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The Challenges of Redressing Violations of Economic and Social Rights in the Aftermath of the Eurozone Sovereign Debt Crisis

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Abstract

The Eurozone sovereign debt crisis represented an occasion to assess whether the international, European Union, and national systems provide adequate remedies for violation of socio-economic rights caused by austerity measures. Victims of these violations tried to obtain a remedy by lodging complaints before national judicial organs, the Court of Justice of the European Union, international human rights bodies (such the UN Committee on Economic, Social and Cultural Rights, the ILO Committee on Freedom of Association and the European Committee on Social Rights), and the European Court of Human Rights. This article addresses whether one (or more) of these venues indicted adequate remedies of violations of socio-economic rights and whether these mechanisms could have adopted a different (and more human rights-oriented) adjudicative approach with the view of enhancing the effectiveness of socio-economic rights enshrined in international treaties.

The paper assumes that the adequacy of the relief depends on two elements. The first is the collective nature of socio-economic rights, which requires structural or systemic remedies rather than individual ones. The second is the need to preserve States' economic soundness in order to allow Countries to satisfy their international obligations, namely securing a minimum essential level of socio-economic rights and their progressive realization. Against these assumptions, remedies should benefit the victimized class as a whole, alongside avoiding major distributional or unintended consequences to the detriment of public finances. The investigation focuses on the case law and pronouncements concerning Greece, Portugal, and Spain. The paper reaches the conclusion that constitutional review of austerity measures is the most adequate and effective venue to address such sensitive matters. This is especially true where constitutional courts rely on international conventions protecting socio-economic rights as per se parameters of constitutionality or through consistent interpretation – *viz*. by construing the national bill of rights in line with treaty-based socio-economic rights.

A. Introduction

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

As is known, the 2008 burst of the United States' housing market bubble turned into a sovereign debt crisis that affected, among other countries, European Union (the Union or EU) Member States. Five Eurozone States – namely Cyprus, Greece, Ireland, Portugal, and Spain – requested loans to face their balance of payment problems. As a condition to receive such aids, beneficiaries had to implement austerity measures at the national level.[2] These domestic policies included the liberalization of labor markets, drastic decreases of public expenditure towards welfare services (e.g., social security systems, healthcare facilities), and the cutting of salaries and pensions of public personnel. Simultaneously, they entailed tax hikes.[3]

Such reforms, which were aimed at restoring the economic soundness of the borrowing State, encroached on various socio-economic rights,[4] such as the right to work, the right to a fair wage, the right to a remuneration which

1 See e.g., A. Nolan, B. Porter & M. Langford, 'The Justiciability of Social and Economic Rights: An Updated Appraisal', CHRGJ Working Paper No. 15 2007/08; M. Langford, 'Judicial Review in National Courts. Recognition and Responsiveness', in E. Riedel, G. Giacca & C. Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (2014), 417 [Langford, Judicial Review].

2 K. Tuori & K. Tuori, *The Eurozone Crisis: A Constitutional Analysis* (2014), 236-241; A. Monteverdi, 'From Washington Consensus to Brussels Consensus', in E. Sciso (ed.), *Accountability, Transparency and Democracy in the Functioning of Bretton Woods Institutions* (2017), 73.

3 On the rescue packages toward Eurozone States see e.g., Tuori & Tuori, *supra* note 2, 80-116, 236-241; C. Kilpatrick & B. De Witte (eds), 'Social rights in times of crisis in the Eurozone: The role of fundamental rights' challenges', EUI Working Paper Law 2014/05.

4 See e.g., G. Adinolfi, 'Aggiustamento economico e tutela dei diritti umani: un conflitto inesistente per le istituzioni finanziarie internazionali?', 8 *Diritti umani e diritto internazionale* (2014) 2, 319; HRC Res. 40/8, UN Doc A/HRC/RES/40/8, 5 April 2019, which adopted the *Guiding principles on human rights impact assessments of economic reforms*, see HRC, *Guiding principles on human rights impact assessments of economic reforms: Report of the Independent Expert on the effects of foreign debt and other related international*

provides a decent living for workers and their families, the guarantees stemming from collective bargaining, the right to social security, the right to be protected against poverty and social exclusion, the right to adequate housing, and the right to health.[5] Victims of these violations tried to obtain a remedy by lodging complaints before national judicial organs, the Court of Justice of the European Union (ECJ), international human rights bodies, and the European Court of Human Rights (ECtHR).[6]

After a brief outline of the mechanisms adopted to manage the turmoil and of the impact of conditionality on the enjoyment of the relevant ES rights (Section A), this enquiry defines the notion of *adequate remedy*, a concept that hinges upon the main features of socio-economic rights and the nature and scope of States' international obligations *vis-à-vis* such rights (Section B). This paper proceeds with an overview of the possible venues to claim a redress, moving from the international to the domestic level (Section C). The piece starts by considering the case law of international committees and the ECtHR, then it turns to the approaches adopted by the ECJ in light of the involvement of several EU institutions in various phases of the assistance programs (Section D). Lastly, this investigation explores the role played by the national courts of borrowing Eurozone States (Section E) and argues that declarations of unconstitutionality with limited temporal scope represent adequate redress measures and that domestic constitutional Courts should rely more on treaty-based ES rights when striking out national laws imposing austerity measures (Section F). The closing section concludes with final considerations (Section G).

The research question underpinning this investigation is whether one (or more) of the above-mentioned judicial venues indicated adequate remedies of violations of socio-economic rights. In case of a negative response, whether

financial obligations of States on the fullenjoyment of human rights, particularly economic, social and cultural rights, UN Doc A/HRC/40/57, 19 December 2018.

5 For an overview of the documents supporting such violations, see e.g., J. P. Bohoslavsky & F. C. Ebert, 'Debt Crises, Economic Adjustment and Labour Standards', in I. Bantekas & C. Lumina (eds), *Sovereign Debt and Human Rights* (2018), 284. Another critical issue is the balance of powers between States and the other actor(s) involved in the assistance program, since the conditionality attached to the rescue packages could result in a restriction of the borrowing Country's fiscal and economic sovereignty, see Tuori & Tuori, *supra* note 2, 188-192; M. Ioannidis, 'EU Financial Assistance Conditionality after "Two Pack"', 74 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2014) 1, 61, 91-100.

6 The term 'remedy' identifies "[…] the substance of relief as well as the procedures through which relief may be obtained". The present paper refers to the first notion. See D. Shelton, *Remedies in International Human Rights Law*, 3rd ed. (2015), 17 [Shelton, Remedies].

international and European complaint mechanisms could (or should) have adopted different adjudicative approaches, and specifically a stronger human rights-oriented attitude with the view of enhancing the effectiveness of socio-economic rights enshrined in human rights treaties.

A last preliminary remark on the scope of the present paper is needed. The article is limited to the austerity-driven litigation concerning Greece, Portugal, Spain and – to a lesser extent – Cyprus. Although Ireland received aid as well, the Irish bailout was not challenged before the relevant bodies or Courts and, hence, there is a lack of relevant practice.[7] Regarding Cyprus, austerity measures were not contested at the international level, but the bail-in of its major banks was addressed by the ECJ, as reported in Section C below. At the national level, the Cypriot Supreme Court issued two judgments on reductions of salaries and pensions, but this article does not deal with these rulings since they do not constitute enough practice to identify a trend.[8]

7 For the reasons underpinning the lack of constitutional case-law on austerity policies adopted in Ireland, see C. Kilpatrick, 'Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry', in T. Beukers, B. De Witte & C. Kilpatrick (eds), *Constitutional Change Through Euro-Crisis Law* (2017), 279, 283 [Kilpatrick, Constitutions]; G. Barucchello & Á. Þór Arnason, 'Europe's Constitutional Law in Times of Crisis: A Human Rights Perspective', 10 *Nordicum-Mediterraneum* (2016) 3, 1, 15.

8 Supreme Court of Cyprus, *Giorgos Charalambous et al. v. The Republic of Cyprus*, Joined Cases Nos. 1480-4/2011, 1591/2011, 1625/2011, Judgment of 11 June 2014, ECLI:CY:AD:2014:C388; Supreme Court of Cyprus, *Maria Koutselini-Ioannidou et al. v. The Republic of Cyprus*, Joined Cases Nos. 740/11 *et al.*, Judgment of 7 October 2014, ECLI:CY:AD:2014:C388. The first judgment declared the cuts of salaries and pensions (Law No. 112(I) of 2011) in compliance with the principle of equality as enshrined in the Cypriot constitution. The second judgment declared the cuts of salaries of civil servants (Law 88(I) of 2011) in violation of the Cypriot constitution and the *Additional Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, Art. 1 (Protection of property), ETS No. 9 [Add. Prot. 1 ECHR]. On these judgments, see e.g. C. Demetriou, 'The impact of the crisis on fundamental rights across Member States of the EU: Country Report on Cyprus', Study for the LIBE Committee (2015), PE 510.017, 66-67; C. Kombos & S. Laulhé Shaelou, 'The Cypriot Constitution Under the Impact of EU Law: An Asymmetrical Formation', in A. Albi & S. Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law: National Reports* (2019), 1373, 1396-1397.

B. The Impact of Austerity Measures on Socio-Economic Rights and the Notion of "Adequate Remedy"

To solve the Eurozone sovereign debt crisis, European States have concluded macroeconomic adjustment programs. The first financial assistance granted to Greece in 2010 (the so-called *Greek Loan Facility*) was a joint package of economic aid: i) provided through bilateral loans between Greece and the other euro-area member States which were reiterated in a Memorandum of Understanding (MoU) signed by the European Commission on behalf of the creditor Countries; ii) funded through a stand-by agreement between Greece and the International Monetary Fund (IMF).[9] Subsequently, a EU Council regulation established the European Financial Stability Mechanism to assist European States in the economic crisis. This instrument falling within the EU regime is no longer in force.[10] Lastly, rescue packages were provided by intergovernmental funds,[11] namely the European Financial Stability Facility, a private company whose shareholders are the euro-area States,[12] and the European Stability Mechanism (ESM), an international organization established by Eurozone Countries through a treaty.[13]

9 For an overview of the several and rather unique legal basis of this rescue package, see J.-V. Louis, 'Guest Editorial: The no-bailout clause and rescue packages', 47 *Common Market Law Review* (2010) 4, 971, 972; Tuori & Tuori, *supra* note 2, 90.

10 Council Regulation 407/2010, OJ 2010 L 118/1, which recalls Article 122(2) TFEU as the legal basis for the establishment of the EFSM, 1, para. 1 [EFSM Council Regulation]. For an overview of the doctrinal debate concerning the legitimacy of the ESFM constitution and its compatibility with the *no bail-out clause* under Article 125 TFEU, see among other, Louis, *supra* note 9, 981-986; Tuori & Tuori, *supra* note 2, 136-146.

11 The wording *rescue package* commonly refers to the set of different lending instruments that financial institutions could grant to States facing economic distress. This phrasing is used also with regard to the aid agreed towards Eurozone States, see e.g. Louis, *supra* note 9, 971.

12 *EFSF Framework Agreement (as amended with effect from the Effective Date of the Amendments)*, available at https://www.esm.europa.eu/sites/default/files/20111019_efsf_framework_agreement_en.pdf (last visited 9 March 2021); See B. Ryvkin, 'Saving the Euro: Tensions with European Treaty Law in the European Union's Efforts to Protect the Common Currency', 45 *Cornell International Law Journal* (2012) 1, 227, 230-235, 240-245.

13 *Treaty establishing the European Stability Mechanism*, 2 February 2012, T/ESM 2012-LT/en [ESM Treaty]. On the issue of whether the establishment of the ESM was compatible with EU law, see *Thomas Pringle v. Government of Ireland and Others*, Case No. C-370/12, Judgment of 27 November 2012, [2012] ECLI:EU:C:2012:756 [Pringle Case]. For the

Although these instruments diverge from each other on a number of aspects, they share common features.[14] For the purpose of the present paper, two of those shared characteristics are particularly relevant. Firstly, each mechanism (except the European Financial Stability Mechanism) presents a *hybrid nature*: despite being framed under international law, they are tied to the EU legal regime.[15] In particular, the reference is to the role played by the European Commission and the European Central Bank (ECB) in the assessment of the requirements to accord loans, in the negotiation and signature of the MoU, and in monitoring compliance of the national policies with the conditionality attached to the MoU.[16]

The second common feature is the two-fold legal basis underpinning conditionality measures, a characteristic that stems from the hybrid nature of such tools. The first legal basis of the loans is a MoU signed by the lender and the borrowing State. This is an international legal instrument that details the conditions attached to the assistance facility.[17] The second legal basis lies within the EU framework. Since the first rescue package to Greece in 2010, the most important elements of the borrower-lender agreements have been reiterated in EU Council decisions addressed to the recipient State. These unilateral, legally binding acts represent the vehicle through which the fiscal consolidation programs set forth in the MoUs fall under the scope of EU secondary law.[18]

doctrinal debate, see, among others, V. Borger, 'The ESM and the European Court's Predicament in Pringle', 14 *German Law Journal* (2013) 1, 113.

14 Tuori & Tuori, *supra* note 2, 97-101.

15 A. Dimopoulos, 'The Use of International Law as a Tool for Enhancing Governance in the Eurozone and its Impact on EU Institutional Integrity', in M. Adams, F. Fabbrini & P. Larouche (eds), *The Constitutionalization of European Budgetary Constraint* (2014), 41; Ioannidis, *supra* note 5, 64-65; A. Poulou, 'Financial Assistance Conditionality and Human Rights Protection: What is the Role of the EU Charter of Fundamental Rights?', 54 *Common Market Law Review* (2017) 4, 991, 995-1003 [Poulou, Financial Assistance].

16 Louis, *supra* note 9, 972-974; Tuori & Tuori, *supra* note 2, 90-97; Ioannidis, *supra* note 5, 70-89; A. Poulou, 'Austerity and European Social Rights: How Can Courts Protect Europe's Lost Generation?', 15 *German Law Journal* (2014) 6, 1145, 1156-1159 [Poulou, Austerity].

