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Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Effects of foreign debt and other related financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights

Note by the Secretary-General

The Secretary-General has the honour to transmit herewith to the General Assembly the report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Juan Pablo Bohoslavsky, submitted pursuant to Human Rights Council resolutions 25/16 and 34/3.

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Report of the Independent Expert on the effects of foreign debt and other related financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights

Impact of economic reforms and austerity measures on human rights

Summary

The present report demonstrates that the introduction of austerity measures does not contribute to economic recovery, but instead has negative consequences in terms of economic growth, debt ratios and equality, and routinely results in a series of negative human rights impacts. There is therefore a solid legal basis to make the case for a prima facie inconsistency between the imposition of austerity policies in times of recession and the enjoyment of human rights.

Because of the usual circumstances in which States find themselves when seeking assistance from international financial institutions, conditionalities are often imposed and are not necessarily negotiated with borrower States, not to mention their populations, who are even less involved in the associated consultations, discussions or negotiations. The scope of such conditionalities, which has been continuously expanded over recent decades, helps in understanding their pervasiveness and omnipresence in key sovereign businesses.

According to standards of international law, international financial institutions may be held responsible for complicity in the imposition of economic reforms that violate human rights. The causal link between the assistance provided (in the form of loans, surveillance and technical assistance, and attached conditionalities) in the commitment of an internationally wrongful act (complicity) and the harm done (human rights violations) is evident and well documented. The knowledge of the wrongful nature of the act could be presumed if, even when advancing the implementation of economic reforms that normally lead to human rights violations, no ex ante impact assessment is undertaken. Legal responsibility for complicity raises obligations in terms of cessation, non-repetition and reparation.

I. Introduction

1. The present report builds on the guiding principles on human rights impact assessments of economic reforms, submitted to the Human Rights Council in 2019 (A/HRC/40/57), and focuses more specifically on the responsibility of international financial institutions for complicity in the implementation of economic reforms by States that violate economic, social and cultural rights. The report responds to the following question: can international financial institutions be held responsible for complicity in the economic reforms implemented by States that violate human rights, and, if so, under what conditions?

2. The report also provides an opportunity to look into some practical implications of guiding principles 14 and 15, entitled, respectively, "External influence and policy space" and "Obligations of public creditors and donors." At the heart of these two principles is the obligation of States and other actors "not [to] exert undue external influence on other States so that they are able to take steps to design and implement economic programmes by using their policy space in accordance with their human rights obligations, including when trying to cope with economic or financial crises". Furthermore, general principle 15 specifically states there is a need to ensure that international financial institutions, bilateral lenders and public donors should ensure that the terms of their transactions and their proposals for reform policies and conditionalities for financial support do not undermine the borrower/recipient State's ability to respect, protect and fulfil its human rights obligations.

3. The conduct of human rights impact assessments in the design of economic reform programmes by international financial institutions is essential; the systematic consideration of the human rights impacts of such programmes is aimed at ensuring that harm is prevented, compensated for and not repeated. Such assessments should be conducted in harmony with existing safeguards and mechanisms in order to contribute to informed decision-making and to complement findings from a human rights perspective.

4. An internationally wrongful act facilitated by a given lender may be considered to constitute a human rights violation of both civil and political rights and of economic, social and cultural rights. In 2014, in a thematic study on financial complicity submitted to the Human Rights Council (A/HRC/28/59), the Independent Expert concluded that lending to States that commit gross human rights violations may contribute to regime consolidation and increase the likelihood of further gross violations of human rights.

5. In 2018, the Independent Expert reiterated this argument when submitting an *amicus curiae* brief in connection with a complaint in relation to the potential failure of two banks to comply with guidelines of the Organization for Economic Cooperation and Development (OECD) in respect of violations of Security Council arms embargoes against the apartheid regime in South Africa.[1] The complaint was examined by the national contact points of Belgium and Luxembourg,[2] under the OECD guidelines for multinational enterprises.

6. Policy and academic debates have devoted much less attention, however,[3] as to whether lenders can be regarded as accomplices for financing and promoting policies

[1] See, for example, Security Council resolution 418 (1977) and General Assembly resolutions 40/64 A, 41/35 B and 42/23 B.

[2] https://www.ohchr.org/Documents/Issues/IEDebt/OECDNationalContactPointsBelgium Luxembourg.pdf.

[3] See, for example, Robert Howse, "The International Criminal Court Should Investigate Germany's Finance Minister for Crimes Against Humanity in Greece," *International Economic Law and Policy Blog* (2016).

and/or measures that violate economic, social and cultural rights. One exception to this trend is an emerging view strongly asserting that certain violations of economic, social and cultural rights can be regarded as international crimes.[4] Nevertheless, what can be considered as an international socioeconomic crime is obviously rather limited and would not fully account for violations of economic, social and cultural rights relating to impermissible retrogressive economic measures.

7. While austerity measures may be adopted by States at their own initiative, they commonly figure in the prescribed conditionalities included within agreements between States and international financial institutions. The responsibility of States for the violation of economic, social and cultural rights by the imposition of such measures can be directly established, but the international financial institutions can also contribute to the violations of such rights in the context of their lending, surveillance and technical assistance operations. By prescribing economic reforms with foreseeable negative effects on human rights, international financial institutions may thus be considered responsible for complicity.[5]

8. Although the term complicity usually pertains to criminal law, the present report explores the concept from a general international law perspective. The notion of responsibility should be understood from a similar standpoint. In this context, responsibility for complicity should be seen as a type of shared responsibility.[6] In accordance with international law, responsibility for complicity implies: (a) the commission of an act considered wrongful under international law; (b) that the element of wrongfulness, which includes wilful blindness, was known by the State or the facilitator such as an international organization;[7] and (c) the existence of a causal link (facilitation) between the goods or services provided by the financial agent and the harm caused (violation of human rights by an economic policy implemented by a given Government).

9. If technical assistance, surveillance, loans and their attached conditionalities are imposed without considering whether they might be detrimental to economic, social and cultural rights, serious concerns must be raised.[8] When human rights violations as a result of the implementation of such conditionalities are demonstrated, there is a need to consider the responsibility of those involved, so that both the direct/main perpetrators (States) and their accomplices (international financial institutions) can be held accountable.

10. The report begins by exploring the notion of conditionality, policymaking processes and main areas of prescription. By focusing on economic reforms and austerity as part of conditionalities, the report also explains their effects on growth, debt sustainability and equality, while deconstructing economic theories supporting austerity. It also describes the impact of economic reforms on the enjoyment of human

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[4] See Evelyne Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law*, Cambridge University Press, 2015.

[5] The Independent Expert thanks the following individuals for their research and contributions to the present report: Dr. Celine Tan, Reader in Law and Associate Professor, and her team (Dr. Stephen Connelly, Associate Professor, and Rafael Quintero Godínez, PhD candidate) at the School of Law, University of Warwick, United Kingdom of Great Britain and Northern Ireland; Nicolò Fraccaroli, PhD researcher in economics, at the University of Rome Tor Vergata; and the staff of the Office of the United Nations High Commissioner for Human Rights (OHCHR) supporting the mandate.

[6] Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility*, Hart Publishing, Portland, 2016, p. 11.

[7] See draft articles on the Responsibility of international organizations, resolution 66/100, annex, article 14.

[8] Margot E. Salomon, "Of Austerity, Human Rights and International Institutions," *European Law Journal*, vol. 21, Issue 4 (2015).

rights. These findings and arguments set the scene for an examination of the concept of legal responsibility for complicity and an investigation of its applicability to international financial institutions in their support for policies foreseeably leading to the violation of human rights. Conclusions and recommendations are presented in the final sections of the report.

