economy resulted in a decrease in employment by 21 per cent (largely in the private sector). This had serious consequences for the social sector, which was characterised by high public spending on a larger number of people, including the large elderly population, who were forced to rely on social protection schemes (Prica 2013: 164-165). The situation in Serbia was particularly alarming as the country recorded an increasing budget deficit since 2008 with a ratio of government debt to GDP of 70.9 per cent of the country's GDP in 2014 (Republic of Serbia 2014: 5). In addition to social protection spending (which included spending on social assistance and pensions), public sector spending was mainly related to the high employment levels in the state sector and the state administration (Barlett & Uvalic 2013: 164). The high public spending was also adversely connected to the chronic problem of high trade and current account deficits. In October 2014, the government, before signing the IMF stand-by loan of 1 billion Euro, issued a package of economic reform measures. However, with loans also came reforms. The salaries in the public sector and pensions above 25 000 dinars (approximately 200 Euro) were effectively cut from 1 November 2014, reducing the pensions of some 1.5 million citizens while also reducing the number of those employed in publicly-owned companies and the state administration (Balkan Insight 2015). Similar conditions were placed on

the IMF loans to Bosnia and Herzegovina, requiring the country to undertake '[c]comprehensive reforms of rights-based benefits ... which are imperative for both medium-term fiscal sustainability and improving the functioning of labour markets' (IMF 2012: 6).

In the 2000s, Croatia embarked on a path of Europeanisation which, until 2008, was accompanied by economic growth and improved social and living standards (Franičevič 2013: 75). After a period of growth in the 2000s, a deep recession set in by the second half of 2008, with no clear prospect of coming to an end. The first phase of austerity policies (2009/2010) did not lead to serious cuts in social spending, or to cuts in public sector employment. Yet, in the second austerity phase of 2012, because of worsening economic trends and increasing foreign risks, major cuts proved to be much more difficult to avoid (Sanfey 2010: 2 in Franičevič 2013: 75). The recession particularly affected those on temporary contracts, but in time even the permanent workforce was also affected. More men than women were made redundant, but this was due to the fact that women did not dominate the sectors that had the immediate impact in terms of unemployment. The austerity measures in the public sector would badly affect women. The youth also faced a high degree of unemployment: The unemployment rate in the 15 to 24 age group increased from 22 per cent in 2008 to 36 per cent in 2011 (Franičevič 2013: 78).

In 2014, Croatia changed its labour law in line with making labour markets more flexible, a measure criticised by the biggest trade unions in the country. The new changes into the labour system included (a) reducing the cost of hiring and firing; (b) more flexible work time; (c) addressing wage rigidities; (d) rendering more flexible working hours; (e) addressing wage rigidity; (f) reducing the maximum amount of compensation paid to a wrongfully-dismissed worker from 18 months to six months; (g) relaxing the constraints on the dismissal of some categories of protected workers in cases justified by business necessities; (h) increasing the flexibility of work time by extending the scope for rescheduling work hours; and (i) raising labour force participation through changing the dates for qualification for pension.

Since the adoption of the law, many civil society organisations have voiced their discontent with the proposed provision part of the new law. The Women's Front for Labour and Social Rights in Zagreb has been particularly critical. This association has organised protests and focused their work on actions, public meetings and the production of texts related to the critique of the flexibilisation of labour legislation in the form of the new labour law. The Pension Insurance Act, which entered into force in November 2014, entitled an insured person to an old-age pension on reaching 65 years of age and having completed 15 years of qualified employment. The next 20 years would see further changes, by increasing the age for eligibility for pension to 67 years for both women and men (Bolfek 2014). Another organisation, the Association of Croatian Public Sector Unions (MATICA), alleged that Act 143/2012 on Withdrawal of Certain Material Rights of the Employed in Public Services, implemented by the government of Croatia on 20 December 2012, had been adopted in violation of the provisions of the European Social Charter. The complaint, registered on 24 March 2015, relates to articles 5 (the right to organise) and 6 (the right to bargain collectively) of the European Social Charter.

The organisation filed a collective complaint to the European Committee of Social Rights. This decision is still pending.

Flexible employment was also promoted in Macedonia through the labour market reform law of 2005 that was based on the rare consensus of key political actors, representatives of employers and unions. This reform introduced flexibility in labour contracts, overtime provisions and employee redundancy, without significantly undermining the legal standing of employees. These policies were strengthened under the government of Nikola Gruevski, who had previously been the Minister of Trade and Minister of Finance, and in 2006 became the Prime Minister. While asserting the need to develop the economy and improve the quality of life for the people, he believed that unemployment could be solved by 'establishing better conditions for doing business' and proceeded to make appropriate changes, including reducing taxes to a flat rate of 10 per cent corporate and personal income tax, and reducing the Value Added Tax in sectors (from 18 to 5 per cent custom duty) and reducing by one-third the contribution by companies to health and pension funds (interview, *The European Times*, 24 March 2015).

While official statistics showed a marginal decline in the official unemployment rate from 2009 onwards, a qualitatively different picture emerges when this is complemented by other sources, such as representative sample surveys. In 2008, such a representative survey of households in Macedonia indicated that 48 per cent of respondents were pensioners, students or housewives who did not participate in the labour market, while 66 per cent lived in households where at least one person was unemployed (Gerovska-Mitev 2013: 111). It also showed that, while 19 per cent of the representative survey experienced a loss of employment, the majority of these were people with an ethnic Albanian background. In addition, 57 per cent of the survey indicated that they knew at least one person who had suffered a loss of employment. Those with a low degree of education, older participants (50-65) and women were most affected during the crisis (Gerovska-Mitev 2013: 111). Protection against unemployment was not adequate, and there was a general lack of knowledge and information about workers' entitlements to benefits and services (Gerovska-Mitev 2013: 112). Other rights, such as those related to health care and health insurance as well as education, were also negatively affected by the global financial crisis (Gerovska-Mitev 2013: 115-118).

Crackdowns were also conducted against those registered as unemployed but who were suspected of earning money elsewhere. Since 2012, the Macedonian Employment Agency also distinguished between active and passive employment seekers. While active seekers were provided with more benefits than passive seekers, they were also bound by more stringent rules, including the obligation to go for interviews and training and to regularly register with an employment agency. It should be noted that since the introduction of the new methodology, the number of passive job seekers has been constantly decreasing, while the number of active job seekers has risen. The government has presented the decrease in passive job seeking and the increase in the active as proof of the success of its policy. However, these numbers may just as well be interpreted as pointing towards a rise in *de facto* unemployment. This situation has several rights-related implications, including the preference for flexibility over security in the labour market; and the undermining of the demand for

favourable working conditions for all while attracting foreign investment based on cost-effectiveness.

Reforms in the labour market and social policy were also promoted by World Bank interventions that sought to bring about Activation and Smart Safety Nets (SSN) for the Western Balkans. In their report of 2013, the World Bank team, led by Boryana Gotcheva and Isik-Dikmelik (2013: 6), noted the following:

> As countries of the Western Balkans are moving up the income tree, there is a need and political will to finalise the first generation SSN reforms (such as reducing benefit fragmentation, improving targeting and coverage, and establishing unified registries) and to move toward a second generation of SSN reforms. The second generation reforms entail creation of 'smart' safety net programmes that inter alia focus on decreasing dependency on welfare among those who are able to work and promoting their employability with a combination of incentive-based cash transfers and services. In other words, this process could be described as moving beyond 'how to get the right people into safety net programs' and toward 'how to "activate" and help beneficiaries graduate from poverty and eventually dependence on transfers'. In this context, activation is a combination of policy tools that supports and incentivizes job searching and job finding as a way to increase productive participation in society and self–sufficiency.

These 'smart safety nets' suggested not only a further reduction in access to social protection for those profiled as unemployable, but also the notion that the social protection transfers and behavioural problems of the unemployed were the primary causes of unemployment. Scant consideration was given to the type of work or the rights of workers within this framework. In the context of the Balkans, the World Bank recommended allocating the unemployed to different profiles by way of a statistical algorithm, as public employment services did not have the resources to undertake this on a case-by-case basis.

Policies such as these have been promoted in different parts of the region. At a workshop in Vienna in 2014, where smart social safety nets in the Western Balkans were discussed, the World Bank emphasised what they have referred to as 'activation' policies to groups that are viewed as 'inactive' and the unemployed, including beneficiaries of social assistance. The idea was to reduce the 'multiple barriers to their employment and active inclusion', and to ensure that demands for protection and prevention of poverty and vulnerability were 'met efficiently' (World Bank 2015). The workshop also aimed at giving policy makers the 'newest international trends … on how to enhance the "promotion" function of the safety net during times wherein increased demand for protection and prevention of poverty and vulnerability need to be met more efficiently under increasing fiscal constraints' (World Bank 2015). In essence, the view is that social transfers and protection were incentives for people to remain unemployed, and more targeted policies were necessary to force these people to undertake some form of employment. In this process, the state was withdrawing from social entitlements while promoting markets for social services and social care, the latter often under the discretion of grant-receiving non-governmental organisations (NGOs), as long as the NGO, a firm or a denominational organisation could succeed on competitive grant markets.

An issue paper prepared by Lusiani and Saiz (2013: 7), published by the Council of Europe Commissioner for Human Rights in November 2013, noted that the in the aftermath of the 2008 financial crisis, many countries had undertaken further austerity measures affecting the 'whole spectrum of human rights … from the rights to decent work, an adequate standard of living and social security to access to justice, freedom of expression and the rights to participation, transparency and accountability'. The paper highlighted the disproportionate hardship experienced by vulnerable and marginalised groups, emphasising that the very capacity of the state to provide basic social welfare and protect the human rights of all was being undermined (Lusiani & Saiz 2013: 7).

6 Protests and alternative discourses

An important outcome of these changes was the increase in social protests undertaken by groups and civil society organisations in the Balkans against the decline in means of livelihood and the retrogression of social rights. These struggles became more widespread and even violent after the financial crisis of 2008 when governments were forced to take even more stringent measures to deal with the fiscal problems. A wide variety of individuals and groups were involved in these demonstrations in Croatia, Bosnia and Herzegovina, Serbia, Macedonia, Montenegro and Albania, and involved students and lecturers, trade unionists, precarious workers, pensioners, anarchists, ecologists, socialists and others. The common theme was anti-establishment and the demand for basic social rights.

In Croatia in the spring of 2011, for a whole month up to 10 000 people marched across Zagreb every evening denouncing the political system and all political parties. In Slovenia in 2012 and 2013, general 'uprisings' mobilised the whole country, contributing to the fall of the right-wing government and a number of corrupt officials. In Bulgaria in the spring of 2013, huge protests triggered by drastically-increased electricity bills brought thousands to the streets, only to be followed by even larger protests after the general elections in the summer of 2013. For weeks, masses protested against political elites and their ties to the powerful Mafia and media moguls. In Romania, protests have erupted sporadically since 2010, in response to unbearable social conditions and continuing austerity measures. Similar types of protests, with a different intensity, have also occurred in Serbia, Macedonia, Montenegro, Kosovo and Albania (Štiks and Horvat 2014: 2). On 14 August 2012, the biggest social protest, consisting of more than 10 000 citizens protesting against the increase in energy prices and the decline in the standard of living, started in Macedonia. These protests lasted for five months, and a citizen's initiative with more than 13 000 signatories was initiated for amending the Energy Law (Stojilovska & Zuber 2013: 3).

In the autumn of 2010, important protests were undertaken in Croatia in support of the struggle of female workers against mismanagement, privatisation and the bankruptcy of the Kamensko factory. In February and March 2011, thousands of people in Croatia took to the streets protesting against unpaid and low wages and deteriorating working conditions. Female workers from the Kamensko textile factory led protests against the non-payment of wages and unemployment resulting from a forced bankruptcy. The workers claimed that the owners had been guilty

of corruption and had been in complicity with the government (Salzmann 2011). However, these protests were more significant than the problems of the Kamensko factory. They reflected a strong resentment amongst ordinary people against the subsidies given by the government to 'dubious' companies. Demonstrations took place in front of banks, the homes of politicians, Croatia's Catholic Church and opposition parties, with many wearing masks of the former Prime Minister, Ivo Sanader, who was viewed as 'a symbol of a thoroughly corrupt and rotten system' (Salzmann 2011).

Similar protests occurred in Bosnia and Herzegovina, where increasing numbers of people were living below the poverty line. Quoting Household Budget Surveys, Kazaz et al (2014: 2) indicated that since 2011, nearly a quarter of the population was living below the absolute poverty line, a significant increase from the situation in 2001 of 18.6 per cent. Other expressions of poverty and deprivation included the increased number of people roaming the streets and the 'explosive increase in the sale of gold reflecting that all other means had "dried" up' (Kazaz et al 2014: 3). Social protection had also worsened after 2007, with the poorest one-fifth receiving just 17.3 per cent of the total non-contributory transfers in 2011 (Kazaz et al 2014: 3). In addition, it was revealed that allocations intended to support and protect the population against natural disasters, such as the floods of May 2014, were 'inappropriately allocated' (Kazaz et al 2014: 3). Social protests have taken place against the political elite, including a wave of protests in June 2013, triggered by the death of an infant who could not obtain the necessary identification number to receive treatment abroad.

Another protest in Bosnia and Herzegovina, this time by workers, began in Tuzla in February 2014 against the lack of adequate social security and wage payments in the wake of the privatisation of factories. Workers clashed with the police, but received support from different parts of civil society across the federation, including the unemployed, war veterans, the youth, pensioners, students and academics (Arsenijević 2014: 45). Particularly novel was the creation of plenums forming spaces for a discussion of the demands of those who had been 'deprived of their rights, unemployed and poor' (Weber & Bassuener 2014: 5). The significance of such spaces and deliberations lays also in countering the prevailing identification of politics with corruption, nepotism and clientelism with people, but rather 'assuming responsibility for one's life with no external guarantees', thus reflecting the 'individual and collective refusal to be bribed and coerced into submission and servility' (Arsenijević 2014: 8). However, these protests had a broader impact on society. In a report by the Democratisation Policy Council titled EU Policies Boomerang: Bosnia and Herzegovina's Social Unrest, Weber and Bassuener describe the 'social discontent' – the worst since the 1992-1995 war – that was essentially anti-establishment and directly linked to allegations of corruption and mismanagement by the local elite who were supported by Western policy makers.

These new social movements reflected a need for the extensive transformation of Balkan societies. While the protests and struggles differed in their methods, ideological orientation and strategies, they responded to abuses of power by corrupt political elites as well as the deteriorating social and economic situation (Štiks and Horvat 2014: 2).

7 Concluding reflections: Violence in transition

The economic policies imposed on the Western Balkans as donor requirements, and necessary to meet the criteria for European accession, promoted a fiscal paradigm that prioritised the reduction of budget deficits and liberalisation of the flows of money, goods and services, often at the cost of constitutional and human rights. In the process, modernisation became the code word for the commercialisation of social policy, with the introduction of tools from neoclassical economics and business management to social sectors and public administration. The discourse displaced the notion of citizens with entitlements to basic rights to market actors and consumers of services, while compelling them to become investors themselves. In the process, basic social rights, including a decent standard of living, minimum wages and security of work, became insecure and aggravated through increased unemployment, flexible work and labour arrangements and poverty, accompanied by a decline in access to health care, housing, old age and disability protection and social assistance. The financial crisis only worsened human insecurity amongst more people, particularly the vulnerable groups in society.

In this scenario, violence assumed many dimensions, taking on direct and structural forms through creating and sustaining divisions in opportunities, social protection and social justice, with the more vulnerable experiencing social exclusion, a loss of livelihoods, and a denial of basic social and citizenship rights. Fundamental contradictions emerged between the neoliberal policies that used the 'free market' as regulatory ideal and declared commitments to democracy, freedoms and human rights. Violence also emerged in protests reflecting anger and defiance against the power and complicity of the political and economic elite at local, national and international levels. The region, having moved away from a history of ethnic conflict and civil war, appears to be on the brink of yet another explosion as people challenge the economic and political deprivations of the past two decades.

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V Abramovich 'Poderes regulatorios estatales en el pluralismo jurídico global' (2017) 1 *Global Campus Human Rights Journal* 141-164

Poderes regulatorios estatales en el pluralismo jurídico global

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Abstract: *The plurality of international regimes generates a complex constellation of legal regulatory systems, operating in a decentralised manner, with great autonomy and fragmentation. This coexistence translates into an 'inter-legality' of sorts in which states give away control to transnational financial entities. Through these processes, states can also regain the exercise of regulatory power over transnational concentrated economic actors. Given this contradiction, there is no agreement on the rules governing the resolution of regulatory conflicts or on the international institutions with authority to enforce them. The article presents an overview of some of the ongoing discussions on the plurality of international regimes, their relationship, divergences and possible convergence.*

Key words: *state sovereignty; international economic regulatory framework; multilateral institutions; global legal order; development; social rights*

Resumen: *El proceso de creación de una pluralidad de regímenes internacionales crea una compleja constelación de sistemas de regulación jurídica, que por lo general funcionan de manera descentralizada, con gran autonomía y fragmentación. Esta convivencia genera una 'interlegalidad' en la cual los Estados pierden el control del conjunto de los procesos en manos de actores financieros transnacionales. Sin embargo, estos procesos pueden también ser utilizados por los Estados para recuperar capacidad de ejercicio de poder regulatorio ante actores económicos concentrados y trasnacionales. Frente a esta contradicción, no existen reglas consensuadas para resolver los conflictos normativos, ni instituciones internacionales que tengan competencias asignada formalmente para dirimirlos. El presente artículo procura presentar un panorama general de algunas discusiones en curso sobre la conformación de una pluralidad de regímenes internacionales, sus relaciones, divergencias y posibles convergencias.*

Palabras clave: *soberanía nacional; regulación de relaciones económicas; orden jurídico global; instituciones multilaterals; desarrollo; derechos sociales*

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1 Introducción

Un rasgo de identidad del nuevo orden global es la trama de regímenes jurídicos internacionales que proyectan sobre los Estados nacionales obligaciones legales diversas, y en ocasiones contradictorias. Los países sudamericanos se insertan bajo características propias en esta constelación de legalidades.

Los regímenes jurídicos internacionales determinan agendas y orientaciones de la políticas exterior, influyen sobre múltiples campos de las políticas domésticas, y condicionan o modelan la institucionalidad pública. Definen además aspectos de las relaciones entre el estado, el mercado y la sociedad, e incluso inciden en las capacidades técnicas y políticas de los Estados en lo que se refiere a regular cuestiones económicas y financieras fundamentales para los procesos de desarrollo autónomos. Una paradoja es la existencia de mandatos contradictorios sobre los Estados nacionales. Así, por ejemplo, los mandatos negativos que algunos regímenes económicos imponen a la actuación de los Estados, afectan la posibilidad de cumplir con los mandatos de protección y garantía de derechos sociales, ambientales, civiles y culturales, que imponen a los mismos estados sus propias constituciones y el régimen internacional de derechos humanos.

Este artículo procura presentar un panorama general de algunas discusiones en curso sobre la conformación de una pluralidad de regímenes internacionales, sus relaciones, divergencias, y posibles convergencias. Para ello describiremos en primer lugar el escenario de pluralismo jurídico global y el problema de la autonomía y segmentación de los distintos ordenamientos. Luego plantearemos el marco constitucional e internacional que conduce a ampliar las funciones estatales de protección y garantía de derechos, y algunas tendencias particulares en los países sudamericanos.

Mostraremos además ejemplos de cómo los diversos ordenamientos internacionales proyectan sobre los Estados nacionales mandatos contrapuestos en el campo de la regulación de las relaciones económicas. Ilustraremos algunos casos particulares de ejercicios de armonización de los diversos sistemas legales, y cómo empresas y activistas sociales se mueven en este escenario global en busca del foro más favorable para plantear sus demandas a los estados nacionales. Por último, desarrollaremos brevemente la iniciativa de algunos gobiernos de creación de un régimen multilateral de reestructuración de deudas soberanas, y la disputa con el actual régimen privado de mercado de capitales.

2 Pluralidad de regímenes internacionales

Si bien nuestro enfoque de los procesos de pluralismo global será centralmente jurídico, preferimos encuadrar la discusión en el concepto abarcador de régimen internacional. Un régimen internacional según la definición clásica de Stephen Krasner es 'un conjunto de principios implícitos o explícitos, normas, reglas y procedimientos de decisiones alrededor del cual las expectativas de los actores convergen en una determinada área de las relaciones internacionales' (Krasner (185).

Las normas son conductas estándares definidas en términos de derechos y obligaciones. Las reglas son prescripciones específicas para la acción. Los procesos de decisión son prácticas prevalecientes para formular e implementar una opción colectiva. Los intereses, las relaciones de poder, las costumbres, pueden jugar un papel en la formación del régimen internacional. Estos factores causales pueden ser manifiestos a través de la conducta de los Estados, de individuos, burocracias particulares y organizaciones internacionales.

En síntesis, los regímenes internacionales constituyen estructuras del sistema internacional que gobiernan diferentes áreas de las políticas públicas internacionales y nacionales, y que convocan a actores estatales y no gubernamentales bajo principios y normas de aceptación universal.

Algunos regímenes internacionales en los que se insertan los país sudamericanos en las últimas dos décadas, han contribuido a ampliar el alcance de los derechos y la ciudadanía, influyendo en los marcos jurídicos constitucionales y en los debates sobre políticas públicas. Entre ellos podemos mencionar el régimen de derechos humanos, y los acuerdos globales y regionales sobre población y desarrollo (ej. Metas del milenio).

Los países de Sudamérica, ampliaron su participación en estos regímenes internacionales, al tiempo que se profundizaba también su inserción en otros regímenes económicos internacionales en la etapa del 'neoliberalismo'. Por ejemplo, el régimen internacional del comercio, el régimen de inversión extranjera, o el régimen de mercado de capitales. Por eso algunos autores señalan la paradoja de que en Sudamérica, coinciden en el tiempo los proyectos denominados 'neo-constitucionales' con los proyectos 'neoliberales' (Rodríguez Garavito (2008)). Un país tras otro adoptó nuevas constituciones o reformas constitucionales que introducían cartas de derechos ampliadas, y que incluían la constitucionalización de tratados internacionales, concretando la inserción en sistemas de protección internacional de derechos humanos. Colombia (1991), Perú (1993), Argentina (1994), Bolivia (1994), y Brasil (1988), son algunos ejemplos. Esto ocurría al mismo tiempo que la política doméstica y la inserción global apuntalaban la desregulación económica, el fomento de la inversión privada trasnacional, la flexibilización laboral, y la precarización de derechos sociales se hacían presentes.

Existe cierto consenso general en afirmar que la consolidación de estos diversos regímenes internacionales (tanto el de derechos humanos como los de índole económica, comercial y financiera), limitan o moderan el ejercicio de la soberanía de los Estados nacionales, al menos en la dimensión del concepto que remite a la exclusión de autoridades externas, lo que algunos autores definen como soberanía westfaliana (Krasner (2010)).[1]

1 Krasner se refiere a cuatro formas de soberanía: i. *Soberanía de la interdependencia*, que es la capacidad de un Estado de controlar, de hecho, las actividades dentro de su frontera y más allá de ellas, incluido el movimiento de bienes, capital, ideas y vectores epidemiológicos; ii. *Soberanía nacional*, consistente en la organización de la autoridad en una comunidad política determinada; iii. *Soberanía westfaliana,* concepto que remite a la exclusión de autoridades externas, es decir, al derecho de un estado a ser independiente de las estructuras de autoridad externas, iv. *Soberanía legal internacional*, que se refiere al reconocimiento de un estado por parte de los otros, este reconocimiento está asociado a la inmunidad diplomática y al derecho a firmar tratados y asociarse a organizaciones internacionales.

Así, por ejemplo, los tratados de derechos humanos obligan al Estado a aceptar decisiones obligatorias de órganos internacionales de protección, como la Corte Interamericana de Derechos Humanos (Corte IDH). Los tratados celebrados en el ámbito de la OMC, otorgan competencia a un mecanismo propio de resolución de disputas, los tratados de protección de inversión delegan facultades de resolución de controversias en órganos arbitrales como el CIADI del Banco Mundial, y los convenios de emisión de deuda externa ceden jurisdicción en tribunales extranjeros en EEUU, Francia y el Reino Unido. Aun, dentro de los espacios internacionales multilaterales creados y sostenidos por los Estados, con frecuencia las regulaciones concretas y las interpretaciones de los acuerdos se producen en un espacio menos político, a través de burocracias técnicas que se han cuestionado por su opacidad, y falta de control democrático.[2]

El proceso de creación de una pluralidad de regímenes internacionales crea una compleja constelación de sistemas de regulación jurídica, que por lo general funcionan de manera descentralizada, con gran autonomía y segmentación.

Varios autores han considerado a este escenario de diversidad de órdenes legales internacionales como procesos de pluralismo jurídico,[3] esto es: la convivencia de múltiples ordenamientos jurídicos en el mismo contexto de tiempo y espacio[4]. Aun cuando los principales estudios sobre la temática difieren respecto de las características de este proceso, y en especial, en los grados de autonomía o conexión entre los órdenes legales. Así, mientras Teubner enfatiza la característica de autonomía y aislamiento, De Sousa Santos plantea la idea de '*interlegalidad*', considerando que estos órdenes se encuentran en gran medida superpuestos, interrelacionados, imbricados, y se influyen recíprocamente (Teubner (2010); Santos (1995)).

Un elemento clave de los procesos de globalización en el que coinciden Teubner y De Sousa Santos, es que los Estados no tienen el control del conjunto de procesos, pues amplios espacios de regulación (o de desregulación) son definidos por actores no estatales globales (empresas

2 La burocracias de las Instituciones Financieras Internacionales (IFIs) fijan normas y directivas para los préstamos que otorgan a países del sur global, los equipos técnicos del GAFI recomiendan modelos de normativas y reglas bancarias anti lavado a los países emergentes, la OMC y la OPS, fijan pautas para procesos sanitarios y condiciones de salubridad de productos. Un sector de la academia legal estudia el derecho creado por los organismos públicos, y semipúblicos, y privados internacionales, y su impacto en las normas administrativas locales, como nueva disciplina jurídica que toma elementos del derecho público y el derecho internacional, bajo el título de 'Derecho Administrativo Global' (Global Administrative Law – GAL), ver Casesse (2012), Kingsbury, Krich, y Stewart (2005).

