

# Not Fit For Purpose? Human Rights in Times of Financial and Economic Crisis

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## Abstract

*This article responds to a key event, or rather two key events—the financial and economic crises that kicked off in 2007–2008. It addresses a conundrum that became clear as the impacts of both the crises themselves, and state responses to them, developed. That conundrum is this: while there had never been such extensive global recognition accorded to human rights language and concepts as at the point when the crises broke, human rights did not form a central—or even a significant—part of national and supranational policymakers’ post-crisis analyses or remedies. Nor did they serve as barriers in terms of protecting the socially vulnerable from the negative impacts of the crises and measures taken in response to them. This raises two questions that I will address here: first, why was this? And, secondly, what can we learn from this contemporary experience in order to make human rights meaningful in future times of crisis?*

## Introduction

This article responds to a key event, or rather two key events—the financial and economic crises that kicked off in 2007–2008. It addresses a conundrum that became clear as the impacts of both the crises themselves, and state responses to them developed. That conundrum is this: while there had never been such extensive global recognition accorded to human rights language and concepts as at the point when the crises broke, human rights did not form a central—or even a significant—part of national and supranational policymakers’ post-crisis analyses or remedies.<sup>1</sup> Nor did they serve as barriers in terms of protecting the socially vulnerable from the negative impacts of the crises and measures taken in response to them. This raises two questions that I will address here: first, why was this? And, secondly, what can we learn from this contemporary experience in order to make human rights meaningful in future times of crisis?

In what follows I will first consider the crises themselves and provide a brief overview of their impacts in terms of human rights enjoyment. This will include the human rights impacts caused by national and supranational responses to the crises. I will then move on to consider the state of the human rights framework at the time of the crises and consider some of the reasons why human rights advocates might have expected human rights to have played a more significant, effective role in responding to the crises

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<sup>1</sup> To quote Saiz: “despite the obvious human rights dimensions of the crisis, human rights have barely figured in the diagnoses or prescriptions proposed by the international community” (I. Saiz, “Rights in Recession? Challenges for Economic and Social Rights Enforcement in Times of Crisis” (2009) 1 *Journal of Human Rights Practice* 277, 280).

than they did. I will conclude by exploring why human rights have not constituted a key tool for social protection in the recent context. I will argue that, while some of the reasons that the crises had the impacts they did were “new” and specific to the particular economic, political and regional context in which they arose, other explanations are attributable to longer-standing weaknesses and challenges in relation to the human rights framework.

## Defining “the crises” and identifying their human rights impacts

Let me start by making clear what I am talking about—what are the crises? In simple terms, the global *financial* crisis, the start of which was signalled by the American sub-prime mortgage collapse, effectively resulted from a combination of a failure of risk models to assess financial products underpinned by serious long-term shortcomings related to the financial system. These shortcomings included financialisation, inadequate regulation and mismanagement of intentionally abstruse institutions. The *economic* crisis, which goes beyond crises in relation to the financial system per se—albeit that the financial crisis certainly contributed to the economic one—has had a number of causes. These included recessions brought about by housing bubble collapses in the United States, Ireland and Spain, recessions partially caused by retrenchment in banks leading to a cut in credit in the economy, as well as sovereign debt crises—some of which stemmed from states taking on banking losses in order to shore up their banks.

The timing of the crises could not have been better in terms of creating a perfect storm for human rights. They created, and exacerbated, jobs, food and housing crises. The data are by any standards remarkable. According to the International Labour Organization, in the 51 countries for which data were available, at least 20 million jobs were lost between October 2008 and the end of the following year.<sup>2</sup> Almost 43 million further workers were deemed to be at-risk of exclusion from the labour market.<sup>3</sup> Figures from 2012 showed that a quarter of the active population in Spain was jobless.<sup>4</sup> By August 2013, Eurostat was reporting that youth unemployment in Spain had reached a new high of 56.1 per cent.<sup>5</sup>

While the global food prices crisis had peaked by June 2008 its effects were still being felt when the financial system went into turmoil; an estimated 40 million people were pushed into hunger in 2008, bringing to 963 million the number of hungry people worldwide at the end of that year.<sup>6</sup> As of June 2009 that number had risen to 1.02 billion.<sup>7</sup> The housing market crisis at the root of the financial and economic crises, coupled with growing unemployment, induced a sharp increase in evictions as a result of non-payment of mortgages, foreclosures and home repossessions in many countries.<sup>8</sup> In addition, evictions from rental housing (in the private and/or social housing sector) have increased as a result of the crisis in countries including Greece, Italy, Portugal, Spain, England, Denmark, the Czech Republic, Poland and France.<sup>9</sup>

<sup>2</sup> International Labour Organization/International Institute for Labour Studies, *World of Work Report 2009: The Global Jobs Crisis and Beyond* (Geneva: International Institute for Labour Studies, 2009), p.vii.

<sup>3</sup> *World of Work Report 2009*, p.1.

<sup>4</sup> CESR, “Spain”, Factsheet No.12 (2012) <http://www.cesr.org/downloads/FACT%20SHEET%20SPAIN.pdf> [Accessed July 29, 2015].

<sup>5</sup> S. Burgen, “Spain Youth Unemployment Rate Reaches Record 56.1%” (August 30, 2013), *The Guardian*, <http://www.theguardian.com/business/2013/aug/30/spain-youth-unemployment-record-high> [Accessed July 29, 2015]. As of May 2015, youth unemployment in Spain stood at 50.1% (Eurostat, “Unemployment Statistics”, [http://ec.europa.eu/eurostat/statistics-explained/index.php/Unemployment\\_statistics#Youth\\_unemployment\\_trends](http://ec.europa.eu/eurostat/statistics-explained/index.php/Unemployment_statistics#Youth_unemployment_trends) [Accessed July 29, 2015].

<sup>6</sup> Special Rapporteur on the Right to Food, “The Right to Food and the Financial and Economic Crisis: Submission to the UN Conference on World Financial and Economic Crisis, UN General Assembly, 24–26 June 2009”, <http://www2.ohchr.org/english/issues/food/docs/NoteCrisisFinal26062009.pdf> [Accessed July 29, 2015].

<sup>7</sup> Special Rapporteur on the Right to Food, “The Right to Food and the Financial and Economic Crisis: Submission to the UN Conference on World Financial and Economic Crisis, UN General Assembly, 24–26 June 2009”.

<sup>8</sup> Council of Europe (COE) Commissioner for Human Rights, “Safeguarding Human Rights in Times of Economic Crisis”, Issue Paper published by the Council of Europe Commissioner for Human Rights (Strasbourg: Council of Europe, 2013), [http://www.enetenglish.gr/resources/article-files/prems162913\\_gbr\\_1700\\_safeguardinghumanrights\\_web.pdf](http://www.enetenglish.gr/resources/article-files/prems162913_gbr_1700_safeguardinghumanrights_web.pdf) [Accessed May 31, 2015], p.19, citing Feantsa, “On The Way Home? FEANTSA Monitoring Report on Homelessness and Homeless Policies in Europe” (2012).