17 Louis, *supra* note 9, 972; Tuori & Tuori, *supra* note 2, 90; Ioannidis, *supra* note 5, 72.

18 Ioannidis, *supra* note 5, 89, 93-94; P. Dermine, 'The End of Impunity? The Legal Duties of "Borrowed" EU Institutions under the European Stability Mechanism Framework', 13 *European Constitutional Law Review* (2017) 2, 369, 378-381. See also *Konstantinos Mallis and Others v. European Commission and European Central Bank (ECB)*, Joined Cases Nos. C-105/15 P to C-109/15 P, Opinion of AG Wathelet delivered on 21 April 2016, [2016] ECLI:EU:C:2016:294, para. 85 [Konstantinos Mallis and Others v. European Commission and European Central Bank (ECB): Opinion of AG Wathelet].

As broadly documented, the macroeconomic adjustment programmes that were meant to solve the Eurozone sovereign debt crisis aggravated the negative impact on the enjoyment of socio-economic rights.[19] Remarkably, such policies created tensions with two main States' obligations in this field. The first is the *positive* obligation to achieve the progressive realization of socio-economic rights by taking appropriate measures to the maximum of their available resources.[20] Such means encompass also judicial remedies.[21] The second is a *negative*

19 On the violation of socio-economic rights as a result of domestic implementation of austerity measures, see among others: Poulou, 'Austerity', *supra* note 16, 1154-1169; M. E. Salomon, 'Of Austerity, Human Rights and International Institutions', 21 *European Law Journal* (2015) 4, 521; L. Ginsborg, 'The impact of the economic crisis on human rights in Europe and the accountability of international institutions', 1 *Global Campus Human Rights Journal* (2017) 1, 97, 101-103; Bohoslavsky & Ebert, *supra* note 5, 284.

20 Art. 2 (1) ICESCR, as interpreted by the CESCR, *Report on the Fifth Session, Annex III: General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, UN Doc E/1991/23, 26 November-14 December 1990, 83 [CESCR, General Comment No. 3]; *Convention on the Rights of the Child*, 20 November 1989, Art. 4, 1577 UNTS 3, 46; *Convention on the Rights of Persons with Disabilities*, 13 December 2006, Art. 4 (2), 2515 UNTS 3, 74; *American Convention on Human Rights*, 22 November 1969, Art. 26, 1144 UNTS 123, 152 [ACHR]; *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador")*, 17 November 1988, OAS Treaty Series No. 69; *African Charter on the Rights and Welfare of the Child*, 11 July 1990, Art. 11(2), Art. 13(3), OAU Doc CAB/LEG/24.9/49 (1990). See also International Labour Organization (ILO), *Recommendation concerning National Floors of Social Protection*, 14 June 2012, R202; *European Social Charter*, 18 October 1961, Art. 3(3) and Art. 12(3), ETS No. 35; European Committee of Social Rights, *International Association Autism-Europe v. France*, Complaint No. 13/2002, Decision of 4 November 2003, 17, para. 53; European Committee of Social Rights, *Fédération internationale des Ligues des Droits de l'Homme (FIDH) v. Belgium*, Complaint No. 75/2012, Decision of 18 March 2013, 31, para. 145.
A wealth of literature addressed the obligation to progressively realize ES rights in light of the pronouncements of international human rights bodies and the judgments of national courts. See among others e.g., P. Alston & G. Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', 9 *Human Rights Quarterly* (1987) 2, 156; S. Skogly, 'The Requirement of Using the 'Maximum of Available Resources' for Human Rights Realization: A Question of Quality as Well as Quantity?', 12 *Human Rights Law Review* (2012) 3, 393; R. Uprimny *et al.*, 'Bridging the Gap. The Evolving Doctrine on ESCR and 'Maximum Available Resources'', in K. G. Young (ed.), *The Future of Economic and Social Rights* (2019), 624.

21 CESCR, *General Comment No. 3*, *supra* note 20, 85, para. 7; CESCR, *An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant*, UN Doc E/C.12/2007/1, 21 September 2007, 1, para. 3 [CESCR, An Evaluation]; CESCR, *General Comment No. 23 (2016) on the right to just and favorable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural*

obligation, namely the prohibition of *unjustified* retrogressive measures: a State must not lower the existing level of protection of ES rights, unless it proves the existence of strong reason(s) underpinning such decision (e.g. the consolidation of public finances in time of economic hardship) and that it has chosen the least harmful options to address the situation.[22] Moreover, even if States may

Rights), UN Doc E/C.12/GC/23, 27 April 2016, 14, para. 50 [CESCR, General Comment No. 23]. For the literature, see above all, Shelton, *Remedies*, *supra* note 6, 100.

22 CESCR, *General Comment No. 14 (2000): The right to the highest attainable standard of health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/2000/4, 11 August 2000, 9, 11, paras 32, 37; CESCR, *General Comment No. 18: The Right to Work (Art. 6 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/GC/18, 6 February 2006, 7, para. 21; CESCR, *General Comment No. 19: The right to social security (Art. 9 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/GC/19, 4 February 2008, 13, 15 paras 42, 54; CESCR, *General Comment No. 23*, *supra* note 21, 15, para. 52; CESCR, *An Evaluation*, *supra* note 21, 3, para. 9; Chairperson of the CESCR, *Letter Dated 16 May 2012 addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights*, ESCR/48th/SP/MAB/SW, 16 May 2012 [CESCR, Letter to States Parties dated 16 May 2012]; Economic and Social Council, *Report of the United Nations High Commissioner for Human Rights*, UN Doc E/2013/82, 7 May 2013, 6-7, 13, paras 15-21, 52; CESCR, *Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights: Statement by the Committee on Economic, Social and Cultural Rights*, UN Doc E/C.12/2016/1, 22 July 2016, 2, para. 4; Human Rights Council, *Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights*, UN Doc A/HRC/34/57, 27 December 2016, 9, para. 22. See also ILO, *365th Report of the Committee on Freedom of Association: Case No. 2820 (Greece): Reports in which the Committee requests to be kept informed of developments*, GB.316/INS/9/1, 1-16 November 2012, 223, 269, para. 990 [ILO, 365th Report on Greece]; ILO, *371st Report of the Committee on Freedom of Association: Case No. 2947 (Spain): Report in which the Committee requests to be kept informed of developments*, GB.320/INS/12, 13-27 March 2014, 84, 122, para. 464 [ILO, 371st Report on Spain]; ILO, *376th Report of the Committee on Freedom of Association: Case No 3072 (Portugal): Report in which the Committee requests to be kept informed of developments*, GB.325/INS/12, 29 October-12 November 2015, 223, 231, 233, paras 917, 923 [ILO, 376th Report on Portugal].

A wealth of literature addressed the prohibition of retrogressive measures in light of the pronouncements of international human rights bodies and the judgments of national courts. See among others e.g., M. S. Carmona, 'Alternatives to austerity: a human rights framework for economic recovery', in A. Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (2014), 23, 26-27; A. Nolan, N. J. Lusiani & C. Curtis, 'Two steps forward, no steps back? Evolving criteria on the prohibition of retrogression in economic and social rights', in A. Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis*, 121; Uprimny *et al.*, *supra* note 20, 630-634.

realize ES rights progressively, they must take immediate actions to ensure the satisfaction of, at the very least, essential levels of socio-economic rights.[23] This minimum core obligation stands irrespective of the resources available to States, which implies that (justified) retrogressive measures cannot undermine the access to basic levels of ES rights.[24]

A sample of the harmful consequences of austerity policies *vis-à-vis* socio-economic rights is the cutting of the minimum wage enacted in Greece which, on the basis of the commitments taken with the lenders, had reduced the minimum salaries of employees under 25 years of age to below the poverty level – a measure conflicting with the right of young workers to fair remuneration.[25] In Spain, in order to enhance the viability of the national health care system, a decree law curtailed the rights of immigrants in an irregular situation to have access to public health services,[26] a policy that frustrated the principle of universal health care and represented a retrogression compared to the previous regime.[27]

Victims of such violations faced serious difficulties in the identification of venues for obtaining adequate redress, not least due to the intricate web of duty-bearers and instruments establishing obligations upon them.[28] Among others, the subjects upon which the human rights regime establishes obligations are

23 See e.g., I. Leijten, *Core Socio-Economic Rights and the European Court of Human Rights* (2018), 146-150 [Leijten, Core Socio-Economic Rights].

24 See e.g., CESCR, *Letter to States Parties dated 16 May 2012*, *supra* note 22.

25 ILO, *Report on the High-Level Mission to Greece*, 19-23 September 2011, 59, 60, paras 309, 311, 312; *General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*, ECSR Complaint No. 66/2011, Decision of 23 May 2012, 16-17, paras 60-65 [ADEDY v. Greece].

26 Real Decreto-ley 16/2012, de 20 de abril, de medidas urgentes para garantizar la sostenibilidad del Sistema Nacional de Salud y mejorar la calidad y seguridad de sus prestaciones, BOE núm. 98, de 24 abril de 2012 (Royal Decree-Law 16/2012 on urgent measures to guarantee the sustainability of the National Health System and improve the quality and safety of its services, 20 April 2012) [Real Decreto-ley 16/2012].

27 CESCR, *Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant: Concluding observations of the Committee on Economic, Social and Cultural Rights: Spain*, UN Doc E/C.12/ESP/CO/5, 6 June 2012, 5, para. 19 [CESCR, Concluding observation on Spain].

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

borrowing States[29] and EU institutions (the Commission, the ECB, and the Council). As for the sources of obligations, Eurozone States are bound to respect ES rights set forth in the International Covenant on Economic, Social and Cultural Rights (ICESCR), a number of International Labour Organization (ILO) Conventions,[30] and the European Social Charter. Moreover, these Countries must comply with the (few) socio-economic rights protected under the European Convention on Human Rights (ECHR),[31] as well as with the Charter of Fundamental Rights of the European Union (CFREU) – if certain conditions are met.[32] Moreover, States' organs must also act in accordance with the socio-economic rights enshrined in their constitutions if those contain a bill of rights. Turning to the EU institutions and bodies, the Commission, the ECB, the Council, and the European Financial Stability Mechanism must act in accordance with the provisions of the CFREU.

In light of this variety of duty-bearers, plaintiffs initiated proceedings against borrowing States and the EU. Cases were referred to international judicial and quasi-judicial organs as well as the ECtHR, the ECJ, and national courts and tribunals. In order to assess whether these mechanisms could (and whether they did) ensure appropriate remedies to the victims, it is necessary to identify which are the main characteristics of an *adequate* redress in the context of sovereign debt crises.

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

30 The ILO's Governing Body identified eight of these Conventions as "fundamental", and structural labor reforms introduced by Portugal, Spain and Greece have contrasted with five of them – namely, ILO, *Freedom of Association and Protection of the Right to Organise Convention*, 9 July 1948, C87; ILO, *Right to Organise and Collective Bargaining Convention*, 1 July 1949, C98; ILO, *Convention Concerning Minimum Wage Fixing with Special Reference to Developing Countries*, 22 June 1970, C131; ILO, *Convention Concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service*, 27 June 1978, C151; ILO, *Convention Concerning the Promotion of Collective Bargaining*, 19 June 1981, C154.

31 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 222 (amended by the provisions of Protocol Nos. 11, 14 and 16) [ECHR].

32 *Charter of Fundamental Rights of the European Union*, 26 October 2012, OJ 2012/C 326/02 [CFREU]. On the CFREU see e.g., N. Lazzerini, *La Carta dei diritti fondamentali dell'Unione europea. I limiti di applicazione* (2018).

The adequacy of a remedy depends on the nature of the violation and on the manner of the infringement, which varies according to the (class of) right(s) at stake.[33] Two elements are crucial in understanding which could be the most adequate form of relief in case of violation of socio-economic rights: i) the main features of such rights, and ii) the nature and scope of States' obligations on ES rights under international law.

Concerning the former aspect, socio-economic rights have three specific characteristics. Firstly, this category encompasses labor and employment rights, alongside rights traditionally associated with the concept of welfare State – such as the right to housing, to education, to health, and to social security.[34] Secondly, ES rights are individual entitlements with a *collective* (or *social*) dimension.[35] The effective and practical enjoyment of these rights mostly relies on the *allocation* of resources and on labor market legislation. States' policies in these two fields are usually addressed to specific sections of the population (e.g., reduction of public servants' wage), or to its entirety (e.g., cutting of the resources allocated to the national health system). Therefore, rights-holders suffer from the lowering of the levels of protection both individually and collectively – i.e., as members of the group targeted by the national policy. Thirdly, the implementation of several socio-economic rights heavily depends on the *availability* of economic resources – hence, their realization could differ from State to State, as well as over time, according to budgetary constraints.

This last feature is strictly connected to the nature and scope of States' obligations on ES rights under international law,[36] namely the above-mentioned positive obligation to achieve the progressive realization of socio-economic rights

33 Shelton, *Remedies*, *supra* note 6, 377-378, 383; L. Hennebel & H. Tigroudja, *Traité de droit international des droits de l'homme* (2018), 508-509.

34 OHCHR, *Fact Sheet No. 33: Frequently Asked Questions on Economic, Social and Cultural Rights*, December 2008, 1-3; C. Kilpatrick & B. De Witte, 'A Comparative Framing of Fundamental Rights Challenges to Social Crisis Measures in the Eurozone', *European Policy Analysis* (2014) 7 [Kilpatrick & De Witte, A Comparative Framing].

35 F. Atria, 'Social Rights, Social Contract, Socialism', 24 *Social & Legal Studies* (2015) 4, 598; E. Christodoulidis & M. Goldoni, 'The Political Economy of European Social Rights', in S. Civatese Matteucci & S. Halliday (eds), *Social Rights in Europe in an Age of Austerity* (2017), 239, 243; K. Pavlidou, 'Social Rights in the Greek Austerity Crisis: Reframing Constitutional Pluralism', 10 *Italian Journal of Public Law* (2018) 2, 287, 290, 291, 315.