3 Para un estudio de la evolución histórica de las nociones de pluralismo jurídico, y de su aplicación más reciente como marco conceptual para el estudio de la globalización a partir de los procesos de transnacionalización del derecho y la proliferación de ordenes jurídicos internacionales, puede consultarse entre muchos otros, Twining (2005) y Santos (1995).

4 Este concepto se aplicó originalmente al reconocimiento de diferentes tradiciones y fuentes jurídicas del derecho de un mismo sistema jurídico, por ejemplo el reconocimiento por la ley estatal del derecho consuetudinario indígena, o de órdenes normativos no estatales. También se aplica el concepto de pluralismojurídico al estudio de las relaciones de normas, ideas, instituciones jurídicas regionales en contextos locales, enfocando los problemas de préstamos y trasplantes que analizaremos más adelante.

trasnacionales, bancos, aseguradoras, mercados financieros) de espaldas al derecho internacional público.

Se trata de procesos que en múltiples dimensiones se desarrollan por fuera y más allá de los Estados nacionales, e incluso en paralelo con las instituciones multilaterales creadas por los Estados para regir las relaciones internacionales formales. Algunos autores definen al producto de estos procesos como *regímenes globales privados* (Teubner (2010)).[5] Como ejemplo de este tipo de régimen, podemos mencionar las regulaciones de modelos de contratos comerciales internacionales, los contratos financieros y de mercado de capitales, contratos modelos de concesión minera, las reglas bancarias para operaciones internacionales, las normas de estandarización de productos y las certificaciones de calidad de bienes y servicios comerciales, las normativas sobre transporte internacional, los modelos de transferencia de tecnología, los protocolos de investigación científica, y los sistemas estandarizados de evaluación educativa.

De esta manera, no sólo se quiebra la relación entre derecho y Estado nacional, sino también la relación entre la política y derecho, pues hay múltiples espacios de creación de normas jurídicas que, por diversos motivos, se vuelven vinculantes y obligatorias para individuos y estados, creadas en los márgenes de los regímenes políticos constitucionales, e incluso por fuera de los organismos regidos por el derecho internacional (Teubner (2010); Sassen (2010)).

De modo que estos procesos de globalización conducen a una multiplicidad de regímenes, en gran medida descentralizados, segmentados, con ámbitos de regulación estatal, y otros de auto-regulación de poderes privados, que crean derecho por fuera del régimen político local y del derecho público internacional.

3 Autonomía de los regímenes internacionales y mandatos contrapuestos sobre los estados

La autonomía y segmentación de los diversos regímenes internacionales implica que dimensiones de un mismo problema jurídico sean tratadas por diferentes regímenes con enfoques, principios, y procedimientos propios, refractarios a la influencia de los demás, y con fuertes contradicciones entre ellos. Esto tiene consecuencias concretas sobre el alcance y la exigibilidad de los derechos, al proyectar sobre los estados nacionales obligaciones disímiles, y con frecuencia también obligaciones directamente contrapuestas.

Si bien el proceso de globalización -como tendencia- morigera el ejercicio de soberanía westfaliana, en el sentido de exclusión de injerencia externa, los Estados nacionales conservan un amplio poder de regulación económica. Además, en los últimos años, varios Estados sudamericanos han comenzado a regular cuestiones económicas que habían sido

5 B Santos los denomina 'regulación comercial trasnacional' y las considera expresión de un renacimiento de una nueva *lex mercatoria*, como '*derecho propio del capitalismo global*', que caracteriza como una forma de derecho no estatal, y un campo importante de justicia privada, que involucra el arbitraje comercial internacional, la OMC y otros procesos institucionales más o menos ocultos, a través de los cuales se conducen las relaciones comerciales transnacionales (Santos (1995)).

desreguladas, o bien nunca se habían regulado. Este proceso se sostiene en lo jurídico por el desarrollo de un derecho social más robusto, reforzado en gran medida por el derecho internacional de derechos humanos, y un enfoque más abierto a la intervención del estado en la vida económica y en el impulso de políticas sociales.

Ello se refleja por ejemplo en nuevas regulaciones laborales (servicio doméstico, trabajo rural, combate a la trata) y en la salida gradual del paradigma del derecho laboral flexibilizado; el establecimiento de leyes sobre ambiente; la definición de marcos legales sobre consumidores y usuarios, y de reglas antimonopólicas; la extensión del concepto de seguridad social más allá de la esfera estrictamente contributiva; el reconocimiento emergente en la jurisprudencia constitucional de un derecho a la salud que tiene una dimensión individual y otra colectiva; el desarrollo de un derecho antidiscriminatorio, de políticas afirmativas y enfoques diferenciados, un emergente derecho a la comunicación social, que sostiene vías de regulación de servicios de comunicación, y límites a la concentración de la propiedad de medios, entre otras manifestaciones (Uprimny (2011); Fajardo (2011); Pautassi (2009); IPPDH-MERCOSUR (2014)).

El constitucionalismo social de nuevo cuño en Sudamérica, y el régimen internacional de derechos humanos constitucionalizado en la región, han ampliado considerablemente los deberes estatales de protección y garantía de los derechos fundamentales. El deber de protección, tal como lo concibe el régimen de derechos humanos, obliga a los estados nacionales a actuar con debida diligencia para prevenir afectaciones de los derechos por *actores no estatales*, producir información sobre los grupos o colectivos estructuralmente discriminados o excluidos, y adoptar acciones afirmativas, medidas preventivas y reparaciones adecuadas y transformadoras, ante las situaciones extendidas, o ante patrones sistemáticos que producen o reproducen esa desigualdad de ciudadanía. La relectura de los derechos civiles en clave de igualdad estructural amplia las obligaciones positivas de los Estados e incluso la responsabilidad indirecta de los Estados por la acción de particulares cuando existen riesgos que un estado puede razonablemente prever y evitar. Además el reconocimiento constitucional y legislativo de derechos sociales (laborales, de seguridad social, de usuarios, salud, educación etc), culturales y ambientales, proyecta sobre los estados una considerable ampliación de las funciones estatales.

Este desarrollo interpretativo se produce en paralelo en los ordenamientos constitucionales y en los órganos internacionales de protección del régimen internacional de los derechos humanos. No se trata de procesos desconectados, sino que estos desarrollos se vinculan por la vía de la constitucionalización de los tratados, tendencia que continúa en las recientes reformas constitucionales de Ecuador (2008) y Bolivia (2009). Al mismo tiempo la jurisprudencia constitucional de varios países de la región (Argentina, Colombia, Perú) plantea que la jurisprudencia de los órganos del régimen internacional de derechos humanos es '*guía o pauta de interpretación*' para los tribunales nacionales. El propio sistema interamericano de derechos humanos, impone a los sistemas de justicia nacionales realizar un '*control de convencionalidad*' de las leyes nacionales, buscando su adecuación a las normas de los tratados y a los estándares interpretativos fijados por el propio sistema, lo que profundiza la relación

entre el orden constitucional y el régimen internacional de derechos humanos (Abramovich (2011)).

Una consecuencia directa de este proceso es la extensión de las funciones *prestacionales de los estados*, y la ampliación de los *deberes de regulación* de las relaciones económicas, de las actividades empresariales, y de los mercados. Así, por ejemplo, el derecho ambiental impone regulaciones en los procesos productivos de las empresas, en el desarrollo de actividades extractivas, mediciones de riesgos, y marcos para la reparación de los daños colectivos. El derecho de los consumidores obliga a regular mecanismos de producción de información y de consulta, modera la autonomía contractual, e impone medidas de reparación de daños basados en riesgos objetivos y de alcance colectivo (o que contemplan la afectación de intereses individuales homogéneos). Los derechos culturales de los pueblos indígenas sobre sus territorios, tierras y recursos naturales, imponen mandatos regulatorios de las actividades mineras y extractivas, la creación de marcos y procedimientos de consulta y búsqueda de consentimiento, la determinación de sistemas de participación en los beneficios de las empresas inversoras, y la prohibición directa de determinadas formas de explotación de esos recursos. El emergente derecho a la salud impone fuertes deberes de regulación de los prestadores privados de salud, pisos mínimos prestaciones para los sistemas privados o semipúblicos, el resguardo de sectores o grupos tradicionalmente discriminados, prestaciones predeterminadas por el estado para evitar abusos contractuales y deberes de reparación específicos, basados en la prevención de riesgos. El emergente derecho a la comunicación social impone obligaciones de producción de información pública, y a la vez el deber estatal de evitar la concentración indebida de los medios de comunicación, y de garantizar el acceso a la expresión en la esfera pública de grupos o sectores históricamente relegados. El principio de igualdad estructural o de apoyo a grupos subordinados, obliga a regular medidas de acción afirmativa (por género, raza, condición social, o discapacidad) en los ingresos al sistema educativo privado, o en los procesos de contratación laboral, o en el acceso a servicios sociales o a servicios públicos.

Estos nuevos campos de regulación estatal afectan en varios casos intereses de empresas privadas nacionales y trasnacionales, imponen restricciones a la propiedad y a la autonomía contractual, y autorizan la injerencia estatal en diversas esferas del mercado y de la actividad económica.

La ampliación de mandatos regulatorios para tutelar derechos, entra en tensión con los mandatos 'desreguladores' que imponen los mencionados regímenes económicos internacionales, orientados a la protección de los mercados. En lo que sigue procuraremos presentar algunos ejemplos que ilustran esta divergencia.

3.1 El régimen de protección de inversión extranjera

El régimen político sudafricano que sucedió a la abolición del sistema de segregación racial, impulsó una serie de políticas públicas en el área económica que buscaban incluir a los sectores sociales históricamente expulsados de las actividades comerciales y productivas. La lógica detrás de estas medidas, era contribuir en los hechos a desmantelar las consecuencias del apartheid, como acciones afirmativas en la esfera

económica, similares a las implementadas -por ejemplo- en el acceso a los empleos del sector público, y los planes de vivienda en ciudades segregadas. Las medidas de integración racial, exigían a las empresas de ciertos sectores estratégicos la incorporación como socios y la contratación de una mínima proporción de gerentes provenientes de la población mayoritaria negra. Las medidas fueron cuestionadas por expropiatorias por empresarios italianos del sector minero, que invocaron el alcance del derecho a un trato justo y equitativo en los tratados bilaterales de protección de inversión (TBIs).[6] En 2010 los demandantes desistieron del reclamo por considerar que el gobierno sudafricano había adoptado medidas que satisfacían el reclamo. Para muchos estudios, esta acción ante el mecanismo del CIADI, tuvo un efecto inhibidor ('enfriamiento regulatorio') sobre el gobierno nacional en el impulso de este tipo de acciones afirmativas en la esfera económica, ante la perspectiva de nuevos reclamos internacionales de los inversores extranjeros en algunos sectores estratégicos de la economía como el sector minero.

Los TBIs estandarizados y algunas normas multilaterales (por ejemplo las que regulan el CIADI del Banco Mundial, o las incorporadas al NAFTA, o al MERCOSUR), así como las interpretaciones, principios y estándares fijados por los tribunales arbitrales y paneles de arbitraje creados por esas normativas, configuran un régimen internacional orientado al objetivo principal de proteger la propiedad privada del inversor extranjero, y en general a la preservación de la integridad patrimonial de la empresas trasnacionales en las economías de los países emergentes. Este régimen incluye una regla general de *trato justo y equitativo*, que se enuncia como un principio de no discriminación, o de igualdad formal ante la ley a favor del inversor extranjero en relación con el trato que se brinde a un inversor nacional. La lectura de los tribunales arbitrales de esta cláusula, fue estirando el principio de igualdad formal, y configurando gradualmente una suerte de *garantía de absoluta estabilidad de los marcos jurídicos* tenidos en cuenta por el inversor al momento de decidir el negocio.

Así, se entiende como comprendida en la noción de trato justo, la preservación de las 'legítimas expectativas' del inversor respecto del comportamiento del estado receptor. Se trata de una noción ambigua y subjetiva, que excede el concepto más claro de 'confianza legítima' que orienta la figura de los 'actos propios' de los estados en el derecho internacional público[7]. El concepto de 'legítimas expectativas del inversor' funciona como un parámetro para analizar la razonabilidad de las políticas y normas derivadas del ejercicio de poderes regulatorios, permitiendo impugnar aquellas que pueden cambiar o alterar las condiciones de mercado, y las expectativas de rentabilidad, consideradas al momento inicial de la inversión. La afectación de estas expectativas de ganancia se asimila a una expropiación indirecta (*taking of property*) habilitando reclamos indemnizatorios. Este concepto de expropiación indirecta permite a un inversor cuestionar normas jurídicas o políticas generales de

6 Caso Piero Foresti, Laura de Carli y otros contra Sudáfrica (CIADI, caso ARB(AF)/07/1).

7 Para una crítica jurídica detallada y sostenida en principios del derecho internacional, de la interpretación extensiva del principio de trato justo y equitativo y del concepto de legítimas expectativas del inversor, en los precedentes arbitrales del CIADI, puede consultarse la opinión separada del árbitro Pedro Nikken, en la decisión sobre responsabilidad del caso *Suez c. Argentina*.

los estados nacionales en temas ambientales, de servicios sociales, de salud, que pueden tener como consecuencia afectar las expectativas de ganancias definida por la empresa al momento de decidir la inversión en el país receptor (Schneiderman (2010)). Esta lectura de la cláusula de trato justo y el concepto de expropiación indirecta, impone fuertes restricciones a los poderes regulatorios, pues los estados jamás pueden prever las situaciones sociales y económicas sobrevinientes a la recepción de la inversión, o que se produzcan durante la operatoria, de modo de asegurar la intangibilidad del entorno legal y económico en el que se desarrolla un proyecto. Además tienen el deber de preservar intereses sociales imperativos en escenarios de crisis o emergencias, de modo que con frecuencia deberán implementar políticas públicas o imponer normativas que puedan cambiar el escenario inicial de la inversión. A partir de una interpretación exorbitante, la cláusula de trato justo y equitativo, deviene en una *cláusula de estabilización*, que busca petrificar los marcos regulatorios e incluso las políticas públicas nacionales. Esta lectura excede considerablemente el principio básico de igualdad ante la ley entre nacionales y extranjeros del derecho internacional público, pues a la luz de la interpretación amplia que le brindan los laudos arbitrales, se emparenta mucho más con una regla de trato preferente, consistente en blindar al inversor extranjero ante cualquier cambio de política pública o del marco legal vinculante y obligatorio para los ciudadanos y las empresas nacionales. En lugar de ser una regla de igual protección, deviene un privilegio diferencial.

Los principios de '*trato justo*' y de '*expropiación indirecta*' tienen su fundamento en la protección de la empresa inversora frente a normativas irrazonables o arbitrarias, que por ejemplo prohíben abruptamente y sin justificación actividades antes autorizadas, o cambian desproporcionadamente las reglas impositivas, o ambientales existentes.

Como la noción de trato justo y equitativo, el concepto de expropiación indirecta apunta a que no se altere arbitrariamente el marco jurídico estatal considerado al momento de ingresar al negocio, de modo que exige siempre un examen de ponderación de la razonabilidad de las medidas impugnadas. Sin embargo la interpretación efectuada por los organismos de aplicación, con fuerte sesgo pro empresa, termina prácticamente eliminando el requisito de arbitrariedad, e imponiendo una suerte de derecho a la permanencia intocable del marco legal preestablecido, sin considerar los cambios de escenarios, las situaciones excepcionales de crisis o emergencia, y las funciones sociales de los estados (Eberhardt (2014)). Además, los órganos del régimen de inversión, son refractarios a los argumentos basados en obligaciones de derechos humanos o constitucionales.[8]

8 En los últimos años, algunos análisis han desarrollado sólidos argumentos de derecho internacional sobre el deber jurídico de que los paneles arbitrales del régimen de inversión de tomar en cuenta las obligaciones de protección de derechos humanos de los Estados nacionales, al momento de examinar los principios clave de trato justo y equitativo, y la expropiación indirecta. No se trata de exceptuar el cumplimiento de obligaciones internacionales en normas internas, sino de compatibilizar las diversas fuentes internacionales. También este tipo de análisis puede ser visto como un ejercicio de interlegalidad procurando cambiar aspectos del enfoque del régimen de inversión para hacerlo permeable a principios del régimen de derechos humanos, de modo de resguardar márgenes de soberanía estatal y poderes regulatorios para la preservación de derechos civiles y sociales. Ver al respecto Bohoslavsky y Justo (2010).

Las personas y comunidades cuyos intereses directos se ven afectados por las disputas, como los usuarios de los servicios prestados por las empresas inversoras, o los beneficiarios de las regulaciones cuestionadas por los inversores, no pueden participar de estos mecanismos, que limitan la controversia a las empresas y al Estado. El caso sudafricano pone en evidencia la tensión entre las políticas de igualdad como estrategias para reestructurar relaciones económicas y sociales segregadas, y las reglas de 'trato justo y equitativo' y 'expropiación indirecta' del régimen de inversión, que reducen y condicionan los poderes regulatorios estatales.

Un tema de particular relevancia es la tensión entre el régimen de inversión, y los derechos de los usuarios de servicios públicos. Un caso ilustrativo se dio en Argentina luego de la crisis de 2001, cuando el gobierno de transición congeló las tarifas de servicios públicos domiciliarios (agua, saneamiento, gas, electricidad). El objetivo enunciado fue preservar la canasta básica en el contexto de la crisis económica y social, ante el aumento abrupto de los niveles de pobreza e indigencia. Este congelamiento, sumado a la brusca devaluación de la moneda local, afectó directamente las expectativas de ingresos en dólares de las empresas concesionarias de servicios, que giraban remesas en divisa a sus casas matrices. Implicó en los hechos un cambio del marco regulatorio tenido en cuenta al momento de acordar el ingreso al negocio, que presuponía una actualización periódica de la tarifa según la variación de costos de las empresas. La empresa Suez a cargo del servicio de agua y alcantarillado en la Provincia de Buenos Aires, acudió al centro de arbitraje del Banco Mundial-CIADI- invocando el acuerdo bilateral de protección de inversión extranjera que había firmado el gobierno argentino con Francia.

En este caso se planteaba un conflicto jurídico similar al del caso sudafricano. Si el Estado quería asegurar el acceso al servicio público de los usuarios, sobre todo de los sectores que en contextos de crisis requieren mayor protección estatal, necesariamente afectaría la ecuación económico financiera de la empresa inversora, y por lo tanto provocaría una lesión de su derecho de propiedad en el sentido casi absoluto en que entiende este derecho el régimen de inversión, por lo que esta empresa podría demandar por la vía de los mecanismos previstos en el TBI la consiguiente reparación económica. Pero si el Estado desatendía los derechos de los usuarios de acceso al servicio, podría ser responsabilizado por transgredir normas legales o constitucionales nacionales en los tribunales locales, e incluso demandado en organismos del régimen de derechos humanos. La pluralidad de regímenes y la autonomía entre ellos, hace que las empresas acudan a los *foros más favorables* para condicionar las políticas que las afectan. Se elige el foro y al hacerlo se determina el enfoque y el marco jurídico con el que se será examinada la controversia.

Un aspecto relevante del caso Suez, es que un grupo de organizaciones de usuarios y de derechos humanos, se presentaron en el CIADI para plantear una defensa de la política gubernamental de congelamiento de tarifas, argumentando que esa política buscaba proteger intereses y derechos de los usuarios del servicio de agua, y estaba además exigida por las normas de derechos humanos y constitucionales que imponían al estado la adopción de medidas concretar para paliar los efectos de las crisis económicas sobre la población en situación de pobreza e indigencia. La forma de la presentación fue un escrito de '*amigo del tribunal*' (*amicus cuariae*) pues el procedimiento ante el CIADI no prevé expresamente que

otras personas ajenas a las empresas y el estado puedan participar de las controversias, ni ser escuchadas. El panel arbitral aceptó la presentación en el caso particular, sosteniendo que si bien la controversia refería centralmente a la afectación de la inversión empresarial, el estado había regulado de determinada manera considerando el interés público comprometido en el servicio de agua y saneamiento para una población socialmente vulnerable. Eso convertía en relevante escuchar aunque de manera muy limitada a aquellas personas que invocaban una potencial afectación de sus derechos a raíz de la controversia. Se trató del primer precedente de aceptación de terceros a las partes en una controversia en el CIADI, lo que importa un cambio no menor en la tradicional opacidad y clausura del mecanismo arbitral, aunque el laudo final no pondera los argumentos presentados por los terceros, y considera ilícita la regulación estatal impugnada por la empresa.[9]

Un punto clave para el análisis de la presentación de las organizaciones sociales, en relación con el problema de la autonomía de los regímenes internacionales señalada por Teubner, es que esta petición, si bien presenta preocupaciones relacionadas con los derechos sociales afectados, como el derecho de acceso al agua y a la salud, e invoca normas de derecho internacional de derechos humanos, también utiliza el lenguaje y los conceptos jurídicos del régimen de inversiones, buscando vincular un orden legal con otro. Las organizaciones realizan el esfuerzo de 'traducir' y 'adaptar' problemas de derechos sociales, para hacerse entender en el lenguaje y con los enfoques y marcos conceptuales del régimen de inversiones. En ese sentido, cuestionan el alcance que los paneles del CIADI y en general el régimen de inversiones, le otorga al concepto de 'trato justo y equitativo', y de 'expropiación indirecta' Argumentan que la interpretación amplia de estos conceptos reduce los márgenes de regulación estatal en asuntos públicos en los que se juegan derechos.[10]

En definitiva, no plantean que el régimen de inversiones resulta desplazado por el régimen de derechos humanos, sino que ciertos conceptos del régimen de inversiones deben ajustarse en función de una *interpretación armonizadora* que incorpore las obligaciones internacionales de los estados. Señalan que el régimen de derechos humanos establece mandatos regulatorios, deberes de protección de grupos y colectivos ante la acción de actores no estatales, y objetivos de política pública específicos, que son relevantes para la solución diferendos entre el estado y el inversor.

9 En otro caso posterior, sobre reestatización del servicio de agua potable en Tanzania, en el que un grupo de organizaciones se presentó como *amicus curiae*, explicando las implicancias de los derechos humanos en este caso, en el laudo final no se ponderó si existía alguna relación entre el derecho fundamental de acceso al agua potable, la rescisión del contrato y los derechos del inversor. Ver *BiwaterGauff contra Tanzania* (CIADI, caso ARB/05/22, laudo del 24 de julio de 2008).

10 Ver, Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA y la República Argentina. Presentación como amigo del tribunal del Centro de Estudios Legales y Sociales (CELS) Asociación Civil por la Igualdad y la Justicia (ACIJ) Consumidores Libres Cooperativa Ltda. De Provisión de Servicios de Acción Comunitaria Unión de Usuarios y Consumidores, *Centre for International Environmental Law (CIEL)*. Además, para una crítica detallada de la interpretación extensiva del principio de trato justo y equitativo, su lectura comprensiva de un derecho a la estabilidad del marco regulatorio con el consiguiente detrimento del poder regulatorio estatal, y la inadecuada aplicación como parámetro de razonabilidad, de la 'legitima expectativa del inversionista', puede consultarse la opinión separada del árbitro Pedro Nikken, en la decisión sobre responsabilidad del caso *Suez c Argentina*.

Se trata de un tipo de interpretación normativa que tiene puntos de contacto con la *interpretación armonizadora* del derecho internacional de los derechos humanos y el derecho nacional en los procesos de implementación doméstica.

Estos pocos casos de '*cruce de foros*' son desarrollados por un sector minoritario de organizaciones sociales, que se mueven entre los diversos órdenes como 'activistas anfibios', con cierta plasticidad para adecuar la descripción de problemas y los encuadres fácticos y jurídicos, y el lenguaje que se requiere para argumentar en un territorio hostil. Si bien estas experiencias no tienen en principio suficiente densidad para constituir puentes sólidos entre regímenes que funcionan principalmente como refractarios y autónomos, determinan puntos de contacto incipientes que podrían ser explorados e investigados con mayor profundidad, incluso bajo el concepto de 'interlegalidad' desarrollado por De Sousa Santos.

3.2 El régimen global de concesiones mineras.

Una estrategia de internacionalización de conflictos, inversa a la de las empresas trasnacionales en el régimen de inversión, es el litigio de casos colectivos que impulsan comunidades locales afectadas en sus derechos ambientales, sociales y culturales, en foros del régimen de derechos humanos. Se trata en nuestra opinión también de la búsqueda de un *foro global más favorable*, esto es, que modifique las relaciones de fuerza locales en las que predominan los intereses de las empresas. La apelación al régimen de derechos humanos en este tipo de casos, busca reforzar los deberes de protección estatales reflejados en mandatos de regulación y supervisión de la actuación de las empresas privadas que desarrollan proyectos de inversión extractivos en el territorio de las comunidades afectadas. Varios países de América Latina atrajeron inversores en el sector petrolero y minero, creando marcos normativos y celebrando contratos de concesión, que responden a modelos estandarizados que se ajustan a medida del capital trasnacional. El desarrollo de este tipo de contratos puede ubicarse en lo que Teubner denomina *regímenes globales privados*. Ello sería así, en nuestra opinión, pues el modelo de contrato contiene elementos comunes en los diversos países receptores de inversión, y resultan condicionantes de la inversión extranjera. Este tipo de contratos, acompañados por lo general por leyes mineras también estandarizadas, limitan el control del estado en la actividad, delegan en las empresas funciones de monitoreo ambiental y gestión de conflictos con comunidades locales afectadas, y resguardan con el secreto aspectos claves del proceso extractivo, lo que dificulta realizar mecanismos de consulta y facilita evadir el control político y social de los emprendimientos. En muchos casos además las empresas trasnacionales que ingresan a la explotación de proyectos extractivos en territorios indígenas, suman el plus de protección del régimen de inversión extranjera, con su foro favorable para eventuales disputas y su efecto inhibidor de regulaciones invasivas de las expectativas de ganancia empresarias. En paralelo, el régimen de derechos humanos establece obligaciones estatales de consulta y búsqueda de consenso con las comunidades potencialmente afectadas, en especial las comunidades y pueblos indígenas en sus territorios colectivos; procura evitar medidas que lleven a desplazamientos masivos de población; y desarrolla de manera incipiente principios que apuntan a la protección cautelar o preventiva de los derechos.[11] El punto de tensión es claro, pues un régimen normativo conduce en términos de orientación

general a la desregulación y la autolimitación de las funciones de control estatal, y el otro régimen impone fuertes deberes de intervención en la regulación y el control de la actividad de las empresas. En varios conflictos las comunidades locales indígenas, campesinas, y negras, han acudido a mecanismos internacionales de derechos humanos, como el sistema interamericano de derechos humanos, o comités de ONU, para exigir respeto de sus derechos colectivos, enfatizar los deberes de regulación delos estados, y en términos políticos, contrarrestar la presión que las grandes empresas trasnacionales mineras ejercen sobre los estados nacionales.[12] La cuestión es conflictiva, pues algunos gobiernos han defendido con argumentos nacionalistas sus concesiones mineras, disimulando el conflicto entre las grandes empresas y las comunidades locales, y acusado a los grupos y las redes de activistas de atacar proyectos de desarrollo autónomos por la vía de la presión internacional. Han sostenido que algunos estándares internacionales sobre territorio indígena y protección ambiental resultan excesivos, y funcionan en la práctica como imposiciones de los países centrales para boicotear las estrategias de desarrollo de los países emergentes (ver Abramovich (2011); Rodríguez Garavito (2011); Rodríguez Garavito (2012)). La argumentación resulta difícil de sostener, sobre todo en aquellos países que receptan estos estándares en sus propios ordenamientos constitucionales, y como resultado de procesos políticos recientes de ejercicio de autodeterminación colectiva en apasionantes asambleas constituyentes.