II. Conditionalities promoted by international financial institutions: weak processes and expanding scope

A. Problematic procedures

11. Looking at policymaking processes of international financial institutions helps in understanding their outcomes. The process surrounding the conclusion of an agreement with the International Monetary Fund (IMF), for example, includes various steps: in general, a series of meetings are held between IMF staff and representatives of the requesting government, aimed at assessing the economic and financial situation specific to the country. An agreement normally ensues and the government prepares a letter of intent, in light of the range of conditions set out, which is accompanied by a memorandum of understanding providing further details on the government's commitments to the Fund.[9]

12. In addition to the urgency or direness of specific country situations, the circumstances surrounding the conclusion of agreements can also reflect a certain asymmetric dynamic. Discussions mainly take place at the expert level, in presence of both parties, representatives of the government in question and IMF staff; country representatives usually negotiate the national programme with IMF staff before they submit it to the IMF Executive Board.[10]

13. In terms of timing, it was observed that what is sometimes referred to as "prior actions", which, in fact, constitute a number of "preconditions" that borrowing States are expected to meet in order to be eligible for a loan, are now often an essential aspect of the lending process. With regard to their coercive nature, while not considered to be binding per se, such preconditions nevertheless play a powerful role in domestic policies. According to international financial institutions, this allows a greater "ownership" of the reforms that are put in place. Just like other forms of conditionalities, they are not viewed as contractual obligations but rather policy or financial requirements to be implemented on a "voluntary basis". The aim of prior actions is to reward the "good behaviour" of States in implementing those requirements.[11]

14. When ready to be presented, the 24 directors of the IMF Executive Board decide on the agreement, usually by consensus and sometimes through a voting process.[12] While uncommon, the submission of a plan to the Executive Board may be envisaged so that country representatives sitting on the Board may be able to revisit components of a programme that would put the enjoyment of human rights at risk, in line with the

[9] See Giuseppe Bianco and Filippo Fontanelli, "Enhancing the International Monetary Fund's Compliance with Human Rights: the Issue of Accountability", in Juan Pablo Bohoslavsky and Jernej Letnar Černič, eds., *Making sovereign financing and human rights work*, (Oxford; Hart Publishing, Portland, Oregon, 2014), p. 227.

[10] Ibid., p. 228.

[11] Celine Tan, *Governance through development: poverty reduction strategies, international law and the disciplining of third world states*, New York, Routledge, 2011, pp. 119–120.

[12] https://www.imf.org/en/About/Factsheets/Sheets/2016/07/27/15/24/How-the-IMF-Makes-Decisions.

obligations they are bound to.[13] However, for the most part, not only does the general practice prevent States from having first-hand information about the level of acceptance or "ownership" of the agreement by the country, the decision-making process also does not easily allow for any potential opposition to programmes.[14]

15. Furthermore, while it is true that the process leading to the conclusion of such arrangements offers some basis for a two-way discussion, the very nature of the legal document is closer to a contract of adherence rather than the result of a meeting of the minds through a fully negotiated bilateral agreement. It would seem that the more a State is in need of a loan, the less bargaining power and negotiation space it has.[15]

16. The asymmetrical relationship between borrower States and IMF is accentuated by the fact that IMF is effectively a lender of last resort, in the absence of an alternative global mechanism to respond to debt crises. As highlighted by scholars, under IMF guidelines on conditionalities, arrangements are not considered to be "agreements" and contractual language is thus avoided, demonstrating the unilateral nature of the decisions of the IMF Board in this regard.[16]

17. As noted above, when the social impact of such reforms are being considered, consultations with and participation of the affected population in the negotiation processes is rather limited, often amounting to a mere "box ticking" exercise. Nor are the views of the population reflected in the contents of the conditionalities. In this regard, the Independent Expert has underlined the importance of respecting certain obligations when economic policies are negotiated and designed, including in terms of transparency, participation and accountability.[17] This presents a significant challenge, however, since, too often, governments themselves may want to limit transparency and public participation in such discussions and negotiations.

B. Number and scope of conditionalities

18. For international financial institutions, conditionalities are key elements of financing agreements. As highlighted by IMF, "Typically, a country's government and the IMF must agree on a program of economic policies before the IMF provides lending to the country. A country's commitments to undertake certain policy actions, known as policy conditionality, are in most cases an integral part of IMF lending". As a result, resources can only be released by IMF "Once an understanding has been reached on policies and a financing package".[18] Nevertheless, human rights impact assessments are not being systematically or not even occasionally conducted prior to the conclusion of financing agreements or the adoption of reforms to ensure that agreements or conditionalities are compliant with international human rights standards.

19. As far as the World Bank is concerned, its International Development Association component specializes in credits, which can be described as loans free of

[13] Referred to as an "indirect effect" in terms of the applicability of the International Covenant on Economic, Social and Cultural Rights to the International Monetary Fund (IMF), see Francois Gianviti, General Counsel of IMF, "Economic Social and Cultural Rights and the International Monetary Fund", in *Current Developments in Monetary and Financial Law*, Volume 3, IMF (2005), paras. 24–25; see also E/C.12/2016/1, para. 9.

[14] Yilmaz Akyüz, "Reforming the IMF: Back to the Drawing Board", United Nations Conference on Trade and Development, Group of 24, Discussion Papers Series, No. 38 (2005), p. 19.

[15] Celine Tan, 120; Paul Mosley et al., *Aid and Power: The World Bank and Policy-Based Lending*, (London, Routledge, 1991).

[16] Bianco and Fontanelli, p. 228.

[17] A/HRC/34/57/Add.1, para. 36.

[18] https://www.imf.org/en/About/Factsheets/IMF-Lending.

interest, whereas the International Bank for Reconstruction and Development lends to governments of middle-income and creditworthy low-income countries.[19] As part of the World Bank Group and, of course, like other development banks, they attach conditions to loans granted to member States. In addition to providing loans related to development policy, the World Bank also provides project financing that aims at supporting various projects and is accompanied by a range of conditions. This report, however, focuses instead on policy lending operations, as they often attach macroeconomic conditionalities. Similar conditions can also be included in agreement by the European Commission and the European Central Bank,[20] including as part of economic adjustment programmes, which, in fact, resemble the much-criticized structural adjustment programmes, implemented in the past.[21]

20. Conditionalities reduce the national legal and policymaking space considerably, while exclusively (and theoretically) aiming at making debt sustainable, improving market competitiveness and boosting inclusive growth. In place for decades, the IMF conditionalities system evolved over time, and, despite a discourse stressing their fundamental transformation, recent studies suggest that changes in that regard have been rather limited.[22]

21. While, IMF has in the past acknowledged the key role of counter-cyclical policy measures and has claimed to preserve social protection by ensuring social spending floors, the materialization of these views has been put into question. Despites a series of reforms at the beginning of the century, including an effort to focus on programmes goals in the limit of its competences, in response to criticism about the scope and level of "intrusiveness", both the number and latitude of conditionalities appear to be still growing.[23] Later initiatives aimed at "flexibilizing" the Fund's approach to structural adjustment were followed by an effort to streamline conditionalities.[24] The most recent adjustments in this regard include a greater consideration for issues such as climate, inequalities and gender.

22. Some also argue that the claims of IMF about its transformation resembles nothing more than a superficial "rebranding" exercise[25] rather than an effort to foster deeper changes in existing practices. For instance, in a study on the Middle East and North Africa region comparing policies recommended before 2011 to more recent prescriptions in four States, it is pointed out that IMF policies have not dramatically changed from one period to the other.[26] As for labour and social policies, such changes may not have found their way into IMF advocacy efforts, nor do they consistently stem from the implementation of its programme segments aiming at social protections, such as social spending floors.[27]

23. The commitment of IMF to address gender inequality is clearly an important initiative. In this regard, the Independent Expert has previously highlighted that there

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[19] http://www.worldbank.org/en/about.

[20] A/HRC/31/60/Add.2, para. 19 and onwards.

[21] Scott Greer, "Structural adjustment comes to Europe: Lessons for the Eurozone from the conditionality debates", *Global Social Policy*, vol. 14 (1), 2013.