36 For an overview see e.g., M. Ssenyonjo, 'Reflections on State obligations with respect to economic, social and cultural rights in international human rights law', 15 *The International Journal of Human Rights* (2011) 6, 969; M. S. Carmona, *supra* note 22, 23.

and the negative obligation to refrain from adopting unjustified retrogressive measures. In view of this, breaches of socio-economic rights often require structural remedies: a redress for violations of socio-economic rights could be deemed "adequate" if it benefits *all* the victims, thus meeting the *collective* dimension of ES rights. The only way to reach this result is for the remedy to address the general cause(s) of the infringement, rather than providing individual reparations.[37] At the same time, the remedy should preserve the State's economic soundness: an opposite outcome will potentially worsen its balance of payment problems and, ultimately, will hinder the State's capacity to progressively realize socio-economic rights – or even its ability to ensure their minimum core.[38]

In the context of sovereign debt crises such as the one faced by Eurozone States, an adequate redress could be the removal of domestic austerity measures, instead of awarding monetary compensation to the parties of crisis-related litigations. This outcome could be achieved through legislative or judicial means. Regarding the former, decisions and judgments of supervisory bodies at the international and EU level could trigger the amending process of the contested policy.[39] Such changes result in advantages towards *all* the victims and do not imply payment of losses by the State – *viz.* they meet the *collective* dimension of socio-economic rights and preserve States' economic soundness. Concerning the latter, declarations of unconstitutionality without retroactive effects entail the removal of austerity measures to the benefit of *each and every* right-holder, hence fulfilling the *social* dimension of ES safeguards, while the restriction of the temporal scope of the rulings prevents a (further) decrease of States' (already scarce) economic resources.[40] When deciding on the legitimacy of austerity measures, national constitutional courts should rely also on treaty-based socio-economic rights in order to ensure that the forum State acts in conformity with

37 D. Shelton, 'Remedies and Reparation', in M. Langford *et al.* (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (2013), 367, 380; D. Bilchitz, 'Socio-economic rights, economic crisis, and legal doctrine', 12 *International Journal of Constitutional Law* (2014) 3, 710, 717.

38 See e.g., *ADEDY v. Greece*, *supra* note 25, 13, para. 47.

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

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

its international obligations. The duty of securing compliance with international law stands regardless of the way in which the specific State systems adapts to international law, i.e., irrespective of whether the State embraces a (mainly) monistic or dualistic approach,[41] or the specific manners of incorporation of international conventions[42] – as Section F below further clarifies.

In light of the above, the following sections address whether international committees, the ECJ, and national courts provided meaningful contributions in redressing violations of socio-economic rights occurring in the context of the Eurozone sovereign debt crisis.

C. Redress at the International Level

The budgetary constraints introduced to reduce public expenditure were challenged before the UN Committee on Economic, Social and Cultural Rights

41 See e.g., J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (2012), 48: "Dualism emphasizes the distinct and independent character of the international and national legal systems. […] Neither legal order has the power to create or alter rules of the other. When an international law rule applies, this is because a rule of the national legal system so provides. In the case of a conflict between international law and national law, the dualist would assume that a national court would apply national law, or at least that it is for the national system to decide which rule is to prevail. Monism postulates that national and international law form one single legal order, or at least a number of interlocking orders which should be presumed to be coherent and consistent. On that basis, international law can be applied directly within the national legal order". See also M. N. Shaw, *International Law*, 8th ed. (2018), 97-100.

42 Luigi Condorelli, *Il giudice italiano e i trattati internazionali: gli accordi self-executinge non self-executing nell'ottica della giurisprudenza* (1974), 29-32; B. Conforti & A. Labella, *An Introduction to International Law* (2012), 7 [Conforti & Labella, An Introduction]; R. Baratta, 'L'effetto diretto delle disposizioni internazionali self-executing', in G. Palmisano (ed.), *Il diritto internazionale ed europeo nei giudizi interni. 24° Convegno SIDI (Roma, 5-6 Giugno 2019)* (2020), 75, 76-79; Y. Iwasawa, 'Domestic Application of International Law', 378 *Collected Courses of The Hague Academy of International Law* (2015), 9, 23-25. Iwasawa distinguishes three systems of incorporation: i) automatic incorporation; ii) by law of approval; iii) individual incorporation.

(CESCR),[43] the ILO Committee on Freedom of Association (ILO CFA),[44] the European Committee on Social Rights (ECSR),[45] and the European Court of Human Rights (ECtHR). However, these judicial and quasi-judicial bodies proved to be rather ineffective when called upon to provide redress measures, albeit for different reasons.

At the universal level, the CESCR adopted two views finding Spain in violation of the right to adequate housing pursuant to Article 11(1) ICESCR.

43 The CESCR was established under ECOSOC Res. 17, 28 May 1985. Among other tasks, the CESCR has the competence to examine individual communications under the *Optional Protocol to the ICESCR*, GA Res. 63/117, UN Doc A/RES/63/117, 5 March 2009 [Op-Prot. to the ICESCR]. The outcome of the individual complain procedure is a (formally) non-binding view. On the Op-Prot. ICESCR see e.g. Hennebel & Tigroudja, *supra* note 33, 287-288; E. Riedel, G. Giacca & C. Golay, 'The Development of Economic, Social and Cultural Rights in International Law', in E. Riedel, G. Giacca & C. Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (2014), 3, 28-35; D. Russo, 'Il Protocollo Facoltativo al Patto Internazionale sui Diritti Economici, Sociali e Culturali: verso un allineamento dei sistemi procedurali di tutela dei diritti umani', 1 *Osservatiorio sulle Fonti* (2015) 1; M. Langford *et al.* (eds), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (2016).

44 The ILO Committee on Freedom of Association was established in 1951 by the Governing Body of the ILO. Its mandate is to examine alleged infringements of the principles of freedom of association and the right to collective bargaining regardless of whether or not the State concerned has ratified the relevant ILO Conventions. The outcome of the procedure is a (formally) non-binding report. On the ILO Committee on Freedom of Association see e.g., ILO, *Freedom of Association-Compilation of decisions of the Committee on Freedom of Association*, 6th ed. (2018), 5-15.

45 The European Committee on Social Rights is empowered to examine collective complaints. See *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints*, 9 November 1995, ETS No. 158. The outcome of the collective complaint is a (formally) non-binding decision. On the system of collective complaint and on the amendments to the system, see e.g., R. R. Churchill & U. Khaliq, 'The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?', 15 *European Journal of International Law* (2004) 3, 417; H. Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights', 9 *Human Rights Law Review* (2009) 1, 61; Shelton, *Remedies*, *supra* note 6, 219-220; K. Lörcher, 'Legal and Judicial International Avenue: The (Revised) European Social Charter', in N. Bruun, K. Lörcher & I. Schömann I. (eds), *The Economic and Financial Crisis and Collective Labour Law in Europe* (2014), 265, 290-294; Hennebel & Tigroudja, *supra* note 33, 319-321; G. Palmisano, 'La Charte Social Révisée, vingt ans après, défis et perspective', in C. Panzera *et al.* (eds), *La Carta Sociale Europea tra universalità dei diritti ed effettività delle tutele* (2016).

In the *I.D.G.* case, the Committee concluded for the infringement due to the mortgage enforcement process at the national level, in which the plaintiff was not properly notified of the application, thus affecting her right to a defence and failing to provide her effective and appropriate judicial remedies.[46] In the *Mohamed Ben Diazia* case, the breach resulted from the eviction of a family with minor children from their home without a guarantee of alternative accommodation, as shown by the denial to each application for social housing lodged by the plaintiff for well over a decade.[47]

Still at the universal level, trade unions filed complaints before the ILO Committee on Freedom of Association. They opposed the structural labor market reforms adopted in Greece, Portugal, and Spain. Such organizations argued that the implementation of austerity measures had violated trade union and collective bargaining rights protected under several ILO Conventions. Among other complaints, the plaintiffs claimed that national legislation imposing cuts to wages (and of other allowances and benefits), which were adopted without a prior consultation of relevant trade unions, had annulled the clauses of collective agreements in force at that time. The ILO Committee released three interim reports in which it advised national governments to refrain from unilaterally modifying the content of freely concluded collective agreements, which are binding upon the parties. The ILO Committee also invited the governments to foster and strengthen social dialogue in relation to the policies taken to deal with the crisis.[48]

46 CESCR, *Communication No. 2/2014: I.D.G. v. Spain*, UN Doc E/C.12/55/D/2/2014, 13 October 2015 [I.D.G. v. Spain]. On this case, see J. C. Benito Sànchez, 'The UN Committee on Economic, Social and Cultural Rights' Decision in I.D.G. v. Spain: the right to housing and mortgage foreclosures', 2016 *European Journal of Human Rights* (2016) 3, 320.

47 CESCR, *Communication No. 5/2015: Mohamed Ben Djazia, Naouel Bellili and others v. Spain*, UN Doc E/C.12/61/D/5/2015, 21 July 2017 [Mohamed Ben Djazia, Naouel Bellili and others v. Spain].

48 ILO, *365th Report on Greece*, *supra* note 22. The complainants alleged numerous violations of trade union and collective bargaining rights protected under ILO Convention Nos. 87, 98, 151 and 154. M. Yannakourou, 'Challenging Austerity Measures Affecting Work Rights at Domestic and International Level. The Case of Greece', in Kilpatrick & De Witte, *supra* note 3 [Yannakourou, Challenging Austerity Measures]; ILO, *376th Report on Portugal*, *supra* note 22. The complainant alleges the violation of the principles of free and voluntary collective bargaining and freedom of association, enshrined in ILO Conventions Nos. 87, 98 and 151. ILO, *371st Report on Spain*, *supra* note 22. The case concerned restrictive legislation on collective bargaining and trade union leave – namely, ILO Convention Nos. 87, 98, 131 and 151.

Turning to the regional level, the European Committee on Social Rights found Greece responsible for the violation of a number of workers' rights,[49] whose establishment and maintenance is deemed as a "[…] core objective […]" of the Charter.[50] The Committee also found Greece in breach of the obligation to raise progressively the system of social security to a higher level – with specific reference to the cumulative effects produced by the reforms of the pension scheme.[51] When examining the merits of the complaints, the European Committee also assessed whether these policies may be justified under the restriction clause of the Charter, which prescribes that the rights thereby enshrined may be subject to limitations provided by law and necessary in a democratic society for the protection of – among other aims – the public interest.[52] According to the Committee, the management of the Greek balance of payment problem "[…] constitutes a pressing social need […]" and the legislative measures enacted in this context "[…] could in principle be regarded as pursuing a legitimate public interest […]".[53] However, the respondent State did not examine or consider "[…] possible alternative and less restrictive […]" means to achieve this legitimate purpose, hence the Greek reforms failed to pass the proportionality test.[54]

As for the outcome of the complaints, at the universal level both the CESCR and the ILO Committee issued general non-binding recommendations meant to provide reparation in the form of guarantees of non-repetition, i.e., with the view of preventing similar violations in the future. These remedies

49 Namely: the prohibition of discrimination in employment on ground of age; the right of just conditions of work, to reasonable notice of termination of employment, of young workers to fair remuneration, of employed persons of under 18 years of age to a minimum of four weeks' annual holiday with pay, to access apprenticeship and other training arrangements; the obligation to and the right of workers to participate in the determination and improvement of working conditions – respectively, *European Social Charter*, *supra* note 20, Art. 1(2), 2, 4(1) and (4), 7(5) and (7), 10(2) and *Additional Protocol to the European Social Charter*, 5 May 1988, Art. 3, ETS No. 128. See e.g., *ADEDY v. Greece*, *supra* note 25, 8-12, 15-19, paras 25-32, 36-41, 56-70; *Greek General Confederation of Labour (GSEE) v. Greece*, ECSR Complaint No. 111/2014, Decision of 23 March 2017, 39-40, 43-44, 52-53, 56-57, 60-61, paras 130-138, 151-160, 198-205, 216-224, 242-245 [GSEE v. Greece].

50 *ADEDY v. Greece*, *supra* note 25, 5, para. 14.

51 *European Social Charter*, *supra* note 20, Article 12(3). See e.g., *ADEDY v. Greece*, *supra* note 25, 13-14, paras 45-49.

52 *European Social Charter*, *supra* note 20, Article 31.

53 See e.g., *GSEE v. Greece*, *supra* note 49, 30, para. 91.

54 See e.g., *ibid.*, 30, para. 90-91.

included positive actions of the respondent State,[55] such as ensuring that the national legislation and its enforcement are in compliance with the obligations in question[56] and the promotion of social dialogue.[57] At the regional level, following the findings of the European Committee on Social Rights, the Committee of Ministers of the Council of Europe called on Greece to revoke the contested measures.[58]

The last venue called to decide upon the alleged contrast between national-adjustment programs and human rights is the ECtHR, which assessed whether the austerity measures implemented by Greece and Portugal were in conformity with the right to property,[59] taken alone or in conjunction with the prohibition of discrimination.[60] The Court declared either the applications inadmissible[61] or the measures under review to be in compliance with the ECHR.[62] The judges grounded these decisions on the principle of subsidiarity[63] and on the doctrine

55 B. Çali, 'Enforcement', in M. Langford *et al.* (eds), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (2016), 363 [Çali, Enforcement].

56 *I.D.G. v. Spain*, *supra* note 46, 16, para. 17; *Mohamed Ben Djazia, Naouel Bellili and others v. Spain*, *supra* note 47, 15, para. 21.

57 ILO, *365th Report on Greece*, *supra* note 22, 273-274, para. 1003; ILO, *376th Report on Portugal*, *supra* note 22, 234-235, para. 927; ILO, *371st Report on Spain*, *supra* note 22, para. 465.