3.3 El régimen internacional del comercio

El régimen internacional del comercio también presenta graves tensiones con el régimen de derechos humanos. Este régimen se basa en los acuerdos multilaterales celebrados por los estados en el marco de la Organización Mundial del Comercio (GATT/OMC). Su principal objetivo es la eliminación de las barreras tarifarias y no tarifarias el comercio internacional. Abarca tres grandes materias: comercio de bienes (GATT), de servicios (GATS) y propiedad intelectual (TRIPS). Un principio jurídico básico del sistema de reglas, es la prohibición de brindar a productos de origen extranjero un trato diferente de los productos nacionales. Ello

11 Ver por ejemplo Corte IDH, *Pueblo Saramaka*, 2007; *Comunidades Indígenas Ngöbe*, 2010. En Comunidad Indígena Sowhoyamaxa, (2006), la Corte IDH planteó en un *obiter dictum* que Paraguay no podía invocar un TBIs para justificar una actividad violatoria de la Convención Americana (en el caso afectaba derechos culturales y económicos sobre el territorio colectivo indígena), fijando una suerte de prioridad de la obligación de derechos humanos, por sobre el acuerdo de inversión extranjera.

12 También existen directivas y políticas operativas de las Instituciones Financieras Internacionales (IFIs) sobre estas cuestiones. Por ejemplo en el Banco Mundial respecto de proyectos financiados por el Banco. Así, otra experiencia similar de *cruce de foros*, son las presentaciones de organizaciones sociales, sindicales, indígenas y ambientales, en el panel de inspección del Banco Mundial que se encarga de supervisar las políticas y normas del propio banco, y en el ombudsman de la CFI. En este foro, regido por el régimen de las instituciones financieras (IFIs), los activistas traducen conflictos de derechos en potenciales violaciones de directivas y políticas operaciones del banco, y argumentan fallas en los procesos de supervisión de los agentes locales de la entidad durante la ejecución de programas y proyectos financiados por el banco. El panel por esta vía oblicua ha estudiado casos de desplazamientos de población y daños ambientales por proyectos de infraestructura, planes de reforma agraria y problemas de acceso a la tierra, el desfinanciamiento de programas sociales garantizados en préstamos de ajuste estructural, inadecuación de los procedimientos estatales de consulta y participación de comunidades locales afectadas, déficit de transparencia de proyectos, entre otros asuntos (ver Clark, Fox y Treakle (2005)).

conlleva a que gran parte de las disputas comerciales judicializadas en este ámbito requieran la determinación de si dos productos son iguales, o si disputan el mismo espacio de mercado o tienen la misma utilidad para los consumidores (cláusula III del GATT). Los Estados tiene un margen para adoptar algunas medidas inconsistentes con el tratado como 'salvaguardas' (cláusula XX del GATT), para proteger la salud pública, la moral pública o el ambiente, pero este tipo de medidas son excepcionales, se examinan bajo un criterio estricto y requieren pruebas cuantitativas y cualitativas para acreditar su proporcionalidad, quedando invalidadas si se acredita que el mismo objetivo podría ser alcanzado con medidas alternativas no lesivas del libre comercio, y que no implican para el estado una carga excesiva o indebida (Ver Jackson, Davey, Sykes (1995)).

Entre los principales temas de conflicto que se han identificado podemos mencionar las limitaciones que tiene el Estado nacional para establecer 'salvaguardas' al ingreso de productos con fines ambientales o sanitarios (aunque con frecuencia los países centrales acuden al argumento para limitar las exportaciones de los países emergentes o menos desarrollados).

Otra cuestión interesante es el tratamiento que reciben en los paneles de la OMC las barreras que algunos estados intentan plantear como 'salvaguardas' para preservar *bienes o servicios culturales*. Si bien el régimen de derechos humanos reconoce un derecho a la identidad y a la diversidad cultural, lo que se ha visto reforzado con la declaración de UNESCO de 2002 y el tratado de UNESCO de 2005 sobre diversidad cultural, la OMC es refractaria a esa perspectiva. Pese a algunos intentos por definir que ciertos bienes y servicios requieren un tratamiento diferenciado del resto por su dimensión o valor cultural en determinado estado (periódicos, libros, material audiovisual), es predominante en este régimen un enfoque estrictamente comercial, que se limita a considerar el tratamiento normativo en función de la condición de mercancías o producto que está en el comercio. En cuanto a la cláusula de trato nacional, los paneles de la OMC consistentemente han rechazado argumentos relacionados con el valor cultural de algunos productos para diferenciarlos de otros con el propósito de imponer impuestos o tarifas diferenciadas a productos extranjeros en los mercados nacionales. También han rechazado regulaciones basadas en el objetivo de preservar las identidades culturales o de promover la diversidad cultural bajo la cláusula de 'salvaguardas'. Quienes proponen una relectura de las normas del GATT para incorporar la dimensión cultural en el tratamiento de ciertos bienes y servicios, argumentan que estos presentan una '*doble dimensión*' que debe ser tenida en cuenta al momento de examinar la razonabilidad de las normas impositivas o de las políticas comerciales de los estados. Son productos que se comercian pero son también vehículos para la comunicación y reproducción de las culturas locales. Esta dimensión cultural no es un rasgo superfluo o accesorio del bien o del servicio, sino que vincula la circulación de estos bienes y su accesibilidad, con los compromisos políticos y jurídicos que asumen los estados en el régimen de derechos humanos de asegurar el derecho a la preservación de las identidades culturales, la pluralidad cultural, y la participación cultural de los ciudadanos (Carmody (2011); Garner (2010)). Este principio de '*doble dimensión*' podría funcionar como un rasgo diferenciador entre productos importados y nacionales a efectos de un tratamiento legal o impositivo diferenciado, consistente con la normativa del GATT. Al mismo tiempo

para esta posición sería indispensable una interpretación amplia de algunos objetivos previstos en la cláusula de salvaguardas que permite imponer ciertas barreras al comercio internacional. Por ejemplo el objetivo de promover la reproducción de la cultura local podría quedar incluido en el concepto de '*preservación de la moral pública*' previsto en la cláusula de salvaguarda del GATT.

En el caso '*Revistas Canadienses*', Canadá defendió tres medidas impuestas a productos provenientes de los Estados Unidos, que alegó que estas medidas eran discriminatorias. Canadá argumentó que el tratamiento tributario diferenciado a favor de publicaciones periódicas con contenido esencialmente local, destinado exclusivamente al público y al mercado canadiense, estaba justificado, pues este tipo de revistas eran productos diferentes que los revistas extranjeras, pues precisamente lo que define a una revista es su contenido, y el tipo de cobertura que presenta. El Panel de Apelación de la OMC examinó el asunto a partir del principio de la imposibilidad de brindar tratamiento diferenciado a bienes que resultan '*directamente competitivos*' o que son '*productos sustituibles*' en el mercado, esto es, bajo la cláusula del Artículo III. 2 del GATT que es más amplia que el principio de '*igual producto*'. El Panel concluyó que si bien las revistas canadienses y las extranjeras tienen diferente tipo de información y realizan coberturas periodísticas diferenciadas, presentan la condición de 'productos sustituibles' en el mercado, y por lo tanto no pueden recibir un tratamiento diferenciado compatible con el GATT. El Panel además consideró que la magnitud de la diferencia fiscal establecida y la forma de implementación de la medida, permitían concluir que en realidad respondía al objetivo de Canadá de proteger a los productos nacionales, lo que resultaba incompatible con los compromisos asumidos en el GATT. En este punto cabe puntualizar que el análisis que realiza el Panel se ciñe a los principios tradicionales de comparabilidad entre productos comerciales, y se basa en sus aspectos físicos, su marco regulatorio, y su uso o utilidad para el consumo a fin de determinar el sector del mercado al que va dirigido o en el que resulta en definitiva consumido. Ese examen comparativo es estrictamente mercantil y no incorpora como variable el valor cultural de la revista, o su función como vehículo de determinada información que tiene un valor cultural en la comunidad local. Algunos autores sostienen que un efecto de esta disputa, fue que Canadá se convirtió en impulsor a nivel global de un nuevo marco jurídico internacional para el tratamiento de la diversidad cultural, y fue un actor relevante en los debates que se desarrollan en la UNESCO a principio del siglo, con la Declaración de 2001 y el Tratado de 2005.

Otro disputa relevante para la discusión es el asunto de *Material Audiovisual en China*. Aquí la cuestión cultural aparece de una manera un tanto diferente. Estados Unidos cuestiona una serie de medidas chinas que regulan actividades de importación y distribución de material impreso, de entretenimiento hogareño, discos, y películas para cine. China justifica las medidas bajo la cláusula XX a del GATT, que permite a un país disponer medidas inconsistentes con el GATT, necesarias para proteger la 'moral pública'. China en este sentido, invoca expresamente la Declaración de UNESCO de 2001 señalando que los bienes y servicios culturales tienen una naturaleza específica como vehículos de identidades, valores y significados, y que no buscan sólo suplir necesidades de consumo o comerciales, sino que juegan un papel crítico en influir y definir diversos aspectos sociales. En el Panel de Apelaciones China volvió a insistir en la

necesidad de considerar estos aspectos específicos de los bienes y servicios culturales. Si bien el Panel de Apelaciones no entró a analizar esta característica particular de los bienes involucrados en el caso, admitió que la excepción de 'moral pública' podía ser invocada para justificar medidas inconsistentes con el GATT en relación con bienes y servicios culturales. Al analizar las medidas impuestas por China, consideró que no estaban justificadas bajo la cláusula de salvaguarda, pues existían otras medidas posibles que resultaban menos lesivas para la libre circulación de los bienes, como una revisión periódica del material que se importaba, tal como había propuesto Estados Unidos. De modo que China perdió su apelación. Pese a ello, para los analistas de la jurisprudencia del GATT esta decisión abrió la puerta para que en el futuro esta excepción ('moral pública') pueda usarse moderadamente respecto de bienes y servicios culturales. También mostró el potencial uso de la normativa de UNESCO para argumentar en el marco del régimen de la OMC. Sin embargo, la mayoría de los análisis puntualizan las limitaciones evidentes del sistema de resolución de disputas de la OMC para mostrar mayor flexibilidad y apertura ante planteos relacionados con el tratamiento de bienes y servicios culturales. Señalan principalmente la dificultad de definir de manera precisa y objetiva el valor o significado cultural de determinados bienes, y de medir con los parámetros cuantitativos y cualitativos tradicionales en este mecanismo, el potencial efecto o impacto de las medidas bajo controversia. Si un estado, por ejemplo, procura mostrar el valor cultural diferenciado de un bien local frente a uno extranjero para justificar un trato comercial o fiscal diferente, enfrentará serias dificultades para producir evidencia empírica que cubra los estándares ordinarios de prueba del mecanismo. Lo mismo ocurrirá si un estado intenta demostrar la necesidad de restringir o condicionar el ingreso de determinados bienes, para preservar intereses o valores relacionados con la reproducción de la cultura local, identidades culturales o formas de expresión cultural características de una comunidad local. En este último supuesto, como dijimos, la restricción o condicionamiento funcionaría como una excepción a los principios rectores del GATT, y por lo tanto impondría al estado una carga de justificación estricta, con el deber de aportar evidencia comprobable objetivamente del eventual perjuicio que se intenta prevenir y la inexistencia de medidas menos lesivas.

También las normas sobre propiedad intelectual (TRIPS) han entrado en tensión con algunas políticas públicas de salud, implementadas por países emergentes para procurar reducir el costo de medicamentos, y asegurar un mayor acceso en períodos de emergencia. Por ejemplo las grandes empresas farmacéuticas con apoyo de los países centrales, dieron una batalla en la OMC contra Sudáfrica y Brasil para impugnar su política de medicamentos genéricos. Los Estados nacionales justificaron sus políticas en las obligaciones que imponían no solo sus leyes nacionales sino el régimen de derechos humanos que consagra un derecho fundamental a la salud pública. Las empresas trasnacionales de medicamentos plantearon que las políticas locales violaban la normativa de la OMC sobre derechos de patentes y propiedad intelectual. De un lado argumentos basados en derechos sociales, y del otros argumentos basados en la defensa irrestricta de la propiedad. En este conflicto, de un modo similar al caso de Suez sobre agua y propiedad, se dio una alianza fuerte entre organizaciones sociales locales y globales y los estados nacionales, para defender el poder regulatorio estatal y contrarrestar la presión de las

grandes empresas farmacéuticas y los países centrales. Algunos autores han considerado este ejemplo como expresión de nuevas formas de activismo global en escenarios no tradicionales, describiendo la potencialidad de un juego de relaciones complejas entre estados y organizaciones sociales, que puede combinar fiscalización y denuncia, con acciones de cooperación (Nelson y Dorsey (2006)).

En igual sentido, la conceptualización de ciertos servicios de educación superior como servicios globalmente transables, y su ubicación como bienes económicos en el marco del Acuerdo General sobre Servicios de la OMC (GATS), según señalan numerosos estudios ha contribuido a promover la tendencia a la '*mercadización*' de la educación superior, en contraposición con el enfoque de la educación como bien público y prestación que origina responsabilidad del estado, en cuanto a su acceso, organización y regulación (Brunner y Uribe (2007)). Es clave remarcar que la educación en varios países de América Latina no sólo es considerada un bien público, sino también objeto de un derecho humano y de ciudadanía. Este punto es relevante, pues no ocurre lo mismo en varios países centrales que impulsan junto con sus empresas la liberalización del sector. Por ejemplo en EEUU no existe algo similar a un derecho constitucional a la educación a nivel federal, el cual sólo ha sido reconocido limitadamente por algunos estados locales. El reconocimiento de un derecho humano a la educación en las constituciones recientes, y en los instrumentos de derechos humanos incorporados a los sistemas jurídicos nacionales, que incluye con condiciones obligaciones de garantía respecto de la educación de nivel superior, se proyecta sobre las competencias y mandatos regulatorios de los estados nacionales. Aquí es donde aparece la tensión con el tratamiento de ciertas prestaciones como servicios lucrativos globales. La lógica del régimen del GATS, apunta a la eliminación de restricciones y barreras, y a liberalizar y desregular el sector. Este enfoque favorece la inversión privada trasnacional, y acota y condiciona el poder regulatorio de los estados nacionales. Este régimen aplicado a vastas áreas de servicios sociales que pasan a estar regidas con las reglas de mercado, ha tenido impactos severos en términos de brechas de acceso en varios países del sur global (Vlk (2006); Ziguras (2003)). Si bien el GATS excluye su aplicación a los servicios públicos, tiene una definición deficiente de que se entiende por servicio público, y para algunas interpretaciones autorizadas sería aplicable a cualquier servicio brindado por el estado cuando medie una contraprestación económica, o en competencia con empresas privadas, lo que permitiría aplicar las normas del GATS en vastas áreas de servicios públicos organizados por los países emergentes, y regidas por el derecho público administrativo nacional.

4 Nuevas legalidades internacionales sobre procesos de deuda soberana. La disputa de competencias regulatorias

Si bien en términos generales los procesos de internacionalización desestabilizan y acotan la idea de *soberanía westfaliana*, existen algunas experiencias que indican que estos procesos también pueden ser utilizados por los estados para recuperar capacidad de ejercicio de poder regulatorio ante actores económicos concentrados y trasnacionales.

En ese sentido, una discusión que muestra esta lógica inversa de los procesos de internacionalización antes mencionados, es la iniciativa de

Argentina avalada por el Grupo 77 más China, para la creación de un marco jurídico multilateral para procesos de reestructuración de deuda soberana, aprobada en la Asamblea de la ONU en septiembre de 2014. Argentina, como otros países emergentes, reguló sus procesos de emisión de deuda en base a modelos estandarizados de contratos con los acreedores, y otorgó jurisdicción a jueces extranjeros para que intervinieran en este tipo de conflictos. El alcance de la afectación de los márgenes de decisión soberana del país se puso en evidencia con la decisión del juez del distrito de New York, Thomas Griesa, ratificada por el tribunal del segundo circuito de New York durante 2012. Al interpretar la cláusula de 'igual trato' (*pari passu*) prevista en los contratos y en la ley mercantil del Estado de Nueva York que los bonos declaran aplicable a los conflictos emergentes de su cobro, atribuyó a los titulares de bonos que no entraron en los canjes de deuda, el derecho a cobrar el total del valor nominal de los títulos. Si bien la mayoría de los acreedores había aceptado los canjes, no existe en los contratos, ni en la normativa aplicable, reglas que permitan imponer la decisión mayoritaria de los acreedores a las minorías refractarias, como ocurre en los procesos legales nacionales sobre concursos y quiebras. En el caso los tribunales brindaron una interpretación extensiva de la cláusula '*pari passu*', derivando de ella una suerte de obligación del deudor de pagar a *pro rata* a la totalidad de los acreedores, sin poder establecer distinciones entre los acreedores que ingresaron en los procesos de reestructuración, y aquellos que decidieron no ingresar, y reclamar el valor nominal de los bonos (*holdouts)*. Hasta entonces, si bien existían algunos precedentes aislados que habían otorgado a la cláusula '*pari passu*', el sentido de un pago a pro rata entre todos los acreedores, las decisiones principales de los tribunales americanos, y la doctrina especializada, rechazaba la interpretación que asimilaba la cláusula a un deber de pago a pro rata. Estas posiciones mayoritarias concluían que la cláusula sólo imponía al deudor una obligación de igual tratamiento, y la prohibición de establecer privilegios legales o una discriminación *de iure* entre los diferentes acreedores. Esta interpretación acotada de la cláusula no inhibía a los estados deudores de realizar acuerdos de reestructuración de deuda soberana, fijando condiciones diferenciales entre los acreedores que aceptaban esos procesos y quienes decidían no ingresar en las reestructuraciones. Incluso es interesante mencionar que al momento en que el tribunal del Segundo Circuito emite su decisión en el caso NML contra Argentina en 2012,[13] un sector importante de la doctrina especializada e incluso el propio gobierno de los EEUU (mediante una presentación *amicus curiae*)[14] emiten pronunciamientos concordantes en el sentido de que se había realizado una interpretación excesiva de la cláusula, lo que no sólo afectaba a la Argentina, sino que ponía en riesgo otros procesos de reestructuración de deuda soberana y la propia plaza norteamericana como ámbito para dirimir conflictos de deuda (Zamour (2013)).[15]

13 *NML Capital Ltd v Republic of Argentina* 699 F.3d 246 (2d Cir. 2012).

14 Brief for the United States of America as *Amicus Curiae* in Support of Argentina's Petition for Panel Rehearing and Rehearing En Banc, *NML Capital Ltd v Republic of Argentina*, No 12-105-cv(L) (2d Cir. Dec. 28, 2012), 2012 WL 6777132.

15 El artículo contiene una buena reseña del caso '*NML Capital v Argentina*', y de la discusión jurisprudencial y doctrinaria sobre la cláusula *pari passu*. El autor sin embargo hace una lectura más estrecha del alcance de la decisión y considera que en el caso no se amplió la interpretación de la cláusula, sino el tipo de remedio fijado por el tribunal ante la determinación del incumplimiento del contrato de deuda.

La iniciativa argentina de internacionalización del asunto en un foro como ONU, buscó por un lado salir de las reglas e instituciones del régimen de mercado de capitales, llevando la cuestión a un foro con mayor voz de los estados y un enfoque prioritariamente político. Dos reacciones marcan las tensiones sobre los diferentes espacios de regulación internacional. Algunos países y los sectores financieros hegemónicos a nivel global, plantearon que el tema debía mantenerse en el mismo espacio o régimen privado que lo venía encuadrando, básicamente el sistema regido por los contratos modelo de la Asociación Internacional de Mercado de Capitales - ICMA- sigla en inglés-. Cuando el proceso avanzó en ONU, la ICMA consideró el caso argentino, y propuso una modificación de los contratos modelo de deuda incorporando la denominada '*cláusula de acción colectiva*'. Esta cláusula permite imponer una reestructuración de deuda a los acreedores minoritarios cuando el proceso es aceptado por una mayoría calificada de acreedores. Esta nueva cláusula implica en la práctica una revisión del estándar de la cláusula '*pari passu*' en orden a facilitar futuras reestructuraciones de deuda soberana, pues permite diferencias de trato entre quienes ingresan o no en el proceso. Es interesante señalar que la inclusión de esta cláusula colectiva había sido recomendada por el FMI y por varios organismos y estados desde al menos principio de siglo ante el bloqueo de los fondos de inversión (fondos buitres) a otros procesos de reestructuración de países africanos. Pero estos planteos no lograron conmover la posición de la ICMA, que integran los principales bancos intermediarios y emisores de deuda (Gelper & Gulati (2009)). La solución propuesta por la ICMA no ha detenido el proceso de discusión de un nuevo marco internacional sobre reestructuración de deuda. Los estados que impulsan el proceso y numerosas organizaciones sociales que acompañan esta discusión, han argumentado que la complejidad de los procesos de reestructuración no puede resolverse sólo con la inclusión de una cláusula de mayoría en los contratos. Entienden que es necesario regular un mecanismo legal que fije claramente el alcance de las normas que rigen la relación entre el estado deudor y los acreedores (algunos lo mencionan como un Código Financiero Internacional),[16] un procedimiento de concurso con reglas claras[17], y un órgano arbitral o bien una corte internacional de concursos y quiebras, que pueda dirimir los conflictos entre los acreedores con criterios objetivos, transparentes y con imparcialidad, desvinculada de los países que exportan capitales, y los sectores del mercado financiero global que tienen un peso hegemónico en la fijación de las reglas vigentes. Esta normativa debería establecer expresamente la posibilidad de un estado de declararse en cesación de pagos (default), habilitando un proceso de negociación con los acreedores, como vía para garantizar intereses públicos imperativos. También debería regularse la posibilidad de clasificar la deuda para excluir de los procesos deuda odiosa o ilegítima y la posibilidad de fijar privilegios o tratos diferenciales a ciertos acreedores, por razones de preservación de interés público (Cibils (2015)).

16 Ver la propuesta de Oscar Ugarteche y Alberto Acosta (2007).

17 Asi, por ejemplo, Kunibert Raffer ha propuesto convertir en norma internacional el procedimiento de concurso de la legislación federal de los EEUU, el denominado Capítulo 9. El FMI en 2001 propuso un procedimiento especial internacional de reestructuración de deuda soberana. Para un examen de las diferentes propuestas, puede verse Kaiser, 2013.

En la discusión emerge como asunto estratégico la elección del régimen global en el que se procura encuadrar los conflictos de reestructuración de deudas soberanas. Un debate sobre la opción por el '*foro más favorable*'.[18] Se evidencia la tensión entre quienes buscan preservar como ámbito de regulación un 'régimen privado global' (los contratos modelo del régimen de mercado de capitales), y el intento de los estados de regular con otro enfoque los procesos de deuda, y en cierta medida poner de nuevo la cuestión en la esfera de la decisión política gubernamental. De allí que procuran al menos sumar un nuevo ámbito regulatorio, la ONU, como espacio multilateral sujeto al derecho internacional público y al derecho internacional de derechos humanos.

La búsqueda de un foro multilateral regido por el derecho internacional surge también de la imposibilidad de regular adecuadamente estos asuntos en el derecho interno de los países afectados,[19] e incluso los límites que han demostrado las normas que dictaron algunos países centrales para contrarrestar en sus sistemas jurídicos nacionales la actuación abusiva de los fondos de inversión.[20]

En ese sentido el derecho internacional público y los mecanismos formales multilaterales, pueden ser vías de preservación de autonomía, cuando permiten establecer regulaciones y límites a poderes económicos concentrados y trasnacionales, que condicionan a los propios estados nacionales. Esto es así si contribuyen en definitiva a recuperar la potestad estatal de producir el derecho. El peso de los regímenes privados globales, expresado por ejemplo en los modelos de contrato de deuda, o de concesiones mineras, y el poder de presión de las grandes empresas trasnacionales, difícilmente pueda ser contrarrestado por los Estados emergentes de manera aislada, unilateral, o exclusivamente a través de sus propios sistemas jurídicos nacionales.

18 Sabino Cassese ha estudiado el proceso de búsqueda de la 'ley más favorable' (*law shopping*) por las empresas en el contexto del derecho administrativo global europeo, donde se articulan normas administrativas nacionales que tienen validez trasnacional,derecho europeo y derecho internacional. Por ejemplo las empresas farmacéuticas eligen en qué país europeo conviene atravesar la certificación de un producto válida para el resto del espacio europeo, y en ocasiones acuden a los foros regionales, como la comisión europea para cuestionar normas regulatorias nacionales, rompiendo la lógica bilateral de la relación clásica del derecho administrativo, Estado/ciudadano. Los procesos que describimos tienen puntos en común con esas experiencias, pues aquí, empresas, ciudadanos organizados, y los propios estados, atraviesan el escenario global para buscar (en su caso crear) el foro y la norma más favorable para dirimir el conflicto (Ver Cassese (2012)).

