A human rights-based response to the financial and economic crisis

Although the legacy of the ongoing financial crisis will be gloomy, it may also have another legacy in that crucial ideas about human rights can no longer be dismissed. The crisis presents a historic opportunity – and a generational responsibility – to rethink decision-making in economic policy. A human rights-based approach calls for a reform of governance structures to ensure that all economic policy is carried out in accordance with the human rights regime. This will ensure participation at all levels, subjecting decisions to public scrutiny, transparency and accountability at every step.

Aldo Caliari[1]
Center of Concern (COC)

What started as a crisis in the sub-prime mortgage sector in the US, in the summer of 2007, has become an economic crisis of global dimensions that has been called the worst crisis since the Great Depression.

The magnitude of the crisis is shedding an altogether new light on the consequences of the traditional approach to human rights and the regulation of finance. Under this paradigm, human rights advocates are told that matters of financial regulation are entirely technical and to be left to the experts, while human rights policy and concerns should either be addressed independently from financial regulatory issues or simply circumscribed by whatever approach financial experts decide to take on such issues. However, the crisis has revealed the deficiencies of this approach and is emboldening a human rights-based critique of financial regulation. While there have been many explanations about the sources of the crisis, there is broad agreement on the importance of a number of failures due to lax regulation and supervision of financial markets, the actors that operate in them and the instruments with which they operate.[2]

At the same time, it is not hard to find support for the notion that the enjoyment of human rights will be significantly affected by the crisis everywhere. For instance, the dramatic decline in aggregate demand globally has resulted in extensive unemployment and destruction of livelihoods. After years of declining unemployment, some 20 million more people will be unemployed in 2009 than in 2007, according to forecasts by the ILO.[3] Some 50 million people could be put out of work if the crisis matches the magnitude of unemployment in the 1990s.[4] These general figures hide the greater impacts on women and their children, the poor, indigenous groups, ethnic minorities and migrant workers. Alongside increasing unemployment, social protection – conditional in many countries on having a job – is declining. For those who still have a job, more unemployment means greater pressure on their salaries and social coverage. Social security for senior citizens is also being significantly affected by the crisis, with pension funds registering losses of close to 50% in some cases.[5] The shift to fewer publicly funded pension systems of the last decades magnifies these impacts. In turn, the public revenues needed to bolster the required support for social and pension coverage have fallen substantially, limiting government options.

Poverty is expected to increase worldwide by as much as 53 million people.[6] Even this figure may be optimistic as it is based on the World Bank's widely questioned definition of poverty and is likely to understate the real number of the poor.[7] The decline in nutritional and health status among children who suffer from reduced (or lower quality) food consumption can be irreversible, and estimates suggest that the food crisis has already increased the number of people suffering from malnutrition by 44 million.[8]

The effects of the crisis are also likely to lead to increasing inequality. The gap between richer and poorer households that has been widening since the 1990s will get bigger. The income gap between the top and bottom 10% of wage earners had increased in 70% of a sample of countries investigated in an ILO report published last year.[9]

If social unrest and public expressions of desperation and frustration are met, as they have already been in some countries, with violent repression by government forces, then civil and political rights will also be threatened by the economic crisis. The rise in xenophobic or otherwise discriminatory sentiments that is being seen in several places could also jeopardize the rights of migrant workers and minority groups, who are most vulnerable to discrimination.

Looking at these impacts, and accepting the consensus about the sources of the crisis, one has to conclude that choices made on financial regulation have tangible consequences for the enjoyment of rights. The reverse is also true: an approach that seeks to uphold human rights standards independently of addressing the impacts of financial policy and regulatory choices will prove to be woefully insufficient and ineffective.

The evidence presented by this crisis, however, is no different from that revealed by other financial crises that have periodically hit different parts of the world in the last century, notably East Asia in the late 1990s. They all bring extreme hardships and suffering to ordinary citizens, especially the most vulnerable and marginalized, while those who profited from financial speculation are not held to account for their actions. For instance, the last few years have seen not only a continuation of trends towards increasing income inequality but also a reported increase in the

1 An earlier draft of this article served as the basis for a statement issued by the International Network for Economic, Social and Cultural Rights (ESCR-Net) in consultation with a large number of human rights organizations. The author is grateful to Nicolas Lusiani, who helped finalize the statement, as well as many human rights organizations that commented on it and provided inputs. Responsibility for any mistakes is, of course, solely that of the author.