58 See e.g., Council of Europe: Committee of Ministers, *General Federation of employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) against Greece*, *Complaint No. 65/2011*, Resolution CM/ResChS (2013)2, 5 February 2013, para. 3.

59 Add. Prot. 1 ECHR, *supra* note 8, Article 1.

60 ECHR, *supra* note 31, Article 14.

61 See e.g., *Koufaki and ADEDY v. Greece*, ECtHR Application Nos. 57665/12 and 57657/12, Decision of 7 May 2013 [Koufaki and ADEDY v. Greece]; *De Conceição Mateus and Santos Januario v. Portugal*, ECtHR Application Nos. 62235/12 and 57725/12, Decision of 8 October 2013 [De Conceição Mateus and Santos Januario v. Portugal].

62 *Mamatas and Others v. Greece*, ECtHR Application Nos. 63066/14, 64297/14 and 66106/14, Judgment of 21 July 2016, concerning the exchange of Greek bonds for other debt instruments of lesser value [Mamatas and Others v. Greece]. See A. Viterbo, 'La ristrutturazione del debito sovrano greco allo scrutinio della Corte europea dei diritti umani: nessuna tutela per i piccoli investitori', 11 *Diritti umani e diritto internazionale* (2017) 1, 294.

63 On the principle of subsidiarity, see e.g., R. Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity', 14 *Human Rights Law Review* (2014) 3, 487; A. Mowbray, 'Subsidiarity and the European Convention on Human Rights', 15 *Human Rights Law Review* (2015) 2, 313.

of the margin of appreciation.[64] According to the former, national authorities are primarily responsible for safeguarding the rights set forth in the Convention, whilst the ECtHR's judicial review is subordinate to the failure in complying with such obligation.[65] The margin of appreciation doctrine is strictly linked to such principle, since the doctrine is meant to reconcile the effective protection of Convention rights and the national sovereignty of States parties to the ECHR.[66] To this end, States parties of the Convention have some room for maneuver in fulfilling the commitments stemming from the ECHR.[67] This discretion is not absolute, since it "[…] goes hand in hand […]" with the ECtHR's supervision.[68] In the context of limitations of the rights enshrined in the Convention, the ECtHR's task consists in appraising, among other grounds, the proportionality of the measure – *viz.* whether the State has struck a fair balance between the general interest underpinning the restriction and the protection of the relevant individual right.[69]

In the austerity-related cases, the judges recognized that wide discretion is granted to States when it comes to general measures of economic and social policy, specifically when the issues involve an assessment of the priorities as to

64 On the doctrine of the margin of appreciation, see e.g., Y. Shany, 'All roads lead to Strasbourg?', 9 *Journal of international dispute settlement* (2018) 2, 180; E. Benvenisti, 'The margin of appreciation, subsidiarity and global challenges to democracy', 9 *Journal of international dispute settlement* (2018) 2, 240; The margin of appreciation doctrine is taking shape also in investor-State dispute settlement mechanisms: see G. Zarra, 'Right to Regulate, Margin of Appreciation and Proportionality: Current Status in Investment Arbitration in Light of *Philip Morris v. Uruguay*', 14 *Revista de Direito Internacional* (2017) 2, 94.

65 See e.g., *S.A.S. v. France*, ECtHR Application No. 43835/11, Judgment of 1 July 2014, 51, para. 129 [S.A.S. v. France].

66 P. Mahoney, 'Marvellous Richness of Diversity or Invidious Cultural Relativism', 19 *Human Rights Law Journal* (1998) 1, 1; *Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium (merits)*, ECtHR Application Nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, Judgment of 23 July 1968, 30-31, para. 10; See also M. Delmas-Marty, *Le flou du droit: Du code pénal aux droits de l'homme* (2004), 15, according to which the margin of appreciation doctrine "[…] *tente de conjuguer l'universalisme des droits de l'homme avec le relativisme des traditions nationales.*"(emphasis added).

67 See e.g., D. Harris *et al.* (eds), *Harris, O'Boyle and Warbrick. The Law of the European Convention of Human Rights*, 2nd ed. (2018), 14-15 and the case-law thereby provided.

68 See e.g., *S.A.S. v. France*, *supra* note 65, para. 131.

69 *De Conceição Mateus and Santos Januario v. Portugal*, *supra* note 61, para. 23.

the allocation of limited budgetary resources.[70] The recognition of such a broad margin of appreciation had two consequences: first, national authorities are better placed to decide general social policies that have broad economic and financial implications for the domestic budget;[71] second, the ECtHR denied its competence on deciding "[…] whether better alternative measures could have been envisaged in order to reduce the State budget deficit […]", provided that the legislator did not exceed its margin of appreciation.[72]

The sketch of this case law shows both the advantages and the disadvantages characterizing the justiciability of socio-economic rights at the international level. As for the pros, the establishment of treaty-based bodies empowered with reviewing the respect of the instruments expressly encompassing ES rights represents a step towards obtaining adequate reparation in the event of a violation of such rights. The CESCR, the ILO Committee on Freedom of Association, and the European Committee on Social Rights recommended measures that might be potentially relevant to the *entire* (segment of the) population suffering from the contested reforms, hence they match the *collective* dimension of ES rights.[73] Plus, the treaty-bodies did not suggest the awarding of monetary compensation, which meets the need to preserve States' solvency. However, the outcomes of these Committees formally lack a binding nature and their enforceability fully relies on the defending Country's discretion and political will.[74] In this regard, the literature and the practice of monitoring bodies are slowly developing the idea that States parties to a convention should, at the very least, consider the pronouncements of the corresponding treaty bodies in good faith.[75] This notwithstanding, the current regime still struggles

70 *Koufaki and ADEDY v. Greece*, *supra* note 61, paras 31, 39; *De Conceição Mateus and Santos Januario v. Portugal*, *supra* note 61, para. 22-26; *Mamatas and Others v. Greece*, *supra* note 62, para. 88.

71 *Koufaki and ADEDY v. Greece*, *supra* note 61, 6, para. 31; *De Conceição Mateus and Santos Januario v. Portugal*, *supra* note 61, para. 22.

72 *Koufaki and ADEDY v. Greece*, *supra* note 61, 9, para. 48; *De Conceição Mateus and Santos Januario v. Portugal*, *supra* note 61, para. 28.

73 M. Langford *et al.*, 'Introduction', in M. Langford *et al.* (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (2013), 13.

74 Çali, 'Enforcement', *supra* note 55, 359, 368; R. van Alebeek & A. Nollkaemper, 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law', in H. Keller & G. Ulfstein (eds), *UN Human Rights Treaty Bodies Law and Legitimacy* (2012), 356, 382-387.

75 See e.g., International Law Association: Committee on International Human Rights Law and Practice, *Final Report on the Impact of Findings of the United Nations Human Rights*

in ensuring the *effet utile* of these provisions, i.e. their practical and effective implementation. This shortcoming characterizes also the repeals suggested in the context of the Eurozone crisis: the two views issued by the CESCR against Spain, the ILO Committee's report concerning the situation in Portugal, and all the recommendations of the Committee of Ministers of the Council of Europe towards Greece are still under the respective follow-up procedures,[76] which means that these Countries have not complied with the measures thereby attached.

Applicants could not obtain an adequate redress before the ECtHR, either – although for different reasons, since this Court's judgments are binding upon the Contracting Parties. Contrary to the findings of the Committees, the ECtHR considered all the contested measures as in compliance with the right to property under the Convention. The Court relied on the States' wide margin of appreciation in allocating limited budgetary resources, alongside its (alleged) lack of competence in deciding whether Greek and Portuguese reforms constituted illegitimate retrogressive measures.

Treaty Bodies - Report of the Seventy-first Conference, 16-21 August 2004, 5, para. 15; UN Human Rights Committee, *General Comment No. 33: Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, UN Doc CCPR/C/GC/33, 25 June 2009, 3, paras 13-15; European Commission for Democracy Through Law (Venice Commission), *Report on the implementation of international human rights treaties in domestic law and the role of courts*, CDL-AD(2014)036, 8 December 2014, 21, 31, paras 50, 78; S. Forlati,'On "Court Generated State Practice": The Interpretation of Treaties as Dialogue between International Courts and States', 20 *Austrian Review of International and European Law* (2015) 1, 99; N. Sitaropoulos, 'States are Bound to Consider the UN Human Rights Committee's Views in Good Faith' (2015), available at https://ohrh.law.ox.ac.uk/states-are-bound-to-consider-the-un-human-rights-committees-views-in-good-faith/ (last visited 9 March 2021); C. Tomuschat, 'Human Rights Committee' (2019), para. 14, available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e813?prd=EPIL (last visited 09 March 2021); D. Russo, 'I trattati sui diritti umani nell'ordinamento italiano alla luce delle sentenze n. 120 e 194 del 2018 della Corte costituzionale', 13 *Diritti umani e diritto internazionale* (2019) 1, 155.

76 CESCR, *Report on the sixty-third and sixty-fourth sessions (12–29 March 2018, 24 September–12 October 2018): Supplement No. 2*, UN Doc E/2019/22-E/C.12/2018/3, 2019, 15, para. 80; European Committee of Social Rights, 'Follow-Up to Decisions on the Merits of Collective Complaints - Findings 2018' (2018), available at https://rm.coe.int/findings-2018-on-collective-complaints/168091f0c7 (last visited 9 March 2021); The ILO CFA declared closed the cases against Greece and Spain: see ILO, *365th Report on Greece*, *supra* note 22; ILO, *Effect given to the recommendations of the committee and the Governing Body - Report No 378: Case No 2947 (Spain)*, June 2016.

Those crisis-related applications had social-security implications, so one could argue that the stance of the Court is consistent with the content of the Convention, which foremost safeguard civil and political rights – and not socio-economic rights, as the instruments supervised by the Committees.[77] Yet, the textual scope of the ECHR does not alone justify this standpoint: indeed, the previous case law of the ECtHR shows that the Court could have reached a different conclusion had the judges pushed forward the emerging – although exceptional – trend to interpret the Convention provisions in a broader manner so as to encompass also ES rights that are not expressly protected therein.[78] This approach is based on the social and economic implications of a number of civil and political rights enshrined in the ECHR,[79] as well as on the Court's well-established case law principle according to which "[…] the Convention cannot be interpreted in a vacuum […]" and the ECtHR must take into account all the other relevant rules relating to the protection of human rights[80] – which also include the ones concerning ES rights. Had the Court found a violation of the Convention, it could have required the State to implement general remedial measures addressing the underlying problem and ensuring non-repetition of the infringement (e.g. amending the existing legislation on budget allocation), rather than awarding monetary compensation in favor of the applicants.[81] In other

77 De Schutter & Dermine, 'The Two Constitutions of Europe', *supra* note 29, 133-136.

78 D. Binder & T. Schobesberger, 'The European Court of Human Rights and Social Rights – Emerging Trends in Jurisprudence', 3 *Hungarian Yearbook of International Law* (2015) 1, 51, 54; I. Leijten, 'The German Right to an *Existenziminimum*, Human Dignity, and the Possibility of a Minimum Core Socioeconomic Rights Protection', 16 *German Law Journal* (2015) 1, 23, 24-25, 35-36; Leijten, *Core Socio-Economic Rights*, *supra* note 23, 25-39.

79 See e.g., *Airey v. Ireland*, ECtHR Application No. 6289/73, Judgment of 9 October 1979, 11-13, para. 26.

80 See e.g., *Demir and Baykara v. Turkey*, ECtHR Application No. 34503/97, Judgment of 12 November 2008, 19-24, 36-38, paras 65-86, 147-154; *Correia De Matos v. Portugal*, ECtHR Application No. 56402/12, Judgment of 4 April 2018, 33, para. 134; The Court refers to the harmonizing interpretation (or systemic integration) of treaties under Article 31(3)(c) of the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331; For the potential of this provision in enhancing coherence in international law and in understating it as a legal order – hence, opposing its fragmentation – see International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission to the Fifty-Eighth Session*, UN Doc A/CN.4/L.682, 13 April 2006, 214, 235-243, paras 467-479.

81 On the different means to abide by the judgments of the ECtHR, see e.g., W. A. Schabas, *The European Convention on Human Rights: A Commentary* (2016), 868-871.

words, the Court could have indicated a remedy that matches both the collective nature of ES rights and the need to preserve States' solvency.[82] Regrettably, the Court opted not to apply such a scheme and preferred to act in self-restraint.

This survey shows the lack of an adequate remedy at the international level, due to either specific characteristics of some of the mechanisms (i.e., the non-binding nature of the Committees' outcomes) or the deferential approach adopted by others (*viz.* the ECtHR). Such flaws in ensuring the effective protection of human rights make it worth exploring whether other remedies are available. The specific features of the management of the Eurozone sovereign debt crisis allow us to consider – at least – two other routes: the ECJ and national judiciaries.

D. Redress at the EU Level

The involvement of EU organs and the use of EU law instruments in the assistance programs provided to euro-area States call into question the applicability of the CFREU, which establishes – among other entitlements – ES rights.[83] Under Article 51 CFREU, the rules of the Charter "[…] are addressed to the institutions, bodies, offices and agencies of the Union […]" and to the Member States "[…] only when they are implementing Union law".

As for the EU organs, the mechanisms meant to manage the Eurozone turmoil have involved three EU institutions, namely the European Commission, the ECB, and the Council, and one EU body, the European Financial Stability

[82] This is also confirmed by the broad consequences of the interim measures granted to families arguing the violation of their right to housing under Art. 3 and Art. 8 of the ECHR. In at least three cases, families with children requested the ECtHR to apply interim measures under Rule 39 of the Rules of the Court to obtain the suspension of forced evictions ordered by the Spanish Government without providing alternative accommodation. The Court upheld every request, each of which was eventually lifted for different reasons. Notably, following the interim measures adopted by the ECtHR, Spanish Courts have suspended evictions of families with children. See *A. M. B. v. Spain*, ECtHR Application No. 77842/12, Decision of 28 January 2014 (interim measure granted on the 12 December 2012); *Mohamed Raj and Others v. Spain*, ECtHR Application No. 3537/13, Decision 16 December 2014 (interim measure granted on 31 January 2013); *Ceesay Ceesay and Others v. Spain*, ECtHR Application No. 62688/13, Decision of 15 October 2013 (interim measure granted on 15 October 2013). On this issue, see D. Utrilla, 'Spain', in S. Civatese Matteucci & S. Halliday (eds), *Social Rights in Europe in an Age of Austerity* (2017), 98, 113.