19 En Argentina, la Corte Suprema ha rehusado implementar decisiones de jueces extranjeros que hicieron lugar a demandas de fondos de inversión en contradicción con normas que la Corte juzgó imperativas y que conforman el *orden público constitucional argentino*. En el caso *Claren, dictado en 2014,* se negó a ejecutar la decisión del juez Thomas Griesa en el caso MNL v Argentina, por entender que esta decisión violaba leyes dictadas por Argentina en el proceso de reestructuración de deuda que habían ponderado el interés público afectado. Esta regla de exequátur blindó la jurisdicción nacional de la ejecución pero no impidió a los acreedores acudir a otros foros para realizar la ejecución del crédito.

20 Así por ejemplo Bélgica en 2008 y Inglaterra en 2009 fijaron regulaciones que limitaban la actuación de estos fondos en casos de deuda pública contraída por países menos desarrollados.

5 Conclusiones

A partir de estos pocos ejemplos reseñados podemos concluir preliminarmente que el pluralismo jurídico global tiene como una de sus consecuencias más relevantes, no sólo los límites de la soberanía westfaliana, sino los obstáculos y condicionamientos que se imponen al ejercicio de soberanía nacional, entendida como el ejercicio de poder político en el espacio nacional. Observamos que estos regímenes plantean a los estados mandatos jurídicos contrapuestos, que responden a enfoques y punto de partida diametralmente opuestos para examinar los mismos conflictos. Los regímenes internacionales de orientación de mercado funcionan como foros para impugnar regulaciones sociales, inhiben y condicionan el desarrollo del derecho social de raíz constitucional en los países sudamericanos, como ocurre con otros países emergentes. En este documento, hasta aquí hemos presentado de manera esquemática cómo se presentan algunas de estas controversias: acciones afirmativas vs igualdad formal de inversores nacionales y extranjeros; seguridad jurídica del inversor vs derecho al agua y acceso a servicios públicos; actividad extractiva vs derechos culturales colectivos; libertad de comercio vs la preservación de la diversidad cultural; acceso a medicamentos vs la propiedad de las patentes; educación superior como bien público vs la educación superior como servicio globalmente transable.

Se trata sin embargo de una problemática por demás compleja y llena de matices, en la cual se debería profundizar la investigación jurídica en pos de precisar las disputas y hacer visible los principales puntos de conflicto, pero también las posibles conexiones o imbricaciones entre los diferentes regímenes. En este artículo hemos presentado brevemente algunos esfuerzos por introducir consideraciones sobre deberes de protección de derechos humanos en regímenes económicos, y el uso incipiente de una hermenéutica que procura 'armonizar' los diferentes órdenes jurídicos. Pese a ello, entendemos que es posible afirmar que un núcleo casi irreductible de esa contradicción es la expectativa diferenciada sobre la función estatal regulatoria de las relaciones económicas. En general el problema fruto del pluralismo jurídico global autónomo y fragmentado, podría plantearse de esta manera: algunos regímenes como el régimen de derechos humanos amplían el espacio de lo público, desarrollan obligaciones estatales positivas de protección y garantía de derechos, y exigen mayor intervención del estado en la actividad económica y en los mercados, extendiendo el alcance de las competencias regulatorias y correlativamente de la responsabilidad estatal indirecta por la acción de actores privados como las grandes empresas. Mientras que otros regímenes, por su historia, sus actores y sus lógicas de intervención, como el régimen de inversiones, y el régimen del comercio internacional, conducen a limitar el poder regulatorio y de fiscalización estatal, ampliando la autonomía contractual y la desregulación de los mercados y de la actividad económica.

Frente a esta contradicción, no existen reglas consensuadas para resolver los conflictos normativos, ni instituciones internacionales que tengan competencias asignadas formalmente para dirimirlos.

Los diferentes actores, empresas trasnacionales y comunidades locales afectadas y sus redes de activismo global, buscan el '*foro más favorable*' dentro de la constelación legal internacional, para presentar sus demandas

y proteger sus intereses. Por lo general ubican a los estados nacionales en el centro del conflicto, ya sea como garantes de derechos, o como custodios de la propiedad y la seguridad jurídica, colocándolos en un escenario de *fuego cruzado*. En algunos casos activistas sociales y académicos anfibios, realizan esfuerzos para *cruzar los diversos foros* y ajustar las interpretaciones legales a principios armonizadores. Algunas discusiones globales, como la que gira en torno a los procesos de reestructuración de deuda soberana y las prácticas abusivas de los fondos de inversión, evidencian las disputas sobre la definición del régimen internacional dominante. O bien el régimen privado de mercado de capitales, definido por actores económicos globales, con su lógica de autonomía y desnacionalización que luego se imponen en los espacios locales, o bien un régimen multilateral en el ámbito formal de las Naciones Unidas, sujeto a las normas del derecho internacional público, donde los estados nacionales recuperan autoridad para fijar las reglas de juego.

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M Killander, K Obura & A Ashenaf 'Selected developments in human rights and democratisation during 2015: Sub-Saharan Africa' (2017) 1 *Global Campus Human Rights Journal* 165-177

Selected developments in human rights and democratisation during 2015: Sub-Saharan Africa

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Abstract: *This brief overview of selected developments with regard to human rights and democratisation in sub-Saharan Africa in 2015 paints a mixed picture of progress and challenges both at the national and regional levels. The contribution discusses elections held in 2015, accountability for mass atrocities, the protection of LGBTI rights and gender equality. With regard to elections, some may be seen as reflecting the will of the electorate, while others clearly were just meant as a show to endorse a predetermined outcome. With regard to accountability for mass atrocities, heads of state do their utmost to avoid judicial scrutiny. LGBTI rights remain a controversial issue, with some states playing on homophobic sentiments to win political points, at the expense of human rights and the rule of law. In 2015, the AU Executive Council challenged the independence of the African Commission on Human and Peoples' Rights by directing the Commission to withdraw the observer states granted to the Coalition of African Lesbians. However, at the national level, there have been encouraging judgments, for example with regard to the right of freedom of association of LGBTI groups. Gender equality also remains a contested issue, as illustrated by a case of the Ugandan Supreme Court dealing with the gender equality implications of the bride price.*

Key words: *accountability; democracy; elections; gender equality; human rights; LGBTI rights; sub-Saharan Africa*

1 Introduction

Africa is a vast continent with many challenges relating to human rights and democratisation. The protection of human rights and democratic governance must be guaranteed at the national level through constitutional and legislative provisions and effective institutions to enforce this. Intergovernmental organisations, such as the African Union (AU), complement the national framework both through norm setting,

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such as the African Charter on Human and Peoples' Rights (African Charter) and the African Charter on Democracy, Elections and Governance, and through establishing institutions, such as the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court), to urge states to comply with their international commitments.

This brief overview of regional and domestic developments relating to human rights and democratisation in sub-Saharan Africa in 2015 considers developments in relation to four themes: democracy; accountability for mass atrocities; lesbian, gay, bi-sexual, transgender and intersex (LGBTI) rights; and gender equality. This is obviously not a comprehensive overview of developments related to human rights and democratisation in sub-Saharan Africa. The focus is on legal developments, such as court cases, rather than on a description of violations that took place during the period covered. More information can be found in the reports of various national and international non-governmental organisations (NGOs), in the reports of national human rights institutions, and in the activity reports of regional institutions such as the African Commission.

2 Democracy

This section briefly explores positive and negative trends with regard to elections held in sub-Saharan Africa in 2015. Thereafter it discusses a Ugandan judgment regarding whether a parliamentarian may retain a seat in parliament after having been expelled from his party. The section further briefly highlights some constitutional developments and a judgment of the East African Court of Justice on the media law of Burundi.

Elections were held in 13 sub-Saharan African states in 2015: Benin (parliamentary); Burkina Faso (presidential and parliamentary); Burundi (presidential); Central African Republic (parliamentary and presidential); Comoros (parliamentary); Côte d'Ivoire (presidential); Ethiopia (parliamentary); Lesotho (parliamentary); Nigeria (parliamentary and presidential); Sudan (parliamentary and presidential); Tanzania (parliamentary and presidential); Togo (presidential); and Zambia (presidential).

In some of these elections there were real contestations. For example, no party won an absolute majority in the parliament in Benin, Burkina Faso, Comoros and Lesotho (AFP 2015; Eizenga 2015; Inter-Parliamentary Union 2015; BBC 2015). For the first time in Nigeria's history, an incumbent president who stood for re-election conceded defeat (Nwabughiogu 2016), and there was less election-related violence than in previous elections (Winsor 2015).

The AU observer mission to the general elections in Burkina Faso noted (AU 2015):

> The Burkinabe people, political actors and the transition authorities deserve credit for the serene and tranquil atmosphere within which the elections were conducted. Through the use of national ingenuity, the challenges which confronted the transition were surmounted.

Similar positive accounts about many of the elections held in sub-Saharan Africa were adopted by election observer missions.

The positive outcome in Burkina Faso followed a judgment by the Community Court of Justice of the Economic Community of West African States (ECOWAS), wherein it was held that an electoral code excluding certain persons from contesting the elections violated their rights (ECOWAS Community Court of Justice 2015).

The most glaring exceptions to the positive picture of elections in Africa in 2015 painted above are the elections in Burundi, Sudan and Ethiopia.

The election observation mission of the East African Community (EAC) noted, with regard to the presidential election in Burundi in April 2015, that it 'fell short of the principles and standards for holding free, fair, peaceful, transparent and credible elections as stipulated in various international, continental as well as the EAC Principles on Election Observation and Evaluation' (EAC 2015 para 31). President Nkurunziza's successful bid for a third term generated violence which continued throughout the year (Al Jazeera 2015).

In the Sudanese presidential election, President al-Bashir won 94.05 per cent of the vote. The ruling National Congress won 323 of the 426 seats in the National Assembly. The elections were 'boycotted by opposition groups and marred by low turnout and public apathy' (Kushkush 2015).

In Ethiopia, the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF) won 500 of the 547 seats of the House of People's Representatives while its affiliates won the remaining 47 seats. Thus, all real opposition parties were demolished. The percentage of seats held by the EPRDF and its associated parties grew from 99.5 per cent (544 of 547 seats) following the 2010 election (EU mission report 2010: 33) to 100 per cent following the 2015 election (National Electoral Board of Ethiopia 2015). The AU election observation mission concluded that 'the parliamentary elections were calm, peaceful, and credible as it provided an opportunity for the Ethiopian people to express their choices at the polls' (AU para 74). The EU decided not to send an observer mission since its report on the 2010 election had not been accepted by the Ethiopian government (EU position on the absence of an EU Election Observation Mission (EOM) for the May 2015 National elections (26 February 2015)).

No opposition in parliament makes a mockery of the right to vote and to be elected in the Constitution. Elections should be held by universal and equal suffrage in secret ballots and they should guarantee 'the free expression of the will of the electors' (article 38 of the Ethiopian Constitution). Many factors contribute to this unfortunate state of affairs. One of the factors contributing to the current situation is the lack of an independent electoral board. Prominent opposition parties have often complained that the electoral board lacks the independence and impartiality required to enable it to freely manage elections (Abraha 2010: 53-54). This view has been reiterated in some election observation mission reports, for example by the EU observer mission (2010) and the Carter Centre (2015).

The exclusion of any opposition from the political space has a long history in Ethiopia. The Council of Representatives, which took over from the Mengistu regime in 1991 under the Transitional Charter, was not a popularly-elected body (Selassie 1992: 219). Rather, it was a body composed of the representatives of the liberation movements that had

brought down the previous regime (Transitional Charter article 7). The leading liberation movement, the Tigrayan People's Liberation Front (TPLF), ensured that the composition of the Council would not threaten its grip on power (Ottaway 1995).

The Council acted as legislature and made formative decisions on the subsequent political structure of the country that remains to this day. It established the Constitutional Commission that drafted the Constitution. The Electoral Board created under the Constitution was not designed to be independent of the executive and the legislature. For example, political parties that do not have a seat in parliament do not have a say in the nomination process. The political parties consulted by the Prime Minister about the nomination of commissioners are those parties with seats in parliament, and these parties also take part in the approval of the nominees. It seems to be a conscious exclusion of political parties without seats, to enable those parties that do have seats in parliament to play multiple roles in the nomination and approval of commissioners, while parties without seats are not allowed to play any role.

It is essential for democracy that votes cast in secret ballots are counted by an impartial body and that the results of elections should be a reflection of the votes cast in the polls. Although the clause does not expressly provide for this, the words 'to be elected' denote the result of an election, and when these words are read in conjunction with the phrase 'to guarantee the free expression of the will of electors', it clearly indicates a need for an impartial body to be set up to manage the electoral process so that electoral results will be a true reflection of the votes cast.

Democracy does not only imply free and fair elections. At the sub-regional level, the East African Court of Justice in May 2015 delivered an important judgment related to both democracy and human rights. As noted by the Court, '[there is no doubt that freedom of the press and freedom of expression are essential components of democracy' (paragraph 75). The Court held that the media law of Burundi violated the Treaty of the EAC.

In other developments linked to democratisation, the Supreme Court of Uganda held that the expulsion of a member of parliament from his or her political party did not result in that member losing his or her parliamentary seat.[1] This case raised a number of important issues related to democratisation in Africa. These issues include the role of political parties in controlling their members of parliament and the status of members of parliament who have been expelled from their parties.

The case concerned the expulsion of four members of the ruling party in Uganda, the National Resistance Movement (NRM). The four members were expelled from the party on the grounds that they had acted in a manner that contravened various provisions of the party's constitution. Following their expulsion, the Secretary-General of the NRM wrote to the speaker of parliament informing her of the party's decision and requesting her to direct the clerk to parliament to declare the members' seats in parliament vacant to enable the Electoral Commission to conduct by-

1 *Ssekikubo & 4 Others v Attorney-General & 4 Others* Constitutional Appeal 01 of 2015 [2015] UGSC 19 (30 October 2015).

elections in their constituencies. The speaker declined this request. This refusal was challenged in the Constitutional Court on the ground that it was contrary to the Constitution. The Constitutional Court declared the speaker's decision unconstitutional, necessitating the expelled members to appeal to the Supreme Court.

In dispensing with the issue whether the expulsion from a political party was a ground for a member of parliament to lose his or her seat in parliament, the Court found that this was not the case. The relevant article of the Ugandan Constitution, article 83(1), provides that a member of parliament shall vacate his or her seat in parliament 'if that person leaves the political party for which he or she stood as a candidate for election to parliament to join another party or to remain in parliament as an independent member'. According to the Court, on a literal interpretation this provision required that leaving the party should have been voluntary for the member of parliament's seat to be declared vacant. In the present instance, this was not the case, as the members were forced out of the party for reasons other than them joining another party or remaining in parliament as independent members.

It should also be noted that a number of sub-Saharan African states are in the process of reforming their constitutions. A referendum on a new constitution for Tanzania planned in April 2015 was cancelled. In Zambia, parliament adopted a new constitution late in 2015 with only the bill of rights and the amendment clause set to be approved through referendum in connection with the general elections in 2016 (Munalula 2016).

3 Accountability for massive violations

Accountability for massive human rights violations remains a challenge. By the end of 2015, no state had ratified the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) adopted in July 2014 to provide the African Court with criminal jurisdiction to enable it to function as an African alternative to the International Criminal Court (ICC). Kenya was the first state to sign the Protocol in January 2015, and Benin, Chad, Congo, Guinea-Bissau and Mauritania followed suit with signatures in 2015.

The ICC charges against President Kenyatta of Kenya were withdrawn in March 2015 (Escritt 2015). President al-Bashir of Sudan remains indicted by the ICC. In June 2015, al-Bashir travelled to South Africa for the AU Summit. During his presence in the country, a South African NGO brought a court case to prevent him from leaving and to order South Africa to surrender him to the ICC. The government argued that the Sudanese President had immunity during his visit under the Diplomatic Immunities and Privileges Act, while the applicant argued that the obligation to surrender an indicted person to the ICC under the ICC Implementation Act took precedence. The High Court granted the order sought by the applicants. However, despite this order, President al-Bashir returned to Sudan.[2]

2 *Southern African Litigation Centre v The Minister of Justice and Constitutional Development & Others* Case 27740/2015. The judgment was confirmed by the South African Supreme Court of Appeal in 2016.

In other developments related to international criminal law at the domestic level, the Ugandan Supreme Court held that under Ugandan law, a former commander of the Lord's Resistance Army did not benefit from amnesty provisions.[3] Justice Katureebe noted as follows:

> There are no uniform standards or practices in respect of amnesty. Each country may put in place appropriate mechanisms with regard to amnesty to solve or address a particular conflict situation it is facing. But there appears to be a minimum below which amnesty provisions may not be permitted in respect of grave crimes as recognised in international law.

At the international level, the International Criminal Tribunal for Rwanda in Arusha, Tanzania, closed down at the end of 2015. The last judgment of the Appeals Chamber was delivered on 14 December 2015 (ICTR 2015). The trial of the former President of Chad, Hissène Habré, finally proceeded before the Extraordinary African Chambers in Dakar, Senegal (Human Rights Watch 2016). The accused first appeared on 20 July 2015, but proceedings were suspended to allow court-appointed lawyers to prepare themselves after the accused had dismissed his initial lawyer and refused to co-operate. During the trial, which lasted from 9 September to 16 December 2015, the Trial Chamber heard evidence from 96 witnesses, mostly survivors of the brutalities.[4] Habré, who was tried for atrocities committed during his presidency between 1982 and 1990, is the second former head of state in Africa to be tried for international crimes following the trial of Charles Taylor of Liberia, who was convicted by the Special Court for Sierra Leone in 2012, with the Appeals Chamber rejecting his appeal in 2013 (BBC 2013).

In October 2015, months after the conclusion of its work, the report of the AU Commission of Inquiry on South Sudan was released. The report concluded that war crimes and crimes against humanity had been committed, but it remains to be seen whether any action, such as criminal trials, will be initiated against the perpetrators (Dersso 2015). Commissions of inquiry were also established at the national level, for example in Kaduna State in Nigeria, following the killing of hundreds of Shia Muslims by the Nigerian army in December 2015 (Human Rights Watch 2015).

4 LGBTI rights

A rift between the continental human rights body, the African Commission, and the political bodies of the AU dominated the human rights discourse at the regional level in 2015. In April 2015, the Coalition of African Lesbians (CAL) was granted observer status by the African Commission. Given the widespread incidence of homophobia in sub-Saharan Africa, the AU Executive Council responded by requesting the African Commission to withdraw CAL's observer status. Its decision (as part of the consideration of the Commission's Activity Report) reads as follows:

3 *Uganda v Kwoyelo* Constitutional Appeal 01 of 2012 [2015] UGSC 5 (8 April 2015).
4 Habré was convicted on 30 May 2016 of having committed crimes against humanity, a separate crime of torture, and war crimes.

> REQUESTS the ACHPR to take into account the fundamental African values, identity and good traditions, and to withdraw the observer status granted to NGOs who may attempt to impose values contrary to the African values; in this regard, REQUESTS the ACHPR to review its criteria for granting observer status to NGOs and to withdraw the observer status granted to the organisation called CAL, in line with those African values.

On the issue of LGBTI rights, there have been interesting developments at the domestic level in some AU member states.

On 14 January 2015, the Persons Deprived of Liberty Act, under which intersex persons first received legal recognition in Kenya, entered into force. Before this, Kenya had for some time grappled with the recognition of intersex persons, with courts in all cases brought before them holding that their hands were tied due to the lack of legislative recognition. A prominent case on the rights of intersex persons was that of *Baby 'A' (Suing through the mother EA) & Another v Attorney-General & 5 Others,* decided on 5 December 2014. The case involved a child born with both sexes who was refused birth registration because the official birth registration documents only provided for the categories male and female. The mother of the child filed a petition at the Constitutional Court alleging that the non-recognition of the intersex category in the registration documents violated the right of the intersex child to legal recognition, dignity, and the right not to be subjected to inhuman and degrading treatment, all of which rights are protected under the Constitution and international human rights instruments.

The Court held that Baby A and intersex persons were entitled to all rights under the Bill of Rights. However, the Court refused to create intersex as a third category of sex for purposes of birth registration, arguing that this was the role of parliament. Instead, the Court upheld its earlier decision in *RM v Attorney-General & Others*,[5] where it had directed that the dominant sex (determined by 'external genitalia and physiological features') of the child at the time of birth should be used for purposes of registration until such time that parliament introduces intersex as a third category of sex.

Of interest is the fact that the Court directed the Attorney-General to start the process of enacting legislation regulating the place of intersex persons as a sexual category and to report back on its progress within 90 days. Following on the heels of this directive, Kenya passed the Persons Deprived of Liberty Act, which entered into force on 14 January 2015. The Act became the first law in Kenya to define an intersex person. Section 2 of the Act defines an intersex person as one certified by a competent medical practitioner to have both male and female reproductive organs. Although this definition is restrictive,[6] it offers guidance on the identification of intersex persons in Kenya. Also, while the Act only deals with the rights of a person who has been arrested, held in lawful custody, detained, or imprisoned in execution of a lawful sentence, it is a first step towards the legislative recognition of intersex persons.

5 Petition 705 of 2007.

6 Compare this with the definition in the South African Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, where the same term is defined in sec 1 as 'a congenital sexual differentiation which is atypical, to whatever degree'.

Another Kenyan case dealing with LGBTI rights is *Eric Gitari v Non-Governmental Organisations Co-Ordination Board & 4 Others* (2015) eKLR. This case is of interest to Kenya and Africa, given the sometimes acrimonious debate on the issue of homosexual rights. In Kenya, as in many countries in Africa, the debate seems to be tilted in favour of those against homosexual rights, especially in light of the conservative approach enacted in the available legal framework. For example, the Kenyan Constitution in article 45 limits marriage to persons of opposite sexes. The Constitution also deliberately omits sexual orientation as a prohibited ground of discrimination in article 27(4). In addition, the Penal Code in sections 162, 163 and 165 criminalises 'carnal knowledge of any person against the order of nature'.

In this case, the petitioner had lodged with the NGO Board, for purposes of the registration of an NGO, the names Gay and Lesbian Human Rights Council; Gay and Lesbian Human Rights Observancy and Gay and Lesbian Human Rights Organisation. The purpose of the NGO was stated as the protection of the human rights of those who belong to the lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) community. The petitioner was advised by the Board that all the proposed names were unacceptable and should be reviewed. According to the Board, the use of the words 'gay' and 'lesbian' made the names unacceptable as these words were inconsistent with the law, particularly the Penal Code, which prohibited and criminalised gay and lesbian liaisons.

The petitioner challenged this decision, arguing that it violated his right to association under article 36 of the Constitution. He contended that article 36 entrenched the freedom of association for 'every person' and did not distinguish between different categories of people. The Court found that the NGO Board had violated the right of the petitioner to association. According to the Court, the right to associate was a right that applied to everyone and that it did not matter whether the views of certain groups were unpopular or unacceptable to persons outside those groups. According to the Court, in order to deny the registration of the NGO, the Board had to satisfy itself that the proposed NGO was intended to promote any activity that was unlawful. Reliance on the provisions of the Penal Code, which criminalised 'carnal knowledge against the order of nature' was untenable as these provisions did not criminalise homosexuality, or the state of being homosexual, but only certain sexual acts 'against the order of nature'. The NGO Board was thus ordered to proceed and register the NGO.

The *Gitari* judgment is a continuation of a positive trend of national courts in Africa, in Botswana and Zambia, which in 2013 and 2014 handed down judgments asserting the rights to freedom of expression and association of LGBTI activists (SALC 2015).

5 Gender equality

The relationship between culture and human rights also remains contested with regard to equality between men and women. In *Mifumi (U) Ltd & Another v Attorney-General & Another*,[7] the Ugandan Supreme Court

7 Constitutional Appeal 02 of 2014 [2015] UGSC 13 (6 August 2015).

upheld the cultural practice of paying a bride price as being consistent with the freedom of choice and equality of couples intending to get married under customary law, but declared the cultural practice of refund of the bride price unconstitutional for violating the right to dignity of a woman and her entitlement to equal rights with a man.

The petitioners in this case sought orders by the Constitutional Court[8] declaring the marriage custom and practice of demanding a bride price, and its refund in case the marriage breaks down, unconstitutional. They based their prayer on the grounds that (a) the bride price promotes inequality and violence in marriage as it reduces wives to possessions contrary to article 21 of the Constitution, which provides for equality of persons; (b) the bride price fetters the free consent of persons intending to marry contrary to article 31, which provides for the right of equality in marriage; and (c) the custom of demanding a refund of the bride price violates the dignity and equality of a woman in marriage contrary to article 31 of the Constitution which provides for the right of equality in marriage.

The Constitutional Court dismissed the petition, holding that the marriage custom and practice of paying the bride price, and demanding a refund of the same, were not unconstitutional. Dissatisfied with the decision, the appellants lodged an appeal before the Supreme Court.

The payment of the bride price and refund of the price in case of dissolution of the marriage is a common practice in many African customary marriages. As noted by the Supreme Court in this case, the notoriety of the practice requires courts to take judicial notice of its existence. However, despite its notoriety, the human rights implications of the custom remain the subject of intense debate in the increasingly modernising African societies, as evidenced in this case.

The Supreme Court disagreed with the petitioner on the first two grounds and, like the Constitutional Court, upheld the constitutionality of the bride price. After having reviewed a number of research statistics presented before it, the Supreme Court found, first, that inequality and its attendant issues of violence and the abuse of women were not the result of customary marriages in which bride prices were paid. According to the Court, male domination is rooted in the culture, tradition and custom of most societies the world over and is witnessed even in marriages where the bride price is not paid. To hold that the bride price promotes inequality and violence would be to ignore the overwhelming statistics of men married under these conditions who nevertheless treat their wives with dignity and non-violence. Abuse of the custom should be seen as aberrations of the noble intentions of the bride price, and government has the responsibility to deal with such abusers without resorting to the easy route of declaring the practice unconstitutional.