<sup>9</sup> Feantsa, “On The Way Home? FEANTSA Monitoring Report on Homelessness and Homeless Policies in Europe” (2012), p.33.

An October 2014 report by UNICEF showed that in 23 of 41 of the world's most affluent countries, child poverty had increased since 2008, with rates in Ireland, Croatia, Latvia, Greece and Iceland, increasing by over 50 per cent.<sup>10</sup> In Greece, 2012 saw median household incomes for families with children sink to 1998 levels—a loss of “the equivalent of 14 years of income progress”.<sup>11</sup> As UNICEF noted, “by this measure Ireland, Luxembourg and Spain lost a decade; Iceland lost 9 years; and Italy, Hungary and Portugal lost 8”.<sup>12</sup> This is a severe step backwards in terms of children's enjoyment of rights related to their development, survival and participation.

Crucially, the damage done to human rights realisation is not only attributable to specific crises-related outcomes such as turmoil on markets and labour opportunities. It also results from a “creeping” of fiscal austerity measures<sup>13</sup> and excessive economic contraction in terms of public expenditure beyond those countries/economies that have dominated the financial headlines since 2008.<sup>14</sup> While most governments affected by the crisis introduced stimulus programmes (fiscal expansion) and ramped up public spending in 2008–2009, by 2010 premature expenditure contraction—in the form of “austerity” measures—became widespread beyond countries in the direct firing line. This public expenditure consolidation through austerity measures, forecast to increase to reach 132 countries in 2015, was expected to intensify at least into 2016.<sup>15</sup> As the Office of the UN High Commissioner for Human Rights has said, “austerity is now being applied for ‘pre-emptive reasons’ i.e. fiscal deficits are being reduced to avert negative reactions from financial markets”.<sup>16</sup> This is despite the growing evidence that austerity has failed on its own terms; it has not in fact proved the economic growth panacea that it was presented as.<sup>17</sup>

While negative impacts on the rights to social security, adequate housing and the highest attainable standard of health are perhaps the most glaring results of the crises and state responses to them, civil and political rights have certainly not escaped unscathed: cuts to legal aid and judicial system budgets;<sup>18</sup> increases in legal fees;<sup>19</sup> cuts to services and support for disabled people;<sup>20</sup> plummeting drops in living standards—these involve and have clear implications for rights such as the rights to a fair trial, freedom from inhuman or degrading treatment, and the principle of human dignity.

In Greece, funding for mental healthcare decreased by 20 per cent between 2010 and 2011, and a further 55 per cent between 2011 and 2012. This was at a time when findings from population surveys suggested “a 2.5 times increased prevalence of major depression, from 3.3% in 2008 to 8.2% in 2011”, and “a 36% increase between 2009 and 2011 in the number of people attempting suicide in the month before the

<sup>10</sup> UNICEF, “2.6 million More Children Plunged into Poverty in Rich Countries during Great Recession”, [http://www.unicef.org/media/media\\_76447.html](http://www.unicef.org/media/media_76447.html) [Accessed July 29, 2015].

<sup>11</sup> UNICEF, “Children of the Recession: The Impact of the Economic Crisis on Child Well-being in Rich Countries”, *Innocenti Report Card No. 12* (Florence: UNICEF, 2012), p.4, <http://www.unicef-irc.org/publications/pdf/rc12-eng-web.pdf> [Accessed July 29 2015].

<sup>12</sup> UNICEF, “2.6 million More Children Plunged into Poverty in Rich Countries during Great Recession”, p.4.

<sup>13</sup> In general, austerity measures fall into four types, each with its own unique consequences for the enjoyment of human rights: (a) public budget contractions affecting social spending, (b) regressive taxation measures, (c) labour market reforms, and (d) structural reforms to pension plans (COE Commissioner for Human Rights, “Safeguarding Human Rights in Times of Economic Crisis”, p.16).

<sup>14</sup> See, e.g. I. Ortiz, J. Chai and M. Cummins, *Austerity Measures Threaten Children and Poor Households: Recent Evidence in Public Expenditures from 128 Developing Countries* (New York, NY: UNICEF, 2011). This study found that 70 developing countries (or 55% of the study sample) reduced total expenditures by nearly 3% of GDP, on average, during 2010, and 91 developing countries (or more than 70% of the sample) were expected to reduce annual expenditures in 2012. Moreover, comparing the 2010–12 and 2005–07 periods suggested that nearly one-quarter of developing countries appeared to be undergoing excessive contraction, defined as cutting expenditures below pre-crisis levels in terms of GDP. The study also highlights that the scope of austerity measures under consideration in developing countries seems to have widened considerably since 2010.

<sup>15</sup> See I. Ortiz and M. Cummins, “Age of Austerity: A Review of Public Expenditures and Adjustment Measures in 181 Countries” (Initiative for Policy Dialogue and the South Centre Working Paper, May 2013), p.i.

<sup>16</sup> OHCHR, “Report on Austerity Measures and Economic and Social Rights” (2013), [http://www.ohchr.org/Documents/Issues/Development/RightsCrisis/E-2013-82\\_en.pdf](http://www.ohchr.org/Documents/Issues/Development/RightsCrisis/E-2013-82_en.pdf) [Accessed July 29, 2015].

<sup>17</sup> See, e.g. G. Zezza, “The Impact of Fiscal Austerity in the Eurozone” (2012) 0 *Review of Keynesian Economics* 37; J. Stiglitz, “Crises: Principles and Policies” in J. Stiglitz and D. Heymann (eds), *Life After Debt: The Origins and Resolutions of Debt Crisis*, IEA Conference Volume 2014 (New York: Palgrave MacMillan, 2014), p.40; and P. Krugman, “The Austerity Debacle” (January 29, 2012), *New York Times*.

<sup>18</sup> COE Commissioner for Human Rights, “Safeguarding Human Rights in Times of Economic Crisis”, p.20.

<sup>19</sup> COE Commissioner for Human Rights, “Safeguarding Human Rights in Times of Economic Crisis”, p.20.