[22] Alexander E. Kentikelenis et al., "IMF conditionality and development policy space, 1985–2014", *Review of International Political Economy*, vol. 23, Issue 4 (2016).

[23] Gino Brunswijck, "Unhealthy conditions IMF loan conditionality and its impact on health financing", European Network on Debt and Development (Eurodad) (2018).

[24] Gino Brunswijck, "Unhealthy conditions IMF loan conditionality and its impact on health financing", European Network on Debt and Development (Eurodad) (2018).

[25] Kentikelenis et al., "IMF conditionality and development policy space, 1985–2014", p. 3.

[26] Mohammed Mossalem, "The IMF in the Arab world: Lessons unlearnt", Bretton Woods Project, (2015).

[27] Kentikelenis et al., pp. 1, 9 and 17 (reporting that liberalization of the labour market is still being advised and that social spending floors are often unmet).

was a need to go beyond efforts deployed solely to close the gender gap in labour force participation. Such commitment to gender equality should also be borne in mind when changes in the coverage of social protection benefits, fiscal space for social services and investments in infrastructure that are sustainable and gender-responsive are considered.[28]

24. As for the conditionalities themselves, not only have they grown in number, the areas covered have also been expanded.[29] The marked increase in the volume of structural conditions in programmes between 2011 and 2017 was noted in the 2018 IMF Review of Programme Design and Conditionality.[30] Furthermore, it was determined that 23 out of 26 IMF loan programmes approved between 2016 and 2017 were conditional on fiscal consolidation.[31]

25. A detailed examination of IMF agreements concluded between 1980 and 2014 revealed that the number of conditions attached to loans increased and their scope was expanded.[32] While conditionalities related to core economic policies areas accounted for nearly 87 per cent of the total number of conditions, more than 12 per cent of conditionalities were related to the privatization of State-owned enterprises, labour issues (public and private sector), institutional reforms and poverty reduction policies (the privatization of State-owned enterprises being the most common, followed by labour issues).[33] In spite of a widespread belief that austerity-driven labour reforms result in labour market deregulation, such policies have not necessarily contributed to economic growth and increased employment, to say nothing of the negative human rights impacts of these conditionalities.[34]

26. As recently pointed out by the Independent Expert in an open letter addressed to the President of the World Bank, expressing his views about the draft *World Development Report 2019*, many contemporary issues, such as labour informality, the breakdown of social contracts and gender and income inequality, have been worsened by austerity and earlier labour reforms, including freezing or lowering minimum wages, labour market deregulation, social security privatization and targeted social protection schemes.[35]

27. In addition, the "Maximizing Finance for Development" approach, recently launched by the World Bank, which is aimed at fostering investment by the private sector to ensure sustainable development, implies that the Bank aims to "promote private (…) solutions", when available, in order to limit "public debt and contingent liabilities".[36] Shifting the provision of essential services to profit-driven corporations can negatively impact human rights and the viability of the public sector.[37]

28. A study focusing on conditionalities attached to the operations of the World Bank's policy on development financing in 2017, concentrating on 56 operations in 43 countries, highlighted the influential role of the Bank at the national level, in developing countries in particular, with regard both to "domestic economic policies"

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[28] A/73/179.
[29] Gino Brunswijck, "Unhealthy conditions", p. 6.
[30] IMF, 2018 Review of Program Design and Conditionality (Washington, D.C., 2019).
[31] Gino Brunswijck, "Unhealthy conditions", p. 3.
[32] Thomas Stubbs and Alexander E. Kentikelenis, "Conditionality and Debt Relief: An Overview", in Ilias Bantekas and Cephas Lumina eds., *Sovereign Debt & Human Rights* (Oxford, Oxford University Press, 2018), pp. 364–365.
[33] Ibid., pp. 367–368.
[34] A/HRC/37/54, para. 56.
[35] https://www.ohchr.org/Documents/Issues/Development/IEDebt/LetterWorldBankAugust2018.pdf.
[36] A/73/396, para. 4; see also World Bank, "Maximizing Finance for Development", briefing note (2018).
[37] A/73/396, paras. 82–83.

and the “shaping of institutions”.[38] Unlike IMF, the study revealed that the number of conditionalities decreased in comparison to the previous year. The study states, however, that “a small number of controversial economic policy conditions can, in any case, be very detrimental to a country’s development agenda”.[39] Of importance is that 27.7 per cent of the total number of conditions listed were “directed at increasing the role of the private sector” across all policies areas.[40]

III. What does austerity really do to the economy?

29. In the immediate aftermath of the global financial crisis in 2008, it was acknowledged that there was a need to stimulate the economy to overcome its social and economic impacts. In this regard, as a recent study notes, IMF would normally have recommended that austerity measures be imposed to contract public purses;[41] instead the Fund had encouraged fiscal stimulus, fearing a worsening of the economic situation. This approach prevailed for two years after the crisis, but a widespread trend of fiscal consolidation was observed afterwards, with two thirds of countries in the world having put austerity measures in place.[37] Affecting economic growth and equality and public resources by definition, such measures impact the realization of human rights but keep being recommended by international financial institutions. It is thus essential to deconstruct the economic theory supporting austerity.

A. Effects of austerity on growth, debt sustainability and equality

30. Evidence shows the adverse impact of austerity on the economy in times of recession,[42] and economists have highlighted that, when the economy is weak, the pain is prolonged by the detrimental effects of fiscal contraction on a number of public services, including public health and education.[43] A significant body of literature has demonstrated that austerity measures do not contribute to economic recovery, but rather have negative consequences for the economy,[44] while lowering public debt as a percentage of the gross domestic product (GDP). For example, looking at the severity of austerity measures adopted by a group of European countries during the period from 2009 to 2013, it was established that the harsher austerity measures were, the lower the GDP growth rate was.[45]

[38] See Gino Brunswijck, “Flawed conditions: the impact of the World Bank’s conditionality on developing countries”, Eurodad (2019).

[39] Ibid., p. 2.

[40] Ibid., p. 5.

[41] Isabelle Ortiz et al., “The Decade of Adjustment: A Review of Austerity Trends 2010–2020 in 187 Countries”, Extension of Social Security, Working Paper No. 53, (Geneva, ILO, 2017); see also Olivier Blanchard, Economic Counsellor and Director, IMF Research Department, *IMF Survey* (online magazine) (2008).

[42] “The boom, not the slump, is the right time for austerity at the Treasury”; ”Yet austerity should never entail cuts to public services that safeguard human rights”, John Maynard Keynes, Collected Writings, 1937.

[43] Alan Taylor, “When is the time for austerity?”, *Vox*, Center for Economic and Policy Research, (2013); see also Òscar Jordàand Alan M. Taylor, “The Time for Austerity: Estimating the Average Treatment Effect of Fiscal Policy”, *The Economic Journal*, vol. 126, Issue 590 (2016), p. 220.

[44] W. D. McCausland and Ioannis Theodossiou, “The consequences of fiscal stimulus on public debt: a historical perspective”, *Cambridge Journal of Economics*, vol. 40, Issue 4 (2016).

[45] Robert Skidelsky and Nicolo Fraccaroli, *Austerity vs. Stimulus: The Political Future of Economic Recovery*, Palgrave Macmillan, Basingstoke (2017); see also Axel Dreher, “IMF and Economic Growth: The Effects of Programs, Loans and Compliance with Conditionality,” *World Development*, vol. 34, (2006).