2 For a detailed survey of the main official sources (IMF, Bank of International Settlements, Financial Stability Forum), showing the remarkable similarity in understanding the proximate causes of the financial crisis, see Caliari (2009), "Assessing Global Regulatory Impacts of the U.S. Subprime Mortgage Meltdown: International Banking Supervision and the Regulation of Credit Rating Agencies", paper prepared for the symposium on Financial Markets and Systemic Risk: The Global Repercussions of the U.S. Subprime Mortgage Meltdown, co-organized by the Journal of Transnational Law and Contemporary Problems at the University of Iowa College of Law, in conjunction with the University of Iowa Center for International Finance and Development.

3 ILO. "The Financial and Economic Crisis: A Decent Work Response." Discussion Paper, 2009 GB.304/ESP/2.

4 *Ibid.*

5 World Bank. The Financial Crisis and Mandatory Pension Systems for Developing Countries. Washington, DC: World Bank.

6 *World Bank News*, 12 February 2009.

7 The World Bank's arbitrary classification of people living below USD 2 a day as poor, and those living below USD 1 a day as extremely poor, has been repeatedly criticized as failing to capture the reality of poverty in different countries with very different poverty lines, and the basket of goods these incomes could purchase in different countries. In 2008, the Bank updated its long-outdated purchasing power parity (PPP) calculations; on this basis the number of people the Bank defines as extremely poor, now those living under USD 1.25 a day, was revised upwards to 1.4 billion, almost 50% more than the previous estimate of 1 billion (see UN Millennium Development Goals Report 2009: 4-7).

8 World Bank. Swimming Against the Tide: How Developing Countries Are Coping with the Global Crisis. Washington, DC: World Bank. 2009.

9 ILO. *World of Work Report 2008: Income Inequalities in the Age of Financial Globalization.* Geneva: International Labour Organization (ILO).

amount of wealth controlled by the "super-rich".[10] This phenomenon was possible with aggressive investment strategies – read, speculation – facilitated by loose flows of capital.[11] Yet it is low-income groups, not those who profited from the pre-crisis boom, who will be disproportionately affected by the post-crisis bust.

In this regard, the financial crisis also calls into question the belief that the wealth earned on markets would "trickle down" to everyone else. Nobel Prize-winning economist Joseph Stiglitz recently stated that financial markets – and indeed GDP growth as currently measured – are not an end in themselves but exist to serve people's well-being. What is good for finance and what is good for GDP growth alone is not necessarily good for the economic well-being of all. This systemic collapse calls for a new role for national governments in economic policy-making – both domestically and, increasingly, at the international level.

A human rights response: the principles

A response to the financial and economic recession that places human rights norms at its centre is not only necessary as a matter of justice; it will also make reforms of the financial and economic system more sustainable and resilient to future crises.

A human rights-based policy response does not presuppose a certain type of economic system. Yet it does take as its point of departure a clear and universally recognized framework – a set of standards founded in the core instruments of international human rights law – to guide the design and implementation of economic policies and programmes to address the crisis. Human rights do not only set limits to oppression and authoritarianism; they also impose positive obligations on states to uphold economic, social and cultural rights. States have the duty to respect, protect and fulfil human rights at all times, especially in times of crisis.

Governments have a duty to ensure minimum essential levels of enjoyment of social and economic rights as a matter of priority, and they have a specific and continuing obligation to move as expeditiously and effectively as possible towards full implementation. Human rights standards call for governments to ensure that no deliberately retrogressive measures are taken – for example, cutting essential programmes – unless this is fully justified by reference to the totality of the rights provided for in the core human rights treaties and in the context of the full use of the maximum available resources. Even in the face of public revenue limitations, states must marshal the maximum available resources to ensure that full implementation of economic and social rights is progressively realized in the short and longer term.

In addition, the principle of non-discrimination requires that states ensure that all measures adopted in response to the crisis avoid disproportionate effects and that deliberate, targeted measures are put into place to secure substantive equality of access to basic services across countries and population groups. Disadvantaged members of society must be protected as a matter of priority, even in times of severe resource constraints.