<sup>20</sup> See, e.g. H. Hauben, M. Coucheir, J. Spooen, D. McAnaney and C. Delfosse, “Assessing the Impact of European Governments' Austerity Plans on the Rights of People with Disabilities” (European Foundation Centre, 2012).

survey, with a higher likelihood for those experiencing substantial economic distress”.<sup>21</sup> As such, a clear threat to the right to life. Spain’s December 2014 public security law, which has been heavily criticised as an attempt by the conservative government to muzzle protests over its handling of Spain’s financial crisis, is a clear limitation on the rights to freedom of expression and association.<sup>22</sup> Cuts to programmes and services focused on specific minority groups—such as those made in Ireland in relation to the Traveller ethnic minority—inevitably have an effect on cultural rights.<sup>23</sup>

Despite the rhetoric of politicians both in the United Kingdom and other jurisdictions, we are very much *not* all in it together. As the UN Special Rapporteur on Extreme Poverty and Human Rights stated in 2009:

“Social economic indicators show that the current global financial crisis is having unparalleled negative consequences on the enjoyment of human rights for many people around the world, *in particular for those living in situations of poverty and extreme poverty.*”<sup>24</sup>

And this reality has not changed since then. Research demonstrates that the poorer, more powerless and less visible populations—those who already experienced lower levels of human rights enjoyment than other social groups—have been hit hard by the job losses, poverty and the economic and political upheaval that have followed the global financial collapse.<sup>25</sup>

This whistle-stop tour of the human rights impacts of the crises does not even start to reflect their more long-term human rights impacts. Nor does it begin to address the question of how the crises—and particularly the widespread socialisation of debt evident in those countries that have received loan assistance—will have on the life opportunities and outcomes of current children and young people and future generations in human rights terms.<sup>26</sup>

## Exploring the crises-related “positives” of human rights

I turn now to the second part of this article, relating to the international human rights framework as it existed and how it developed during the lifetime of the crises. I want first to highlight some features of that framework that would seem to have augured well for human rights playing a meaningful role in responding to the crises.

Foremost here is a recognition of what human rights are. As we have developed our understanding of human rights and their connection with human dignity, we have seen significant progress in terms of the “scope” of human rights law. No longer simply reflective of a classical liberal theory obsession with property rights and the protection of the worthy “few” against a greedy and intrusive state, the international community’s (which I take to include civil society and states) conception of human rights has expanded to embrace issues of the many—issues that are crucial to the varied and multifaceted challenges faced by

<sup>21</sup> A. Kentikelenis, “Greek Health Crisis: From Austerity to Denialism” (2014) 383(9918) *The Lancet* 748.

<sup>22</sup> “Spain’s New Security Law Sparks Protests across the Country” (December 20, 2014), *The Guardian*, <http://www.theguardian.com/world/2014/dec/20/spain-protests-security-law-parliament> [Accessed July 29, 2015]. Emphasis added by author.

<sup>23</sup> See, e.g. Pavee Point, “Travelling with Austerity: Impacts of Cuts on Travellers, Traveller Projects and Services” (2013), <http://www.paveepoint.ie/document/travelling-with-austerity-2013/> [Accessed August 3, 2015]. Amongst other things, this report highlights the impact that the post-2008 “disinvestment” in the Traveller Community, an Irish ethnic and cultural minority, has had on Traveller education and community development.

<sup>24</sup> M. Sepúlveda, “Report of the Independent Expert on Extreme Poverty and Human Rights: The Social Protection System and the Financial and Economic Crisis”, UN Doc.A/64/279 (2009), p.22.

<sup>25</sup> See, e.g. R. Heltberg, N. Hossain and A. Reya (eds), *Living through Crises: How the Food, Fuel, and Financial Shocks Affect the Poor* (Washington, DC: World Bank, 2012).

<sup>26</sup> From a somewhat different perspective, Mary Dowell-Jones warns that blocking current austerity measures on the grounds that they violate current enforcement of human rights may mean the problem of addressing public debt is pushed onto the shoulders of future right-holders (M. Dowell-Jones, “The Economics of the Austerity Crisis: Unpicking Some Human Rights Arguments” (2015) 15(2) H.R.L.R. 193, 199). However, in countries where the repayments of “bail-out” agreements are set to be multi-generational (e.g. Ireland and Greece), this is happening anyway. For an example of a national response to the financial crisis that did not result in socialisation of debt and was “largely human rights-compliant”, see J. Boholavsky, “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: Mission to Iceland” (December 8–15, 2014), UN Doc.A/HRC/28/59/Add.1 (2015).

humans in their lived experience. Gender-based violence,<sup>27</sup> the legal capacity of people with disabilities,<sup>28</sup> the cultural rights of indigenous people<sup>29</sup>—all of these are now captured by human rights. From the perspective of the financial and economic crises, perhaps the most significant thing we have seen in terms of the expanded “scope” of human rights has been the increased prominence accorded over the last 20 years to economic and social rights and the conceptualisation and recognition of poverty as being a human rights issue.

The second key “positive” of human rights concerns its mechanisms. Both before and during the crises we saw an expansion of accountability mechanisms in the form of international processes such as the Universal Periodic Review and other initiatives enabling complaints to be brought about human rights violations to various UN human rights treaty-monitoring bodies. For instance, in 2008, we saw the adoption by the Human Rights Council of an instrument providing for a complaints mechanism to the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>30</sup> This marked a much-desired equality of arms at the international level between civil and political rights and economic, social and cultural rights.<sup>31</sup> At the domestic level too, the last two decades have seen a veritable explosion in constitutional and legislative protections for human rights, as well as a massive increase in national human rights institutions. In the United Kingdom alone, for example, there are three human rights commissions and four children’s commissioners.<sup>32</sup>

Moving beyond legal standards and mechanisms, we see growing awareness in many if not most countries of the reach and potential of human rights. While human rights awareness is certainly not uniform or universal, it is far more developed now than it ever has been in the past. This is true both amongst elite actors like lawyers and judges and within grassroots social movements. The growing “prevalence” of human rights is evidenced to some degree by increased reference to them globally in the media, in political discourse and party manifestos—albeit certainly not always in positive terms as we see in recent debates in the United Kingdom about the Human Rights Act and the role of the European Court of Human Rights in Strasbourg.<sup>33</sup>

Indeed, to some degree the crises appear to have galvanised human rights advocacy and political discourse—from the indignados in Spain to the more recent right to water campaigners in Ireland—all of whom use rights language to some degree in challenging specific impacts of the crises, often as part of broader arguments premised on social justice and poverty reduction. A key part of Syriza’s 40-point programme in Greece, for instance, was to bring about constitutional reforms to guarantee protection of the rights to education, health care and the environment.<sup>34</sup> Internationally, civil society groups and others who would not have overtly used human rights language before have turned to it in this time of crisis.<sup>35</sup>

<sup>27</sup> See, e.g. Committee on the Elimination of All Forms of Discrimination against Women, “General Recommendation No.19 on Violence against Women”, UN Doc.A/47/38 at 1 (1992).

<sup>28</sup> See the Convention on the Rights of Persons with Disabilities, art.12; Committee on the Rights of Persons with Disabilities, “General Comment No.1 on Article 12: Equality before the Law”, UN Doc.CRPD/C/GC/1 (2014).

<sup>29</sup> See, e.g. Resolution 61/295 (2007), UN Declaration on the Rights of Indigenous Peoples.

<sup>30</sup> Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

<sup>31</sup> As of April 2014 and May 2008, complaints about violations of economic, social and cultural rights can also be brought directly to the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities, respectively.

<sup>32</sup> These are the Children’s Commissioners for England, Scotland and Wales, the Northern Ireland Commissioner for Children and Young People, the Equality and Human Rights Commission, the Scottish Human Rights Commission and the Northern Ireland Human Rights Commission.