31. It has been demonstrated repeatedly that austerity does not result in economic growth.[46] For example, after the latest global crisis, the United Nations Conference on Trade and Development reiterated that austerity was not a synonym for growth, confirming its previous results and predictions.[47] Furthermore, the organization highlighted that austerity in Europe, along with an overreliance on monetary policy, have also affected the stability of international financial markets, contributed to the accumulation of the financial imbalance in developing and emerging economies and have not succeeded in boosting demand.[48]

32. Economically speaking, it is not possible to conclude that fiscal contraction results in economic expansion, taking empirical concerns into account.[49] Some have found out that those cases used to demonstrate "the positive effects of austerity", such as Denmark or Ireland,[50] should be considered rather as a cautionary tale more than an externally valid model, to say nothing of the human rights issues that have arisen in this regard.[51] While comparing Ireland's experience in the 1980s to the adoption of austerity measures following the latest global crisis, it was suggested that the impact of austerity on growth was not as clear as what had been projected, and, in the short term, "it would have been difficult to see the country's economy recovering as a result of austerity alone".[52]

33. The latest IMF Review of Programme Design and Conditionality highlights that, between 2011 and 2017, three quarters of the programmes implemented with the support of the Fund were at least partly successful, and that "growth assumptions were often too optimistic".[53] Due to this unfounded optimism, IMF made statements to the effect that the credibility of these programmes would be enhanced. It recommended, inter alia, the reassessment of certain "trade-offs in programme design", advising, for instance, a more "granular fiscal conditionality" for a more case-by-case and a "sharper debt sustainability analysis".[53]

34. A rise in inequality and unemployment often follows the introduction of fiscal consolidation. As pointed out by IMF, from 1978 to 2009, fiscal consolidation measures in 17 countries members of the Organization for Economic Cooperation and Development, in addition to decreasing wage income and contributing to a rise in unemployment in the long term, significantly entrenched structural inequalities.[54]

35. The ensuing threat to social cohesion is already visible in a number of countries. While, in some cases, austerity measures have briefly contributed to economic growth, partly due to high domestic demand, a number of developing countries adopted austerity measures preventively, after the crisis.[55] Nonetheless, since that time, austerity measures, in various forms, have been adopted in two thirds of countries worldwide. It was observed that wage caps and cuts, along with lower

[46] Òscar Jordà and Alan M. Taylor, "The Time for Austerity", p. 221.

[47] See https://unctad.org/en/pages/PressRelease.aspx?OriginalVersionID=95.

[48] United Nations Conference on Trade and Development, *Trade and Development Report*, Geneva (2016), p. 162.

[49] Robert Boyer, "The four fallacies of contemporary austerity policies: the lost Keynesian legacy", *Cambridge Journal of Economics*, vol. 36, Issue 1, (January 2012).

[50] Francesco Giavazzi and Marco Pagano, "Can Severe Fiscal Contractions be Expansionary? Tales of Two Small European Countries", National Bureau of Economic Research, Working Paper No. 3372 (1990).

[51] Mark Blyth, *Austerity: The history of a dangerous idea* (Oxford University Press, Oxford, 2013); see also Stephen Kinsella, "Is Ireland really the role model for austerity?", *Cambridge Journal of Economics*, vol. 36, Issue 1 (January 2012), p. 235.

[52] Stephen Kinsella, p. 235.

[53] See IMF, "2018 Review of Program Design and Conditionality".

[54] Laurence Ball et al., "The Distributional Effects of Fiscal Consolidation", IMF Working Paper, No. WP/13/151 (2013).

[55] OHCHR, "Report on austerity measures and economic and social rights" (Geneva, 2013), para. 5.

subsidies, were more common in developing countries, while labour and pension reforms were more evident in high income countries.[56]

36. There is, by now, no doubt about the potential human rights impacts of austerity measures. In 2016, the Committee on Economic, Social and Cultural Rights highlighted the potential effects of austerity measures on a number of human rights, including labour rights, the rights to food, housing and social security.[57] Furthermore, the conclusions of a 2015 paper specifically underlined the impact of fiscal consolidation in lowering economy's aggregate incomes and its harsher effects on the poorest segment of the population.[58]

37. In this regard, the Independent Expert has often reported on the impact of austerity measures on human rights and inequality, while clarifying that economic inequality is both a result of, and contributor to, economic crises.[59] It appeared that, after the latest crisis, conventional austerity-related labour reforms did not help recovery nor did they increase access to employment, labour or other social rights.[60] Similar conclusions have been drawn, looking at the impact of austerity on human rights in general and on women's rights in particular.[61]

B. Deconstructing the "expansionary austerity" theory

38. While the subject of fiscal consolidation has been at the centre of research and debate for years, a new wave of economic studies has paid particular attention to its impact on economic growth and its relevance in times of crisis. A few scholars have suggested that austerity [would have] "an expansionary effect", arguing that fiscal consolidation would contribute to economic recovery. For instance, key results of a recent study suggest that "(o)n average fiscal adjustment based upon spending cuts have very small output costs and in some cases are expansionary".[62]

39. This approach is usually referred to as the "expansionary fiscal contraction" theory. According to its advocates, avoiding further increase in the fiscal deficit in times of shock allows for an economic revival.[57] Despite widespread evidence showing that austerity does not contribute to economic recovery or growth,[63] this idea seems to keep influencing mainstream economic thinking to a disproportionate degree.

40. Resulting in positive outcomes from a human rights standpoint and at the economic level, other economists have however argued that fiscal deficit would be helpful for economic recovery and that stimulus and redistributive measures can go hand in hand.[64]

41. The rationale supporting the resort to austerity is based on the oversimplified idea that, in times of economic downturn, further fiscal deficit should be avoided. Therefore, increasing (or maintaining) public spending would result in deepening

[56] Isabelle Ortiz et al., "The Decade of Adjustment", p. 13.
[57] E/C.12/2016/1.
[58] Davide Furceri et al., "Fiscal Consolidation and Inequality in Advanced Economies: How Robust Is The Link?" (2015), p. 29.
[59] Juan Pablo Bohoslavsky, "Economic Inequality, Debt Crises and Human Rights", *Yale Journal of International Law*, vol. 41, Issue 2, (2016).
[60] A/HRC/34/57, para. 57.
[61] See A/73/179.
[62] Alberto F. Alesina Carlos A. Favero and Francesco Giavazzi, "What do we know about the effects of Austerity", *National Bureau of Economic Research*, Working Paper No. 24246, (2018).
[63] See, for example, Òscar Jordà and Alan M. Taylor, "The Time for Austerity" ("on average, fiscal consolidations generate a drag on GDP growth").
[64] Robert Skidelsky and Nicolo Fraccaroli, *Austerity vs. Stimulus*, p. 52.

fiscal deficit, thus either affecting consumers spending, according to the “Ricardian” school, or impacting investments, according to economists who follow the ideas of the “new classical” school.[65] While economists base their results on a number of explanatory elements, the level of confidence (be it of consumers or investors) is without any doubt the most questionable.[66]

42. Arguing that the fiscal deficit necessarily affects businesses and consumer confidence[67] in the economy, a number of economists claim that deficits result in decreasing private spending and business investments and impact recovery. In their view, austerity contributes to the restoration of confidence and induces economic growth. These assumptions have been challenged many times.

43. In this regard, the main issue lies in the research methodology of used in studies supporting “expansionary austerity”. In short, the variable used to conduct empirical studies on the effects of austerity on the economy is not qualified correctly, and thus significantly impacts the results of economic research.

44. While fiscal consolidation is considered an “exogenous” variable by advocates of expansionary austerity, other economists have demonstrated that this approach is fundamentally biased, and should be considered “endogenous”. As an exogenous variable is an economic instrument used to identify a variable outside the economic model, (such as the occurrence of a shock), endogenous variables are determined by the economic model itself, (or cannot be considered as an external phenomenon). In the case of IMF, the implementation of austerity measures can actually be “predicted using predetermined macroeconomic controls”,[68] and thus cannot be qualified as exogenous. That is to say, some economic studies, based on empirical flaws, have erroneously concluded that austerity has an “expansionary” effect, thus misinterpreting its role in potential economic recovery.