Second, the Supreme Court held that the bride price arrangement did not fetter the parties' free consent to enter into marriage as they still had the option under Ugandan law to choose other forms of marriage which do not require the payment of the bride price. The Court also noted that in many cultures, not only in Uganda but also in other countries in Africa,

8 The Court of Appeal sits as the Constitutional Court on constitutional issues. Its decision can be appealed to the Supreme Court.

the bride has to give her consent before the groom or his parents pay the bride price, meaning that the issue of bride price arises after and not before consent.

With regard to the third ground, the Supreme Court agreed with the petitioner, noting that the customary practice of the husband demanding a refund of the bride price in the event of dissolution of the marriage demeans and undermines the dignity of a woman and violates her entitlement to equal rights with the man in marriage, during marriage and at its dissolution. According to the Court, a demand for a refund fails to honour the wife's unique and valuable contribution to a marriage, which is a violation of a woman's constitutional right to be a partner equal to the man. The Court further noted that the bride price constituted gifts to the parents of the girl for nurturing and taking good care of her up to her marriage, and being gifts, it should not be refundable.

In another case dealing with gender equality, *Mary Mwaki Masinde v County Government of Vihiga & Another* (2015) eKLR, the Kenyan Constitutional Court recognised the right of a married woman who has relocated to the husband's home to vie for elective or nominative positions in her original place of birth.

This case illustrates the frustration a married woman faces when she attempts to vie for elective or nominative positions in her original place of birth. The petitioner applied for the position of member of the County Management Board with respect to Vihiga County Land Management Board advertised by the National Land Commission. She passed the interview and was selected among six other candidates for final approval by the Vihiga County Assembly. Despite noting that she was properly vested with the knowledge and expertise for the position, the Vihiga County Assembly decided against her appointment on the grounds that, although born in Vihiga, she had married and stayed in Mumias (a town in a different county) and, as such, was not able to represent the interests of the people of Vihiga. The same consideration was, however, not brought to bear on her male counterparts who were born in Vihiga but lived in areas outside Vihiga. The petitioner challenged the court process on the grounds that the decision was based entirely on her marital status and was, therefore, discriminatory. The Court found the decision discriminatory and ordered the county government to pay the petitioner Kshs 3 million for a breach of her right not only against discrimination, but also to dignity. According to the Court, the purpose of the right against discrimination on the grounds of, among others, marital status or sex, was to preserve human dignity that, in itself, was a right recognised under article 28 of the Constitution. The Court further held that women and men had the right to equal treatment (provided in article 27 of the Constitution), which included the right to equal opportunities in political, economic, cultural and social spheres.

An important case decided at the regional level is the decision of the African Commission in the case of *Equality Now and Ethiopian Women Lawyers Association v Ethiopia*.[9] The case deals with the rape and abduction of a 13 year-old girl as part of a traditional practice in Ethiopia and the lack of response by the Ethiopian authorities. The perpetrator was

9 Communication 341/2007, adopted by the African Commission in November 2015.

initially convicted by a court, but this conviction was overturned on appeal. The Commission held that violators must be pursued with diligence and that the decisions of the national appeal courts had been 'manifestly arbitrary and affront the most elementary conception of the judicial function' (paragraph 137). In addition to prosecution, the state had an obligation to adopt preventive measures. However, the Commission noted that it would not dictate what these measures were, given the state's 'unique knowledge of the local realities' (paragraph 128). This decision is the first in which the Commission has ordered the state to pay a specific amount of non-material damages.

6 Conclusion

This brief overview of selected developments with regard to human rights and democratisation in sub-Saharan Africa paints a mixed picture. On the one hand, democracy is taking hold, albeit with imperfections, in many African states. On the other hand, in a few states, ruling elites are attempting to hold onto power by all possible means. Developments in 2015 in Ethiopia, Sudan and Burundi illustrate this challenge. With regard to accountability for mass atrocities, the picture is also mixed. Current heads of state do their utmost to avoid judicial scrutiny and have the full backing of African heads of state in avoiding accountability. Selected prosecutions of former heads of state, such as those of Charles Taylor and Hissène Habré, are exceptions to the rule. The mixed picture extends to LGBTI rights. The AU Executive Council's reaction to the African Commission granting observer status to CAL could have serious consequences for the functioning of the African regional human rights system. However, at the national level, there have been encouraging judgments, for example with regard to freedom of association of LGBTI groups, which is the question at the heart of CAL's contested observer status. Much has in recent years been achieved in relation to gender equality, but sub-Saharan Africa remains highly patriarchal. There is no simple answer to dealing with issues such as the bride price, as illustrated by the judgment of the Ugandan Supreme Court in *Mifumi*. The case against Ethiopia, which was pending before the African Commission for eight years before finally being decided, is hopefully not the last to explore gender-based violence and other issues related to gender equality in Africa.

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N Azizah, M Mullen & S Sangroula 'Selected developments in human rights and democratisation during 2015: Asia-Pacific' (2017) 1 *Global Campus Human Rights Journal* 179-193

Selected developments in human rights and democratisation during 2015: Asia-Pacific

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Abstract: *Informality is a characteristic central to the Asia-Pacific region. Nonetheless, the regional discourse around democratisation, which includes not only speech but also practice, tends to mention informal institutions only in passing. In the Asia-Pacific region, prominent informal institutions include local customs; clan politics; money politics; corruption; clientelism; patronage; informal mobilisation and resiliency networks; everyday resistance; vigilantism; shadow markets; and unconventional community-based organisations. This contribution posits that these informal institutions rarely receive adequate treatment as part of debates and discussions about democratisation and the shaping of the practice around it. It is argued that the tendency to ignore or reject informality compromises attempts to understand and support democratisation processes in the region. Each of the three case studies brought forth in this contribution illustrates different types of informal institutions and their impact on democratisation in different contexts and dynamics, namely, (i) the way in which informal institutions shape procedures ranging from everyday licensing to national elections in Indonesia; (ii) the way in which individuals and communities have been able to build resiliency action and networks by leveraging informal institutions in their pursuit of transitional change in Myanmar; and (iii) the threat posed by informal institutions to post-earthquake aid and recovery activities throughout Nepal. As the contribution illustrates, understanding the situation in 2015 requires locating developments in a more expansive and broadened historical perspective. Fortunately, recent experiences signpost that making informality more central in discourses around democratisation in the Asia-Pacific region could be a shift towards ensuring that informal institutions receive the due consideration their influence on politics merits.*

Key words: *informal institutions; Asia-Pacific; democratisation; discourse; politics*

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1 Introduction

Dealing with democratisation, and the lack thereof, in the Asia-Pacific region during 2015 requires an honest accounting of the prominent role informal forces and informality play in shaping manifest politics. In the sense that 'informality is an integral part of every political system' (Lauth 2012), informality is a central characteristic of the Asia-Pacific region. Nonetheless, the regional discourse around democratisation, which includes not only speech but also practice, tends to mention informal institutions only in passing. Informal institutions, in this contribution, refer to Helmke and Levitsky's conception of 'socially-shared rules, usually unwritten, that are created, communicated, and enforced outside of officially sanctioned channels' (Helmke & Levitsky 2004). In the Asia-Pacific region, prominent informal institutions include local customs; clan politics; money politics; corruption; clientelism; patronage; informal mobilisation and resiliency networks; everyday resistance; vigilantism; shadow markets; and unconventional community-based organisation. This contribution posits that these informal institutions rarely receive adequate treatment as part of debates and discussions about democratisation and the shaping of practice around it. There may be a number of reasons for the neglect of informal institutions in the discourse around democratisation in the Asia-Pacific region.

Each of the following three case studies illustrates different types of informal institutions and their impact on democratisation in different contexts and dynamics: (i) the way in which informal institutions shape procedures ranging from everyday licensing to national elections in Indonesia; (ii) the way in which individuals and communities have been able to build resiliency action and networks by leveraging informal institutions in their pursuit of transitional change in Myanmar; and (iii) the threat posed by informal institutions to post-earthquake aid and recovery activities throughout Nepal. As the contribution illustrates, understanding the situation in 2015 requires locating developments in a more expansive and broadened historical perspective.

2 Informal institutions in Indonesian democracy in the post-Soeharto era

Informal institutions, which vary from patronage, clientelism, corruption, cultural values, and local charismatic elites, have different impacts on democratisation processes in Indonesia. This section briefly discusses informal institutions relative to Indonesian democracy. It subsequently considers how informal institutions impact on democratisation processes. In Indonesia and elsewhere, an overly formal lens of democratisation leads to a conception of democracy 'as a negative utopia' (Lauth 2012). By illustrating how informal institutions in Indonesia are shaping democratisation in the country, this section posits that, while informal institutions may have a detrimental impact on democratisation, it is possible that some other forms of informality may positively impact on the development of democracy. In Indonesia, informal institutions are not purely a distraction in a formal democratisation exercise. Informal institutions shape Indonesia's democratisation experience, even if it often does so in adverse ways.

The current wave of democratisation in Indonesia has been in place since the fall of Soeharto in 1998. Since then, various democratisation agendas have been implemented, starting with the first free general elections in 1999, the empowerment of the legislative council, and decentralisation, all of which transferred considerable authority from the national government to local government. As from 2001, the powers of the national government were transferred to local governments, which caused a 'decentralisation big bang' to be heard around the world (Hofman and Kaiser 2004).

Institutionalising democracy soon became a great challenge for Indonesia. Researchers have been trying to gauge democratisation from formal and, to a lesser extent, informal perspectives. In this process of assessment, scant attention has been paid to the role of patronage, clientelism, corruption, grafts, money politics, as well as clans and their role in the democratisation process. These informal institutions can be present in a formal organisation, such as local government or local parliament, a political party, or other formal organisation. For instance, in order to obtain a licence for mining at the local level, investors may have to bribe public officials so as to expedite the licensing process. Another example presents itself if a politician wants to win an election, where money politics (one form of informality related to patronage) become an effective way of buying people's votes (Aspinall & Sukmajati 2015b). Everyone may be satisfied and there may be no critical questions to challenge these practices. All these informal institutions infiltrate efforts at formal democratisation.

Therefore, democracy will need to be defined as a base for analysing the relationship between informal institutions and democracy itself. There are many definitions of democracy. Although leading political scientists, such as Joseph Schumpeter, Robert Dahl and O'Donnell, offer different definitions, two basic dimensions may be found within these variations (Lauth 2012 in Christiansen & Neuhold 2012: 40). These dimensions are individual political freedom and equality. However, a third dimension should be added, namely, political and legal control, to prevent individual political freedom from violating the freedom of others (Lauth 2012 in Christiansen & Neuhold 2012: 41). In addition, Lauth (2012) identifies five characteristic elements of democratic institutions: procedure of decision; regulation of the intermediate sphere; public communication; the guarantee of rights; and agreement on and implementation of rules. The question then follows: How has the development of democracy in Indonesia progressed thus far?

Most Indonesians agree that, until 2015, democracy in Indonesia had been on the right track – at least to some extent. One reason for this positive view is the lack of 'serious threats in its territorial integrity' (Hill 2014) up to that time. This may be what Hill calls 'an impressive, indeed remarkable, achievement' (Hill 2014). Furthermore, democratisation in Indonesia is widely open to actors or political elites at the local and national level to display their power and compete through executive or legislative election. There are no obvious barriers to public positions in the executive or legislative branches. The emergence of popular leaders at the local level, such as Joko Widodo from Solo Regency, now the President of the country (based on the 2014 election), is proof of political access and the openness of democracy and decentralisation.

In spite of these successes, there are obvious problems and challenges to democratising Indonesia. Many of these challenges have at their core informal institutions. As mentioned before, money politics have become prevalent in Indonesian general elections and have even normalised in some cases, for instance in elections for member of parliament or for governor/regent/mayor (Aspinall & Sukmajati 2015b). Research has revealed disturbing findings about the use of money or other goods to buy people's votes, as well as the use of patronage politics as a central campaign strategy for many candidates in legislative elections (Aspinall & Sukmajati 2015a). The research led by Aspinall and Sukmajati in 2014 revealed that corruption had emerged as a serious national and local challenge. As power was being transferred from the central to local government, corruption spread further throughout the country. Local elites holding public office abuse their authority to pursue their personal interests.

A clear example is the rise of a 'shadow state' in Banten Province. The term 'shadow state' implies that within a state (at national or local level), informal institutions and actors take control over formal institutions in decision-making processes (Harris-White in Hidayat 2007). Hence, the formal elite (governor) was in the shadow of the informal elite who, in reality, drove policy-making processes, especially in the context of deciding on projects for the development of infrastructure (Hidayat 2007). In many parts of Indonesia, democratisation seems to have been hijacked by elites or an oligarchy (Aragon 2007; Hadiz 2003; Timmer 2007), which is also evident from the resurrection of clan or identity politics (Mietzner 2014 in Hill 2014; Tanasaldy 2007). The rise of clan or identity politics, elite collusion at the local and national level, and corruption are cases identified by Aspinall (2013) as the product of patronage. The rise of local bossism and/or local elites in some areas, who then collaborate with businessmen or even criminals in the name of clan identity or religion identity, has also been found (Sidel 2005).

What, then, can be said about democratisation in Indonesia? It is obviously very difficult to accurately measure the status of democracy in Indonesia. Another obvious point is that formal democratisation procedures contain informal institutions that change their very nature. The resurrection of clans and identity politics, the emergence of strong local leaders, money politics, corruption, and related practices have effectively put democracy in Indonesia under the control of small elitist groups. In these situations, informal institutions are not only interfering with democratisation, but informality is shaping the very nature of democratisation in Indonesia.

It should be noted that there are also positive ways in which informal institutions impact on democracy in Indonesia. As Indonesia is an archipelagic country, in some parts of Indonesia formal government organisations only deliver limited public services. In these situations, informal institutions, such as customary and the local charismatic elites, may become alternatives for societal service provision (Lay 2012). Another example is Maluku in the eastern part of Indonesia. In this area, there is an unwritten customary law, called *Sasi*, preventing all people in this area from taking certain (mostly natural) resources in certain periods. There is, for example, *Sasi Kelapa*, during which people will be prevented from harvesting any coconut. This is part of local wisdom, which is actually

related to the reproductive systems of certain resources. Social sanctions will be applied against those who violate this *Sasi*, such as having to pay fees or being excluded from society. In this way, informal institutions provide equal access to resources for all people in the area, which certainly is a principle of democracy.

On the one hand, the dimensions of democracy explained earlier, namely, patronage, clientelism and money politics, obviously have a negative impact on democracy. Clientelism and money politics limit at least one dimension: equality among individuals to compete fairly in general elections. Money politics, therefore, provide a better chance for a candidate with large financial resources, whether the funds emanated from a candidate's own resources or from those of a supporter group, to win a general election by buying people's votes. Moreover, money politics tends to lead politicians to recirculate money through corruption or rent seeking, providing easy access to investors or businessmen who provide financial support during elections. This is incompatible with rules settlement and implementation, as a democratic institution, because corruption creates an ineffective government and unequal treatment among individuals.

On the other hand, informal institutions may also have a positive impact on the democratic agenda in Indonesia. The *Sasi*, as explained above, is an informal institution that had been rooted in local wisdom in Maluku long before Indonesian independence in 1945. *Sasi* seems compatible with the principle of equality, since this phenomenon of informality assures equal access to resources in the area. There is also control over resources by people, in the interests of their own sustenance. The *Sasi* is also an effective instrument in terms of assuring the sustainability of resources for future generations.

The existence of self-governing communities in Indonesia is another example of how informality can work in combination with democracy development. The Kasepuhan Ciptagelar community in West Java Province has played an important role in managing and providing services independently. As an agriculture-based society, these people believe that all plants, especially paddies, are important for their existence. Based on their cultural and spiritual value, paddies cannot be sold because they are their livelihood. Whenever it is time to harvest the paddies, they will be preserved in a *Lumbung*, a place in their village where people save their paddies together. The paddies will only be used for daily needs, and the rest will be left in the *Lumbung* for the dry season. By maintaining this asset, people have their paddies preserved for at least three years ahead. This has been the custom for hundreds of years, and is still so today.

In addition, this community has its own mechanisms for resolving conflicts over natural resources, whether internal conflicts among community members or conflicts between the community and external groups, including formal government, the private sector or other communities. They are also able to produce electricity using hydropower, with the result that they are not dependent for electricity supply on the government. In short, the Kasepuhan Ciptagelar community has been successful in establishing equality among individuals and ensuring political control over resources, making it compatible with two of four dimensions of democracy, as explained above. Thus, the *Sasi* and Kasepuhan Ciptagelar may be categorised as informal institutions that are

empirically part of democratisation in Indonesia. As many forms of informality existed prior to the modern Indonesian state, informal institutions cannot be regarded as separate from the current democratisation process, but as embedded in every aspect of Indonesian politics.

3 Informal resiliency in transitioning Myanmar

During decades of military rule, informal institutions in Myanmar offered a chance at self-protection. Formal powers and processes of governance during the military reign were not only unreliable, but they were often predatory. The junta's Four Cuts campaign aggressively sought control in ethnic areas, leaving communities with three choices: 'fight, flee or join the *Tatmadaw*' (Smith 1999: 259-260). Laws such as the Electronic Transaction Law (2004), the Unlawful Association Act (1908), the State Protection Act (1975) and the Emergency Provision Act (1950) gave the state sweeping powers to target anyone using a computer or socialising publicly. All things formal became synonymous with oppression and predation rather than with protection. Cheesman (2010: 101) writes that '*habeas corpus* in Myanmar ultimately could have … detrimental rather than beneficial effects on a society that is already profoundly demoralised'. With formal institutions exacerbating vulnerability, informal institutions became a realm where people could seek opportunities, change and protection. Recalling that informal institutions are understood as 'socially shared rules, usually unwritten, that are created, communicated, and enforced outside of officially sanctioned channels' (Helmke & Levitsky 2004), navigating the informal was key to surviving and striving. Unwritten protocols around the corruptibility of local officials (Malseed 2008a; 2008b; 2009), the rules of silence and honesty (Fink 2001; 2009), schemes around local 'behind the scenes advocacy' (South et al 2010: 3), the rules of engagement with different authorities (Thawnghmung 2003; 2004), unique local customs and other schematics could guide individuals to informally organise and funnel remittances and resources, share information, broker, bargain, defy orders and engage in everyday resistance, and start local projects in a system that forbids such action.

In 2015, as Myanmar continued its inchoate transition, the tone around formal institutions had started to change. A central task in the process of transition is replacing the picture of the adversarial state with a functional, legitimate governing machine. The sweeping parliamentary victory of the National League for Democracy (NLD) on 8 November 2015 brought new hope and life to Myanmar's formal institutions. Yet, informal institutions remain crucial for everyday coping and resiliency. Ordinary citizens continue to rely on shadow economies for everyday labour trade and services. Informal community-based organisations continue to be political forces locally and, when taken cumulatively, nationally. Local customs, village hierarchies, money politics and local agencies continue to determine politics and power at the extremities. For the Muslims of Myanmar, and particularly the Rohingya, informal resiliency networks have become lifelines for survival. Dislocated and deprived villagers whose marginalisation has been legitimated by formal institutions have turned to subversion, brokering, informal mobilisation and cursing ceremonies: 'creative and provocative insertion of a culturally resonant script into a new context, an experiment in the reception of a new writing of that text

by both the spirit world as well as the Burmese public' (Prasse-Freeman 2016: 83-84). While the role of informal institutions is changing during the formalisation and legitimation project ubiquitously known as transition, these institutions remain crucial to survival and the struggle for change in NLD-led Myanmar.

As the move towards greater formalisation as part of the transitional process in Myanmar gains momentum, there is a risk of neglecting or dislocating the pre-existing informality. As is argued in this section, retaining space for informality amidst sweeping formalisation achieves two crucial objectives. First, it ensures that people do not have to depend solely on formal institutions that may remain oppressive or predatory. Second, there is the possibility of tapping into the networks and methods of resilience built by people at the grassroots level.

The push towards formalisation in a transitioning Myanmar is meant to invigorate systems of governance capable of protecting the rule of law, delivering public services and ensuring welfare. This requires fundamentally overhauling the machinery of 'a military state with hybrid-imperial structures, characterised by high despotic but low infrastructural modes of power, and fuelled by rent-extraction' (Prasse-Freeman 2012: 371). Such transitions are always uncertain and imperfect. Thus far, from below the transition there appears to be a trail of institutional change leading to both new opportunities and new vulnerabilities (Mullen, Ya Tu & Prasse-Freeman 2015: 66):

> Informant perceptions suggest that vulnerability has defused from emanating from one primary source (the military state) to being experienced as tied up in a number of different institutions (the market, the law, society itself in the cases of those who are different). In this diffusion, there is evident a *thickening* and *expansion* of the subjective experiences of vulnerability. Indeed, the many institutions that are the vehicles of the transition insinuate opportunity (through the idioms of development, rights, formalisation, democracy, the rule of law, and progress), while simultaneously introducing vulnerabilities as well.

Wariness regarding formalising efforts may be the result of both memory and real-time assessment of the impact on local livelihoods. Decades of authoritarianism and cronyism are embedded in governing institutions, and there is no formula for extracting the structural and cultural violence lying within. Regardless of the pace of transition, formal, state-sanctioned protection remains at best uncertain.

While protection by formal institutions is a worthy pursuit, it cannot replace the resiliency and self-protection people continue to secure through informal institutions. Until formal institutions are proven, the need for informal resilience will remain. Informality has particular importance in the realm of everyday politics, where local communities and local authorities 'define legal and cultural norms of property, resources access and management principles', leading to 'conflict within state agencies and different levels of government', and 'contested domains of policy and legal authority' (Sivaramakrishnan 2005: 258). In a transitioning Myanmar, where many oppressive laws remain and enforcement falls under the military's mandate set out in the prevailing 2008 Constitution, informality provides an alternative field for contestation and an outlet to break with dependency. Discussing the

different ways of referring to the rule of law in transition Myanmar, Cheesman (2015) concludes:

> Myanmar's institutions are not animated by the rule of law idea at all but by principles hostile to it. And because those institutions are opposed to the rule of law, in Myanmar today the rule of law is not sensible if represented anatomically. For the time being, at least, it only makes sense to talk about the rule of law as signifier of something more.

Formalising processes can marginalise and oppress. There may be good reason to depart from formal rules or refuse formalising efforts. Preemptively foreclosing the space for local communities to use the informal for brokering and navigation pushes them into a relationship of dependency on the very powers from which they are trying to liberate themselves. Whether it is the Letpadaung protestors, Rohingya communities, a farmer who lacks proper documentation for land, or any individual facing marginalisation in the name of the law, reliance on formal protection is not an option. In any situation, when formal institutions compromise local orbits of protection, informality remains a realm of hope for protection and change.

In addition to being an alternative to uncertain formal protection in a transitioning Myanmar, retaining space to leverage informal institutions is a way of retaining the agency that was built over decades of struggling for change. In every corner of the country, individuals have found ways of organising, of initiating projects and creating change from below, all the while surrounded by systemic threats. These coping and navigation skills remain. The extent which stakeholders are able to find and tap into this agency (among others though a flexing of the political muscles of the grassroots (Prasse-Freeman 2010)), depends heavily on whether there is openness to the informality at play. Mullen (2013: 36), describing the ways in which individuals throughout military rule chose to forego formal claims and instead engage in informal brokering practices, describes the dilemma as follows: 'Brokering often involves bribery and some type of compliance with oppressive authority. On the other hand, brokerage could be seen as an innovative way to realise rights in the face of even the worst oppression.' It is the nature of informality that makes informal institutions so potent in settings such as transitioning Myanmar. Informality is difficult to wrangle, sanction or control. It can be an unpredictable space where a different set of rules applies. This makes informal institutions controversial, but also all the more consequential, and for those who continue to face threats and vulnerabilities in transitioning Myanmar, any type of resiliency and protection appears welcome.

4 The 'elephant in the room': The role of non-governmental organisations in building a stronger government in Nepal

Everyone who felt the tremor can tell exactly what they were doing when the earthquake of 7.8 magnitude struck Nepal on 25 April 2015 and again reared its powerful 7.3 magnitude head on 12 May 2015. Associated Press (2016) reported that over 40 per cent of Nepal was affected in 39 of its 75 districts, killing 8 000 people and leaving an estimated 2.8 million people in need of humanitarian assistance. Tapping into the most human of

emotions, the news of the earthquake spread around the world. From all over there was an outpouring of help, succour and solidarity.

To a large extent, the earthquake revealed the lack of preparedness for disaster on the part of the government. However, despite the initial chaos and confusion, the security sector of the government was applauded for its rescue efforts with international support. Needless to say, international and local non-governmental organisations (NGOs) bustled trying to help as many people as possible in the immediate aftermath of the earthquake in a country notorious for its bureaucratic niggling, corruption and a largely inefficient public sector. They sometimes reached places before the government did and, in many cases, the aid and relief materials provided by the NGOs in their smaller target areas were superior in quality to those provided by the government. Understandably, people began to look to the NGOs, and the NGOs started setting up their tents, often without the government being aware.

In those crucial days, Nepal eerily started to resemble Port-au-Prince after the Haitian earthquake of 2010. Drawing from his anecdotes, the Deputy Special Envoy to Haiti (under former United States President Bill Clinton), Dr Paul Farmer (2012: 15), wrote about Haiti after the earthquake: 'Everyone wanted to help, but no one knew exactly what to do. Each of the many tents erected by NGOs in the hospital courtyards became its own semi-autonomous world.'

A year after the devastating earthquakes, the tents are not as obvious as before and Nepal no longer makes headlines. A year later, a question was asked by a disaster survivor: 'They came faster than the government then; where did those NGOs go now? Shouldn't they help?'[1] The profundity of the survivor's question revealed the 'elephant in the room': an accountability deficit and the lack of legal obligation on the part of NGOs to help earthquake survivors in a country where people look to NGOs for essential services.

Dr Farmer termed the Haitian earthquake an 'acute on chronic' event, a disaster with social roots (Farmer 2012). This nomenclature is appropriate in the Nepalese context, as the devastation caused by the earthquake was exacerbated by pre-existing adverse and fragile socio-economic settings, poor housing structures and haphazard urbanisation of the densely-populated capital city. Not surprisingly, in the aftermath of the Nepalese earthquake, parallels were drawn with the Haitian earthquake of 2010 and how it came to be known as the 'Republic of NGOs', which even before the quake had more NGOs *per capita* than any other country in the world, except for India (Kristoff & Panarelli 2010). With a similar proliferation of NGOs in Nepal, the old saying 'something is better than nothing' does not hold true.