<sup>33</sup> From a UK perspective, see, e.g. “David Cameron Calls for Reform of European Court of Human Rights” (January 25, 2012), *The Guardian*, <http://www.theguardian.com/law/2012/jan/25/david-cameron-reform-european-court> [Accessed July 29, 2015]; “UK’s threat to quit ‘led Euro court to back down on votes for prisoners’: Strasbourg runs scared as it puts issue off until September” (September 26, 2014), *Daily Mail*, <http://www.dailymail.co.uk/news/article-2770227/UK-s-threat-quit-led-Euro-court-votes-prisoners-Strasbourg-runs-scared-puts-issue-September.html> [Accessed July 29, 2015]; and The Conservatives, “The Conservative Party Manifesto 2015”, <https://s3-eu-west-1.amazonaws.com/manifesto2015/ConservativeManifesto2015.pdf> [Accessed July 29, 2015], pp.60 and 73.

<sup>34</sup> See, e.g. “Syriza’s Original 40 Point Programme”, <http://www.zerohedge.com/news/2015-01-29/syrias-original-40-point-manifesto> [Accessed July 29, 2015]; Syriza, “Thessaloniki Programme”, <http://www.syriza.gr/article/id/59907/SYRIZA---THE-THESSALONIKI-PROGRAMME.html#VMaNEbfXCR> (September 2014) [Accessed July 29, 2015].

<sup>35</sup> Two examples of this common trend include the European Anti-Poverty Network in Spain, and the Child Poverty Action Group in the United Kingdom, both of which have adopted a more expressly rights-based approach to advocacy since 2007.

The last positive I would want to highlight here are the steps taken of late in terms of addressing the enormous and ongoing implementation gap between human rights standards on paper and in practice. Recent years have seen significant developments in terms of new human rights advocacy approaches and methodologies that are having a concrete impact in terms of human rights realisation in many contexts. Tools such as human rights-based budget analysis<sup>36</sup> and indicators<sup>37</sup> are making human rights standards more concrete both for human rights advocates and, more importantly, for rights-bearers and those responsible for giving effect to rights. And recalling the mechanisms referred to above, but going beyond those to embrace litigation at state level, an ever-more refined use of strategic litigation is leading to an opening up of human rights issues in the courts in many countries.<sup>38</sup> All of these are positive signs in terms of the potential of human rights in times of crisis.

So, we have standards, we have mechanisms, we have better human rights awareness than ever and we have advocacy approaches. We have all of this and yet human rights ultimately played a negligible role in preventing and challenging the impacts of the financial and economic crises on the most vulnerable in global society. Why was this? And, building on contemporary problems, what can we do to ensure that human rights play a more significant role in future times of crisis? In this the third part of this article, I propose four answers to these questions.

## The failures of human rights and lessons we must learn

The first answer relates to the state-centric nature of the human rights framework: human rights are traditionally understood to impose obligations on states. Admittedly, we have seen recent efforts to delineate the (non-legally binding) corporate responsibility of business in relation to human rights.<sup>39</sup> Furthermore, some human rights treaties do make reference to the duties of some non-state actors (for instance the UN Convention on the Rights of the Child talks about the responsibilities of parents)<sup>40</sup> and a number of UN treaty monitoring bodies have addressed the human rights-related duties and responsibilities of non-state actors to some extent in their work. However, the state remains the key actor for the purposes of international human rights law.<sup>41</sup>

The failure of human rights law to engage effectively with non-state actors is a huge issue when we consider the central part that non-state actors, like the European Union and the International Monetary Fund, have played in relation to the causation and the design of responses to the crises. In the post-2007 context, this has been perhaps most strongly evidenced by the role of the IMF, European Commission and European Central Bank troika with regard to the bilateral loans or loans made to a number of Eurozone states from the European Financial Stabilisation Mechanism, the European Stability Mechanism and the European Financial Stability Facility. If international financial institutions remain largely “untouched” (or at least unconstrained) by the existing state-centric human rights framework, how can they be expected to accord weight to those rights in their functioning? Indeed, despite the increased reference to human

<sup>36</sup> For an overview of the field of human rights-based budget analysis, see the resources at the International Budget Partnership website, <http://www.internationalbudget.org> [Accessed July 29, 2015].

<sup>37</sup> For a useful overview of the development of indicator work at the international level, see OHCHR, “Human Rights Indicators: A Guide to Measurement and Implementation” (2012), [http://www.ohchr.org/Documents/Publications/Human\\_rights\\_indicators\\_en.pdf](http://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf) [Accessed July 29, 2015].

<sup>38</sup> Useful examples of the now very extensive literature on, and practice of, strategic litigation are provided by V. Gauri and D. Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (New York: Cambridge, 2008); R. Gargarella, Pilar Domingo and Theunis Roux (eds), *Courts and Social Transformation in New Democracies* (Aldershot: Ashgate, 2006); CRIN, “Children’s Rights: A Guide to Strategic Litigation” (2008), <http://crinarchive.org/resources/infoDetail.asp?ID=17127> [Accessed July 29, 2015]; and Interights, “Making a Difference to Human Rights: A Pilot Framework for Assessing the Impact of Interights’ Strategic Litigation” (2013), [www.interights.org/files/311/2013\\_11\\_10\\_LA%20Report.pdf](http://www.interights.org/files/311/2013_11_10_LA%20Report.pdf) [Accessed July 29, 2015].

<sup>39</sup> “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Respect, Protect and Remedy’ Framework”, UN Doc.A/HRC/17/31 (2011).

<sup>40</sup> See, e.g. arts 5, 18(2) and 27(2) of the Convention on the Rights of the Child.

<sup>41</sup> For useful overviews of the liability of non-state actors under international human rights law, see, e.g. J. Hessbruegge, “Human Rights Violations Arising from Conduct of Non-State Actors” (2005) 11 *Buff. Hum. Rts L. Rev.* 21; J. Knox, “Horizontal Human Rights Law” (2008) 102 *A.J.I.L.* 1.

rights on their part, there is evidence that international financial institutions such as the IMF and the World Bank have failed to appreciate the human rights implications—and impacts—of austerity policies.<sup>42</sup>

The same is true of corporations and other private entities whose actions have contributed to, or exacerbated the effects of, the crises—for example, non-international financial institutions (frequently banks and mortgage loan companies) who have played a significant role in relation to foreclosing on mortgaged properties, thereby negatively impacting on the right to adequate housing.<sup>43</sup> Another group is employer organisations and other members of the business sector who have taken advantage of the current economic context to argue for tax breaks and a weakening of labour protections, resulting in an erosion of work rights.<sup>44</sup> The current human rights framework only addresses and engages with non-state actors to a very limited degree. On that basis, how can it serve to effectively protect right-holders from those actors' rights-impacting actions (and omissions) in a time of crisis?<sup>45</sup>

Not only are these non-state actors largely legally “immune” from human rights obligations, many of them have consistently shied away from human rights language and concepts and we are still far from seeing “internalisation” of human rights in their processes or a conceptualisation by them of their activities in terms of human rights. Certainly, there was no requirement on the part of the European Commission, International Monetary Fund and European Central Bank troika that human rights impacts assessments should form part of state activities for the purposes of loan assistance.<sup>46</sup> Dowell-Jones has highlighted that private financial institutions have made very few references to human rights in debates on the unfolding crisis,<sup>47</sup> and it is difficult to find any acknowledgement on such actors' part that the problems of austerity, bank bailouts and sovereign (over)indebtedness in the Eurozone may have anything to do with those institutions' human rights commitments. This ongoing disconnect between human rights and the key players in terms of financial regulation, bond markets and financial globalisation<sup>48</sup> has proved an enormous obstacle to human rights having traction in the context of the recent crises. It must be addressed if human rights are to play a more central role vis-à-vis future crises.