IV. Effects of austerity on human rights

45. Fiscal consolidation is often among the conditions attached to loans, and it has been widely advised, promoted and even pushed by international financial institutions over the last years.[69] However, its devastating consequences on human rights are well known and documented. Treaty bodies, special procedures mandate holders, civil society organizations and scholars have repeatedly reported its various actual and potential consequences on a wide range of human rights and on specific groups, underscoring that people confronting cumulative and/or intersecting inequalities are disproportionally affected.[70]

46. In this context, for illustrative purposes,[71] some examples are presented below, with a view to demonstrating how conditionalities, including the implementation of fiscal consolidation and structural adjustment, can directly undermine the enjoyment of economic, social and cultural rights. The negative effects of austerity on economic growth, debt sustainability and economic equality easily translate into adverse consequences for human rights.

[65] Ibid., p. xviii.
[66] Alberto Alesina and others also mention accompanying policy, labour supply and networks.
[67] Robert Skidelsky and Nicolo Fraccaroli, *Austerity vs. Stimulus*, p. xix.
[68] Òscar Jordà and Alan M. Taylor, “The Time for Austerity”, p. 11.
[69] See, for instance, IMF, “2018 Review of Program Design and Conditionality”, pp. 5 and 31.
[70] See for instance, OHCHR, “Report on austerity measures and economic and social rights”, para. 49 and onwards; see also Aoife Nolan, *Economic and Social Rights after the Global Financial Crisis*, Cambridge, Cambridge University Press (2014).
[71] A/HRC/34/57/Add.1; and A/HRC/25/50/Add.1.

47. Labour-related reforms implemented in the context of structural adjustment programmes have contributed to the erosion of collective and individual labour rights, and the right to just and favourable work and working conditions have been affected by the implementation of wage caps or employment limits, for instance.[72] The consequences of such reforms can also result in impacts on women's right to equality. For instance, mandated cuts to public sector jobs have contributed to rising informality, diminished unemployment benefits, the deterioration of social protections and increased burdens in terms of unpaid care work on women.[73]

48. In addition to fiscal consolidation, specific reforms proposed in similar situations can be of particular concern. Attached to Ukraine's most recent loan agreement with IMF was a series of conditionalities, including the privatization of a significant number of State-owned enterprises.[74] In the context of privatization, access to a range of services, including essential services such as water and electricity, can be put at risk.[75] Furthermore, measures that result in the reduction of subsidies or that affect the price of specific goods can have a direct effect: for example, a diminution in (or elimination of) gas and fuel subsidies could have serious consequences for livelihoods and could jeopardize the realization of economic, social and cultural rights.

49. Measures put in place to better target the beneficiaries of social protection systems are also of concern. In Tunisia for example, the Independent Expert highlighted that redirecting benefits exclusively to the ultrapoor should not result in inadequate coverage for others in situations of poverty.[76] In its concluding observation on Portugal, the Committee on the Rights of Persons with Disabilities expressed its concerns with regard to the impact of austerity measures on support services available to persons with disabilities, while underlining that "in the absence of family support or assistance networks" they are at risk of living in poverty or extreme poverty.[77]

50. Similarly, the Committee on the Elimination of Discrimination against Women has underlined that, in general, public services cuts in the context of economic crisis, have had specific impacts on women and girls,[78] potentially excluding them from education and burdening them with additional unpaid care work, for instance. Underscoring that the current economic system is sustained by gender inequality and multiple forms of gender discriminations, the Independent Expert highlighted that austerity-driven fiscal consolidation measures and economic reforms, such as those encouraging labour market flexibilization reductions in the coverage of social protection benefits and services, cuts to public-sector jobs and the privatization of services, tend to negatively affect women more than men.[79]

51. In its concluding observations on Cyprus, the Committee on Economic, Social and Cultural Rights noted with concern "the continuing significant decrease in public spending, particularly in the areas of social protection, housing, health and education, under fiscal consolidation measures".[80] It also highlighted the disproportionate

[72] Thomas Stubbs and Alexander E. Kentikelenis, "Conditionality and Debt Relief: An Overview", p. 375.
[73] A/HRC/34/54.
[74] A/HRC/40/57/Add.1.
[75] A/73/396.
[76] A/HRC/37/54/Add.1, para. 38.
[77] CRPD/C/PRT/CO/1, para. 53.
[78] CEDAW/C/GC/36, para. 38.
[79] See A/73/179.
[80] E/C.12/CYP/CO/6, para. 11.

adverse impact of such measures on the enjoyment of economic, social and cultural rights, especially for the disadvantaged and marginalized individuals and groups.

52. An increase of poverty-reduction conditionalities has been noted over recent years, rising from around to 1 per cent in 1998 to 5 per cent of the total number of conditionalities in 2014. However, gaps remain and, as pointed by scholars, given the non-binding nature of poverty reduction targets, these conditionalities are not considered as important as macroeconomic conditions, including fiscal consolidation.[81] That is, despite the establishment of priority spending targets, they often remain unmet,[76] not to mention that poverty reduction conditionalities may not be compliant with human rights standards.

53. Poverty reduction or other conditionalities affect specific social sectors, with important potential consequences on human rights. In this regard, a clear example is the potential impact of fiscal consolidation and related cuts on public spending in the health sector. For instance, in Chad, between 2013 and 2017, due to tight fiscal deficit targets, the budget of the health sector was decreased.[82] Furthermore, by contributing to the deregulation of the sector's market for instance, the adoption of structural adjustment can result in diminishing the accessibility and quality of provided services.[83]

54. The human rights of specific groups, in particular those living in situations of vulnerability, can be particularly affected by the adoption of austerity and related measures. For example, regressive tax reforms, resulting in a shift from direct to indirect taxation policies, can have important consequences, in particular for low-income households. For example, a significant increase in the value added tax was introduced in Colombia[84] and Costa Rica,[85] following the advice of IMF in 2017. In this regard, in his report on his country visit to Sri Lanka, the Independent Expert expressed his concern at the significant rise in the value added tax, given that the brunt of such taxes is often borne by the poorest.[86]

55. Although austerity measures are thought to be temporary, their effects last far beyond the period of their effective implementation. Lessons learned from previous experiences, such as the imposition of structural adjustment programmes in various regions, including in South-East Asia, Latin America and sub-Saharan Africa a few decades ago, indicated that it could take up to 20 years to recover from the human rights impacts of austerity measures,[87] resulting in an increase in inequalities and poverty.

V. Complicity of the international financial institutions

56. International organizations are responsible for actions (and omissions) attributable to them which constitute a violation of their own obligations. This principle of independent responsibility is paramount throughout the draft articles on

[81] Thomas Stubbs and Alexander E. Kentikelenis, "Conditionality and Debt Relief: An Overview", p. 371.

[82] Gino Brunswijck, "Unhealthy conditions", p. 19.

[83] Ibid., "strikes by health personnel, calling for improvements in salaries, working conditions and equipment during the IMF programme period" were also observed in many countries in 2017 and 2018.

[84] https://www.imf.org/en/Publications/CR/Issues/2017/05/31/Colombia-2017-Article-IV-Consultation-Press-Release-Staff-Report-and-Statement-by-the-44952.

[85] https://www.imf.org/en/Publications/CR/Issues/2016/12/31/Costa-Rica-2016-Article-IV-Consultation-Press-Release-Staff-Report-and-Statement-by-the-43916.

[86] A/HRC/40/57/Add.2, para. 26.

[87] See Oxfam, "A cautionary tale", Briefing Paper 174 (2013).

the responsibility of international organizations of the International Law Commission. Furthermore, complicity with States is one of the most common means of participating in an internationally wrongful act.[88]

57. Complicity is a separate area of responsibility devolving from the principal wrongful act it facilitates: the international organization is responsible for its own contribution facilitating the principal wrongful act.[89] In other words, while such organizations can directly be held directly responsible for the commission of an internationally wrongful act, responsibility can also result from the provision of technical and/or financial assistance to a State that is the ultimate perpetrator.