While the primary human rights obligations of states rest within their jurisdictions, they are also – in the spirit of the UN Charter and applicable international law – required to contribute to international cooperation in the full realization of human rights. When acting within inter-governmental forums such as the UN, the World Bank and *ad hoc* meetings of the Group of 20 (G-20), states must guarantee that their policies are consistent and conducive to the realization of human rights. In this regard, those states that have enjoyed a more powerful position in decision-making on global economic policies have had greater responsibility for causing, through their actions and omissions, this global meltdown. This means that they also carry greater responsibility for the mitigation of the consequences and for taking the steps needed to assure a just and sustainable way forward. Under international law, governments must also ensure that human rights standards take primacy over trade, investment or finance commitments.

Basic human rights principles include social participation, transparency, access to information, judicial protection and accountability. People must be able to participate in public life and to meaningfully interact with the decision-making process affecting them, thus rendering the processes affecting their lives open to contest. Additionally, states must ensure that no one is above the law. Individuals whose rights have been affected must enjoy accessible and effective remedies to seek redress. Those responsible for harms, including private actors, must be brought to justice, and future activities affecting human rights must be prevented.

Reform of decision-making processes on economic policy

The crisis facing us today provides a historic opportunity and indeed a generational responsibility to rethink the manner in which decision-making on economic policy has so far taken place. A human rights approach calls for the reform of governance structures to ensure that all economic policy at the domestic and international levels is carried out in accordance with the legal content that the human rights regime offers.

Too often, official decisions on the regulation of financial capital flows, for example – or the need to dispense with them – are made by a few "experts", often including representatives of the private-sector industries themselves. This process in essence closes avenues for public participation in fundamental policy and legal discussions that affect everyone, with particular impacts on the most vulnerable and marginalized. A human rights-based policy response would transform this process, ensuring participation at all levels and subjecting decisions to public scrutiny, transparency and accountability at every step.

Accountability and participation in economic policy-making are also impaired when intrusive policy conditions are demanded by international financial institutions and donors or by inflexible rules in trade and investment agreements. States should be empowered to assert that their human rights obligations take priority over economic commitments or investors' rights.

These same human rights principles must be instilled at the international level, where cooperation in the realization of these rights is an obligation of all states, particularly those responsible for harms. Despite the far-reaching consequences of financial policy measures, the inter-governmental bodies setting the agenda and designing financial reforms, such as the Basel Committee on Banking Supervision, the Financial Stability Forum and the G-20, limit participation from the majority of countries. The IMF and the World Bank for their part continue to be ruled by principles regarding decision-making that confine developing countries to a marginal role and limit transparency. Equally important, other international organizations that have the express mandate to protect human rights are excluded from the design of policy responses in these forums.

The UN, as the guardian of the international legal framework, is the most appropriate and most legitimate forum to discuss the reforms that are necessary to restructure the international economic and financial system on a human rights foundation. Its role would be greatly strengthened by the establishment of a Global Economic Coordination Council, as recommended by the UN Commission of Experts.[12] Such a body, operating under the principle of constituency-based representation and at a level equal to the General Assembly and the Security

10 According to a 2007 study by Merrill Lynch and Capgemini, "The number of people with USD 1 million or more to invest grew by 8% to 9.5 million last year, and the wealth they control expanded to USD 37,200 billion. About 35% is in the hands of just 95,000 people with assets of more than USD 30 million." See Thal Larsen. P. "Super-rich Widen Wealth Gap by Taking More Risks." *Financial Times*, 28 June 2007.

11 Thal Larson (op. cit.), quoting a Merrill Lynch's executive who said the difference between the rich and super-rich reflected "a willingness by the very rich to take greater risks".

12 United Nations General Assembly. "Recommendations of the Commission of Experts of the President of the General Assembly on Reform of the International Monetary and Financial System." A/63/838. 29 April 2009.

Council, could provide greater effectiveness, representation and transparency in policy-making to address economic policies as they relate to development priorities beyond the narrow purview of finance or economic ministries.