The second reason for human rights' disappointing impact in terms of limiting and counter-acting negative crises-related effects on the socially vulnerable relates not so much to the nature of the human rights framework as to the state of play of crisis-related human rights scholarship, in particular the ongoing obsession of human rights law scholars with the courts.<sup>49</sup>

This is certainly nothing new. Lawyers generally tend to zone in on the courts and regard them as the key branch of government because it is a way of making us—the lawyers—the stars of the story. However, a court-centric focus risks overlooking the fact that, when it comes to ensuring the effective implementation of human rights, the courts' role is necessarily (and generally desirably) reactive. This reflects the way

<sup>42</sup> See, e.g. M. Dowell-Jones, M. Footer, J. Kenner, M. Mustaniemi-Laakso, A. Nolan and S. Wallace, “Deliverable 7.2: Report on Enhancing the Contribution of EU Institutions and Member States, NGOs, IFIs and Human Rights Defenders, to More Effective Engagement With, and Monitoring Of, the Activities of Non-State Actors” (March 2015), Part IV.

<sup>43</sup> See, e.g. R. Rolnik, “Report of the Special Rapporteur on Adequate Housing: The Financial Crisis and Its Causes”, UN Doc.A/HRC/10/7 (2009).

<sup>44</sup> For an overview of such lobbying activities, see ILO Bureau for Employers' Activities, “Employers' Organisations Responding to the Impact of the Crisis” (Working Paper No.2, 2010), [http://www.ilo.org/public/english/dialogue/actemp/downloads/publications/working\\_paper\\_n2.pdf](http://www.ilo.org/public/english/dialogue/actemp/downloads/publications/working_paper_n2.pdf) [Accessed July 29, 2015].

<sup>45</sup> For a thoughtful treatment of how the facticity of the human rights impacts of economic globalisation increasingly undermines the normativity of the state-centred conception of international human rights law, see D. Augenstein, “The Crisis of International Human Rights Law in the Global Market Economy” (2014) (44) *Netherlands Yearbook of International Law* 41–64.

<sup>46</sup> Salomon relatedly notes that “when we look to the international creditors for awareness as how to devise policies that are human rights compliant we find virtually nothing” (M. Salomon, “Of Austerity, Human Rights and International Institutions” (2015) 21(4) *European Law Journal* (forthcoming)).

<sup>47</sup> M. Dowell-Jones, “The Sovereign Bond Markets and Socio-economic Rights: Understanding the Challenge of Austerity” in E. Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford: OUP, 2013), p.51.

<sup>48</sup> See, e.g. D. Elson, R. Balakrishnan and J. Heintz, “Public Finance, Maximum Available Resources and Human Rights” in A. Nolan, R. O'Connell and C. Harvey (eds), *Human Rights and Public Finance: Budget Analysis and the Advancement of Economic and Social Rights* (Oxford: Hart Publishing, 2013), pp.13–40; M. Dowell-Jones, “Financial Institutions and Human Rights” (2013) 13(3) *H.R.L.R.* 423.

<sup>49</sup> A notable exception from a constitutional law perspective that goes beyond litigation and the role of the courts is X. Contiades and A. Fotiadou, “How Constitutions Reacted to the Financial Crisis” in X. Contiades (ed.), *Constitutions in the Global Financial Crisis* (Aldershot: Ashgate, 2013), p.9.

that human rights are drafted<sup>50</sup> and, indeed, the reality of the actions needed—legislative, administrative, budgetary—to give effect to them.

Much has been made of the judgments that have emerged from courts in countries such as Portugal, Greece, Italy and Latvia that have addressed specific rights-violating aspects of state responses to the crises.<sup>51</sup> However, as has been demonstrated,<sup>52</sup> there is no clear-cut answer to the question of whether courts have served as a countercyclical or counterhegemonic force in relation to the current crises, the economic policies that caused them, and the measures introduced in their wake. The answer to that question varies from court to court,<sup>53</sup> jurisdiction to jurisdiction<sup>54</sup> and over time.<sup>55</sup> National experiences from Europe, Latin America and the United States make it clear that it is very much not a case of “one size fits all”—whether in terms of forms of review,<sup>56</sup> adjudicative interpretive approaches to human rights obligations,<sup>57</sup> implementation and enforcement strategies,<sup>58</sup> or explicit judicial engagement with the crisis context in decision-making.

It is worth noting, furthermore, that given the institutional and normative constraints within which they operate, courts are generally naturally reluctant to engage with issues of economic policy. This is likely to be compounded where such measures can be characterised, as they have been by the Irish courts as “part of the constitutional mandate of the Government that it should be able to act swiftly, and if necessary unilaterally, in urgent protection of the national interest”,<sup>59</sup> or where you have declaration of states of

<sup>50</sup> See, e.g. art.2(2) and (3) of the International Covenant on Civil and Political Rights and art.2(1) of ICESCR.

<sup>51</sup> There is a large and growing literature on this jurisprudence. For useful comparative overviews in a European context, see C. O’Cinneide, “Austerity and the Faded Dream of Social Europe” in A. Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (Cambridge: CUP, 2014), p.169; C. Fasone, “Constitutional Courts Facing the Euro Crisis. Italy, Portugal and Spain in a Comparative Perspective”, EUI Working Paper LAW 2014/25, [http://cadmus.eui.eu/bitstream/handle/1814/33859/MWP\\_WP\\_2014\\_25.pdf](http://cadmus.eui.eu/bitstream/handle/1814/33859/MWP_WP_2014_25.pdf) [Accessed July 29, 2015]; and the contributions to (2014) 3 *European Journal of Social Law*.

<sup>52</sup> See generally, Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (2014).

<sup>53</sup> For a useful example of contrast between the approaches of two European judicial and quasi-judicial bodies in terms of playing a counter-hegemonic role in the context of the recent crisis, compare the work of the European Court of Human Rights and that of the European Committee of Social Rights in addressing domestic “austerity measures” with human rights implications. While the European Court of Human Rights has allowed states a very wide margin of appreciation in the context of austerity measures, citing the unprecedented nature of the economic crisis faced by defendant states (see, e.g. *Koufaki and Adedy v Greece*, App. Nos 57665/12 and 57657/12, decision of May 7, 2013; *Mateus and Januário v Portugal*, App. Nos 62235/12 and 57725/12, decision of October 8, 2013), the European Committee of Social Rights has strongly asserted states’ ongoing obligation to ensure European Social Charter rights in times of crisis (see, e.g. *GENOP-DEI/ADEDY v Greece*, Complaint No.66/2011, decision of May 23, 2012; *IKA-ETAM v Greece*, Complaint No.76/2012, decision of December 7, 2012).