Something is not better than nothing if that 'something' means a weakening of the governance structure and public sector of transitioning governments faced with acute-chronic disasters. Nepal ranks 130th among 175 countries in the latest Corruption Perception Index (CPI) of 2015. The 'elephant in the room' means that, in the case of governments such as that of Nepal, few donors and NGOs trust the government with their

1 Field interview conducted by Swechhya Sangroula, 2015.

money, citing the lack of 'absorptive capacity' or the ability of the government to absorb the influx of capital necessary for reconstruction with an infrastructure of transparency and accountability in place (Farmer 2012: 156). While at first distrusting such governments and wanting to bypass them makes sense, in the long run it only weakens these governments and worsens governance.

The United States Institute of Peace in its briefing paper analysed the repercussions of funnelling aid and assistance through NGOs in a country with a weak public sector and mired in corruption. Evidence suggests the perpetuation of a situation of limited governance capacity and weak institutions. Furthermore, this has led to problems in developing 'human or institutional capacities to deliver services' (Kristoff & Panarelli 2010). It creates a vicious cycle of an inefficient and incompetent public sector unable to deliver public goods and earning credibility by the people. As a result, people look to NGOs rather than to the government.

The problem is that most aid organisations have the freedom to ignore a crisis if they so choose or to limit themselves to areas they wish to work in, a privilege not extended to states. Polman (2010: 39) argues that humanitarian organisations 'choose which crises to focus on based on their own cost-benefit analysis' and that 'humanitarian aid exists in a free market, where anyone who chooses can set up a stall'. Consequently, the beneficiaries of goods delivered by NGOs cannot claim the enforceability of their rights against these organisations, as they would against their government.

Sachs (2005) writes about the importance of long-term investment in public infrastructure for transformational development and the negative repercussions of an under-funded public sector. A glaring example is the statistic revealing that the Haitian government had received significantly less than 1 per cent of United States relief aid since the quake and that an estimated 0.3 per cent of all Haitian quake relief had gone to the public sector (Fisch & Mendoza 2010).

In Nepal, the tension between praxis and policy has become apparent, as local news reports suggest that the clumsy oversight mechanism of the government has been unable to acquire updated reports from NGOs and to assess of the quality of their work. The District Development Committee (DDC), tasked with the role of oversight, has mentioned fake reports from NGOs regarding the construction of houses. In Kavre, one of the affected districts, one year after the earthquake, the District Disaster Relief Committee (DDRC) under the DDC states that most of the 40 NGOs/INGOs that had listed themselves at the DDRC are missing from the district with no records on the aid and beneficiaries (Republica 2016). These are serious impediments to the road to reconstruction in Nepal.

For a lasting and sustainable impact and a rights-based approach to development, it is crucial to strengthen the public sector and rebuild public institutions. In this regard, the Rwandan example is relevant. Paul Kagame's post-genocide leadership was based on co-ordinating reconstruction aid by the central and district governments (Golooba-Mutebi 2008: 31). Kagame's Vision 2020 led to a policy known *investir dans l'humain* ('investing in people'), requiring NGOs to align their activities with the development plan of Rwanda. Many NGOs left Rwanda, citing the government as 'heavy-handed' (Uvin 1998).

A good practice could be the example of Zanme Lamaste, a Haitian-run wing of the NGO 'Partners in Health' in Haiti, and its subsequent shift in working modalities. While Zanme Lasante originally worked independently, it later partnered with the Haitian Ministry of Health to improve the public health system, to such an extent that today every clinic built by Partners in Health is a Ministry of Health clinic (Farmer 2012). The Code of Conduct for NGOs in Health Systems Strengthening, created by a group of international organisations, may be considered an exemplary document to strengthen a constructive relationship between NGOs and governments. The Code of Conduct, in its preamble, aims not to supplant but to supplement the public sector by identifying six crucial areas where NGOs can improve. These include helping government systems and investing in long-term commitments with lasting benefits. More importantly, the Code recognises that the management capacity of governments is often limited and that 'rather than building parallel or circuitous structures around inadequate capacity, strengthening government's ability to operate effectively and efficiently is paramount'.

Robust governance capacity and a strong public sector system are crucial prerequisites for states to fulfil their duties. Shue (1985: 86) suggests that states have three sets of duties, namely, to respect, protect and fulfil the rights of its residents. The state must, among others, aid the deprived who are the state's 'special responsibility', and protect them from deprivation. The government should spearhead the duty of reconstruction and seek support from NGOs to strengthen its implementation capacity. In respecting, protecting and fulfilling the rights of victims of the earthquake, Nepal is required to exhibit the essential features of availability, accessibility, acceptability and adaptability in their rights-based reconstruction efforts (Schutter 2010: 462-465). NGOs should be prepared to trust the government and to aid it in fulfilling its legal obligations towards its citizens, especially victims of the earthquake.

The National Reconstruction Authority of Nepal, set up in January 2016 amidst a climate of doubt, has attempted to learn from the Haitian shortcomings and in April 2016 endorsed the Directives for Mobilising NGOs for Reconstruction and Rehabilitation. As per the directives, NGOs providing funds for post-earthquake reconstruction can set aside 20 per cent of the funds as overheads (Republica 2016). While much remains to be done, the structure created by the National Reconstruction Authority of Nepal and the Directives for Mobilising NGOs in Reconstruction may be regarded as a positive step in terms of creating an infrastructure of co-ordination and accountability. This is big step towards learning from the Haitian experience.

The ways in which NGOs operate in different countries around the world vary greatly and often differ according to the governance structure and presence or absence of democratic governance values in these countries. Indeed, an NGO working in a highly oppressive, dictatorial model of governance will differ greatly from NGOs working in transitioning democracies such as Nepal. In the latter case, NGOs can play a greater role in strengthening and democratising the public sector despite resistance and the bureaucratic art of stonewalling.

The popular reconstruction motto reads 'Building Back Better and Safer'. Building back better and safer in Nepal requires co-ordination and partnership between the government and NGOs, with shared values aimed

at creating dignified opportunities to victims through reconstruction. Creating such opportunities is not a matter of charity or a convenient project, but a development effort with a national reach grounded on a rights-based approach to development. NGOs in Nepal have an important role to play in such democratisation and holding states accountable to their human rights obligations. To begin this from low-level governance, and embed accountability as a foundation for local democratisation in post-earthquake Nepal, dialogue and engagement around local informal institutions in Nepal need to be transformed.

5 Conclusion

The impact of informal institutions on democracy varies, depending on the particular form that the informal institution itself takes. A negative impact is achieved when the informal institution ignores state authority and challenges government's effectiveness, disregards the rule of law, and manipulates and undermines the democratic process.

Informality may be difficult to capture as it is often intangible or lacking in structure. Mullen argues that the reason why informality was such a powerful source of resilience during military rule and the inchoate transition in Myanmar is because it is so difficult to govern. Informal institutions may cause discomfort. Azizah discusses the crucial role of patronage, clientelism, corruption, graft, money politics, local customs, clan politics and the charisma of local elites in the democratisation process in Indonesia. Apart from being inconvenient, it is burdensome to govern these processes. Sangroula discusses the 'elephant in the room' with regard to post-earthquake recovery efforts, highlighting an accountability deficit around informal institutions that may corrupt assistance efforts if not adequately engaged. In all these emergency situations, it is conceded that informality is not easy to manage. Yet, it is argued that the tendency to ignore or reject informality compromises attempts to understand and support democratisation processes in the region. Recent experiences signpost that making informality more central in discourses surrounding democratisation in the Asia-Pacific region could be a shift towards ensuring that informal institutions receive the due consideration their influence on politics merits.

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CL Tatar 'Selected developments in human rights and democratisation during 2015: Middle East' (2017) 1
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Selected developments in human rights and democratisation during 2015: Middle East

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Abstract: *This contribution aims at providing a synthetic analysis of the process of political changes which has been driving and continues to drive a wave of unrest across the Middle East. It presents a slightly different understanding of Arab uprisings by dividing the ongoing process into three different phases: During the first period, namely, in the pre-revolutionary context, a set of socio-economic and political factors mutually reinforcing Arab discontent will lead to mass mobilisation. Subsequently the revolutionary momentum will pave the way for a second phase, the instant outcomes of Arab upheaval, in particular the toppling of authoritarian regimes and the call for free elections won by Islamist groups. Finally, the third and last stage, namely, the demobilisation process, will lead to the current situation of disintegration and chaos that is prevailing in some countries, the exacerbation of the sectarian rift and the return of a new authoritarianism as a result of counter-revolution strategies launched and led by Saudi Arabia.*

Key words: *Arab upheaval; phases; resilience; counter-revolution; refugees; authoritarianism*

1 Introduction

The Middle East and North Africa (MENA) region, stretching from the Kingdom of Morocco in the west to the Sultanate of Oman in the east, is one of the most disturbed regions in the world as it is one of the most diverse in terms of ethno-linguistics and religious pluralism. According to the Economist Intelligence 2015 Unit Democracy Index, MENA remains the most repressive area in the world, with 14 out of 20 countries categorised as 'authoritarian' (Economist Unit Intelligence 2015).[1] Only Tunisia has recently seen some significant progress in terms of democratisation and human rights. The unprecedented rise of mass mobilisation calling for political change in the Arab world led many to expect a new wave of democratisation two decades ago after that occurring

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1 The Democracy Index is based on five categories: electoral process and pluralism; civil liberties; the functioning of government; political participation; and political culture. Based on their scores on a range of indicators within these categories, each country is itself categorized as one of four types of regime: 'full democracies'; 'flawed democracies'; 'hybrid regimes'; and 'authoritarian regimes'. Economist Unit Intelligence, *Democracy Index 2015. Democracy in an age of anxiety*, available at http://www.eiu.com/Handlers/WhitepaperHandler.ashx?fi=EIU-Democracy-Index-2015.pdf&mode=wp&campaignid=DemocracyIndex2015 (last visited 30 June 2016).

in Eastern Europe and South America. However, five years after the outbreak of regime-changing revolutions, it has become apparent that democracy in the MENA region remains a highly-uncertain prospect, and, what is even worse, the return of 'paranoiac' authoritarian states, more violent and dominant, have cracked down on freedom of speech, stifled protests, and arrested activists.

We are currently witnessing critical times in the history of the Arab world. The revolutionary spillover affected all states in different ways: Some were directly impacted with major changes (Tunisia, Egypt, Syria, Libya and Yemen), while others faced minor political adjustments (Jordan, Morocco, Kuwait, Oman, Qatar and the United Arab Emirates). On a more global scale, the shock waves that started in the Middle East reach all the continents that are facing at least a double short-term impact of the Arab uprising: On one hand, the rapid spread of the self-proclaimed Islamic State (IS), deeply entrenched within the failing Iraqi, Syrian and Libyan states, will lead to the globalisation of terrorism, relocating threats and attacks inside Western national territory. On the other hand, the protracted horrors of the Syrian and Libyan civil wars, combined with states' destabilisation, are forcing millions of refugees on the path of exile, seeking shelter and international protection in already fragile neighbouring countries or crossing into Europe, sparking a crisis as countries struggle to cope with the influx, and creating division in the European Union (EU) over how best to deal with resettling people at a time of rising local populism.

According to Kepel (2016), the Arab revolutions occurred in three distinct phases across three separate 'zones'. The first phase stretched from Mohammed Bouazizi's self-immolation to early 2012, and was characterised by the mass movements which toppled, or failed to topple, regimes. Three different outcomes ensued: Zone A, North Africa, witnessed successful movements by civilians that toppled dictators; Zone B, the Gulf states, experienced stagnation, such as the deadlock and repression in Bahrain and Kuwait; and Zone C, the Levant, witnessed chaos, such as the bloody crisis that emerged in Syria. In phase two, that is to say the revolution's direct outcomes, the launching of electoral process resulted in the rising power of the Society of Muslim Brotherhood in countries such as Egypt, and of political Salafism in Tunisia and Egypt. Phase three is the current phase in which the inter-Sunni divide is added to the Sunni-Shia sectarian rift, the latter shaping the main regional struggle since the 2003 American military intervention that toppled the Saddam Hussein government and led to renegotiating the underling rules of political game to the benefit of the long-oppressed Shia's community. This illustrates the strong Saudi desire to run Arab affairs as unrivalled regional *hegemon*. This ambition embodies both an anti-Ikhwan regional counter-revolution strategy that ends up with the return of authoritarian states and the exacerbation of sectarian tensions opposing Iran and Saudi Arabia leading either to a proxy war in Syria and Yemen or internal competition in Lebanon, Iraq and Bahrein.

This contribution is a contextual analysis of events that have unsettled the region since 2011. The revolutionary momentum encourages a reconsideration of one's understanding of the stability and resilience of authoritarian regimes. All these countries share a common denominator in the omnipresence of *Moukhabarat* or secret police, and one wonders how

such autocratic and police regimes could have been taken by surprise by these uprisings. Arab revolutions raise a series of questions: Why do people decide to confront their ruling regime? Why did the Arabs rebel? How is a revolutionary wave of social protest likely to topple well-established authoritarian states? In others words, the Arab regimes, thought to be strong and resilient to any political change, started to collapse one after the other. Although the Arab revolutions did not succeed in leading to relevant political changes, it is too early to judge the successes of the Arab turmoil, except for Tunisia, whose success depends both on its strong and educated middle class, who have taken the revolution into their own hands, and on a civil society that functions differently from many Middle Eastern countries. The long-term process it has initiated may be the first phase of a slow pace of deep transformation that should be put into the perspective of radical changes that are taking place, namely, the unleashing of a new social force, the youth or 'twitter generation' that is becoming the fuel for Arab mobilisation.

Building on these three distinctive phases of the ongoing process of change in the MENA region, as detailed above, the contribution argues that Arab revolutions are driven by a common set of longstanding economic problems, deep societal transformations and political grievances. However, their outcomes vary from one country to another, considering the availability of a state's resources, in particular foreign interventions, repression, institutional structure stability, cohesion of the challenged elite, shared interests between the regime and significant or influential segments of the population and civil society dynamism.

2 Roots of Arab discontent

The Arab upheaval was triggered on 17 December 2010 by the self-immolation of a Tunisian street vendor, Muhammad Bouazizi, who became the symbol of frustration and a sense of injustice and indignity felt by many. Anger and the mobilisation of hope have produced organised collective action (Aminzade & McAdam 2001). The Tunisian uprising was primarily a social protest movement which later became a fully-fledged revolution when people of all social classes formed a unified front determined to oust the Ben Ali regime. Starting with the Jasmine revolution in Tunisia, this event initiated what later turned into a wave of protest and revolutionary situations throughout almost the entire Arab world. In fact, during its first year, cascading popular democracy movements that started in Tunisia inspired Egypt, and consequently animated other movements across the region. Four of the world's longest-reigning military dictators, Ben Ali of Tunisia, Hosni Mubarak of Egypt, Muammar Gadhafi of Libya and Ali Abdullah Saleh of Yemen, fell after decades in power.[2]

Social protests in the Arab world have spread across North Africa and the Middle East, largely because the digital media caused communities to realise that they shared grievances and because they nurtured

2 Zine-Abidine Ben Ali of Tunisia stood down as president mid-January 2011 after having been in power for 24 years; he found exile in Saudi Arabia. Hosni Mubarak reigned in Egypt for 30 years and is still facing trial for the deaths of hundreds of protestors. Mouammar Gadhafi held Libya in a tight grip for 40 years. In late August 2011, after

transportable strategies for mobilising against dictators (Howard & Hussein 2013). These dissents drew out networks of people, many of whom had not before been activists in any kind of political organisations: young entrepreneurs; government workers; women's groups; civil society actors; and – in the case of Tunisia – the urban middle class. During the early months of Arab upheavals, traditional political actors, such as unions, political parties and Islamist movements, were not involved. It was a popular mass rally initiated outside institutionalised political forces. This new form of activism implied a profound transformation of the dynamics of contention. First, the traditional political forces suffer from a loss of legitimacy because of their failure to impose and achieve reforms. Second, the efficiency of formal organisations depends on the particular political context in which they operate, and in the MENA region collective action emerges in a hostile and repressive environment so that civil society organisations can hardly challenge the regime or the political system (Wiktorowicz 2004). Finally, to escape state control, contenders retreat to personal networks based upon individuals with shared beliefs, where social ties provide bonds of trust and solidarity (McAdam 1986; Della Porta 1995). Thus, the use of informal social networks, nurtured and regenerated by the spread of digital media, is often appropriate in a less open political system. Overt protestors and formal organisations face harsh reprisals, so that activism and the rise of collective action are sustained through 'basic structures of everyday life'. These 'micromobilisation contexts' (McAdam 1988: 125) 'suggest a wide variety of social ties within people's daily rounds where informal and less formal ties between people can serve as solidarity and communication facilitating structures when and if they choose to go into dissent together' (McCarthy 1996: 143).

After more than five decades of independence from European colonialism, autocratic rulers have failed to meet the legitimate aspirations of the Arab people. These include political freedom, economic prosperity and human dignity. The unifying and overriding elements of the socially-heterogeneous protests were moral and ethical principles, above all justice (*adalah*), freedom (*hurriyah*), dignity (*karamah*) and respect (*ihtiram*). The current situation is a corollary of decades of failed policies, exacerbated by a unique economic crisis. The claims of this rebellious youth rising against the reigning gerontocracies were wide-ranging, and also evolved as protest movements developed. In Tunisia, for instance, protests which primarily began over economic frustration, injustice and indignity grew to anger at corruption in ruling families and elites. The 'operative master frame' (Goffman 1991; Benford & Snow 2000) on which protest waves were based was an inclusive ideological frame that had a better chance of success (Osa 2005). According to Bayat (2000: 900):

anti-Gadhafi fighters backed by Western military intervention had captured Tripoli, he retired to his stronghold, Sirte, where he was captured and killed. After his 33-year rule, Ali Abdallah al Saleh of Yemen handed over power late in 2011. However, unlike his counterparts in Tunisia, Egypt, and Libya – who ended up exiled, imprisoned and murdered, respectively – Saleh managed to step down in exchange for immunity.

> In general, contemporary social movements by their very nature carry a multiplicity of discourses espoused by diverse fragments and constituencies, although they may be dominated by one. Shaped in a complex set of concentric circles (like the whole set of circled waves on a calm water surface), social movements possess various layers of activism and constituency (leaders, cadres, members, sympathisers, free riders, and so on) who are likely to exhibit different perceptions about the aims and objectives of their activities.

So what binds these fragments together? In what way is commonality-assured consensus built and solidarity achieved among differentiated actors? The result is that the diverse participants tend to converge on the generalities, but are left to imagine the specifics, to envision commonalities (Bayat 2000: 904). The mass mobilisation was a social justice movement protesting the severe economic and human rights violations ('injustice frame'), particularly in the Tunisian and Egyptian states. Interestingly, Islamists did not manage to control the terminology of these upheavals. This situation stands in sharp contrast to the Iranian revolution that occurred 30 years ago. At that time, Ayatollah Khomeini managed to impose his rhetoric and discourse on the democratic riot against the Shah and thus subverted it (Kepel 2003). On the contrary, Egyptian or Tunisian 'participatory' Islamists did not manage to establish their own rhetoric to convey what was taking place. Even Shiites from Bahrain use the terminology of human rights and democracy. Contention was structured by civic and not religious movements, even though Islamist groups were important core components. These observations highlight the failure of political Islam to find deep roots among the people to convince the masses to act. Indeed, the Arab upheaval derives from an explosive combination of factors which, if taken separately, would not necessarily be determinative and is located in a long chain of actions and contentions, dating back to long before 2011. Above all, to a considerable extent two popular grievances – the deteriorating economic conditions and the yearning for dignity and freedom – galvanised the masses in triggering the popular unrest across the region. First, a common causal motivation behind all the uprisings is the further deterioration of the economy due to the 2008-2009 global financial crisis that exacerbated longstanding structural economic problems endemic to the Arab world, such as high unemployment, particularly among the youth; rising social inequalities; rampant government corruption; clientelism; rising food prices; and so on (Gause III 2011; Malik & Awadallah 2011; Achcar 2013; Hertog et al 2015).[3] As the demographic profile is transforming, the region's economic structure has remained unresponsive to the growing needs of its population.

3 Indeed, during the years 1960 to 1970, Algeria, Egypt and Tunisia, like much of the Arab world, pursued ambitious state-driven economic strategies which, by the mid-1980s, were generating only modest economic results and proving fiscally unsustainable. The end of the oil boom (1971-1981) further aggravated the economics of the region. With vast deficits and high levels of debt and inflation, Tunisia and Egypt were forced to seek help from the World Bank (WB) and the International Monetary Fund (IMF). These international organisations provided a loan package in return for structural adjustment programmes consisting of a series of market-oriented reforms, with the objective of limiting the state's intervention in the economy, promoting private sector growth and integrating their economies into the world market. As a result of the implementation of reforms called for by the IMF and WB, in Egypt, and to a greater extent in Algeria, the state welfare system was going through a serious crisis, with a dramatic worsening in the quality of and access to healthcare, education and the provision of housing. To make matters worse, during the last decade, ordinary citizens

The deeply-rooted socio-economic problems outlined above were inseparably linked and combined with a set of political grievances primarily originating from the widening gap between the regimes and the public in the Arab world. Authoritarianism certainly has reinforced popular discontent. Being either autocratic republics or monarchical autocracies, except in the case of Lebanon and Israel, most Arab states are facing massive legitimacy deficits entrenched in a more lengthy historical background going back to the nineteenth and twentieth centuries. In particular in the Levant and Fertile Crescent, the processes of state formation result from the British and French imperial powers that drew the boundaries of political entities that later were to become independent states in line with their own interests and influence, considering a few national yearnings of ancient peoples (Salame 1987; Hourani 2010; Corm 2012). By implication, unstable entities were created that were unable to integrate and harmonise communities but simply tried to neutralise conflicts among classes, nationalities and ethnicities (Ayubi 1995). Looking at North African countries (with the exception of Libya), prior to the colonial period state formation processes had already acquired functioning bureaucracies and centralised state systems. Thus, they had already developed a sense of statehood before the physical arrival of the French and the British, who remodelled them before endorsing them as their local agents. The same process applies to the Arab states of the Persian Gulf, where the British drew the frontiers in the early twentieth century, creating sparsely-populated territories populated by nomadic peoples. In these countries, the state formation process may be attributed largely to political tribalism where a contract emerged between merchant tribes who needed to protect their commercial activities and trade (al-Naqeeb 1990). During the period of independence, weak states would appear and would be pushed aside by military *coups* (Iraq, Syria, Egypt). Throughout regional turbulences, the newly-founded authoritarian regimes would succeed in surviving, particularly by using repression and legitimising discourse based on Arab nationalism and socialism. They settle down into a phase of 'routinisation', in the sense that they tend to stabilise by being assimilated into normal states that come along with a relative opening up of public space through elections, while fighting leftist and later Islamist opposition. Therefore, public space and political opposition remain under tight control by the ruling elite, who monopolise all economic and financial leverages, security and military sectors and ideological resources by imposing official Islam that legitimises and maintains the existing regime. The brutal appearance of the revolutionary event was in reaction to decades of authoritarian drift (the violation of human rights and the denial of basic rights by regimes) and to its stabilisation without any prospect of change.

faced a gradual erosion in their purchasing power as their salaries stagnated, and inflation, particularly in terms of food prices, grew. In Egypt, soaring food prices were the main cause of rising poverty over the last decade as world prices of flour and sugar almost doubled. Therefore, by early 2011, deteriorating labour market conditions, particularly among the educated youth, an erosion of purchasing power and a crisis in the welfare system all contributed to a growing tide of popular agitation.

3 Outcome of the Arab upheavals

The momentum of the revolution has led to a second phase, namely, the overthrow of authoritarian regimes. In Tunisia and Egypt, the Arab upheaval has certainly resulted in a change of regime, and free national elections were the first step in this transitional process. The difficult part is after votes and ballots have been counted and when constitutions are being discussed and the rules of the political game renegotiated. Not surprisingly, the first national elections in Tunis were won by the Salafi of Annahda and by the Muslim Brotherhood and their affiliates in Egypt, sweeping 70 per cent of parliamentary seats, mainly because they were the most consistently-organised force that benefited from the socially-constructed perception of martyrdom of the fallen dictatorships and of non-corrupted and upright people.

The demands for full citizenship and for the recognition of individual political rights were a powerful unifying theme across the Arab revolutions. However, now that four autocrats have been driven from power, the crucial questions at the centre of these transitions are as much economic and social as they are political. Furthermore, beyond a collective sense of endeavour and empowerment, the social movements were not united by a concrete or programmatical agenda for post-regime transformation. The pressing demands for economic transformation, social well-being and the implementation of human rights will be sidelined and the newly-empowered but largely inexperienced Islamist political forces will now clash over secondary issues, such as dress codes and the policing of morality, on which they have clear positions but which do not deliver hope for meaningful change or prosperity or economic growth.

However, the Tunisian and Egyptian revolutions have differed in both environment and outcomes. After the Muslim Brotherhood candidate, Mohamed Morsi, acceded to power in June 2012, he did not manage to take over the 'deep state'. The quasi-institutionalised system that lay inside the state agencies, namely, the army, the intelligence services, the judiciary, or the top levels of the bureaucracy (Scott 2014), were left intact and in a central position to influence the shape of the transition. The former authoritarian state remains, together with the ruling elites it has created, the state structures it has built, and the powerful secret services and friendly capitalists it has nurtured. The 'deep state' did not disappear when the despot was deposed. The battle during the Morsi reign saw a confrontation between state institutions and the Muslim Brotherhood, which the Brotherhood lost. In July 2013, a military *coup* deposed the Egyptian President and brought General Abdel Fattah al-Sisi, appointed commander-in-chief of the armed forces and minister of defence, to power. Elected in May 2014 as the head of state, Marshal al-Sisi won the presidency and Egypt reverted to an authoritarian and repressive regime, the most openly militaristic since the days of Gamal Abdel Nasser (Rougier & Lacroix 2015; Kienle & Sika 2015).