Banking and financial sector regulation

A striking aspect of the crisis is the extent to which financial entities managed to transfer the burden of their irresponsible risk-taking to the most vulnerable in society, and it was specific government policies designed to deregulate the financial system as a whole that enabled this. Governments – domestically and in concert with others – must therefore adopt measures to protect the human rights of their peoples through robust banking and financial sector regulation. They must also strengthen accountability and the rule of law by reining in criminal behaviour. Where certain acts are not currently seen as crimes (e.g., "tax evasion" in certain countries) or as offences that triggers legal liability, then appropriate legislation should be passed and enforced. Furthermore, governments must take serious action to ensure that those individuals and countries affected through no fault of their own find remedy.

Banks are the most regulated of all financial sector entities. Yet their behaviour has increasingly been ruled by principles of supervision that rely on their own internal mechanisms for risk management, rather than externally developed standards shaped by national supervisors. In response to pressure from industrialized countries, many poor countries have progressively adopted these same principles, partly lured by the possibility of attracting international banks. They also acceded, for the same reason, to the unrestricted movement of capital by such banks. Deregulation to attract foreign banks has often not had the desired payoffs, however. Empirical evidence shows no link between liberalized capital accounts and increased economic growth. Access to credit, especially by the most marginalized groups, has shown little improvement, while large international banks have tended to eliminate the domestic banking sector on which the neediest depend. Today, those countries with the greatest exposure to and dependence on foreign banks are the ones worst affected by the financial crisis, as these institutions retreat back to their home countries and refuse to lend in now fragile economies.

Reforms in the banking sector should include the space for national governments to regulate the services provided by any bank in the interest of ensuring broad access to credit and other key social functions. If state-provided banking services are considered a better option for guaranteeing rights, they should be fully pursued.

Hedge funds, private equity funds and credit rating agencies have been left to self-regulatory schemes. Hedge funds have been allowed to become, in many countries, the mainstream mechanism for ordinary citizens to hold their savings, placing citizens' access to social security at risk. Hedge funds and private equity funds have also forced sudden unemployment and other labour rights violations through their undue influence on the decision-making processes in the restructuring of companies around the world. Extraordinary profits were also fostered by leverage strategies that relied on tax exemptions on debt financing, thereby putting sources of public revenue at risk. This has limited the fiscal expansion possibilities of many governments just at the time they need it most to spur job creation and strengthen social protection measures.

> "African-American people and indigenous peoples have a common history of exploitation and conquest, and are disproportionately suffering the impacts of the crisis. Our current American Empire was built on the so-called *American dream*, but we see that stolen land and stolen labor was also used to construct this country, the wealthiest the world has ever known. From the outset, financial institutions aided and abetted profiteers seeking to build empire by any means necessary. We must reject the *neoliberal theology* and construct more progressive theological theories."
>
> Jean Rice *(Picture the Homeless, New York)*

Recognizing that the activities of these financial actors have profound, measurable impacts on human rights, the state must not abdicate its duty to protect. Governments should work together to adopt all necessary measures to prevent hedge funds, private equity funds, derivative instruments and credit rating agencies from adversely affecting human rights.

The liberalization of capital and the creation of impenetrable tax havens have made it more difficult to engage in progressive taxation of capital flows, and further eroded the tax base in countries of both North and South by facilitating the shifting of profits from where they are earned to other low- or zero-tax regimes. This has negative outcomes on public revenue, which is critical for governments to be able to meet their human rights obligations. Governments must live up to their duties toward their people by protecting public revenue in a transparent and accountable way, closing tax havens and taking appropriate measures to control the movement of capital and strengthen fiscal accounts.

Central banks for their part are public agencies and, as part of the government, have obligations to human rights. The principle of "central bank independence" has too often meant independence from social and human rights interests. It has not meant, however, freedom from interference by private financial interest groups. Central banks must recognize that independence does not mean lack of responsibility in serving the interests of society as a whole. They must balance the need to achieve stable and low inflation with their obligations to battle income inequalities and stabilize peoples' jobs and livelihoods through various credit and supervisory instruments.