[83] For an overview of the ES provisions of the Charter *in peril*, see Poulou, 'Austerity', *supra* note 16, 1161-1169.

Mechanism. The applicability of the Charter to the European Financial Stability Mechanism and to the Council has never been contested: the former is an EU institution and the latter is an EU body established under a specific regulation; moreover, both operate within the Union system.[84] On the contrary, the issue of whether the CFREU binds the European Commission and the ECB has been a matter of debate: specifically, their qualification as institutions notwithstanding they perform tasks assigned under international law instruments outside the EU regime. The ECJ clarified this issue by expressly ruling that "[…] the Charter is addressed to the EU institutions, including […] when they act outside the EU legal framework".[85] Even if, in that specific case, the Court focused essentially on the obligations binding the European Commission,[86] the breadth of this statement covers also the conducts of the ECB in the context of the ESM.[87]

Following the applicability of the CFREU, potential victims may resort to the ECJ to challenge the compatibility of austerity measures with the Charter by two means: the action for compensation for non-contractual liability of the EU and the action for annulment.

The end of the first proceeding is awarding *monetary compensation* to the plaintiffs of a successful action, rather than removing the contested measure from the Union's legal order.[88] The *individual* nature of such relief hampers its adequacy in redressing violations of socio-economic rights, deemed as entitlements with a *collective* nature.[89]

84 L. Fromont, 'L'application problématique de la Charte des droits fondamentaux aux mesures d'austérité: vers une immunité juridictionnelle?', *Journal européen des droits de l'homme* (2016) 4, 469, 482-483.

85 *Ledra Advertising Ltd. and Others v. European Commission and European Central Bank (ECB)*, Joined Cases Nos. C-8/15 P to C-10/15 P, Judgment of 20 September 2016, [2016] ECLI:EU:C:2016:701, para. 67 [Ledra Advertising Case].

86 *Ibid.*, paras 67, 75.

87 *Ledra Advertising Ltd. and Others v. European Commission and European Central Bank (ECB)*, Joined Cases Nos. C-8/15 P, C-9/15 P and C-10/15 P, Opinion of AG Wahl delivered on 21 April 2016, [2016] ECLI:EU:C:2016:290, para. 85; S. Vezzani, 'Sulla responsabilità extracontrattuale dell'Unione europea per violazione della Carta dei diritti fondamentali: riflessioni a margine alla senza della Corte di giustizia nel caso Ledra Advertising', 99 *Rivista di diritto internazionale* (2016) 1, 156; O. De Schutter, *The Implementation of the Charter of Fundamental Rights in the EU institutional framework: Study for the AFCO Committee* (2016), 38.

88 *Consolidated Version of the Treaty on the Functioning of the European Union*, 13 December 2007, Art. 268, Art. 340 (2) and (3), OJ C202/1 [TFEU]. See also A. Kaczorowska-Ireland, *European Union Law*, 4th ed. (2016), 511-533.

89 Atria, *supra* note 35, 598; Christodoulidis & Goldoni, *supra* note 35, 243; Pavlidou, *supra* note 35, 290, 291, 315. The ECJ also expressed its *great concern* related to the scarcity

Even assuming that making good for damages constitutes an adequate remedy for infringements of ES rights, the action for compensation proved to be ineffective in the context of the Eurozone sovereign debt crisis. Applicants introduced several proceedings challenging: i) the conducts of the European Commission and of the ECB under the ESM Treaty,[90] and ii) one of the Council decisions reproducing conditionality measures.[91] The ECJ dismissed each claim on the grounds that the contested conduct and decision did not contribute to a serious breach of the provisions of the CFREU, since the interferences in the enjoyment of the rights at stake respected the limitation clause set forth in Article 52(1) CFREU. According to this provision, restrictions must be provided by law, must genuinely meet objectives of general interest of the Union, and must be proportionate to this aim.[92]

of the Union budget. See *Evangelou v. European Commission and European Central Bank (ECB)*, Case No. T-292/13, Order of 21 September 2017, [2017] ECLI:EU:T:2017:678, para 23 [Evangelou Case, 21 September 2017]; F. Pennesi, 'The Accountability of the European Stability Mechanism and the European Monetary Fund: Who Should Answer for Conditionality Measures?', 3 *European Papers* (2018) 2, 511, 529.

90 These actions claimed the violation of the right to property (Art. 17 CFREU). See *Evangelou* Case, 21 September 2017, *supra* note 89; *Ledra Advertising* Case, *supra* note 85.

91 See *Leïmonia Sotiropoulou and Others v. Council of the European Union*, Case No. T-531/14, Judgment of 3 May 2017, [2017] ECLI:EU:T:2017:297 [Leïmonia Sotiropoulou Case]. The applicant claimed the violations of several ES rights under the CFREU, namely the right to human dignity (Art. 1), of access to social security benefits (Art. 25), and to social services (Art. 34). The applicant also claimed the violation of the principle of conferral of powers and the principle of subsidiarity (Art. 4 and 5 TEU). This complaint was dismissed as well, paras 67-74.

92 *Ledra Advertising* Case, *supra* note 85, paras 69-76; *Leïmonia Sotiropoulou* Case, *supra* note 91, paras 89-90. In this judgement the ECJ also took into account the wide margin of appreciation enjoyed by the Council and stated that it did not overstep the limits of its discretion when it adopted the contested acts (paras 77-87). In the *Evangelou* case, the ECJ declared that the applicants did not establish "[…] with the necessary certainty that the damage they claim to have suffered was actually caused by the inaction alleged against the Commission", *Evangelou v. European Commission and European Central Bank (ECB)*, Case No. T-292/13, Order of 10 November 2014, [2014] ECLI:EU:T:2014:977, para. 54 [Evangelou Case, 10 November 2014]. For a critical view on the ECJ's line of reasoning, see among others, A. Spagnolo, 'The loan of organs between international organizations as a *normative bridge*: insights from recent EU practice', 26 *Italian Yearbook of International Law* (2017) 1, 171; Pennesi, *supra* note 89; F. Costamagna, 'The Court of Justice and the Demise of the Rule of Law in the EU Economic Governance: The Case of Social Rights', Carlo Alberto Notebooks 2016/487, 22-23; A. Miglio, 'Le condizionalità di fronte alla Corte di giustizia', 11 *Diritto internazionale e diritti umani* (2017) 3, 763, 770.

Moving to the action for annulment, such a proceeding is meant to remove the contested acts from the Union's legal order.[93] In the context of the Eurozone crisis, this would result in the removal of the Council decision encompassing conditionality, which would constitute a *collective* redress since it would benefit *all* the individuals affected by austerity measures.[94] Persons affected by such policies launched two actions for annulment claiming that the Council decision adopted during the first rescue package to Greece was in violation of the CFREU. The ECJ dismissed both actions on a procedural ground: according to the Court, applicants lacked standing.[95] In particular, the plaintiffs struggled to prove that the decision had directly affected their rights and that the addressee – namely, Greece – had enjoyed no discretion in its implementation. The judges declared that the structural program encompassed in the Council decision was framed in general terms. Such vagueness left a "wide discretion" to the Greek authorities in determining the specific content of the required implementing measures, provided that the ultimate aim of reducing the Country's excessive deficit was pursued. Hence, it would have been the Greek law which would have directly affected the legal situation of the applicants and not the Council decisions at stake.[96] This last argument backed the Court's suggestion to challenge the validity of national legislation enacting austerity measures before domestic courts and, thus, triggering the referral of a question for a preliminary ruling.[97]

This case law shows that, in the context of the Eurozone crisis, the action for annulment could provide an adequate redress but its effectiveness appears theoretical rather than practical because of the adjudicative approach

93 TFEU, *supra* note 88, Art. 263. See Kaczorowska-Ireland, *supra* note 88, 467-497.

94 Persons affected by such measures launched actions for annulment against ESM-State MoUs, but the ECJ declared them inadmissible: according to the Court, ESM-State MoUs fall outside its *ratione materiae* scope, since they are acts of the ESM, i.e. external to the EU legal regime. See *Pringle* Case, *supra* note 13, para. 161; *Evangelou* Case, 10 November 2014, *supra* note 92, para. 56-60; *Ledra Advertising* Case, *supra* note 85, para. 53-54.

95 *ADEDY and Others v. Council of the European Union*, Case No. T-541/10, Order of 27 November 2012, [2012] ECLI:EU:T:2012:626, paras 56, 67 [Case No. T-541/10]; *ADEDY and Others v. Council of the European Union*, Case No. T-215/11, Order of 27 November 2012, [2012] ECLI:EU:T:2012:627, paras 59, 73-78 [Case No. T-215/11]. Albeit none of the orders explicitly referred to the CFREU, these rulings are worthy of attention due to their underpinning reasoning.

96 Case No. T-541/10, *supra* note 95, paras 70-76, 84; Case No. T-215/11, *supra* note 95, paras 81, 84, 97.

97 Case No. T-541/10, *supra* note 95, para. 90; Case No. T-215/11, *supra* note 95, para. 102.

of the ECJ.[98] Due to this drawback, it is worth examining whether the other proceeding suggested by the ECJ itself – i.e., a referral for a preliminary ruling – could (and did) grant an appropriate relief.

Besides representing an additional safeguard for persons with no *locus standi* to propose an action for annulment, the request for a preliminary ruling is a tool to indirectly control whether national law implementing conditionality violates EU law: by demanding a clarification of the meaning of EU provisions, domestic judicial organs implicitly raise the issue of whether national policies comply with the Union system.[99] Domestic courts and tribunals may request the ECJ to clarify whether specific provisions of the CFREU preclude Member States to adopt certain austerity measures on condition that the forum State was "implementing" EU law within the meaning of Article 51(1) CFREU when it enacted those policies.[100]

As suggested by the ECJ, pending crisis litigations, Portuguese tribunals referred several questions related to the interpretation of the workers' rights set forth in the CFREU. The ECJ dismissed all of them by stating that the order for reference did not contain concrete evidence that Portugal was "implementing" EU law within the meaning of Article 51(1) of the Charter while enacting the contested national reforms,[101] although those acts were executing the loan requirements enclosed in Council decisions.[102]

This stance is highly questionable for a number of reasons, among which is the inconsistency of the ECJ. Firstly, the Court did not follow the path it had set out in the above-mentioned decisions concerning actions for annulment. Secondly, the ECJ did not conform with the approach it had embraced in a

98 Another criticality of the action for annulment is its short time limits, since it shall be introduced "[…] within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be" (TFEU, *supra* note 88, Art. 263(3)). For a different opinion on the potential of annulment action, see Poulou, 'Austerity', *supra* note 16, 1172-1173; Dermine, *supra* note 18, 379-380.

99 Case No. T-541/10, *supra* note 95, para. 90 and Case No. T-215/11, *supra* note 95, para. 102.

100 For a general overview of the preliminary rulings under TFEU, *supra* note 88, Art. 267, see Kaczorowska-Ireland, *supra* note 88, 388-428.

101 See e.g. *Sindicato Nacional dos Profissionais de Seguros e Afins v. Via Directa-Companhia de Seguros SA*, Case No. C-665/13, Order of 21 October 2014, [2014] ECLI:EU:C:2014:2327, paras 11-16.

102 Kilpatrick, 'Constitutions', *supra* note 7, 311.

previous similar – although not identical – case.[103] On this occasion, the judges affirmed that the objectives set out in the relevant Council decision were "[…] sufficiently detailed and precise […]"[104] to infer that the purpose of the national law under scrutiny was to implement such act within the meaning of Article 51(1) of the Charter – consequently, the CFREU was applicable.

Notably, an indirect protection of the right to housing stemmed from the referrals of Spanish tribunals related to the interpretation of the Unfair Contract Terms Directive.[105] In one of these cases, the ECJ also declared that the Spanish mortgage enforcement proceeding contrasted with the Directive because the system did not grant equality of arms among the parties of the proceeding. This statement was also based on the principle of effective judicial protection under Article 47 of the Charter.[106] All these rulings impacted the Spanish mortgage regime, which was amended through declarations of the Supreme Court and legislative reforms.[107] These changes have a *collective* dimension, due to their wide-ranging corrective consequences which benefit not only the applicants of the domestic disputes but the entire sections of the population affected by the prior Spanish mortgage system.

The survey of this case law highlights two main aspects. Firstly, the action for compensation for non-contractual liability of the EU is inappropriate: it is a remedy of an *individual* character since its aim is awarding monetary compensation to the parties of the relevant case. Secondly, the action for annulment and the request for preliminary rulings are quite ineffective in

103 *Eugenia Florescu and Others v. Casa Județeană de Pensii Sibiu and Others*, Case No. C-258/14, Opinion of AG Bot delivered on 21 December 2016, [2016] ECLI:EU:C:2016:995, paras 65-71; *Eugenia Florescu and Others v. Casa Județeană de Pensii Sibiu and Others*, Case No. C-258/14, Judgment of 13 June 2017, [2017] ECLI:EU:C:2017:448, para. 48; *Konstantinos Mallis and Others v. European Commission and European Central Bank (ECB): Opinion of AG Wathelet*, *supra* note 18, para. 89, according to which "[…] the Council decisions thus addressed to a Member State support the view that national measures […] constitute an implementation of EU law […]".