<sup>54</sup> See, e.g. the different approaches adopted to human rights challenges by courts in different jurisdictions addressed in C. Kilpatrick and 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, <http://cadmus.eui.eu/bitstream/handle/1814/31247/LAW%20WP%202014%2005%20Social%20Rights%20final%202242014.pdf?sequence=1> [Accessed July 29, 2015]. For an example of differing approaches between jurisdictions in the same country, see the discussion of US state court responses to litigation seeking to secure economic and social rights in a post-crisis context in H. Hershkoff and S. Loffredo, “Tough Times and Weak Review: The 2008 Economic Meltdown and Enforcement of Socio-economic Rights in US State Courts” in Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (2014), p.234.

<sup>55</sup> See, e.g. G. Maurino and E. Nino’s account of the evolving approach of the Argentine Supreme Court to economic and social rights the context of economic crises from 2001 to 2013 in “Economic and Social Rights and the Supreme Court of Argentina in the Decade Following the 2001–2003 Crisis” in Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (2014), p.299.

<sup>56</sup> For contrasting views on the appropriate model of review to be adopted in dealing with economic crisis, see X. Contiades and A. Fotiadou, “Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation” (2012) 10(3) I.C.O.N. 660; D. Bilchitz, “Socio-economic Rights, Economic Crisis, and Legal Doctrine” (2014) 12(3) I.C.O.N. 710, and follow-up pieces in (2014) 12(3) I.C.O.N. 747.

<sup>57</sup> Contrast, e.g. the willingness of the Colombian Constitutional Court to recognise the right to have at least the minimum level of satisfaction of social needs to be able to live a dignified existence (discussed by D. Landau, “The Promise of a Minimum Core Approach: The Colombian Model for Judicial Review of Austerity Measures” in Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (2014), p.267) with the South African Constitutional Court’s refusal to construe economic and social rights as imposing a minimum core obligation (considered by A. Pillay and M. Wesson in “Recession, Recovery and Service Delivery: Political and Judicial Responses to the Financial and Economic Crisis in South Africa” in Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (2014), p.335).

<sup>58</sup> See, e.g. the discussions by Hershkoff and Loffredo, “Tough Times and Weak Review: The 2008 Economic Meltdown and Enforcement of Socio-economic Rights in US State Courts”; Landau, “The Promise of a Minimum Core Approach: The Colombian Model for Judicial Review of Austerity Measures” and Pillay and Wesson, “Recession, Recovery and Service Delivery: Political and Judicial Responses to the Financial and Economic Crisis in South Africa” of the different mechanisms/strategies used by courts to ensure enforcement in the United States (e.g. retaining jurisdiction to monitor enforcement post-judgment), South Africa (e.g. meaningful engagement) and Colombia (e.g. issuing follow-up orders with deadlines for political action on discrete issues, and using public hearings and civil society groups to monitor compliance) in the context of crisis-related litigation.

<sup>59</sup> *McKenzie v Minister for Defence* [2010] IEHC 461, November 30, 2010 at [52].



“economic emergency” resulting in orders or decrees passed by the executive (in the absence of legislative involvement), as we have seen previously during crises in both Argentina and Colombia.<sup>60</sup>

To repeat: my criticism on this point is not of the courts per se—rather it is of the approach adopted by human rights scholarship in relation to the crisis, and that of legal scholars in particular. Given that the key decision-makers for the purposes of the impacts of the crises have not been the courts, it is striking that so much of the response from human rights academics has been court-centric. If human rights law scholarship is really to engage with the causes and impacts of the crisis in a way that is meaningful for right-holders, then its focus must shift—at least in part—towards the non-judicial national and supranational bodies and decision-making fora that are key for the purposes of minimising the crises’ human rights impacts. The growing “executive dominance” that we are seeing in many Eurozone countries, as well as in the European Union itself,<sup>61</sup> and the nature and location of such executive power in relation to policy fields such as national budgets and macro-economic decisions mean that it is incumbent upon human rights scholars to look to those bodies and processes when considering how human rights may have meaning in times of economic crisis.

The third reason for the failure of human rights traction in the context of the crises relates to key shortcomings in the content of human rights standards. Of course I earlier described these standards in positive terms, and I would not want now to resile completely from that. But that there are weaknesses is undeniable. In particular, the framework has a number of key gaps and confusions that matter hugely when it comes to effectively labelling particular crisis-related actions and omissions as human rights violations.<sup>62</sup>

The problem of the incompleteness of human rights obligations is a particular issue when it comes to the duties imposed by economic and social rights like the right to adequate housing and social security. The gaps in terms of the understanding of the content of those rights is not to do with the nature of those rights as such. Rather, it is attributable to the fact that they have received far less attention from scholars and others than civil and political rights like the right to freedom from torture. As a result, uncertainty remains with regard to a number human rights standards that are directly relevant to assessing and addressing the crises’ human rights impacts. Let us consider the obligation of states to “progressively realise” economic and social rights to the maximum extent of the resources available to them. This is set out in art.2(1) of the International Covenant on Economic, Social and Cultural Rights. That provision essentially means that states have to move towards the full achievement of those rights as quickly and as effectively as possible depending on the resources they can access.<sup>63</sup> The contents of art.2(1) raises some key questions from a crisis perspective that were largely unanswered in 2007. First of all: what do we mean by the state’s maximum available resources? Is it just what states choose to allocate or do we need to look beyond existing budgetary allocations? How can/should one determine whether the state is making the fullest possible use of the wide range of resources available to it? When we talk about the obligation of steps to

<sup>60</sup> For key considerations of how the “emergency” argument has manifested in domestic law in the context of the recent crises, see, e.g. S. Coutts, L. Díez Sánchez, A. Marketou and L. Pierdominici, “Legal Manifestations of the Emergency in National Euro Crisis Law EUI Working Paper” LAW 2015/14, [http://cadmus.eui.eu/bitstream/handle/1814/35499/LAW\\_2015\\_14.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/35499/LAW_2015_14.pdf?sequence=1) [Accessed July 29, 2015]. For a discussion of the application of the “emergency paradigm” to economic crises, see A. Greene, “Questioning Executive Supremacy in an Economic State of Emergency” (2015) 35(3) *Legal Studies* (forthcoming).

<sup>61</sup> See, e.g. D. Curtin, “Challenging Executive Dominance in European Democracy”, Chorley Lecture, June 4, 2013. For more on these concerns and their implications for the stability of the EU project as a whole, see M. Dawson and F. De Witte, “Constitutional Balance in the EU after the Euro-Crisis” (2013) 76(5) *Modern Law Review* 817; C. Fasone, “European Economic Governance and Parliamentary Representation. What Place for the European Parliament?” (2014) 20(2) *European Law Journal* 164. For more on executive dominance at a national level in an economic crisis context, see E. Kopsidi, “Le Renforcement du Pouvoir Exécutif sous l’Effet des Crises Financières. L’exemple Américain, Argentin et Grec”, paper presented at World Congress of Constitutional Law, June 16–20, 2014, <http://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/workshop12.html> [Accessed July 29, 2015].