The post-revolutionary transition in Tunisia followed a different path. The departure of Zineddine el Abidine Ben Ali in January 2011 created a political vacuum that neither the old nor new forces could fill. The election of the National Constituent Assembly, a body that would draft a new constitution and form a transitional government, took place in October 2011. It was evident that none of the main three socially-

embedded political forces, namely, the Tunisian General Labour Union (TGLU), Ennahda, the Islamist party, and the aging veterans of the Habib Bourguiba period, had a dominant position which would have allowed the winner to manage the transition on its own. The election results confirmed that the political spectrum was both diverse and fragmented. Although Ennahda received by far the most support, the Secular Congress for the Republic (CPR) and the socialist Ettakatol were also main actors. This led the three main forces to form a coalition government, the so-called *troika*, with Ennahda taking the premiership, the CPR the presidency, and Ettakatol the presidency of the Constituent Assembly. In Tunisia, by contrast, the judiciary was unable and the military unwilling to perform the substitute function. Without state institutions to partner with, the Tunisian opposition ultimately had no choice but to come to the negotiating table with Ennahda, facilitating consensus. In an overall context of instability, with normal political mechanisms derailed and under pressure from a coalition of political and civil society groups, Ennahda and its partners in government were forced to accept a second new transition process. The legislative and presidential elections, widely deemed free and fair, took place in 2014, shifting the balance of power from the Ennahda party to the Nidaa Tounes party, widely described as secular and made up of a broad range of supporters from former Ben Ali loyalists to some leftists and secularists (Marzouki 2016; Willis 2014).

Elsewhere, great uncertainty surrounds the potential outcomes and the development of conflicts in Syria, Libya and Yemen. The uprisings against Gaddafi's regime triggered the 2011 NATO-led military intervention that drove the Libyan leader and his entourage from power. A chaotic post-revolution period followed, with a complete disintegration of state institutions that plunged Libya into a civil war and facilitated the entrenchment of terrorism. Like the Syrian and the Yemeni wars, the inextricable complexity of the current conflict in Libya is the result of the entanglement of different layers and stratums, both at the domestic and international levels. At the local level, conflict emerged between old and new elites, and partially overlapping divisions between secular and Islamist, on one hand, and economic competition between coastal and desert regions, on the other. Since 2014, Libya has had two transitional and separate governments: the self-declared Islamist government based in the capital Tripoli; and the 'Tobruk government' recognised by the international community. At the regional level, the conflict is destabilising the North African and Sahel regions, as Libya is the regional stronghold of jihadism and smuggling of all kinds. The ongoing war in Yemen, the southern neighbour of Saudi Arabia, with its population of 25 million people in a state of absolute poverty, represents a major security risk for the monarchies of oil producers. The Yemeni revolution was in fact muted by petrodollars, and tribal competition and sectarian divisions, combined with the 2015 Saudi-led military intervention against the Houthis rebels, reveal a mosaic of multifaceted local and regional power struggles.

Finally, the Syrian pro-democratic upheaval that erupted in March 2011 in the southern city of Deraa soon resulted in civil war opposing the anti- to pro-President Bachar al-Assad. Besides the civil society mobilisation against dictatorship, the conflict has acquired sectarian overtones, pitching the Sunni majority against the President's Alawite sect backed by a coalition of minorities of Christians, Druze, Kurds, as well as some Sunni. A fault line extends across the Middle East region, of which Syria has

become the epicentre, with the Shiite-Sunni 'clash' opposing the Shiite 'crescent', led by Tehran and supported by Maliki's Iraq, Assad's Syria, the Lebanese Hezbollah and the Shiite populations on the Arab side of the Gulf peninsula, on one side; and a Sunni front, whose principal leaders are Saudi Arabia, Qatar, Turkey and Egypt, on the other side. Moreover, the rise of the *takfirist* group Islamic State (IS) and the establishment of the Caliphate in June 2014 have added a further dimension. IS has capitalised on the chaos and taken control of large territories of Syria. Its many foreign fighters are involved in a 'war within a war' in Syria, battling rebels and rival jihadists from the al-Qaeda-affiliated Nusra Front, as well as government and Kurdish forces. The latest actors involved in the protracted conflict are the two major powers: With different agendas and interests, Russia and the US-led international coalition have separately launched airstrikes inside Syria since 2014 to degrade and ultimately destroy the terrorist groups. Despite the confused situation, the regime is not really militarily threatened by the revolt. The majority of the armed forces have remained loyal and defections have not escalated to a point where the coherence of the state is in a state of uncertainty. However, unlike the previous extended revolt faced by the regime from 1979 to 1982, Bashar's government does not have the coercive capacity to suppress the revolt. Its use of sectarian ideology has solidified its base amongst the Alawite community, and fears of radical Islam and uncontrolled violence have forced other minorities to offer their support. The exiled organisation formed to represent the opposition, the Syrian National Council, has failed to establish coherent and meaningful links with the revolt within Syria, which remains highly localised and fractured. Attempts at international mediation have thus far failed to break this bloody stalemate, forcing millions of Syrians to flee their country, divided between regime, opposition, radical groups and the Caliphate of the Islamic State turfs.

The ongoing war in Syria has caused the largest humanitarian crisis since World War II, with more than half of the population directly affected by the armed conflict: Around five million Syrians are refugees in neighbouring countries (95 per cent have found shelter in Turkey, Lebanon, Iraq, Jordan and Egypt) and more than seven million people are internally displaced. The challenge of migration is likely to continue for many years, even decades, destabilising a fragile Levant area and giving rise to a large and unanticipated flow of war refugees from the Middle East to Europe, unsettling the European Union (EU) like no crisis before it. This sudden and massive flow of population has already had a substantial impact on the domestic politics of most Arab and European countries. It has generated new tensions, and exacerbated pre-existing tensions in host countries. The extra burden on neighbouring countries caused by economic hardship, social problems, changing ethnic and sectarian balances, additional pressures generated by the influx of Syrian refugees on extremely limited public resources, already in crisis, has resulted in conflicts between nationals of the host countries and the Syrian refugees (Alsharabati & Lahoud Tatar 2016). This unprecedented mass displacement highlights the challenges and the limits of the humanitarian system.

4 Conclusion: The reinvention of authoritarianism

The Arab unrests have generated unexpected short-term consequences and the results are clearly disappointing for those who held the view that the time had come for people's emancipation after decades of authoritarian rule. Authoritarianism has resisted and even reinvented itself. Five years after the Arab upheaval, the picture is bleak. On the one hand, states like Iraq, Syria or Libya have collapsed, abandoning territories to civil war and political chaos that benefit organisations such as the Islamic State. On the other hand, some authoritarian regimes have survived or, in the case of Egypt, returned to power under a new shape, at the great cost of brutal repression and often deeply damaging to the social contract. The rest of the Middle Eastern states retain the ruling elites of before the start of the Arab upheaval. Monarchies have initiated superficial reforms without surrendering power. Successful revolutions are very rare indeed. The Arab unrests have led to a regional counter-revolution piloted by Gulf autocracies, to the extent that it may even be said that these subsequent developments have taken hostage the revolutionary dynamic in the name of regional geopolitical interests. The Saudis have their own understanding of the crises in the region from their national interests without any real concern for the aspirations of the people of the region. Thus, the Saudis, obsessed with maintaining the *status quo*, have almost always played the counter-revolutionary card, except in Syria, where the rivalry with Iran has been at its strongest, leading them to frame their struggle as anti-Iran rather than in the name of revolution. The recent experience strongly suggests that the MENA region has a long way to go before meaningful political changes would be achieved. What could have been a process of transition to democracy seems more like a return to stronger autocracies. The Middle East has sunk into the abyss of war and terrorism directly affecting other regions, mainly Europe.

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J Taiana & V Gomez 'Selected developments in human rights and democratisation during 2015: The Americas' (2017) 1 *Global Campus Human Rights Journal* 207-225

Selected developments in human rights and democratisation during 2015: The Americas

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Abstract: *This contribution traces some salient developments related to human rights and democratisation in the Americas during 2015. As to national developments, the Colombian peace process, the political crisis in Guatemala and the elections in Haiti are discussed. As to regional arrangements, the focus falls on the participation of Cuba in the Seventh Summit of the Americas, and on elections and standard-setting within the Organization of American States. A few highlights in respect of the promotion and protection of human rights in the Americas by the Inter-American Commission and Court of Human Rights are also reviewed.*

Key words: *Colombian peace process; political crisis Guatemala; elections Haiti; Seventh Summit of the Americas; OAS General Assembly; Inter-American Commission; Inter-American Court*

1 Introduction

Peace negotiations to bring to a close the longest internal armed conflict in the recent history of the continent, the long overdue re-establishment of diplomatic relations between Cuba and the United States of America, and the challenges faced by fragile democracies were among the topics on the agenda of the states and the various regional and sub-regional arrangements of the Americas during 2015. Also during this period, the Inter-American Court and Commission on Human Rights took a number of significant decisions and issued reports on gender, health and human mobility, among other issues. The review that follows includes a selection of highlights of these developments from national and multilateral perspectives as well as some comments on the setting and enforcement of standards by the regional mechanisms for the protection of human rights during 2015.

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2 Highlights on human rights and democracy issues at the national level

2.1 Colombian peace process

During 2015, significant progress was made in the peace talks between the government of Juan Manual Santos and the guerrilla leaders of the Revolutionary Armed Forces of Colombia – People's Army (FARC-EP), to put an end to more than five decades of internal armed conflict in Colombia. It is estimated that this armed conflict has been responsible for hundreds of thousands of deaths and the internal displacement of more than six million people. It has also had repercussions beyond the national borders with thousands of refugees fleeing to neighbouring countries.

After a preliminary confidential dialogue between the Colombian government and the FARC-EP, on 26 August 2012 the parties signed the General Agreement to End the Conflict and Build a Stable and Lasting Peace. This document set a six-point agenda for dialogue at the Table for Conversations to End the Conflict and Build a Stable and Lasting Peace in Colombia.[1] Since then, the parties have undertaken a step-by-step approach to negotiations in Havana – with the support of the governments of Cuba and Norway – in order to reach a final peace agreement. Once reached, the final agreement will require approval via plebiscite, with the participation of at least 13 per cent of the electorate, in order to enter into force.

As part of the step-by-step approach in the peace talks, on 15 December 2015 the parties released a Draft Agreement on point 5 of the agenda on victims of the armed conflict, establishing a comprehensive system for truth, justice, reparations and non-repetition of human rights violations.[2]

Regarding the right to truth, the Draft Agreement[3] establishes a Truth, Coexistence and Non-Repetition Commission as a temporary body charged with explaining to society at large the complexity of the conflict, and the roles and responsibilities of those directly and indirectly involved. The Draft Agreement also establishes a Special Unit for the Search for Disappeared Persons in the Armed Conflict as a high-level special unit charged with coordinating a search and identification operation, without substituting or interfering with any parallel judicial investigations.

The Draft Agreement indicates that once the cessation of hostilities pursuant to international humanitarian law enters into force, the Colombian government may grant the guerrilla members entering into the peace agreement and persons accused or convicted of political crimes the

1 See http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Paginas/mesa-de-conversaciones-con-las-farc-ep.aspx (last visited 30 July 2016).

2 Joint Communiqué 64 'Agreement on the Victims of the Conflict, Comprehensive System for Truth, Justice, Reparation and Non-Repetition, including the Special Jurisdiction for Peace; and Commitment on Human Rights', Havana, 15 December 2015, available at https://www.mesadeconversaciones.com.co/sites/default/files/joint-communique-64-december-15-2015-1450285397.pdf (last visited 30 July 2016).

3 *Borrador conjunto del Acuerdo sobre las Víctimas del Conflicto: 'Sistema Integral de Verdad, Justicia, Reparación y No Repetición'*, available at (Spanish only) http://wp.presidencia.gov.co/sitios/especiales/Documents/20150921-declaracion-proceso-paz/docs/Punto5-Victimas.pdf (last visited 30 July 2016).

'widest possible' amnesty (paragraphs 10, 23, 37 and 38 of the section on Special Jurisdiction for Peace in the Draft Agreement). The granting of amnesty or pardon does not relieve the beneficiary from contributing to ascertaining the truth about the consequences of the armed conflict on the civilian population, nor – allegedly – does it extinguish the right of the victims to reparations (paragraphs 27 and 43 of the Special Jurisdiction section). Crimes against humanity, war crimes and genocide, listed in the Rome Statute of the International Criminal Court, as well as other serious human rights violations, such as torture, extra-judicial execution, or forced disappearance are not subject to amnesty or pardon (paragraphs 22, 25 and 40 of the Special Jurisdiction section).

Regarding the right to justice of victims of human rights violations, the Draft Agreement establishes a Special Jurisdiction for Peace with a legal framework 'principally based on the international law of human rights and international humanitarian law' (paragraph 19 of the Special Jurisdiction section), applicable to all those directly or indirectly participating in the armed conflict, and 'taking precedence over other criminal, disciplinary or administrative jurisdictions acting in connection with conduct directly or indirectly linked to the armed conflict' (paragraphs 32 and 33 of the Special Jurisdiction section).

The Draft Agreement establishes a complex organic framework for the functioning of the Special Jurisdiction for Peace, including an Investigation and Indictment Unit and a number of justice chambers: the Chamber for the Acknowledgment of Truth and Responsibility; the Chamber for Amnesty and Pardon; the Chamber for the Determination of Legal Status; and the Tribunal for Peace, with a First Instance and a Review Instance. These bodies are entrusted with the administration of two types of proceedings, namely, (a) the proceeding for cases involving the acknowledgment of truth and responsibility; and (b) the proceeding for cases involving the lack of acknowledgment of truth and responsibility (paragraphs 45 and 46 of the Special Jurisdiction section).

The Draft Agreement provides that in cases involving a lack of acknowledgment of truth and responsibility, the Tribunal for Peace shall prosecute the individuals in question pursuant to the principles of due process of law and, if convicted, they will receive ordinary sentences for the crimes committed, of up to 20 years' imprisonment. In cases involving the acknowledgment of truth and responsibility, the individuals tried will receive non-custodial sentences of between five and eight years (paragraphs 54 and 60 of the Special Jurisdiction section).

Regarding the victims' rights to reparations, the Draft Agreement provides for individual and collective restitution, compensation, rehabilitation, satisfaction and non-repetition, as well as measures for peace building. The language used covers vulnerable populations and groups particularly affected by the conflict with a differentiated gender approach.

At the time of its adoption, some local human rights organisations hailed point 5 of the Draft Agreement as an historic landmark in conflict resolution because of the comprehensive system of truth, justice, reparation and non-repetition for accountability in cases involving human

rights violations and breaches of humanitarian law, and the participation of victims' representatives during the negotiation process.[4]

Other organisations have been less optimistic when predicting the effectiveness of the institutions proposed. For instance, it has been argued that, when establishing individual responsibility for serious crimes, the courts will not be at liberty to consider the information received or uncovered by the new Truth Commission. It has also been argued that sanctions provided for in the so-called Special Jurisdiction for Peace are hardly proportionate to the severity of the crimes perpetrated during the conflict (Amnesty International 2016). Others have challenged the language defining the responsibility attributable to commanding officers in the commission of human rights violations; and the lack of criteria to secure effective, independent and impartial compositions for the Peace Tribunal and the chambers of the Special Jurisdiction (Human Rights Watch 2015).

The Office of the United Nations High Commissioner for Human Rights (OHCHR) has indicated that, although the integrated system offers a unique opportunity to address victims' rights, considerable planning is still required in order to overcome the foreseeable challenges faced at the budgetary, financial and operational levels to ensure the implementation of the agreement. Ensuring the system's legitimacy and credibility will require transparent selection processes for its administrators; co-operation with institutions dealing with victims and the judiciary; and incentives and guarantees for the participation of state actors, the FARC-EP and other parties. In its view, the successful implementation of the agreement and the sustainability of peace will ultimately depend on whether Colombian society can finally overcome conflict-related violence and structural human rights violations.[5]

In principle, point 5 of the Draft Agreement is to be commended for its rights-based approach in the pursuit of truth, justice and reparations for individual and collective victims of serious human rights violations, grounded on the Rome Statute and other human rights and humanitarian law treaties. In practice, Colombia is no stranger to the challenges derived from the establishment of a special jurisdiction to review the situation and potential criminal liability of the participants in this protracted armed conflict. In fact, the imposition of reduced sentences in exchange for the acknowledgment of individual responsibility echoes the still on-going experience under the Law of Justice and Peace adopted in 2005 to enable the demobilisation of paramilitary groups, with mixed results.[6]

Aside from the challenges derived from the administration of justice through a special jurisdiction, the success of the system envisaged by point

4 See, for instance, Comisión Colombiana de Juristas, Press Release of 21 December 2015, available at (Spanish only) http://www.coljuristas.org/documentos/comunicados_de_prensa/acuerdo_sobre_victimas_necesario_y_oportuno.pdf (last visited 30 July 2016).

5 UN Human Rights Council, Thirty-first Session, Report of the United Nations High Commissioner for Human Rights, Addendum: Situation of human rights in Colombia, A/HRC/31/3/Add.2 15 March 2016, paras 4 and 8.

6 See, for instance, IACHR Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia, OEA/Ser.L/V/II.Doc. 49/13, 2013, ch 3, available at http://www.oas.org/en/iachr/reports/pdfs/Colombia-Truth-Justice-Reparation.pdf (last visited 30 July 2016).

5 of the Draft Agreement will depend on the safeguards ensuring that vulnerable groups – in particular peasant communities, afro-descendants, indigenous peoples, displaced persons and human rights defenders – are not again victimised by the parties in the conflict; and that Colombian society at large show its rejection of war and violence and its commitment towards non-repetition.

The chance to deactivate, by peaceful means, one of the factors contributing to the persistence of an armed conflict that for many decades has been the backdrop of extreme violence against the civilian population is vital for the future of Colombia. It is equally vital for its neighbours and the region as a whole, who have a stake in the process in terms of their collective aspiration of becoming a continent freed from armed conflict.

2.2 Political crisis in Guatemala

During 2015, Guatemala underwent what the UN Office of the High Commissioner for Human Rights[7] and the Inter-American Commission on Human Rights[8] chose to define as one of its most serious political crises in decades.

Reports issued by the Public Prosecutor's Office and the International Commission against Impunity[9] in April and May 2015 uncovered a customs fraud implicating high-level officials in the executive branch. As a result, a protest movement involving diverse sectors of society gathered momentum and demonstrated for weeks in front of the presidential palace in Guatemala City and across the country to show their discontent. Protesters called for an end to corruption and demanded the resignation of government officials. Vice-President Roxana Baldetti was forced to resign because of her alleged involvement in the corruption case.

By 21 August 2015, pressure from influential sectors of society and media coverage of corruption cases prompted impeachment proceedings against President Otto Pérez Molina. A few days later his immunity from prosecution was lifted by Congress, and he resigned on 3 September 2015, whereafter he was detained and tried for his alleged participation in the customs fraud network.

Alejandro Maldonado Aguirre, a former Constitutional Court judge, was sworn in as President, days before the general election that had been scheduled for September 2015. Comedian James Ernesto Morales Cabrera was elected President in the second round held in October 2015[10] and was due to take office in January 2016.

7 OHCHR Guatemala 'A Guatemalan awakening: The revolt for justice and change, available at http://www.ohchr.org/EN/NewsEvents/Pages/AGuatemalanawakening.aspx (last visited 30 July 2016).

8 IACHR Situation of Human Rights in Guatemala: Diversity, Inequality and Exclusion OEA/Ser.L/V/II.Doc. 43/15, 31 December 2015, paras. 54-63, available at http://www.oas.org/en/iachr/reports/pdfs/Guatemala2016-en.pdf (last visited 30 July 2016).

9 CICIG *Financiamiento de la Política en Guatemala*, 2015, available at http://www.cicig.org/uploads/documents/2015/informe_financiamiento_politicagt.pdf (last visited 30 July 2016). See also CICIG *Informe de la Comisión Internacional contra la Impunidad con Ocasión de su Octavo Año de Labores,* available at http://www.cicig.org/uploads/documents/2015/COM_085_20151113_VIII.pdf (last visited 30 July 2016).

10 Tribunal Supremo Electoral de Guatemala, Memoria de las Elecciones Generales y de Diputados al Parlamento Centroamericano 2015, available at http://www.tse.org.gt/MEMORIA-ELECTORAL-2015.pdf (last visited 30 July 2016).

2.3 Electoral calendar in Haiti

During 2015, Haiti failed to fulfil the objectives set out in its parliamentary and presidential electoral calendar. Low voter participation, irregularities denounced by candidates and violence interfered with the elections scheduled for August, October and December 2015.

In March 2015, following consultations with the Provisional Electoral Council and political parties, President Martelly issued an electoral decree and published the electoral calendar, calling for three rounds of polls for 2015. On 11 May, the Provisional Electoral Council launched the candidate registration period for the presidential race scheduled for October. By 20 May, a record number of 70 candidates had applied for registration and a final list of over 50 candidates – excluding some high-profile names of people who had allegedly failed to submit financial probity certifications – was drawn up.[11]

On 9 August 2015, the first round of parliamentary elections was held amidst disruption and violent incidents. On 25 October 2015, the first round of presidential elections and the second round of legislative and municipal elections were held. There were a few violent incidents, and opposition candidates and national election observers denounced fraud. As no candidate received a majority vote in the first round, a run-off was scheduled for 27 December 2015; but opposition candidate Jude Celestin refused to participate. Amid growing tension and violent incidents between protestors and the police, the Provisional Electoral Council postponed and finally cancelled the elections.

Despite the mandates of the UN Stabilisation Mission in Haiti (MINUSTAH) and the Organization of American States (OAS) to contribute to the upholding of democracy in Haiti, there is growing consensus among analysts that pressure exerted by the international community on the government to ensure a degree of institutional stability has led most Haitians to believe that the elections reflect the will of international donors rather than their own.[12] This belief has translated into a steady decrease in electoral participation – which has fallen to well below 25 per cent – with further political instability.

3 Highlights on regional arrangements

3.1 Seventh Summit of the Americas and the participation of Cuba

On 10 and 11 April 2015, the states of the region gathered for the Seventh Summit of the Americas, Prosperity with Equity, held in Panama City. This forum, first established in 1994, congregates heads of state and government from the member states of the OAS.[13]

11 UN Security Council, Report of the Secretary-General on the United Nations Stabilisation Mission in Haiti, S/2015/667, 31 August 2015, paras. 3, 4 and 7, available at https://minustah.unmissions.org/sites/default/files/n1525971.pdf (last visited 30 July 2016).

12 See, for instance, Inter-American Dialogue 'Beyond MINUSTAH: What can Latin America do for Haiti?' available at http://www.thedialogue.org/blogs/2016/02/beyond-minustah-what-can-latin-america-do-for-haiti/ (last visited 30 July 2016).

Through a number of official preparatory meetings and side forums and events involving the participation of civil society and other actors, the states of the region agreed on a number of mandates for action[14] addressing issues of health, education, energy, the environment, migration, security, citizen participation, and democratic governance. The implementation of the mandates for action is to be overseen by the OAS, the Economic Commission for Latin America and the Caribbean (ECLAC), the Pan-American Health Organisation (PAHO), the Inter-American Development Bank (IDB), the World Bank, the Development Bank of Latin America (CAF), and other multilateral financial and technical assistance institutions.

Cuba joined the meeting for the first time in the Summit's history. Following on the announcements made in December 2014,[15] Cuba and the United States held several rounds of negotiations during the first half of 2015 as part of the process of normalisation of their diplomatic relations that had been suspended since 1961. The steps taken included, amongst others, the removal of Cuba from the List of State Sponsors of Terrorism drawn up by the US Department of State;[16] the reopening of their respective embassies in Havana and Washington DC on 20 July 2015; and the establishment of a bilateral commission with an agenda for establishing relations in areas such as environmental protection, health, science and law enforcement.[17] However, concern remains regarding the continuation of the US economic embargo on Cuba and the impact on the enjoyment of human rights on the island, as consistently indicated by the Inter-American Commission on Human Rights (Inter-American Commission) in its reports.[18]

13 The 2015 Summit of the Americas was attended by the Presidents of Panama, Juan Carlos Varela; Colombia, Juan Manuel Santos; Ecuador, Rafael Correa; Brazil, Dilma Rousseff; Mexico, Enrique Peña Nieto; the United States, Barack Obama; Argentina, Cristina Fernández de Kirchner; Guatemala, Otto Pérez Molina; Venezuela, Nicolas Maduro; Honduras, Juan Orlando Hernández; Peru, Ollanta Humala; Bolivia, Evo Morales; Uruguay, Tabaré Vázquez; El Salvador, Salvador Sánchez Cerén; Nicaragua, Daniel Ortega; Haiti, Michel Martelly; Dominican Republic, Danilo Medina; Cuba, Raul Castro; and the Prime Ministers of Canada, Stephen Harper; Trinidad and Tobago, Kalma Persad-Bissessar; The Bahamas, Perry Christie; Jamaica, Portia Simpson-Miller; Saint Vincent and the Grenadines, Ralph Gonsalves; Barbados, Freundel Stuart; Antigua and Barbuda, Gaston Browne; Grenada, Keith Mitchell; and Saint Lucia, Kenny Anthony.

14 Seventh Summit of the Americas 'Prosperity with equity: the Challenge of co-operation in the Americas' Mandates for Action OEA/Ser.E, Panama, 2015, available at http://www.summit-americas.org/vii/docs/mandates_en.pdf (last visited 30 July 2016).

15 See The White House, Press Release, Fact Sheet: Charting a new course on Cuba, 17 December 2014, available at https://www.whitehouse.gov/the-press-office/2014/12/17/fact-sheet-charting-new-course-cuba (last visited 30 July 2016).

16 US Department of State, Press Statement, Rescission of Cuba as a State Sponsor of Terrorism, 29 May 2015, available at http://www.state.gov/r/pa/prs/ps/2015/05/242986.htm (last visited 30 July 2016).