104 *Eugenia Florescu and Others v. Casa Județeană de Pensii Sibiu and Others*, Case No. C-258/14, Judgment of 13 June 2017, [2017] ECLI:EU:C:2017:448, para. 48.

105 Council Directive 93/13/EEC, OJ 1993 L 95/29. See e.g. *Finanmadrid EFC SA v. Jesús Vicente Albán Zambrano and Others*, Case No. C-49/14, Judgment of 18 February 2016, [2016] ECLI:EU:C:2016:98.

106 *Juan Carlos Sánchez Morcillo, María del Carmen Abril García v. Banco Bilbao Vizcaya Argentaria, SA*, Case No. C-169/14, Judgment of 17 July 2014, [2014] ECLI:EU:C:2014:2099, paras 21-51.

107 M. G. Pascual, 'Welfare Rights and Euro Crisis – The Spanish Case', in Kilpatrick & De Witte, *supra* note 3.

providing an adequate remedy for victims of violations of ES rights under the CFREU, albeit their *hypothetical* feasibility in affording a redress of *collective* nature. As shown above, the most effective protection of ES rights results from proceedings related to EU secondary law which safeguard specific aspects of the Union internal market (as consumer protection provisions), rather than from referral straightforwardly based on the fundamental rights enshrined in the CFREU.[108]

E. Redress at Domestic Level

To tackle austerity measures, domestic courts had two main venues of redress: awarding monetary compensation for non-contractual liability of the borrowing State for a breach of the CFREU or declaring the unconstitutionality of austerity measures.

Applicants could propose the action for compensation if there is a direct causal link between two elements: i) a sufficiently serious breach of a provision of the Charter conferring rights on individuals and ii) the damage suffered by the injured parties.[109] States executing loan conditions are implementing EU law within the meaning of Article 51(1) CFREU, since these policies are outlined (also) in Council decisions addressed to those Countries.[110] Hence, the State beneficiary of the aid shall respect the Charter while enacting macroeconomic reforms. A Country that breaches this obligation must compensate the victims.

Domestic tribunals of Eurozone Countries receiving rescue packages have never adjudged on this issue.[111] This does not represent a missed opportunity to judicially enforce ES rights. Had courts awarded pecuniary damages to the parties of the litigations, other persons in the position of the plaintiffs could (and probably would) have sought a similar remedy. This circumstance would be at odds with the *collective* nature of the ES rights, first and foremost for the *individual* character of monetary compensation. Besides, the remedy would be paradoxical for the responsible State because it would be bound to pay a (very large) sum towards successful applicants while facing a severe debt crisis.

108 C. Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?', 10 *European Constitutional Law Review* (2014) 3, 393, 419-420.

109 For a general overview of the features of this action, see Kaczorowska-Ireland, *supra* note 88, 362-387.

110 Kilpatrick, 'Constitutions', *supra* note 7, 311.

111 See e.g. Poulou, 'Financial Assistance', *supra* note 15, 1018-1019, noticing that both Greek and Portuguese highest courts and tribunals rarely consider the EU origin of domestic austerity measures.

Turning to constitutional adjudication, the compatibility of austerity measures with national constitutions has been challenged in Spain, Portugal, and Greece.[112]

While at the international level complaints focused on the impairing of the right to housing, the Spanish courts have mostly addressed health-related issues. The majority of such cases were discussed in the frame of conflicts of competences or questions of constitutionality.[113] Specifically, the Spanish government is empowered to outline general economic policies, while Autonomous Communities legislate on social matters. The overlapping of these two fields resulted in most of the Spanish judgments dealing with one of these authorities either narrowing or broadening the scope of the right to health.[114]

In particular, the Spanish Constitutional Court declared unconstitutional the legislation of the Basque[115] and Valencian[116] communities which re-included irregular migrants to the public healthcare system following their exclusion under a governmental decree.[117] According to the Court, both the communities exceeded their competences by extending the standard of health protection to

112 C. Fasone, 'Constitutional Courts Facing the Euro Crisis. Italy, Portugal and Spain in a Comparative Perspective', EUI Working Paper MWP 2014/25, 8-10; Kilpatrick, 'Constitutions', *supra* note 7, 309-310. For the reasons underpinning the lack of constitutional case-law on austerity policies adopted in Ireland and Cyprus, see *ibid*., 284; Barucchello & Þór Arnason, *supra* note 7, 15.

113 The Spanish system is based on a centralized model of constitutional review (Art. 159 Spanish Constitution). The *recurso de amparo* (Art. 53(2) Spanish Constitution) is not available to challenge the violation of the social rights enshrined in the constitution – with some exception.

114 The Supreme Constitutional Court was also called upon to decide a question of constitutionality referred by an ordinary tribunal pending the main proceeding. The Court declared it inadmissible on procedural grounds: see M. G. Pascual, 'Constitutional Courts before Euro-crisis law in Portugal and Spain: A Comparative Prospect', 4 *e-Pública* (2017) 1, 110 [Pascual, Constitutional Courts].

115 Decreto del Gobierno Vasco 114/2012, de 26 de junio, sobre régimen de las prestaciones sanitarias del Sistema Nacional de Salud en el ámbito de la Comunidad Autónoma de Euskadi, BOPV núm. 127, 2973 (Basque Government Decree 114/2012 on the regime of health benefits of the National Health System in the scope of the Autonomous Community of the Basque Country, 26 June 2012).

116 Decreto-ley 3/2015, de 24 de julio, del Consell de la Generalitat Valenciana, por el que se regula el acceso universal a la atención sanitaria en la Comunidad Valenciana, DOGV núm. 7581, de 29 de julio de 2015, pg. 23079-23083 (Decree-Law 3/2015 of the Consell de la Generalitat Valenciana regulating universal access to health care in the Valencian Community, 24 July 2015).

117 Real Decreto-ley 16/2012, *supra* note 26.

situations not covered by the State's basic law.[118] Yet, due to the pressure of civil society, a few months later the Spanish Government restored universal access to the national healthcare system.[119]

Quite interestingly, and contrary to the foregoing judgments, this decree explicitly refers to the prohibition of discrimination set forth in international human rights law. The statute recognizes that the exclusion of irregular migrants constituted a retrogressive measure affecting the previous legal protection scheme and a more general violation of international commitments binding upon Spain – to which this recent reform aims to give effect.[120]

In the same vein as the Spanish judiciary, the Portuguese Constitutional Court reviewed macro-adjustment programs following abstract proceedings.[121] The Court's rulings dealt with public salary cuts,[122] reforms of the public pension

118 STC 134/2017 de 16 de noviembre de 2017, BOE núm. 308, de 20 de diciembre de 2017, 125915-125954, ECLI:ES:TC:2017:134, paras 4-5; 145/2017, de 14 de diciembre de 2017, BOE núm. 15, de 17 de enero de 2018, 6881-6890, ECLI:ES:TC:2017:145, para. 2. See also STC 85/2014, de 29 de mayo de 2014, BOE núm. 153, de 24 de junio de 2014, 97-103, para. 3(d); 71/2014, de 6 de mayo de 2014, BOE núm. 135, de 4 de junio de 2014, 6-32, para. 6. In these two judgments, the Spanish Constitutional Court declared unconstitutional the regional legislation of Catalonia and Madrid, both imposing an extra-charge of one euro on medical prescription, since the citizens of the two autonomous communities would have access to basic services under more burdensome conditions compared to the citizens of the other Spanish regions.

119 Real Decreto-ley 7/2018, de 27 de julio, sobre el acceso universal al Sistema Nacional de Salud, BOE núm. 183, de 30 de julio de 2018, 76258-76264 (Royal Decree-Law 7/2018 on universal access to the National Health System, 27 July 2018).

120 *Ibid*., Preamble.

121 Constitution of the Portuguese Republic, Art. 281. The Portuguese system of constitutional review has a dual nature: each court could decide not to apply a law that they deem to be unconstitutional (Constitution of the Portuguese Republic, Art. 280), but only the Constitutional Court is empowered to remove the provision from the legal order and to model the temporal effects of its own decision (Constitution of the Portuguese Republic, Art. 282). For an overview of the constitutional case-law on austerity measures, see M. Canotilho, T. Violante & R. Lanceiro, 'Austerity measures under judicial scrutiny: the Portuguese constitutional case-law', 11 *European Constitutional Law Review* (2015) 1, 155; F. Pereira Coutinho & N. Piçarra, 'Portugal: The Impact of European Integration and the Economic Crisis on the Identity of the Constitution', in A. Albi & S. Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law: National Reports* (2019), 591, 617-621.

122 See e.g. Tribunal Constitucional de Portugal, Processo n.º 14/2014, Acórdão do Tribunal Constitucional n.º 413/2014, Diário da República n.º 121/2014, Série I de 2014-06-26, 3420.

system,[123] and workers' rights.[124] The Court's attitude has been characterized by a progressive – although not always consistent – evolution towards a rigorous approach critically labelled as judicial activism.[125] In the words of Dworkin, "judicial activism" allows courts "[…] to accept the directions of the so-called vague constitutional provisions […]"[126], including the principles of legality and equality, and to judge municipal laws according to them. These vague standards are appeals to moral concepts that guide domestic tribunals in the interpretation of the underlining provisions. The chief objection against judicial activism argues that advocates of this theory depart from strict legal authority only to achieve a desired (and moral-oriented) result.[127]

The first of this set of rulings declared the 2012 Budget Law unconstitutional since the disputed policy on workers' and pensioners' rights was not temporary and it did not allocate the public burden accordingly with the proportionality principle.[128] However, since the retroactive effects of this judgment could have endangered the State's solvency, the judges decided not to apply them retrospectively – i.e., with regard to 2012.[129] This ruling could be considered as a (unheeded) warning toward the Portuguese government: in almost all its subsequent judgments, the Constitutional Court adopted similar grounds of review and attributed retroactive effects to its declarations of unconstitutionality.[130]

123 See e.g. Tribunal Constitucional de Portugal, Processo n.º 1260/13, Acórdão do Tribunal Constitucional n.º 862/2013, Diário da República n.º 4/2014, Série I de 2014-01-07, 20.

124 See e.g. Tribunal Constitucional de Portugal, Processo n.º 531/12, Acórdão do Tribunal Constitucional n.º 602/2013, Diário da República n.º 206/2013, Série I de 2013-10-24, 6241; Processos n.os 935/13 e 962/13, Acórdão do Tribunal Constitucional n.º 794/2013, Diário da República n.º 245/2013, Série II de 2013-12-18, 36019.

125 See e.g. R. Cisotta & D. Gallo, 'Il tribunale costituzionale portoghese, i risvolti sociali delle misure di austerità ed il rispetto dei vincoli internazionali ed europei', 7 *Diritti umani e diritto internazionale* (2013) 2, 465; Fasone, *supra* note 112, 24-30; Pascual, 'Constitutional Courts', *supra* note 114, 123-125.

126 R. Dworkin, *Taking Rights Seriously* (1977), 137.

127 *Ibid*., 131-149.

128 Tribunal Constitucional de Portugal, Processo n.º 40/12, Acórdão do Tribunal Constitucional n.º 353/2012, Diário da República n.º 40/2012, Série I de 2012-07-20, 3846, 3854-3857, paras 5-6.

129 *Ibid*., para. 6.

130 Fasone, *supra* note 112, 27. See e.g. Tribunal Constitucional de Portugal, Processos n.os 2/2013, 5/2013, 8/2013 e 11/2013, Acórdão do Tribunal Constitucional n.º 187/2013, Diário da República n.º 78/2013, Série I de 2013-04-22, 2328, 2377, para. 61, which also referred to the ECtHR case-law on the right to property under Art. 1, Add. Prot. 1 ECHR, *supra* note 8; Processo n.º 531/12, Acórdão do Tribunal Constitucional n.º

More in detail, the Portuguese Constitutional Court based its conclusions on the violation of the principles of proportional equality ensuring the fair and equitable repartition of public burdens through the fiscal system. The Court also drew upon the protection of legitimate expectations – this last one considered strictly connected to the principle of legal certainty. Among these judgments, only one was based on the breach of a labor right enshrined in the Constitution.[131]

The several declarations of unconstitutionality led to the renegotiation of loan conditions.[132] Further, due to the evolution of the Court's approach, the Portuguese government has tried to mitigate the risks to the State's balance of payments caused by the retrospective effects of similar rulings: the lawmaker executed austerity measures through general legislative acts, whose constitutionality could be reviewed *before* their entry into force, thus "[…] allowing [the] early reaction on the part of the government […]".[133]

Moving to Greece, its diffuse system of constitutional review resulted in a rather multifaceted case law on austerity measures. Both lower and higher courts decided upon incidental and concrete requests of constitutional legitimacy.[134] Lower courts contributed significantly to the protection of labor and workers' rights by providing interim measures prohibiting the application of the contested

602/2013, *supra* note 124. Only two rulings upheld the constitutionality of the contested legislation: Processos n.os 935/13 e 962/13, Acórdão do Tribunal Constitucional núm. 794/2013, *supra* note 124; Acórdão do Tribunal Constitucional núm. 572/2014, Diário da República n.° 160/2014, Série II de 2014-08-21, Série II de 2014-08-21, 21763.

131 See Tribunal Constitucional de Portugal, Processo n.° 531/12, *supra* note 124, paras 29-34, which declared that some of the disputed provisions violated the right to job security (Constitution of the Portuguese Republic, Article 53).

132 A. Baraggia, 'Conditionality Measures in the Euro Area Crisis: A Challenge to the Democratic Principle?', 4 *Cambridge Journal of International and Comparative Law* (2015) 2, 268, 285-286.

133 International Monetary Fund, 'Portugal: Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding' (2013), 7, para. 9, available at https://www.imf.org/external/np/loi/2013/prt/061213.pdf (last visited 9 March 2021).