58. Complicity in such instances involves three main elements: the fact that the aid or assistance provided by an international organization in question would be considered internationally wrongful, that this element was known by international organization,[90] and the existence of a causal link between the goods or services provided and the harm caused (violations of human rights, in this case).[91]

59. An international organization is responsible for a wrongful act when conduct consisting of an action or omission constitutes a breach of an international obligation of that organization.[92] While it is true that the World Bank[93] and, far less explicitly, IMF[94] are statutorily prevented from making political considerations, it is difficult to argue that violating human rights can be part of the domestic political affairs of countries (Art. 2(7) of the Charter of the United Nations).[95] Referring to the opinion of IMF, Special Rapporteur Giorgio Gaja of the International Law Commission held that one cannot say "that an organization is free from international responsibility if it acts in compliance with its constituent instrument".[96] Furthermore, a number of international financial institutions provide, in their statutes, the principle of neutrality ("making political considerations"), which has been routinely violated by bypassing it or reinterpreting it artificially in order to institute structural adjustment policies.[97]

60. What are these relevant international obligations that must be considered when granting a multilateral loan? It has been argued that international human rights conventions, such as the International Covenant on Economic, Social and Cultural Rights, only bind States parties, with the operations of international financial institutions being guided by their own Articles of Agreement.[98]

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[88] Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility*, p. 2 and onwards.

[89] Ibid., pp. 4–5.

[90] Resolution 66/100, annex, article 14.

[91] Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility*, p. 262.

[92] A/CN.4/L.632, article 3.

[93] International Bank for Reconstruction and Development, Articles of Agreement, articles IV (10) and III (5)(b); see also Hassane Cissé, Daniel Bradlow and Benedict Kingsbury eds., "International Financial Institutions and Global Legal Governance", *The World Bank Legal Review*, vol. 3, (2012).

[94] Articles of Agreement of IMF (https://www.imf.org/external/pubs/ft/aa/index.htm), articles I and IV (3)(*b*).

[95] John Ciorciari, "The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement", *Cornell International Law Journal*, vol. 33, Issue 2 (2000).

[96] See A/CN.4/610.

[97] Alexander Kentikelenis and Sarah Babb, "The Making of Neoliberal Globalization: Norm Substitution and the Politics of Clandestine Institutional Change", *American Journal of Sociology*, vol. 124, Issue 6, (2019).

[98] Francois Gianviti, General Counsel of IMF, "Economic Social and Cultural Rights and the International Monetary Fund", *Current Developments in Monetary and Financial Law*, Volume 3, IMF (2005), p. 43 and onwards.

61. However, IMF and the World Bank are specialized agencies of the United Nations,[99] and consequently they are required to act in conformity with the Charter; more importantly, as international organizations they are clearly subject to international law, and therefore must not violate customary international law[100] and the general principles of international law[101] which not only include economic, social and cultural rights[102] but also, in the case of responsibility for complicity, find legal foundation in a long and robust list of international instruments, cases in customary international law,[103] the jurisprudence of international and national courts and national legislation.[104]

62. International financial institutions are not exempt from the obligation not to violate or become complicit in the violation of general rules of human rights law.[105] More specifically, the International Covenant on Economic, Social and Cultural Rights emphasizes the obligation of the international community to cooperate towards the realization of economic, social and cultural rights. States cannot get out of their clear obligations (including those emanating from the Covenant) by having an international organization act on their behalf.

63. The Committee on Economic, Social and Cultural Rights has also highlighted that international financial institutions and other international organizations are "bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties".[106] The Committee also specified that "they are therefore obligated to comply with human rights as listed, in particular in the Universal Declaration of Human Rights, that are part of customary international law or of the general principles of law, both of which are sources of international law".[107]

64. International financial institutions should not exert undue external influence on States; doing so could amount to complicity.[108] States should be able to use their legal and policy space[109] to design and implement economic programmes in line with their human rights obligations. Undue external influence means direct or indirect intervention in the economic affairs of a State through the use of economic and/or political measures seeking to influence States to adopt certain economic policies or to secure from them advantages of any kind that undermine the ability of States to respect, protect and fulfil their human rights obligations. Economic measures can

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[99] See Agreement between the United Nations and the International Monetary Fund, United Nations, *Treaty Series*, No. 328 (1948); Agreement between the United Nations and the International Bank for Reconstruction and Development, United Nations, *Treaty Series*, No. 346 (1948); and Agreement on the Relationship between the United Nations and the International Development Agency, resolution. 1594 (XV).

[100] See *Interpretation of the agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, ICJ Reports 1980*, p. 73.; A/CN.4/532, article 3; and A/CN.4/553, article 8.

[101] Willem van Genugten*, The World Bank Group, the IMF and Human Rights: A Contextualised Way Forward*, Cambridge-Antwerp-Portland, Intersentia (2015).

[102] Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford, Oxford University Press, (2006).

[103] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007*.

[104] See Juan Pablo Bohoslavsky, "Tracking Down the Missing Financial Link in Transitional Justice", *International Human Rights Law Review*, vol. 1 (2012).

[105] Christian Tomuschat, "International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law", *Recueil des cours*, vol. 281 (1999).

[106] *Interpretation of the agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, ICJ Reports 1980*, para. 37.

[107] See E/C.12/2016/1, para. 7.

[108] Resolution 66/100, annex, article 15.

[109] See A/HRC/40/57, principle 14; Sustainable Development Goal 17, target 15; resolution 69/313, annex, sect. I, para. 9; and resolution 2625 (XXV).

include both conditionalities attached to financial assistance programmes and implicit conditionalities informally urged by international or regional institutions.[110]

65. Furthermore, it is important to note that States are not allowed to deploy international financial institutions to violate international law when they cannot do so in their capacity as individual States: such delegation cannot be used to avoid responsibility.[111] As underscored in the guiding principles, "States cannot escape responsibility for actions or the exercise of functions that they have delegated to international institutions or private parties (re blended finance and privatization): delegation cannot be used as an excuse to fail to comply with human rights obligations, in abnegation of the extraterritorial character of these obligations," (para. 15.3). Furthermore, as explained by the Committee on Economic, Social and Cultural Rights in its concluding observations on Ireland, "(…) It also encourages the State party, as a member of international organizations, including international financial institutions such as the Fund, to ensure that the policies of these organizations are in conformity with the obligations of State parties under the Covenant".[112]

66. During the discussion and codification of the draft articles on the responsibility of international organizations, some international organizations providing financing objected to the content of complicity and its link to the principal wrongful act, which could be associated with financial assistance.[113] In particular, the World Bank highlighted, with regard to the application of the provision on aid and assistance to international organizations, that " (…) if not strictly confined to its proper scope, this provision is worrisome and may create a dangerous chilling effect for any international financial institution providing economic assistance to eligible borrowers and recipients".[114]

67. In the same vein, IMF explained, while sharing its concerns on the interpretation provided by article 16 of the commentary, which would assimilate the notion of aid or assistance to the facilitation or provision of financing that would be essential or had significantly contributed to the act in question, that "given the fungible nature of financial assistance, such references in the case of financial assistance can only mean assistance that is earmarked for the wrongful conduct". The international organization further underlined that

> "(…) This should be distinguished from aid and assistance, as those words are used colloquially, which international organizations regularly provide their members.
>
> For example, IMF was established, inter alia, to provide financial assistance to its members to assist in addressing their balance of payment problems. Consistent with its charter, IMF regularly provides such financial assistance.
>
> That said, a member receiving financial assistance from IMF may still engage in wrongful conduct. Neither IMF itself, nor the provision of financial assistance by IMF, is capable of precluding such conduct or contributing significantly to it.".[115]

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[110] A/HRC/40/57, principle 15.

[111] Ian Brownlie, "State Responsibility: The Problem of Delegation", K Ginther et al. (eds.), *Völkerrecht zwischen normativem Anspruch und politischer Realität*, Duncker & Humblot, Berlin (1994); see also International Law Association, "Accountability of International Organizations Final Conference Report", (Berlin, 2004).