<sup>62</sup> For more on this point, see A. Nolan, “Putting ESR-Based Budget Analysis into Practice: Addressing the Conceptual Challenges” in Nolan, O’Connell and Harvey (eds), *Human Rights and Public Finance* (2013), pp.46–52.

<sup>63</sup> See ComESCR, “General Comment No.3 on the nature of States parties’ obligations” (1990), para.9.

progressively realise—to move forward—economic and social rights enjoyment, what, if any, excuses can states use to justify steps backwards in human rights enjoyment during an economic crisis?<sup>64</sup>

Article 2(1) also states that states parties must take steps through “international assistance and co-operation” to achieve Covenant rights. How should this obligation of international cooperation beyond state borders limit crisis-related state cuts to development assistance? To what extent do crisis-related resource constraints serve as justifications for states limiting the resources they devote to giving effect to this obligation?<sup>65</sup> What implications do the positive and negative extra-territorial obligations imposed on states have for states’ activities as members of international organisations such as the European Union and IFIs in times of economic crisis?<sup>66</sup> What is the scope of states’ extraterritorial obligations in the context of financial globalisation and monetary and financial policy that has transnational human rights effects?<sup>67</sup>

These are the kind of questions we would have expected the bodies responsible for monitoring and interpreting human rights, the UN treaty-monitoring bodies, to answer. However, the key body in terms of this task—the Committee on Economic, Social and Cultural Rights which monitors the International Covenant on Economic, Social and Cultural Rights—has demonstrated a historic reluctance to link economic decision-making, macroeconomic policy and the impacts of such with specific economic and social rights obligations. It has also been reluctant to engage with states’ obligations beyond their territorial borders, including with regard to resourcing the realisation of economic and social rights obligations.<sup>68</sup> Indeed, the key contribution in this area has not been one produced by the Committee but the 2011 Maastricht Guidelines on Extra-territorial Obligations of States in the Area of Economic, Social and Cultural Rights,<sup>69</sup> a document taking the form of an “international expert opinion” on the part of key academics and civil society actors working on extra-territorial obligations.<sup>70</sup>

One might be tempted to say: “oh but these crises were unprecedented, it is natural that the Committee would take time to develop an approach”. But that ignores the fact that there had been economic crises—and human rights impacts—before which had provided the Committee with the opportunity to refine human rights standards in a crisis context. Indeed, the Committee’s failure to engage with issues of economic crisis in its work was clear prior to 2007–2008; during the various economic crises of the 1990s and early 2000s in the Czech Republic, Hungary, Mexico, Thailand, Indonesia, South Korea, Argentina and Russia, for example, neither the Committee nor other relevant UN treaty-monitoring bodies deemed structural adjustment policies or public expenditure cuts to be in contravention of the International Covenant or other international human rights instruments.<sup>71</sup> This reluctance to engage with economic policy and processes left the Committee—and human rights—in a very weak position at the outset of these crises and it was not until May 2012 that the Committee really started to engage with the crises when it issued

<sup>64</sup> For a consideration of these questions, see A. Nolan and M. Dutschke, “Article 2(1) ICESCR and States Parties’ Obligations: Whither the Budget?” [2010] 3 E.H.R.L.R. 280.

<sup>65</sup> For a discussion of the determination of “maximum available resources” for the purposes of satisfying states’ obligation of international assistance and cooperation, see W. Vandenhole and W. Benedek, “Extraterritorial Human Rights Obligations and the North-South Divide” in M. Langford, W. Vandenhole, M. Scheinin and W. van Genugten (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge: CUP, 2013), pp.332, 342–346.

<sup>66</sup> While the Maastricht Guidelines do provide insights into this question (see, e.g. Guidelines 15, 16, 21 and 29), the Committee has yet to address this issue in detail. The Committee on the Rights of the Child has spoken about the obligations of states which are members of international organisations but thus far has focused its work in this area on the issue of business. See Committee on the Rights of the Child, “General Comment No.16 on State obligations regarding the impact of the business sector on children’s rights”, UN Doc.CRC/C/GC/16 (2013).

<sup>67</sup> For more on this point, see R. Balakrishnan and J. Heintz, “Extraterritorial Obligations, Financial Globalisation and Macroeconomic Governance” in Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (2014), p.146.

<sup>68</sup> For a discussion of the Committee’s treatment (or lack thereof) of resources in the context of the extra-territorial obligations imposed by art.2(1) of ICESCR, see A. Khalfan, “Division of Responsibility amongst States” in Langford, Vandenhole, Scheinin and van Genugten (eds), *Global Justice, State Duties* (2013), p.299.

<sup>69</sup> See, in particular, Guideline 31 on “Capacity and Resources”. For a discussion of this Guideline and commentary on the Guidelines as a whole, see O. De Schutter, A. Eide, A. Khalfan, M. Orellana, M. Salomon and I. Seiderman, “Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights” (2012) 34 *Human Rights Quarterly* 1084, 1150–1154.

<sup>70</sup> It is notable, however, that one of the key authors of the Guidelines, Olivier De Schutter, has been a member of the Committee since May 2015. This bodes well for the Committee’s likely engagement with this area in future.

<sup>71</sup> For more on this point, see A. Nolan, N. Lusiani and C. Courtis, “Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic and Social Rights” in Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (2014), p.121.

a letter to states parties on the permissible parameters of austerity measures and subsequently applied those standards to country situations that it addressed as part of its reporting process.<sup>72</sup>

As this last point shows, there has been some progress. But much work remains both on the part of the Committee and human rights scholars in terms of making the link between human rights obligations and economic policy decision-making in specific contexts. In academic terms, we are seeing the beginnings of such a move in, for instance, the work of the “Budget Analysis and the Advancement of Economic and Social Rights in Northern Ireland” project.<sup>73</sup> That project focused on making the connection between legal economic and social rights obligations and decision-making in relation to budgetary inputs, outputs and outcomes. There is also nascent but growing work on the extent of states obligations beyond their borders in relation to preventing and addressing financial and economic crises against a backdrop of increasingly integrated economies.<sup>74</sup> But much remains to be done in this area if human rights standards are to be relevant and understood so as to engage effectively with the challenges posed by future crises.

This brings me to the fourth and final reason why human rights did not serve as such effective tools for social protection during the crises as they might have been expected to have done: namely, the prevailing economics paradigm and the obstacles that it poses to human rights. Far from putting an end to the dominance of anti-statist, unregulated free market liberalism that predated and contributed to the crises, it is strongly arguable that by rescuing the financial markets (through taxpayer money and mass socialisation of debt), mainstream neoliberalism has actually contrived an opportunity to *intensify* the dominance of individualistic, anti-statist unregulated free market liberalism.<sup>75</sup> Indeed, commentators such as Grant and Wilson have noted the ongoing dominance of what they term “neoliberal Washington consensus policies” following the global financial crisis.<sup>76</sup> This contrasts with earlier financial crises which resulted in major shifts in policy paradigms.<sup>77</sup> In practice, the language of human rights has been near-silenced at the political level by the apparent inevitability of neo-liberalism.