134 Greece adopted a diffuse system of constitutionality review: ordinary courts may declare a provision unconstitutional and refuse to apply it to the pending case. The decision is binding *inter partes* (Article 93(4) of the Constitution of Greece). The three highest courts (the Supreme Civil and Criminal Court, the Council of State and the Court of Audit) may review the constitutional judgments of the relevant lower courts, thus harmonizing the system. See A. Kaidatzis, 'Greece's Third Way in Prof. Tushnet's Distinction between Strong-Form and Weak-Form Judicial Review, and What We May Learn From It', 13 *Jus Politicum* (2014), 1.

rules, which were subsequently declared unconstitutional.[135] The judges based their conclusions – among other grounds – on the violation of rights enshrined in the Greek Constitution and in the European Social Charter,[136] as well as on the general principles of human dignity[137] and proportionality.[138]

The case law of high judicial organs is rather intricate. As for the claims related to the right to property (e.g. cuts of public salaries and pensions, abolition of pecuniary benefits for public servants), the Greek Council of State – i.e., the highest administrative court – reached opposite outcomes depending on the specific occupation of the applicants. The Court found that the reductions of these entitlements complied with the Greek Constitution,[139] except where the right-holders belonged to specific sub-categories of public servants – such as judges, doctors working for the National Health System, and people serving in the armed forces.[140] According to the Council of State, the legislature failed to strike a fair balance between the importance of the job performed by personnel employed in these sectors and the budgetary interest of the State. This questionable differentiation was indirectly challenged by the Greek Court of Audit, which issued a number of non-binding opinions declaring the

135 See M. Yannakourou, 'Austerity Measures Reducing Wage and Labour Costs before the Greek Courts: A Case Law Analysis' (2014), 11 *Irish Employment Law Journal* (2014) 2, 36, 41 [Yannakourou, Austerity Measures]; Pavlidou, *supra* note 35, 293-299.

136 See the case-law referred to in Pavlidou, *supra* note 35, 296. According to the Author, references have been made also to the ECHR. See also Yannakourou, 'Austerity Measures', *supra* note 135, 42, who reports Xanthi Court of First Instance, Decision 90/2013, (2013) 72 EErgD 347, to which further reductions of salary violated Art. 4(1) of the *European Social Charter*, *supra* note 20 (right to a fair remuneration).

137 See the case-law referred to in: Pavlidou, *supra* note 35, 297; Yannakourou, 'Austerity Measures', *supra* note 135.

138 Referred to in M. Iodice, '*Solange* in Athens', 32 *Boston University International Law Journal* (2014) 2, 101, 122-126.

139 See e.g. Hellenic Council of State 668/2012, 1285/2012, para. 12. See also the case-law reported in: Iodice, *ibid.*, 117-121; Pavlidou, *supra* note 35, 300; S. Kaltsouni, A. Kosma & N. Frangakis, 'The Impact of the Crisis on Fundamental Rights across Member States of the EU: Country Report on Greece', Study for the LIBE Committee (2015), PE 510.014, 77, 101, 135-136, 142-143; D. Diliagka, *The Legality of Public Pension Reforms in Times of Financial Crisis: The Case of Greece* (2018), 264-265.

140 See e.g. Hellenic Council of State 7412/2015, paras 3 and 17 and 431/2018, paras 13 and 17. See also the judgments reported in: Diliagka, *supra* note 139, 202-203, 214-215, 222; A. Marketou, 'Greece: Constitutional Deconstruction and the Loss of National Sovereignty', in T. Beukers, B. De Witte & C. Kilpatrick (eds), *Constitutional Change Through Euro-Crisis Law* (2017), 179, 194-196.

unconstitutionality of the cuts of pensions regardless of the specific occupation of former public servants.[141]

Notably, all these judgments of the Council of State and the opinions of the Court of Audit were mostly based on general principles (e.g. proportionality, equitable distribution of public charges, and protection of legitimate expectations) and on the right to a dignified life, which stems from the principle of minimum subsistence.[142] However, few rulings of the Council of State examined also whether the contested measures contrasted with the right to property under the ECHR, which the Council of State deemed as a directly applicable provision.[143] Lastly, similar to the Portuguese Constitutional Court, the Greek Council of State limited the temporal effects of a number of its declarations of unconstitutionality so as to avoid impairing the State's solvency.[144]

This inconsistent approach towards claims related to the right to property differs from the uniform attitude of the Council of State regarding ES entitlements. This Court never declared the unconstitutionality of austerity measures for breaching ES entitlements, set forth either in the Greek Constitution or in international treaties. As for the latter, the Council of State affirmed that ILO Conventions[145] and the European Social Charter only contain "directions" for Contracting Parties.[146] Hence, their non-directly applicable nature precludes

141 See the advisory opinions mentioned in: Iodice, *supra* note 138, 126-128; E. Psychogiopoulou, 'Welfare Rights in Crisis in Greece: The Role of Fundamental Rights Challenges', in Kilpatrick & De Witte, *supra* note 3.

142 See, in particular, Hellenic Council of State 2287/2015, paras 7, 21 and 24. Diliagka, *supra* note 139, 144-148, 260-270, also reported Hellenic Council of State 2288-2290/2015 as similar to Judgment 2287/2015. In Judgment 2307/2014, the Council of State based its declaration of unconstitutionality on the violation of the right to determine general working conditions by means of arbitration (paras 32-33). On this case law, see also A. Baraggia, *Ordinamenti giudici a confronto nell'era della crisi: La condizionalità economica in Europa e negli Stati nazionali* (2017), 108-110; Kaltsouni, Kosma & Frangakis, *supra* note 139, 73-74, 98-102.

143 Hellenic Council of State 668/2012, *supra* note 139, paras 34-36 (declaring the measures in compliance with the ECHR); 7412/2015, para. 16 (declaring the measures in violation of the ECHR).

144 See e.g. Hellenic Council of State, Judgment 2287/2015, *supra* note 142, para. 26.

145 Namely, ILO Convention Nos. 87, 97 and 154.

146 Hellenic Council of State, Judgment 2307/2014, para. 40. In para. 41 the judgment also found the contested policy in compliance with *Add. Prot. 1 ECHR, Art. 1*, *supra* note 8. See also Judgment 1285/2012, in which the Council of State dismissed the pleads claiming the violation of the European Social Charter and the ICESCR because too vague (paras 18-19).

any declaration of unconstitutionality of the relevant national law for breaching the provisions thereby enshrined.

Notably, this statement contradicts the stance of lower judges and the previous approach embraced by the Council of State itself: according to all these rulings, municipal law could be declared invalid for infringing the provisions of the European Social Charter.[147]

F. The Way Forward: International Treaties as Parameters to Review the Constitutionality of Austerity Measures

The survey of the Spanish, Portuguese, and Greek case law points out similarities and differences among the standards of review and the adjudicative interpretative approaches adopted by national judiciaries. The most evident common feature is the use of general constitutional principles as constraints to the policymakers' discretion in matters concerning allocation of public resources. On the other side of the coin, the highest tribunals referred just a few times to international ES rights. The Greek case law is partly different, since lower courts relied more on treaty-based socio-economic rights. Still, both the Greek Council of State and the Court of Audit based their respective rulings mostly on general constitutional principles of international law.

147 See Hellenic Council of State 1571/2010, paras 5 and 7; Xanthi Court of First Instance, *supra* note 136. On this issue, see Yannakourou, 'Challenging Austerity Measures', *supra* note 48, 19, 28; C. Deliyanni-Dimitrakou, 'Les Transformations Du Droit Du Travail Et La Crise: Les Réponses Du Droit Grec', 5 *Revista Juridica de los Derechos Sociales* (2015) 2, 52, 78-80; N. A. Papadopoulos, 'Paving the Way for Effective Socio-economic Rights? The Domestic Enforcement of the European Social Charter System in Light of Recent Judicial Practice' (2019), available at https://www.academia.edu/39175763/Paving_the_way_for_effective_socio-economic_rights_The_domestic_enforcement_of_the_European_Social_Charter_system_in_light_of_recent_judicial_practice (last visited 9 March 2021); C. Tsimpoukis, 'Some Brief Notes on Decision Nº 3220/2017 Of Piraeus' Single-Member Court of First Instance' (2018), 8 *Revista Jurídica de los Derechos Sociales* (2018) 2, 18. Besides, the justiciability and direct application of treaty-based socio-economic rights is confirmed by a statement of the delegation of Greece before the CESCR. The delegation stated that: "All courts had the power and the duty not to apply any legislative decision contrary to the Covenant. The provisions of the Covenant were justiciable and could be used as norms of reference for the application of economic, social and cultural rights.", see CESCR, 'Committee on Economic, Social and Cultural Rights considers report of Greece' (2015), available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16568&LangID=E (last visited 9 March 2021).

Yet, treaty-based provisions form part of the Greek, Spanish, and Portuguese legal systems[148] and prevail over ordinary statutes – such as the ones executing austerity measures.[149] In Spain and Portugal, domestic rights and freedoms must be construed according to international human rights law,[150] and in Spain these rights must be granted in conformity with the interpretation of the relevant international supervisory bodies.[151]

The attitude of Spanish, Portuguese, and Greek courts towards the domestic application of treaty-based ES rights leads to a wider reflection on their justiciability before national courts, especially in times of budgetary imbalances.

In general terms, the purpose of international human rights treaties – including those enshrining socio-economic rights – is to confer entitlements to individuals.[152] Therefore, asserting that they provide mere "directions" to State parties is defective.[153] Contracting parties enjoy discretion as to the manner of implementation of international commitments in their respective

148 See, respectively: Spanish Constitution, Article 96(1) and STC 116/2006, de 24 de abril de 2006, BOE núm. 125, de 26 de mayo de 2006, 12-22, ECLI:ES:TC:2006:116, para. 5; Constitution of the Republic of Portugal, Article 8(2); Constitution of Greece, Article 28(1).

149 See A. Yokaris, 'Greece', in D. Shelton (ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (2011), 249, 257; F. Ferreira de Almeida, 'Portugal', in D. Shelton (ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (2011), 500, 510-512; A. Cassese, 'Modern Constitutions and International Law', 192 *Recueil des Cours* (1985), 331, 403-405.

150 See, respectively: Spanish Constitution, Article 10(2) and STC 31/2018, de 10 de abril de 2018, BOE núm. 124, de 22 de mayo de 2018, 53548-53638, ECLI:ES:TC:2018:31, para. 4(a); Constitution of the Republic of Portugal, Article 16(2).

151 Spanish Constitution, Article 10(2); STC 116/2006, *supra* note 150, para. 5; 31/2018, *supra* note 148. See also *Recurso de casación n.º 1002/2017*, (2018) Tribunal Supremo, Sala De Lo Contencioso-Administrativo, ECLI:ES:TS:2018:274, according to which the views of the UN Committee on the Elimination of Discrimination Against Women in individual complaints are binding on Spain, although neither the Convention nor its Optional Protocol establishes their binding character.

152 M. Iovane, 'Domestic Courts Should Embrace Sound Interpretative Strategies in the Development of Human Rights-Oriented International Law', in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (2012), 607, 608.

153 Langford, 'Judicial Review', *supra* note 1, 416; M. C. R. Craven, 'The Domestic Application of the International Covenant on Economic, Social and Cultural Rights' (1993), 40 *Netherlands International Law Review* (1993) 3, 367, 376; G. Zarra, 'La Carta Sociale Europea tra unitarietà dei diritti fondamentali, *Drittwirkung* e applicazione da parte dei giudici interni', 5 *Annali della SISDiC* (2020), 19.

legal systems.[154] However, once international human rights conventions acquire formal validity within municipal legal orders, States must respect, protect, and fulfil such rights.[155] This duty binds domestic public organs, including the judiciary.[156] Indeed, courts and tribunals are those primarily responsible for the effective enforcement of these rights.[157]

Broadly speaking, international human rights, including socio-economic rights, could play at least three roles before national courts. Such norms could: i) be deemed as directly applicable rules, i.e. tribunals could apply them as such, regardless of any further domestic measure; ii) serve as interpretative standards of municipal statues (so-called indirect application); iii) work as parameters of constitutionality of ordinary laws.[158]

The direct and indirect applicability of international human rights before domestic courts has been a matter of doctrinal debate, as well as of inconsistent case law – across States and between courts of the same forum State.[159] Notably, despite the extensive scholarly attempt at clarification, the terminology surrounding these two notions still lacks a universally accepted agreement.[160]

154 A. Nollkaemper, 'The Effects of Treaties in Domestic Law', in C. J. Tams *et al.* (eds), *Research Handbook on the Law of Treaties* (2014), 123, 131 [Nollkaemper, The Effects of Treaties].

155 *Ibid.*, 132; O. Dörr & K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties. A Commentary* (2018), 495, according to which the freedom of implementation "[…] is circumscribed by the principle of effectiveness, which gains special importance in the context of human rights […] treaty law". See also B. Conforti, 'National Courts and the International Law of Human Rights', in B. Conforti & F. Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (1997), 3, 7 [Conforti, National Courts]; Craven, *supra* note 153, 377.

156 Conforti & Labella, *An Introduction*, *supra* note 42, 3; G. Betlem & A. Nollkaemper, 'Giving Effect to Public International Law and European Community Law before Domestic Courts: A Comparative Analysis of the Practice of Consistent Interpretation', 14 *The European Journal of International Law* (2003) 3, 569, 574; C. Sciotti-Lam, *L'applicabilité des traités internationaux relatifs aux droits de l'homme en droit interne* (2004), 353.

157 B. Conforti, *International Law and the Role of Domestic Legal System* (1993), 8-10; Craven, *supra* note 153, 367-368; Betlem & Nollkaemper, *supra* note 156, 574; Iovane, *supra* note 152, 608; Poulou, 'Austerity', *supra* note 16, 1171.

158 See above all Iwasawa, *supra* note 42, 86-90; Nollkaemper, 'The Effects of Treaties', *supra* note 154; A. Nollkaemper, *National Courts and the International Rule of Law* (2011), 117-165 [Nollkaemper, National Courts].