[112] See E/C.12/IRL/CO/3, para. 35.

[113] See A/CN.4/637.

[114] Ibid., p. 27.

[115] A/CN.4/582, p. 10.

68. Of concern, for IMF at the time was the fact that such conduct could not be precluded given that "a member always has an effective choice not to follow the conditions on which IMF assistance is provided". Furthermore, it highlighted that

> "(…) IMF cannot contribute significantly to such conduct because IMF financing is not targeted to particular conduct; it is provided to support a member's economic programme that addresses its balance of payment problems. The financial resources utilized by the member to engage in particular conduct can be, and typically are, obtained from a variety of sources – domestic taxpayers, domestic and international creditors and international donors. The fungible character of financial resources also means that IMF financial assistance can never be essential, or contribute significantly, to particular wrongful conduct of a member State (…)"[116]

69. These arguments can be broken down into four elements.[117] First, the World Bank warns that responsibility for complicity applied to international financial institutions could have a chilling effect and limit financial provisions to borrowers and recipients. Apart from the fact that this assertion would need to be empirically proved, this is not something necessarily to be concerned about if the financial assistance not provided would have had an adverse impact on human rights.

70. Second, as a matter of principle IMF argues it cannot be responsible for what its financing could provoke as borrowing States always have the choice not to follow the conditions under which the loans are provided. This argument is problematic. On the one hand, usually States temporarily going through financial turbulences and losing access to other sources of funds will resort to international financial institutions, typically IMF. This is why IMF sees its bargaining power enhanced to exercise influence on the borrower so that the borrower is not fully free to choose its own economic policies.[118] On the other hand, even when the borrowing State is able to freely decide what economic path to follow, should the international financial institution know (or have wilful blindness of) about the wrongful act financed, it should bear responsibility for this assistance, provided that the causation requirement is met.

71. Third, the financing provided by IMF is generic by nature (not to finance any particular project) and there are necessarily a number of concurrent financial sources that borrowing States could use to facilitate the implementation of retrogressive economic policies. But the multiplicity of causes is not a sufficient factor to exclude responsibility, it just requires its proper allocation among the wrongdoers. Apportioning responsibility should be done according to the actual behaviour of each agent and its consequences.[119] It has also been proposed a principle of joint and several liability, allowing for the balancing of the different interests of injured and responsible parties through holding one responsible who can then recover any losses from others.[120]

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[116] Ibid., pp. 10–11.

[117] Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility*, p. 169 and onwards.

[118] A/CN.4/553, para. 28: "A hypothetical example of coercion would be that of an international financial organization imposing strict conditions for an essential loan and thereby coercing the recipient State to infringe obligations towards another State or certain individuals", see Giorgio Gaja, Special Rapporteur, Third report on responsibility of international organizations".

[119] Roger P. Alford, "Apportioning Responsibility among Joint Tortfeasors for International Law Violations", *Pepperdine Law Review*, vol. 38, (2011).

[120] Christiane Ahlborn, "To Share or Not to Share? The Allocation of Responsibility between International Organizations and Their Member States", *Amsterdam Law School Research Paper*, No. 2013-73 and *Amsterdam Centre for International Law*, No. 2013-26, (28 November 2013).

72. And fourth, the fungibility of IMF financial assistance would preclude it from being a significant contribution to the perpetration of an internationally wrongful act. However, fungibility of the money does not mean that loans do not ever contribute to the commission of human rights violations.[121] It is not tantamount to neutrality. As stated in the context of financial complicity on the part of the State, "while it is most certainly difficult to establish any form of specific causality between the granting of a certain amount and a specific internationally wrongful act, it would provide States with a very tempting loophole if they could avoid responsibility for complicity simply by resorting to cash flows instead of providing material aid in the traditional sense".[122]

73. It is important to remark that it is not only about money, but also about the so-called "catalytic effect"[123] of loans from international financial institutions as they send a signal to international markets, and this affects investors decisions and borrowing costs – both often have a much bigger impact on public finances than the modest amounts IMF provides.

74. Nothing in the draft articles on the responsibility of international organizations seems to indicate that contributions have to be essential, as stated by IMF. This requirement could apply to project financing, not to massive financial assistance to support macroeconomic programmes. In this regard, a great legal and academic discussion has flourished over recent last years.[124] The International Law Commission has stressed that "the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act".[125] Therefore, "the key question to be asked is whether a given action or omission made it easier for another State or international organisation to commit its wrongful act."[126] Of course there should be a "very close connection between the authorization or recommendation [made by an international financial institution] and the relevant act of the member State".[127]

75. Given the direct causal link between austerity and human rights violations, the latter being foreseeable consequences of the former (see sections III and IV), if the technical advice, surveillance or financial support granted by an international financial institution to a borrowing State facilitated and/or promoted the implementation of impermissible economic retrogressive measures that negatively and unjustifiably impacted on the enjoyment of human rights, the lender should prove that the funding was given with no knowledge of the circumstances of the principal wrongful act.[128] This shift is legitimate, given that victims of economic and social

[121] Sabine Michalowski and Juan Pablo Bohoslavsky, "Ius Cogens, Transitional Justice and Other Trends of the Debate on Odious Debts. A Response to the World Bank Discussion Paper on Odious Debts", *Columbia Journal of Transnational Law*, vol. 48, No. 1 (2010).

[122] Helmut Aust, *Complicity and the Law of State Responsibility*, Cambridge, Cambridge University Press (2011).

[123] Thomas Stubbs et al., "Catalyzing Aid? The IMF and Donor Behaviour in Aid Allocation", *World Development*, vol. 78, (2016).

[124] See, for example, Sheldon Leader, "Project finance and human rights", in Juan Pablo Bohoslavsky and Jernej Letnar, *Making Sovereign Financing and Human Rights Work*, Oxford, Hart Publishing (2014).

[125] International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, article 16, commentary, para. 1 (http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf).

[126] Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility*, p. 185.

[127] Comment made by Austria, in A/C.6/60/SR.11, para. 61; see also Independent Evaluation Office of IMF, "The IMF and Social Protection", (5 July 2017), p. 25.

[128] Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility*, p. 234 and onwards.

human rights violations may have no access to the relevant evidence from international financial institutions or from States.[129]

76. One effective way to prove this lack of knowledge is by showing that a human rights impact assessment was undertaken and measures to avoid adverse human rights consequences were taken in a timely manner. Measures that would result in backward steps in terms of the achievement of economic social and cultural rights are permissible only if States can demonstrate that such retrogressive measures are in line with a range of criteria,[130] as outlined in the guiding principles.

77. Being held responsible for complicity brings a number of legal consequences,[131] which include three main obligations: cessation, non-repetition and reparation.[132] If the internationally wrongful act is of a continuing character, as most economic reforms and their impacts are, the obligation of cessation is thus of specific relevance. Assurances and guarantees of non-repetition are linked to prevention, which, in the case of international financial institutions, should include the systematic and mandatory use of ex ante human rights impact assessments. In terms of reparation, which includes restitution, compensation and satisfaction,[133] the complex distributional, cumulative and short and long-term effects of economic reforms pose a great challenge; ex post human rights impact assessments are thus of paramount importance to undo and remedy retrogressive measures and their effects.

78. Another important implication of the responsibility of the international financial institutions for complicity is their obligation, in a case of State default; to bear some financial losses,[134] taking into account their level of recklessness towards the sovereign debtor, its population and the other creditors.[135]

VI. Conclusions

79. As discussed herein and in other reports,[136] austerity measures regularly result in a series of negative human rights impacts; hence, there is a solid legal basis to make the case for a prima facie inconsistency between the implementation of austerity policies during times of recession and the obligation to protect the enjoyment of human rights.[137]

80. There is no evidence that the so-called expansionary austerity even exists from an economic standpoint. It is much clearer that structural adjustment programmes are linked to declines in economic growth, employment, debt sustainability and equality.