This retrenchment of neoliberalism and the prioritisation of austerity as a solution to the economic crisis have been at the expense of other, more potentially “human rights-friendly” models such as those advanced by progressive and feminist economists.<sup>78</sup> There have been a series of voices arguing for alternatives to austerity—for instance, Ortiz, Chai and Cummins’ work that seeks to present ways of moving from expenditure contraction to expanding fiscal space by measures such as reallocating public expenditure,

<sup>72</sup> CESCR, Letter to States Parties dated May 16, 2012, Reference CESCR/48th/SP/MAB/SW.

<sup>73</sup> For more details, see <https://www.qub.ac.uk/schools/SchoolofLaw/Research/HumanRightsCentre/ResearchProjects/BudgetAnalysis/> [Accessed July 29, 2015]. The author co-managed this project.

<sup>74</sup> See, e.g. Balakrishnan and Heintz, “Extraterritorial Obligations, Financial Globalisation and Macroeconomic Governance” in Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (2014).

<sup>75</sup> Neoliberalism is a contested term that has been accorded multiple definitions. However, frequently identified elements of neoliberalism as an economic theory include an emphasis on deregulation, economic liberalisation and market reforms. These will be understood as constituting fundamental elements of neoliberalism for the purposes of this article. For useful overviews of the history and development neoliberalism, see D. Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005); R. Plant, *The Neo-liberal State* (Oxford: Oxford University Press, 2010); and D. Steadman Jones, *Masters of the Universe: Hayek, Friedman and the Birth of Neoliberal Politics* (Princeton University Press, 2012).

<sup>76</sup> W. Grant and G. Wilson, “Introduction” in W. Grant and G. Wilson (eds), *The Consequences of the Global Financial Crisis The Rhetoric of Reform and Regulation* (Oxford: OUP, 2012), p.6. For more on this point, see C. Crouch, *The Strange Non-Death of Neoliberalism* (Cambridge: Polity, 2011).

<sup>77</sup> Joseph Stiglitz has described the financial crisis as a failure of “economic science”: the standard macroeconomic models have failed, by all the most important tests of scientific theory: “they did not predict that the financial crisis would happen; and when it did, they understated its effects” (“Rethinking Macroeconomics: What Failed, and How to Repair It” (2011) 9(4) *Journal of the European Economic Association*, 591). According to Stiglitz, this has made the models of limited relevance either for prediction, explanation or policy in times of severe downturns, when markets evidently are working so poorly (at p.592). This is a whole other article but it is clear that there is a much larger conversation to be had about the dominant paradigm of economic thought that pre-existed, and to a large degree postdates, the crises.

<sup>78</sup> For a detailed claim that suggests that mainstream economics has foundational elements that are not congruent with human rights approaches, see S. Reddy, “Economics and Human Rights: A Non-conversation” in D. Elson, S. Fukuda-Parr and P. Vizard, *Human Rights and the Capabilities Approach. An Interdisciplinary Dialogue* (London: Routledge, 2012). See also, D. Elson, R. Balakrishnan and J. Heintz, “Public Finance, Maximum Available Resources and Human Rights” in Nolan, O’Connell and Harvey (eds), *Human Rights and Public Finance* (2013).

adopting progressive taxation and opting for a more accommodating macroeconomic framework.<sup>79</sup> So far, however, these alternative models have had very limited traction.

I am, of course, not suggesting that international human rights law requires states to adopt a specific economic model. The UN Committee on Economic, Social and Cultural Rights has emphasised that it does not, stating that “in terms of political and economic systems”, ICESCR is “neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or laissez-faire economy, or upon any other particular approach”.<sup>80</sup> But international human rights law *does* have a lot to say about the parameters and impacts of economic decision-making. And it has a crucial role to play as an analytical framework for evaluating, critiquing and recalibrating the processes, inputs, outputs, outcomes and assumptions underpinning the economic models that have been employed by states. Crucially, it can serve as a key framework for alternatives.

It is vital that efforts be devoted to integrating human rights concerns with economic analysis so as to provide rights-focused economic models and analyses. We see such work being done by economists like Elson, Balakrishnan and Lusiani who have used the concept of the obligation of the state to use its “maximum available resources” to give effect to the rights under the International Covenant as the basis for considering how states might mobilise or access resources in an alternative, human rights-compliant way.<sup>81</sup> From a UN actor perspective, the Special Rapporteur on the Question of Extreme Poverty and Human Rights has argued in favour of the implementation of socially responsible and human rights-compliant tax policies to maximise resources available to states.<sup>82</sup>

There is much going on in this area but for human rights to really form part of economic policy thinking and decision-making, we will need to see far more in order to move past our current situation in which human rights actors and economic actors operate in separate, watertight spheres, resulting in human rights being both sidelined and undermined in the implementation of post-crisis measures. Given that austerity threatens to extend well beyond the current economic crisis, this is not work that can be postponed.

## Conclusion

This article has addressed the key question of how, despite the prevalence and strength of human rights language and concepts prior to the crises, they were largely ignored by policymakers and have been violated on a grand scale throughout the crises. I have considered four key reasons why the human rights project has failed to rise effectively to the challenge of the crisis, identifying shortcomings in terms of the state-centric nature of the human rights framework, the court-oriented nature of human rights scholarship, key gaps and confusions in human rights standards, and, finally, the disconnect between economics and human rights. In doing so, I have highlighted the key lessons that we need to learn from this contemporary experience, and the issues we need to tackle in terms of standards, advocacy and scholarship, in order to make human rights meaningful in future times of crisis. None of what I have said should be taken as a call to abandon human rights. Rather, it should be taken as a call to arms. We need to strengthen human rights work so as to address the challenges highlighted here in order to ensure that when another crisis comes along—and come it will—human rights *will* have meaning.

<sup>79</sup> I. Ortiz, J. Chai and M. Cummins, “Identifying Fiscal Space: Options for Socio-Economic Investments in Children and Poor Households” in I. Ortiz and M. Cummins (eds), *A Recovery for All: Rethinking Socio-Economic Policies for Children and Poor Households* (New York: UNICEF, 2012), pp.231–301.

<sup>80</sup> See ComESCR, “General Comment No.3 on the nature of States parties’ obligations” (1990), para.8.

<sup>81</sup> R. Balakrishnan, D. Elson, J. Heintz and N. Lusiani, “Maximum Available Resources and Human Rights” (New Jersey: Rutgers Center for Women’s Global Leadership, 2011).

<sup>82</sup> M. Sepúlveda, “Report of the Special Rapporteur on Extreme Poverty and Human Rights: Taxation and Human Rights”, UN Doc.HRC/26/28 (2014), paras 54–78.