159 Langford, 'Judicial Review', *supra* note 1, 440-442. See also the Greek case-law on austerity measures.

160 M. J. Bossuyt, 'The Direct Applicability of International Instruments on Human Rights (With Special Reference to Belgian and U.S. Law)'15 *Revue Belge de Droit International*

Besides, uncertainty characterizes also the method for determining whether a (part of a) treaty is directly applicable.[161] Sufficient is to recall the discussion concerning the need to adopt a subjective criterion or objective parameters. The former is grounded on the intention of the contracting Parties, as expressed in the text of the treaty (provision) invoked.[162] Doubts mark the latter, since there are no unequivocally accepted objective criteria.[163] According to some, treaty-based human rights are directly applicable if their substantive content is sufficiently complete and precise,[164] while for others the category of non-directly applicable rules is restricted to two types of norms: the ones conferring discretionary powers on States (rather than creating obligations), and the ones that create obligations but that cannot be (immediately) implemented due to the lack of the necessary mechanisms or procedures in the domestic legal order.[165]

Ultimately, the notion of direct applicability is not *by definition* inadequate to ease the protection of treaty-based socio-economic rights before national courts. However, its effectiveness in achieving such a goal heavily depends on the approach adopted by the specific court called upon to decide the dispute. Therefore, rather than enhancing effectiveness, direct applicability may serve as a justification for national courts to declare the issue as non-justiciable.[166] The Greek case law on austerity measures shows the negative consequences stemming from the absence of binding parameters to secure that even just those courts belonging to the very same forum State adopt a coherent and uniform approach. Indeed, while Greek lower courts considered ES rights set forth in international instruments as directly applicable rules, the Council of State denied this theory and overruled its previous stance on the matter. The unpredictability surrounding judicial outcomes and the resulting lack of legal certainty lead to the conclusion that direct applicability of treaty-based human rights does not

(1980) 2, 317; Sciotti-Lam, *supra* note 156, 335; Iwasawa, *supra* note 42.

161 A. Aust, *Modern Treaty Law and Practice* (2000), 159.

162 Bossuyt, *supra* note 160, 319-320. For an extensive analysis of the subjective criterion, see Iwasawa, *supra* note 42, 158-171; Sciotti-Lam, *supra* note 156, 357-437.

163 For an extensive analysis on the objective criteria, see Iwasawa, *supra* note 42, 172-184; Sciotti-Lam, *supra* note 156, 438-499.

164 See e.g. Bossuyt, *supra* note 160, 318-319; A. Nollkaemper, 'The Duality of Direct Effect of International Law', 25 *The European Journal of International Law* (2014) 1, 105, 112, 115-117.

165 Conforti, 'National Courts', *supra* note 155, 8.

166 Iwasawa, *supra* note 42, 174-177; Craven, *supra* note 153, 388; Nollkaemper, *National Courts*, *supra* note 158, 140.

represent the most suitable technique in fostering the protection of ES rights before national courts.

The implications of the indirect applicability are also unclear.[167] This notion requires national courts to interpret municipal law (both constitutional provisions and ordinary statutes) in conformity with the forum States' international treaty obligations, including those concerning socio-economic rights. Through consistent interpretation, courts can secure States' compliance with international commitments, including human rights in cases where individuals have no standing before national tribunals.[168] However, it is still unclear whether courts should rely solely on the wording of the treaty provisions or if they should take into account the (often non-binding) interpretation of the relevant supervisory body. This problem was explored also with regard to international human rights treaties as parameters of constitutionality. Generally speaking, courts must duly *take into account* such pronouncements.[169] This obligation that ultimately stems from the general principle of interpreting and applying treaties in good faith and compels national courts to duly consider the interpretation of treaty-based bodies and to provide a reason in case they decide to depart from it.[170]

167 The terminology "indirect applicability" has multiple meanings, among which: i) the duty of national courts to interpret municipal statutes in line with the international commitments of the forum State; ii) a technique of incorporation of international law in the domestic legal system. The present paper used the first one as working definition. See A. Nollkaemper, 'General Aspects', in A. Nollkaemper et al. (eds), *International Law in Domestic Courts: A Casebook* (2018), 1, 19-27; Bossuyt, *supra* note 160, 318.

168 Condorelli, *supra* note 42, 42; Iwasawa, *supra* note 42, 192; Sciotti-Lam, *supra* note 156, 601-605; Betlem & Nollkaemper, *supra* note 156, 574-579.

169 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, ICJ Reports 2010, 639, 663-66, para. 66. According to the International Law Commission, these pronouncements cover "[…] all relevant factual and normative assessments by such expert bodies", including general comments, views, reports, and decisions, Special Rapporteur Georg Nolte, *Fourth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties*, UN Doc A/CN.4/694, 7 March 2016, 8, para. 14.

170 Craven, *supra* note 153, 389-390; Iwasawa, *supra* note 42, 232-242; S. Forlati, 'Corte costituzionale e controllo internazionale. Quale ruolo per la "giurisprudenza" del Comitato europeo dei diritti sociali nel giudizio di costituzionalità delle leggi?', in Università degli Studi di Ferrara Dipartimento di Giurisprudenza, *La normativa italiana sui licenziamenti: quale compatibilità con la Costituzione e la Carta sociale europea?-Atti del seminario in previsione dell'udienza pubblica della Corte Costituzionale del 25 settembre 2018 sulla questione di costituzionalità sul d. lgs n. 23/2015* (2018), 67, 76; D. Amoroso,

With this in mind, constitutional courts could declare the invalidity of austerity measures for infringing general constitutional principles (e.g. proportionality or human dignity) and socio-economic rights listed in national constitutions, construed in accordance with the international instruments binding upon the forum State and taking into account the pronouncement of supervisory mechanisms.[171] A strict proportionality test and the reference to provisions setting forth socio-economic rights under both domestic and international law could avoid confining their safeguarding solely to situations where individuals are deprived of their minimum subsistence – as occurred, for example, in the case law of the Greek Council of State, which considered the right to human dignity as the ultimate constraint on legislators' discretion.[172]

Lastly, once international conventions become part of the national legal system and the forum State prescribes their supremacy over ordinary laws, constitutional courts could (and should) use treaty provisions as parameters of constitutionality of ordinary statutes.[173] Once again, the standard of review is the treaty provision as interpreted by the relevant supervisory body. This is a suitable alternative specifically where constitutions do not contain a bill of rights. In the absence of such a list, there is no constitutional provision that could be construed consistently with international law, but constitutional courts could still strike down ordinary statutes for infringing a superior rule. The opposite

'Sull'obbligo della Corte Costituzionale italiana di "prendere in considerazione" le decisioni del Comitato europeo dei diritti sociali', in *Ibid*.

171 See e.g. the case-law of the Belgian Council of State in Sciotti-Lam, *supra* note 156, 352; Corte Costituzionale Italiana 194/2018, as briefly commented in G. Frosecchi, 'European Social Charterin the Constitutional Review of National Laws: the Decisive Application of Art. 24 by the Italian Constitutional Court', 5 *International Labor Rights Case Law* (2019) 2, 182. On this judgment, see also: C. Di Turi, 'Libertà di associazione sindacale del personale militare e Carta sociale europea nella recente giurisprudenza della Corte costituzionale', in 12 *Diritti umani e diritto internazionale* (2018) 3, 615.

172 See e.g. Hellenic Council of State 668/2012, *supra* note 139, where the right to a dignified life appears to be the extreme limit to the State's wide discretion in shaping the content of financial reforms (paras 34-36).

173 Nollkaemper, 'The Effects of Treaties', *supra* note 154, 142-143; R. Pisillo-Mazzeschi, 'Sulla natura degli obblighi internazionali di tutela dei diritti economici, sociali e culturali', in G. Venturini & S. Bariatti (eds), *Liber Fausto Pocar, Diritti individuali e giustizia internazionale* (2009), 715, 723-725; D. Amoroso, 'Inutiliter Data? La Convenzione delle Nazioni Unite sui Diritti delle Persone con Disabilità nella Giurisprudenza Italiana' (2017), available at http://www.sidiblog.org/2017/02/07/inutiliter-data-la-convenzione-delle-nazioni-unite-sui-diritti-delle-persone-con-disabilita-nella-giurisprudenza-italiana/ (last visited 9 March 2021) [Amoroso, Inutiliter Data].

outcome would deprive ES rights of their binding nature and of their higher ranking in the national legal system. [174]

Greek lower courts followed this approach and declared the unconstitutionality of statutory laws imposing austerity measures due to their contrast with – among other grounds – treaty-based socio-economic rights. Portuguese and Spanish constitutional courts could have adopted the same approach, since their legal regime prescribes the supremacy of international law over ordinary statutes. All these courts could have relied upon the interpretation of treaty-bodies in shaping the content of such rights.[175] For instance, the Spanish Constitutional Court could have upheld the Basque and Valencian regulation: the judges could have argued that the national legislation excluding undocumented migrants from the public healthcare service was in violation of the ICESCR (as interpreted by the CESCR) because such limitation violated the prohibition of discrimination, constituted an unjustified retrogressive measure and impaired the core of the right to health.[176] Incidentally, the preamble of the 2018 reform expressly mentions Spain's international commitments. It recognizes that such curtailing had represented a step backwards compared to the previous regime, which instead had complied with treaty-based obligations. Furthermore, the decree law recalled the prohibition of discrimination enshrined in international instruments.[177]

Ultimately, judgments declaring the unconstitutionality of austerity measures meet the *collective* nature of socio-economic rights: such rulings produce systemic consequences, since the removal of the cause(s) of the infringement benefits (the sections of) the population that suffered from the harm. Moreover, human rights-based declarations of unconstitutionality should have no (or limited) retroactive effects in order to avoid worsening the balance of payment of the forum State: rulings with retrospective consequences could hamper States' ability to secure the protection of socio-economic rights, since preserving economic soundness is a crucial condition for ensuring the satisfaction of minimum essential levels of ES rights as well as their progressive

174 See e.g. R. Pisillo-Mazzeschi, *Ibid*.; D. Amoroso, 'Inutiliter Data?', *supra* note 173.

175 On the *taking into account approach*, see e.g. P. Rossi, 'L'interpretazione conforme alla giurisprudenza della Corte EDU: quale vincolo per il giudice italiano?', *Osservatorio sulle Fonti* (2018) 1, 1.

176 See e.g. CESCR, *Concluding observation on Spain*, *supra* note 27, 5, para. 19. See also N. J. Luisiani, 'Rationalising the Right to Health: is Spain's austere response to the economic crisis impermissible under international human rights law?', in A. Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (2014), 202, 221-223.

177 Real Decreto-ley 7/2018, *supra* note 119.

realization.[178] This conclusion is valid irrespective of whether the declaration of unconstitutionality derives from indirect application of human rights treaties (i.e. the interpretation of the national constitution according to obligations stemming from these conventions) or their role as *per se* parameters of review of constitutionality.

G. Concluding Observations

The Eurozone sovereign debt crisis represented an occasion to assess whether the international, EU, and national systems provide adequate remedies for violation of ES rights caused by austerity measures. The adequacy of the relief depends on two elements. The first is the *collective* nature of socio-economic rights, which requires structural or systemic remedies – rather than individual ones. The second is the need to preserve States' economic soundness in order to allow Countries to satisfy their international obligations, namely securing a minimum essential level of socio-economic rights and their progressive realization.

Committees established under the international treaty law recommended general measures, but they turned out to be deficient due to the non-binding nature of their outcomes. The ECtHR did not suffer from this shortcoming, yet the Court adopted a restrained approach in interpreting the scope of the rights covered by the Convention and declared either the applications inadmissible or the contested measures in compliance with the ECHR. The action for compensation before the ECJ provides *individual* relief, which is inadequate to remedy violations of ES rights. Besides, plaintiffs who launched similar actions failed due to findings of non-violation of the CFREU. Moreover, actions for annulment and referrals for preliminary rulings were ineffective because of procedural barriers – although the structural consequences stemming from such proceedings could represent an adequate remedy, at least theoretically.

On the contrary, constitutional review of austerity measures in Spain, Portugal, and Greece proved to be rather adequate and effective. The wide-ranging consequences of such rulings appear in line with the *collective* nature of socio-economic rights, since they benefit (entire portions of) the population which suffered the harm. Moreover, the binding nature of such declarations

[178] Roach, *supra* note 39, 56-58, suggests "[…] two-track remedial strategies […]" that combine individual remedies (e.g. payment of compensation to the parties of the litigation) with systemic remedies to the benefit of the groups affected by the contested policy.

ensures their effectiveness. Lastly, the possibility of limiting the temporal scope of these decisions could help preserve States' solvency and, consequently, their ability to satisfy their international commitments – *viz.* the obligation to ensure the enjoyment of the minimum essential level of ES rights and the duty to progressively achieve their realization. The case law related to the Eurozone sovereign debt crisis proved that sensitive matters which may have major distributional or other unintended consequences on sensitive matters strictly linked to States' sovereignty, such as the allocation of public finances, may be adequately addressed solely before domestic courts.

These positive aspects notwithstanding, the interpretative and adjudicative approaches developed during the Eurozone sovereign debt crisis are improvable. Constitutional Courts could (and should) rely on international instruments, alongside constitutional general principles, to boost the protection of ES rights, especially in times of economic downturns and austerity policies which may seriously threaten the enjoyment of such rights. Constitutional courts may either construe the bill of rights under national constitutions in line with socio-economic rights enshrined in international instruments, or may strike down ordinary statutes by using treaty-based ES rights as *per se* parameters of constitutionality. In any event, Constitutional courts must duly take into account the interpretation provided by the relevant monitoring bodies.

This scheme is also in line with the principle of subsidiarity, according to which the effective enforcement of international commitments relies primarily on States' organs, including the domestic judiciary. Ultimately, declarations of unconstitutionality grounded on treaty-based socio-economic rights secure their *effet utile* as well as States' compliance with their international human rights obligations.