17 Ministry of Foreign Affairs of Cuba, Special Section Cuba-United States, Cuban Chancellor receives US Secretary of State, Havana, 14 August 2015, available at http://cubaeeuu.cubaminrex.cu/article/recibe-canciller-cubano-al-secretario-de-estado-de-los-estados-unidos (last visited 30 July 2016).

18 See IACHR Annual Report 2015 ch IV, Countries, Cuba, paras 18-20, available at http://www.oas.org/en/iachr/docs/annual/2015/TOC.asp (last visited 30 July 2016).

3.2 Organization of American States

On 18 March 2015, during the XLIX Special General Assembly, the member states of the OAS elected Luis Almagro to succeed José Miguel Insulza as Secretary-General of the organisation for a five-year term commencing on 26 May 2015. In his acceptance speech, Secretary-General-elect Almagro - a former Minister of Foreign Affairs of Uruguay - identified democracy, human rights, security and integral development as the key priorities in the Americas. Referring to the budgetary difficulties and the criticism faced by the organisation, Almagro stated that he did not intend 'to be the administrator of the crisis of the OAS, but the facilitator of its renewal' and called for hemispheric unity under the objectives established in the Strategic Vision of the OAS adopted in 2014.[19]

On 16 June 2015, at the 45th Regular General Assembly, the member states of the OAS elected Enrique Gil Botero (Colombia), Esmeralda Arosemena de Troitiño (Panama), Margarette May Macaulay (Jamaica) and Francisco José Eguiguren Praeli (Peru) to serve in their personal capacity as members of the Inter-American Commission. Their four-year term will start on 1 January 2016 and end on 31 December 2019. In the same session, the OAS General Assembly elected four new judges to the Inter-American Court: Elizabeth Odio Benito (Costa Rica); Patricio Pazmiño Freire (Ecuador); Eduardo Vio Grossi (Chile); and Eugenio Zaffaroni (Argentina). Their six-year term will start on 1 January 2016 and end on 31 December 2021.

The election of four new commissioners and judges for the Inter-American Commission and Court, respectively, will significantly modify the current makeup of the seven-member composition of each human rights supervisory organ. Prior to the election, an independent panel of experts, convened and endorsed by civil society organisations, publicly advised the OAS to establish an *ad hoc* advisory committee to review the suitability of candidates and to provide guidance to states during the election process, in light of the experience gathered by the European Court of Human Rights and the International Criminal Court.[20] The human rights community of the Americas has long called for safeguards to ensure the transparent selection of suitable and competent candidates with a balanced approach in terms of gender and ethnicity.

Also during the 45th General Assembly, the OAS member states adopted the Inter-American Convention on Protecting the Human Rights of Older Persons.[21] The purpose of this instrument is to promote, protect and ensure the recognition and full enjoyment and exercise, on an equal

19 OAS AG/RES 1 (XLVII-E/14) Guidelines and Objectives of the Strategic Vision of the Organization of American States, adopted at the plenary session of the OAS General Assembly, 47th Special Session, held on 12 September 2014, Washington DC OEA/Ser.P AG/RES.1, available at http://www.oas.org/consejo/GENERAL%20ASSEMBLY/47SGA.asp (last visited 30 July 2016).

20 Final Report of the Independent Panel for the Election of Inter-American Commissioners and Judges, June 2015, available at https://www.opensocietyfoundations.org/sites/default/files/iachr-panel-report-eng-20150603.pdf (last visited 30 July 2016).

21 Inter-American Convention on Protecting the Human Rights of Older Persons, adopted at the 45th Regular Session of the OAS General Assembly in Washington DC on 15 June 2015, available at http://www.oas.org/en/sla/dil/inter_american_treaties_A-70_human_rights_older_persons.asp (last visited 30 July 2016).

basis, of all human rights and fundamental freedoms of older persons, in order to contribute to their full inclusion, integration and participation in society, with a differentiated treatment. The Convention was signed by Argentina, Brazil, Chile, Costa Rica and Uruguay and requires the ratification by two signatory countries in order to enter into force.

4 Highlights on regional human rights protection and promotion

4.1 Inter-American Commission on Human Rights

During 2015, as part of its mandate to promote human rights, the Inter-American Commission issued an important number of thematic reports with standards relating to children, women, lesbian, gay, bisexual, transgender and intersex (LGBTI) persons, indigenous peoples, migrants, and persons deprived of their liberty. Some of these reports had a special focus on these cross-cutting issues in specific states, as was the case with the situation of indigenous women and girls in Canada and migrant children in the United States.

In its report on Canada,[22] the Inter-American Commission highlights the situation of indigenous women and girls as one of the most disadvantaged groups in society, with poverty and racial discrimination aggravating their vulnerability. The findings in the report reveal that indigenous women are disproportionately affected as victims of homicide and violence, and that there is a lack of due diligence by local authorities in the investigation and prosecution of these types of cases.

It is worth noting that in June 2015, after the release of the report, the government of Canada launched an independent national inquiry[23] with a mandate to examine the greater vulnerability of indigenous women and girls, the systemic causes of violence, and the impact of policies and practices by state institutions charged with policing, child welfare, and the administration of justice.

In its report on the situation of refugee and migrant families and unaccompanied children in the United States,[24] the Inter-American Commission addresses immigration detention, immigration proceedings, deportation, and the removal of migrants in light of the apprehension of a record number of unaccompanied children between October 2013 and September 2014, on the US-Mexico border. The recommendations in the report call for an end to the practice of automatic and arbitrary immigration detention of families. The Commission also recommends the treatment of unaccompanied Mexican children with the same safeguards and procedures applicable to unaccompanied children from non-contiguous countries; the investigation of claims of abuses and

22 IACHR *Missing and murdered indigenous women in British Columbia, Canada* OEA/Ser.L/V/II. Doc. 30/14, 2015, available at http://www.oas.org/en/iachr/reports/pdfs/Indigenous-Women-BC-Canada-en.pdf (last visited 30 July 2016).

23 Government of Canada, Independent National Inquiry into Missing and Murdered Indigenous Women and Girls, available at https://www.aadnc-aandc.gc.ca/eng/1448633299414/1448633350146 (last visited 30 July 2016).

24 IACHR Human Rights Situation of Refugee and Migrant Families and Unaccompanied Children in the United States of Americas OAS/Ser.L/V/II 155, July 2015, available at http://www.oas.org/en/iachr/reports/pdfs/Refugees-Migrants-US.pdf (last visited 30 July 2016).

mistreatment committed by US border agents; and the safeguarding of due process guarantees and the best interests of the child in immigration proceedings.

The current context in the so-called northern triangle of Central America - El Salvador, Guatemala and Honduras – has forced many to flee their communities in search of international protection because of transnational organised crime and local gangs (*maras*). Many of these migrants are women and children and unaccompanied children. These patterns of displacement flow towards Mexico and ultimately the United States, where migrants remain deprived of their liberty while a decision on their status is made. As the Inter-American Commission warns, the situation requires addressing poverty, economic and gender inequality, discrimination and violence in the migrants' countries of origin.

Within the framework of the Commission's mandate to monitor the human rights situation in OAS member states and the follow-up on compliance with Precautionary Measure 409/14, a report on the disappearance of 43 students of the rural school Raúl Isidro Burgos in Ayotzinapa, Mexico, was issued. According to the available information, during the night of 26 September 2014 municipal police officers, allegedly in collusion with members of organised crime, attacked a group of approximately 80 students travelling by bus from Iguala to Chilpancingo in the state of Guerrero. As a result, six students died, 14 were injured, and 43 students were missing, with no further clarification of the reasons for the attack. In early October 2014, the Inter-American Commission issued a precautionary measure requesting Mexico to establish the whereabouts of the missing students, to protect the lives and physical integrity of the surviving students and to report on the judicial investigation into the events.[25] A few days later, the Commission signed an agreement with the state and the representatives of the missing students, to appoint the Interdisciplinary Group of Independent Experts (GIEI, its acronym in Spanish) in order to provide technical assistance to Mexico in the search for the missing students and the judicial investigation.[26] On the basis of a number of on-site observations in Mexico, the GIEI issued a preliminary report[27] examining the contradictory accounts in the judicial files of the events that took place on the day of the attack; and the deficiencies in the search for the students during the crucial 72 hours after the disappearances. The GIEI made a number of recommendations on the unification of the multiple parallel investigations; the plausible lines of investigation that had not been pursued; the need for accountability for the acts and omissions of local

25 IACHR Resolución 28/2014 Medida Cautelar No.409/14 Estudiantes de la Escuela Rural 'Raul Isidro Burgos' respecto del Estado de México, 3 de octubre de 2014, available at (Spanish only) http://www.oas.org/es/cidh/decisiones/pdf/2014/MC409-14-ES.pdf (last visited 30 July 2016).

26 IACHR, Press Release 117/14, 'IACHR makes an urgent call on the Mexican state regarding the murder and disappearance of students' 10 October 2014, available at http://www.oas.org/en/iachr/media_center/PReleases/2014/117.asp (last visited 30 July 2016); Press Release 136/14 'IACHR makes official technical co-operation agreement about Ayotzinapa students in Mexico' 18 November 2014, available at http://www.oas.org/en/iachr/media_center/PReleases/2014/136.asp (last visited 30 July 2016).

27 GIEI Ayotzinapa Report. Research and Initial Conclusions of the Disappearance and Homicide of the Normalistas from Ayotzinapa, available at http://media.wix.com/ugd/3a9f6f_e1df5a84680a4a8a969bd45453da1e31.pdf (last visited 30 July 2016).

authorities; and the importance of continuing with the search for the disappeared students according to new hypotheses on their whereabouts. Since the presentation of the report in October 2015, the mandate of the GIEI, initially fixed for six months, has been extended.

The disappearance of the Ayotzinapa students gained global notoriety as an example of the extreme violence by organised crime in collusion with local state officials in Mexico. Based on official figures, the Inter-American Commission has stated that in certain areas of the country, disappearances have reached critical levels, with more than 20 000 cases recorded, and consistent information on the direct participation, acquiescence or tolerance of state agents.[28]

As part of its mandate to process individual petitions on the violation of the American Declaration of the Rights and Duties of Man against states that have not yet ratified the American Convention on Human Rights, the Inter-American Commission during 2015 issued and published three reports on the merits relating to the United States. These three reports refer to the application of the death penalty in violation of the right to due process and a fair trial. In two of the cases, the Commission found that non-nationals charged with the commission of crimes punishable by death in the United States had not been afforded access to effective court-appointed counsel and to consular notification and assistance.[29] In the third case, the Commission found that a national had not been afforded access to effective court-appointed counsel and that the United States had failed to respond to allegations and evidence 'concerning possible racial discrimination' (paragraph 146) during the judicial proceedings.[30] As in previous cases concerning due process violations in death penalty cases under the American Declaration, the Commission concluded in the three reports that the imposition of capital punishment in these circumstances constituted a violation of the right to life.

Regarding its mandate to examine claims on the violation of the American Convention and other Inter-American human rights treaties, the Inter-American Commission decided to make public two reports on the merits during 2015. One of the cases involved the violation of the rights to privacy and equality before the law of two members of the Mexican armed forces who had been discharged on account of their testing HIV positive.[31] The Commission decided to publish the report on the grounds that the Mexican state had fully complied with the recommendations first issued in this case in 2011 regarding the provision of comprehensive medical

28 IACHR Press Release 'IACHR publishes report on the situation of Human Rights in Mexico' 2 March 2016, available at http://www.oas.org/en/iachr/media_center/PReleases/2016/023.asp (last visited 30 July 2016).

29 IACHR Report 11/15 Case 12.833 Merits (Publication), Felix Rocha Diaz, OEA/Ser.L/V/II.154 Doc 5, 23 March 2015, available at http://www.oas.org/en/iachr/decisions/2015/USPU12833EN.pdf (last visited 30 July 2016); Report 79/15 Case 12.994, Merits (Publication), Bernardo Aban Tercero, OEA/Ser.L/V/II.156 Doc 32 28 October 2015, available at http://www.oas.org/en/iachr/decisions/2015/USPU12994EN.pdf (last visited 30 July 2016).

30 IACHR Report 78/15 Case 12.831, Merits (Publication), Kevin Cooper, United States OEA/Ser.L/V/II.156 Doc 31, 28 October 2015, available at http://www.oas.org/en/iachr/decisions/2015/USPU12831EN.pdf (last visited 30 July 2016).

31 IACHR Report 80/15 Case 12.689 Report on Merits (Publication), JSCH and MGS, Mexico, OEA/Ser.L/V/II.156 Doc. 33, 28 October 2015, available at http://www.oas.org/en/iachr/decisions/2015/mxPU12689EN.pdf (last visited 30 July 2016).

services for the victims; their being reinstated into the armed forces; the compensation of material and non-material damages caused by their discharge; and the adoption of domestic legislation providing that testing positive for HIV may only serve as a ground for discharge if it results in the loss of functionality to perform actions in the line of duty.

In 12 cases on the merits concerning Bolivia, Brazil, Ecuador, Guatemala, Honduras, Nicaragua, Peru and Venezuela, the Inter-American Commission decided not to publish its reports and instead to refer these matters to the contentious jurisdiction of the Inter-American Court of Human Rights (Inter-American Court). The cases involve issues relating to extrajudicial executions, forced disappearance, slave labour, freedom of expression, physical integrity in connection with reproductive rights and non-discrimination, due process of law, and access to justice.

4.2 Inter-American Court of Human Rights

During 2015, the Inter-American Court delivered 16 judgments on preliminary objections, merits and reparations, and two judgments on the interpretation of previous decisions. The judgments on the merits involved the application of the American Convention on Human Rights and other Inter-American human rights treaties to issues relating to non-discrimination, gender, indigenous rights, forced disappearances, extrajudicial execution, freedom of the press, political participation and due process of law. Some of the more significant decisions in terms of development of Inter-American standards are summarised below.

In its judgment in the case of *Cruz Sanchez & Others v Peru*,[32] the Inter-American Court examined the death of three Tupac Amaru Revolutionary Movement (MRTA) members in the context of a hostage rescue operation known as *Chavin de Huantar*, and considered whether the acts and omissions of the state agents involved were compatible with the American Convention and the applicable rules of international humanitarian law. The operation was carried out by Peruvian special forces on 22 April 1997 in order to rescue 72 hostages held by 14 MRTA members at the Japanese embassy in Lima. The judgment acknowledged that at the time of the events there was an internal armed conflict in Peru,[33] and that the state was entitled to use force with the specific objective of ensuring the release of the hostages who had been held at the embassy for almost four months, always within the framework of international humanitarian and international human rights law.

According to the initial reports issued by the security forces, all 14 MRTA members involved in the hostage taking had been killed in the confrontation during the rescue operation. However, it was later established that at least one of the three MRTA members whose case was brought before the Inter-American Court had been killed while in the custody of the state and not in combat, as previously reported. Therefore,

32 Inter-American Court Case of *Cruz Sánchez & Others v Peru*. Judgment of 17 April 2015 (Preliminary Objections, Merits, Reparations and Costs) Series C No 292, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_292_esp.pdf (last visited 30 July 2016).

33 Comisión de la Verdad y Reconciliación del Peru, Informe Final, 2003, volume I, chapter 1.1 'Los períodos de la violencia' 54 and 55, available at (Spanish only) http://cverdad.org.pe/ifinal/ (last visited 30 July 2016).

the Inter-American Court found that the state was responsible for the violation of the right to life protected in article 4 of the American Convention. Regarding the other two alleged victims in the case, the Court considered that the evidence available was not sufficient to ascertain the circumstances of the deaths and, therefore, no violation of the right to life under the American Convention could be found. Instead, the Court established that the state had failed to conduct a proper investigation and to ensure due process and judicial protection for the victims' family members.

This judgment follows previous decisions by both the Inter-American Court and Commission when interpreting the obligation to respect and ensure the right to life under the American Convention in a manner complementary to the rules of international humanitarian law in cases involving combat situations between state security forces or their proxies and armed groups in Argentina, Guatemala and Colombia. In this case, however, the Court chose not to follow its - until now - constant practice of granting monetary compensation for material and moral damages as part of the reparations in cases involving the commission of extrajudicial executions. In their respective separate dissenting opinions, Judges Vio Grossi and Ferrer Mac-Gregor Poisot expressed the view that the publication of the judgment in itself was insufficient as a reparation and that monetary compensation for the moral damage caused to the victims' family members should have been awarded, in line with the historical approach of the Inter-American Court *vis-à-vis* the reparation of the violation to the right to life and judicial protection.

In its decision in the case of *López Lone & Others v Honduras*,[34] the Inter-American Court examined the arbitrary removal from office of four judges who – as members of a pro-democracy association – had publicly contradicted the official position of the Supreme Court justifying the ousting of President Zelaya in 2009,[35] and instead identified it as a *coup d'état*. In retaliation, the four judges were subjected to disciplinary proceedings and removed from office by the Supreme Court.

Based on the wide condemnation by the international community of President Zelaya's ousting - including strong pronouncements by the OAS General Assembly and Permanent Council and by the UN General Assembly - the Inter-American Court considered that the events of June 2009 indeed constituted a *coup d'état* and that the victims had been removed from office as a consequence of expressing their views on the impact the *coup d'état* would have on the rule of law in Honduras.

The Inter-American Court found that the removal from office of the victims violated the principles of legality and due process of law, and the rights to freedom of expression, freedom of association, and participation in government provided for in articles 8, 13, 16 and 23 of the American

34 Inter-American Court, case of *López Lone & Others v Honduras*, Preliminary Objection, Merits, Reparations and Costs. Judgment of 5 October 2015, Series C No 302, available at (Spanish only) http://www.corteidh.or.cr/docs/casos/articulos/seriec_302_esp.pdf (last visited 30 July 2016).

35 For an account of the events of June 2009 in Honduras and the reaction of the Inter-American system, see IACHR 'Honduras: Human rights and the *coup d'état* OEA/Ser.L/V/II. Doc. 55, 2009, available at http://www.cidh.org/countryrep/Honduras09eng/Toc.htm (last visited 30 July 2016).

Convention. The Court explained that these rights could be subjected to restrictions compatible with the treaty, among them those limiting their exercise by officials from the judicial branch, particularly judges. In fact, in the case of members of the judiciary, restrictions on freedom of expression, association and participation in political parties may be pertinent and necessary to ensure the integrity of the administration of justice within the rule of law. However, the Inter-American Court considered that in times of serious democratic crises, any restriction on individual rights that may interfere with the judges' actions to uphold democracy should be lifted. In its view, in this case any impediment to expressing views on the illegality of the 2009 *coup d'état* would contradict the independence that the members of the judiciary, as one of the branches of government, must enjoy. Thus, the Inter-American Court concluded that the conduct of the victims in this case could not be construed as contrary to their roles as judges nor be subject to restrictions and disciplinary proceedings. As part of the reparations, the Court ordered Honduras to reinstate the four judges and to provide them with compensation for material and moral damages.

As acknowledged in the judgment itself, this is the first opportunity where the Inter-American Court has addressed the right of officials from the judicial branch to gather, express their views and exercise their political rights in terms of participation in and access to public service and the so-called 'right to defend democracy'. The case is significant in view of the mutually-reinforcing nature of democracy, the rule of law and the independence of the judicial branch.

In the case of *Gonzales Lluy & Others v Ecuador*,[36] the Inter-American Court examined the rights to life, physical integrity, and education *vis-à-vis* non-discrimination in a case involving the infection of a child with HIV and the exclusion she suffered on account of her health, in particular regarding her schooling. As a three year-old, the victim was diagnosed with thrombocytopenic purpura and received an urgent blood transfusion at a Red Cross blood bank, without prior basic safety HIV testing. The Inter-American Court found that inadequate state supervision had resulted in the administration of a contaminated transfusion, with permanent consequences for the victim's physical integrity and a severe risk to her life. Thus, the state was found to have failed to fulfil its obligation to monitor and supervise the provision of health care services, within the framework of the right to personal integrity and the obligation not to endanger life, in violation of articles 4 and 5 of the American Convention. This finding is in line with previous decisions of the Inter-American Court relating to the lack of due diligence in the control of third party providers of health services, always within the obligation to ensure the rights to life and physical integrity under the American Convention.[37] As in previous cases where the Inter-American Court has established state responsibility

36 Inter-American Court *Gonzales Lluy & Others v Ecuador* Judgment of 1 September 2015 (Preliminary objections, merits, reparations and costs) Series C No 298, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_298_ing.pdf (last visited 30 July 2016).

37 See, for instance, Inter-American Court case of *Suarez Peralta v Ecuador*, Judgment of 21 May 2013 (Preliminary Objections, Merits, Reparations And Costs) Series C No 261, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_261_ing.pdf (last visited 30 July 2016).

and addressed issues relating to access to health by invoking the right to physical integrity under article 5 of the American Convention, the separate opinions in this judgment revisit the ornamental debate on direct justiciability of socio-economic rights under article 26 of the American Convention. In this composition, Judge Porto, on the one hand, does not support the direct justiciability of socio-economic rights under article 26, and favours the pragmatic connectivity with the right to life or the right to personal integrity (paragraph 30 of the separate opinion), while Judge Ferrer Mac-Gregor Poisot (Judges Robles and Caldas concurring), on the other hand, contends that by not basing its finding on an expansive interpretation of article 26 of the American Convention, the Court fails to deliver in full an analysis of the duty to ensure the right to health (paragraph 13 of the *Lluy* case, citing paragraph 57 of his concurring opinion in the case of *Suárez Peralta*).

The judgment also examined the decision of the school authorities to exclude the victim from attending classes on account of a potential risk to the health of other students and their best interests. The Inter-American Court found that school authorities had failed to show that the differentiated treatment of the victim was justified and that the purpose and the effect of the exclusion were not discriminatory. The Court stated that stereotypical presumptions concerning the possible risks related to HIV were not appropriate to ensure the legitimate objective of protecting the best interests of the child, and that precisely this principle could not be invoked to justify discrimination against another child owing to her health status. Thus, in this case, far from adopting measures to combat the prejudice surrounding HIV, the school had actually reinforced the stigma associated with such illnesses. The Inter-American Court found that the state had failed to ensure article 13 of the Protocol of San Salvador, in relation to articles 19 and 1(1) of the American Convention in terms of the right not to be discriminated against on the basis of health in the context of the education system. The Court stated that various vulnerability factors and the risk of discrimination intersected in this case: the victim's condition as a child, a female, a person living in poverty, and a person living with HIV. Apart from the payment of compensation, the reparations ordered by the Court included the provision of medical and psychological treatment, a scholarship, and decent housing for the victim. The Court also ordered the state to train health officials on best practices and on the rights of patients with HIV.

During 2015 the Inter-American Court once more addressed the issue of the lack of due diligence by the state in the prevention and investigation of femicides in the context of violence against women, the growing number of vicious killings, and structural gender discrimination and stereotyping. In line with its 2014 decision in the case of *Maria Isabel Veliz Franco v Guatemala*,[38] and based on the grounds originally established in the *Campo Algodonero* case in 2009,[39] the Inter-American Court examined the conduct of state agents in the prevention and investigation of a young woman's initial disappearance and violent homicide in the case of *Claudina Velásquez Paiz & Others v Guatemala*,[40] and found serious violations of the

38 Inter-American Court case of *Veliz Franco & Others v Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 19 May 2014, Series C No. 277, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_277_ing.pdf (last visited 30 July 2016).

Convention of Belem do Para and the American Convention. The reparations granted on behalf of the victims, including the family members of Claudina Velásquez Pais, are also in line with previous decisions in terms of compensation for material and moral damages, symbolic measures, education to eradicate gender discrimination, specialised training of state officials involved in the prevention and investigation of these types of cases, and the adoption of legislative and policy measures to establish a search mechanism for victims.

4.3 Working Group of the Protocol of San Salvador

The Working Group to Examine the Periodic Reports of the States Parties to the Protocol of San Salvador (WGPSS), a specialised monitoring mechanism composed of independent experts, government experts and representatives from the Inter-American Commission created by AG/RES 2262 (XXXVII-O/07), published a report compiling all progress indicators to measure compliance with social, economic and cultural rights protected under the Protocol of San Salvador.[41] The WGPSS initially drafted progress indicators to measure compliance with the rights to education, social security and health that were formally adopted in 2011 by the OAS General Assembly (AG/RES 2713 XLII-O/12). Progress indicators to measure compliance with a second group of rights in the Protocol, including the right to work, trade union rights, the right to a healthy environment, the right to food, and the right to the benefits of culture, were also drafted by the WGPSS and adopted by the General Assembly two years later, in 2014 (AG/RES. 2823 XLIV-O/14). The WGPSS designed an important number of structural, process and outcome indicators, arranged into three conceptual categories, including the incorporation of rights, financial context and budgetary commitment, and state capabilities. These conceptual categories are to be considered in light of the principles of equality and non-discrimination, access to justice, and access to information and participation. The information submitted by state parties must also take into consideration gender equity, special needs groups (children, the elderly, persons with disabilities), and ethnic diversity (indigenous peoples and Afro-descendants, in particular) as cross-cutting issues.

The WGPSS met for its first two monitoring sessions in February and October 2015 at OAS headquarters in Washington DC and received official delegations from Bolivia, Colombia, Ecuador, Mexico, Paraguay and Uruguay to discuss the very first national reports on compliance with the rights to social security, health and education on the basis of the progress indicators compiled in the report. The submission of national reports and the monitoring of progress on the basis of the indicators accepted by

39 Inter-American Court case of *González & Others ('Cotton Field') v Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of 16 November 2009. Series C No. 205, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_205_ing.pdf (last visited 30 July 2016).

40 Inter-American Court case of *Velásquez Paiz & Others v Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 19 November 2015. Series C No 307, available at (Spanish only): http://www.corteidh.or.cr/docs/casos/articulos/seriec_307_esp.pdf (last visited 30 July 2016).

41 WGPSS, Progress Indicators for Measuring Rights under the Protocol of San Salvador, OEA/Ser.D/XXVI.11, 2015, available at http://www.oas.org/en/sedi/pub/progress_indicators.pdf (last visited 30 July 2016).

consensus at the OAS General Assembly at the proposal of the WGPSS constitute a significant landmark in the protection of economic, social and cultural rights in the Americas.

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2017-01

Global Campus Human Rights Journal, Volume 1 No 1

Guest editor for special focus: Vahan Bourhazian, Yerevan State University

Global Campus