The crisis and human rights in the South

The extent to which the crisis compromises the achievement of human rights commitments may be more dramatically exposed in the South. Developing countries that for a long time were told they must rely on export-led growth and free market policies are now suffering the most due to the drop in external demand caused by the crisis. They should be allowed special flexibility, so they can fully take into account their human rights obligations as they develop trade policies that can deal with the crisis and forestall export-related vulnerabilities in the future. The export profile and strategy chosen by a country, and its balance between exports and domestic market needs, should be carefully guided by its human rights obligations, in particular the need to ensure non-discrimination and progressive realization of rights.

Debt levels are also set to rise in developing countries. Not only will the crisis worsen their trade and financial situations, making more borrowing necessary, but also an effective crisis response that does not resort to deficit spending to expedite recovery is likely to undermine minimum core levels of well-being. However the human rights consequences and impacts for the future of borrowing cannot be ignored. Part of the increase in debt is due to the proliferation of rapid lines of credit by multilateral financial institutions including the World Bank, purportedly to help developing countries cope with the crisis. These lines of credit are disbursing vast amounts of money with little or no opportunity for citizen control and public accountability, with real risks of completely bypassing social and environmental safeguards. Part of the increase in debt levels comes as a result of countries having to refinance debt in stressed private capital markets where funds have become scarce, as developing countries try in vain to compete with industrialized countries in order to fix their troubled banking sectors and implement stimulus plans.

While in the short term these lines of credit may be necessary to allow governments to stabilize spending, human rights principles are critical to determine: (1) the strictly necessary borrowing that needs to be undertaken, (2) the demands that should be met through concessional finance rather than borrowing, and (3) the accountability and transparency principles that will ensure new lending is done in a responsible way, with appropriate social control, so as to prevent the generation of more illegitimate debts that future generations will be forced to pay.

Some forecast that the budgetary cuts provoked by the crisis, and the shift of funds to fiscal stimulus packages, will lead donor countries to cut back on their development aid. With the enjoyment of human rights of so many people at stake due to the financial crisis, donor governments must not regress on their obligations to international assistance by cutting development aid in any way.

Human rights-oriented economic stimulus packages

The outline of a human rights approach to the crisis would not be complete without reference to the very particular role that human rights standards should play in domestic economic stimulus packages. Particularly relevant in this regard are the aforementioned principles of non-discrimination, transparency, accountability and participation.

Economic stimulus packages must not in any way discriminate. Governments should evaluate the distributional consequences of the packages across society to ensure that equitable benefits are experienced across lines of gender, ethnicity, sexual orientation and class. Extra measures may need to be taken to promote substantive equality for those historically marginalized and especially vulnerable. Gender-sensitive policies, for example, require women's participation in the design and implementation of stimulus packages. Decisions throughout the life of the stimulus must also be open to question and based on participation and transparency in order to strengthen public accountability.

One particular area of priority for governments in their fiscal stimulus packages should be the stabilization and strengthening of social protection systems for all, especially the most vulnerable. The right to social security is recognized in the Universal Declaration of Human Rights and in numerous international human rights treaties, and all states have an obligation to immediately establish a basic social protection system and progressively expand it over time according to their available resources. The strengthening of such systems both fulfils the short-term duty to protect people from an economic downturn and contributes to the longer-term economic priority of investing in people.

Yet at present not all countries have the ability to invoke economic stimulus packages in order to avoid regressive measures in the fulfilment of rights and to boost their national economies. While guaranteeing that such packages meet basic human rights standards at home, governments should likewise uphold their obligation to international cooperation by filling the finance gap in the global South.

It is important that, in an effort to stabilize employment and livelihoods, stimulus packages do not expand demand along patterns of consumption that are out-dated and untenable in both rich and poor countries alike. The continuation of a high-carbon economy, by depleting the Earth's resources and increasing greenhouse gas emissions, will only compound the challenges that many countries already face in their attempts to uphold human rights standards.

Concluding remarks

We should expect a gloomy legacy to the ongoing financial crisis, more so than to any other crisis that the current generation has seen. But alongside this, there is a legacy of important ideas that can no longer be dismissed and that should be at the heart of the restructuring of the global economic system. The undeniable relevance to financial and economic policy choices of the human rights commitments that the international community has endorsed since 1948 is one of them. Humanity would be well advised not to forget at what cost the modern human rights instruments were forged. ■