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[129] See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, International Court of Justice Reports 2010*, para. 55: "A public authority is generally able to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law – if such was the case – by producing documentary evidence of the actions that were carried out".

[130] See E/C.12/2016/1.

[131] See *Jam v. International Finance Corporation* (2019); the United States Supreme Court decided that international organizations enjoy the same immunity to which foreign sovereigns are currently entitled; i.e. they are not granted absolute immunity.

[132] Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility*, p. 261.

[133] Ibid., p. 269; see resolution 66/100, annex, articles 35–37.

[134] Kunibert Raffer, "Preferred or Not Preferred: Thoughts on Priority Structures of Creditors", paper prepared for discussions at the 2nd Meeting of the ILA Insolvency Study Group, Washington, D.C. (2009).

[135] Juan Pablo Bohoslavsky, "Lending and Sovereign Insolvency: A Fair and Efficient Criterion to Distribute Losses among Creditors," *Goettingen Journal of International Law*, vol. 2-1 (2010), pp. 387–412.

[136] A/HRC/37/54; A/73/179; see also A/HRC/31/60/Add.2.

[137] A/HRC/40/57, principle 10; see also E/1991/23, para. 10.

It is not surprising that the combination of economic downturns and contractionary turns in fiscal policy have affected a wide range of human rights, in particular the rights of those in the most vulnerable situations. It is obvious that a threat to government expenditures, when and where they are most needed, results in a high risk of human rights violations.

81. It is not that all economic reform policies responding to economic crises are intrinsically contrary to the protection of human rights,[138] but austerity lacks any serious theoretical and empirical justification from a human rights perspective. Given the well-established human rights records connected with austerity policies, it is striking that economic reforms and measures adopted by States to implement conditionalities pushed by international financial institutions to that effect are rarely accompanied by ex ante human rights impact assessments.[139] While States remain as the main duty bearer in this domain,[140] international financial institutions can also be held accountable for their complicity when prescribing policies with clear potential human rights impacts and/or contributing to violations of human rights in this context.

82. The fact that human rights impact assessments are neither regularly conducted nor requested by international financial institutions (nor by States) is inconsistent with their practice, even if very imperfect, of undertaking environmental and social impact assessments when dealing with project financing. If they can be held responsible for the avoidable harm done to those affected by a financed dam, why should they not be responsible for the avoidable human rights damage produced by retrogressive economic reforms? This question implies that development is not only about shared economic growth but also about shared losses for society.[141]

83. In this context, the present report develops the argument that, according to international law standards, international financial institutions can be held responsible for complicity with economic reforms that violate human rights. The causal link between the assistance provided (loans, surveillance and technical assistance, and attached conditionalities) in the commitment of a wrongful act (complicity) and the harm done (human rights violations) is evident and well documented. The knowledge of the wrongful nature of the act could be presumed if, even when pushing economic reforms that normally lead to human rights violations, no ex ante impact assessment is undertaken. Legal responsibility for complicity raises obligations in terms of cessation, non-repetition and reparation.

84. Because of the usual circumstances in which States find themselves when seeking assistance from international financial institutions, conditionalities are often imposed and are not necessarily negotiated with borrower States, not to mention their populations, who are even less involved in the associated consultations, discussions or negotiations. Furthermore, the scope of conditionalities has been continuously expanding over the last decades. All this helps to provide an understanding of the pervasiveness and omnipresence of conditionalities in key sovereign businesses, even taking into account the overwhelming rejection from the respective populations and the social-oriented goals of international financial institutions, according to their own statutes.[142]

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[138] A/HRC/40/57, preamble.

[139] A/71/365, para. 63.

[140] International Covenant on Economic, Social and Cultural Rights; see also A/HRC/40/57, principle 2.

[141] Amartya Sen, *Development as Freedom*, Oxford, Oxford University Press (1999).

[142] See Articles of Agreement of IMF, article I (ii) (https://www.imf.org/external/pubs/ft/aa/index.htm); see also IBRD Articles of Agreement, article 1 (https://www.worldbank.org/en/about/articles-of-agreement/ibrd-articles-of-agreement).

85. Is the outcome of a proper human rights impact assessment a utopia from a practical perspective? International financial institutions should learn from successful implementation of both counter-cyclical measures and adjustment programmes that are largely human rights compliant, such as those in Malaysia (1997–1998), which imposed capital controls on short-term outflows, and in Iceland (2009–2010), which also included capital controls, the sheltering of the social welfare system from cuts and a strong focus on revenue generation and redistribution through taxation policies.[143]

86. In the 1960s, the General Assembly requested the World Bank and other international institutions to refrain from lending to South Africa because of its poor human rights records, and the World Bank stopped approving further loans to the apartheid regime after 1966.[144] There can be no legal justification for international financial institutions not to facilitate civil and political rights violations and to remain complicit in the imposition of economic, social and cultural rights violations. The broad adverse human rights implications of retrogressive economic measures are widely known, and international financial institutions nonetheless regularly promote and advance them; the present report explains why this would give rise to their legal responsibility for complicity.

VII. Recommendations

87. **The Independent Expert recommends that international financial institutions:**

(a) **Include in their policy documents an explicit commitment to respect all human rights, including labour rights, in their lending, surveillance and technical assistance policies;**

(b) **Undertake independent, participatory, informed, transparent and gender-sensitive human rights impact assessments of economic reform policies before and after determining certain conditionalities and, more generally, economic reforms to State borrowers/recipients, in line with the guiding principles:**[145] **this assessment should not replace (nor be replaced by) existing practices regarding environmental and social impact assessments;**

(c) **Ensure that the terms of their transactions and their proposals for reform policies and conditionalities for financial support do not undermine the borrower/recipient State's ability to respect, protect and fulfil its human rights obligations: this includes identifying and avoiding economic reforms policies that would have negative implications for the enjoyment of human rights, in particular of those in the most vulnerable situations;**

(d) **Propose a (non-exhaustive) list of preventive and mitigating measures, which goes far beyond targeted social protection measures to ensure conformity of the economic reform policies considered with the human rights obligations of States, and make sure that these mechanisms provide redress to those directly negatively impacted by the policies of international financial institutions;**

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143 See Juan Pablo Bohoslavsky and Kunibert Raffer eds., *Sovereign Debt Crises: What have we learned?*, Cambridge, Cambridge University Press (2017), chaps. 7 and 10.

144 See Samuel A. Bleicher, "UN v. IBRD: a dilemma of functionalism", *International Organization*, vol. 24, Issue 1 (1970).

145 See A/HRC/40/57.

(e) **Regard human rights priority spending targets as binding conditions, with concrete financial implications if they are not met;**[146]

(f) **Add a human rights dimension to the debt sustainability analysis, and ensure that the findings of impact assessments systematically play a role in debt restructuring;**

(g) **Include the findings of human rights impact assessments and monitor their evolution through a review of international financial institutions and reporting processes already in place;**

(h) **Engage, as other creditors often do, in debt relief and restructuring negotiations, with the aim of supporting the freeing up of fiscal space to safeguard the capacity of States to meet their human rights obligations: in the case of international financial institutions complicit with economic retrogressive measures this obligation is even stronger.**

88. **The Independent Expert recommends that States, as members of international financial institutions:**

(a) **Exercise their functions as members of international financial institutions and of various boards, in line with human rights standards;**

(b) **Demand that international financial institutions have human rights policies and monitor their implementation;**

(c) **Push for the inclusion of mandatory ex ante and ex post human rights impact assessments in negotiation processes and official methods of work;**

(d) **Ensure that human rights impact assessments are conducted before going forward with decisions and/or recommendations implying economic reforms at the country level;**

(e) **Encourage those international financial institutions that have independent accountability mechanisms already in place to strengthen them, and those international financial institutions, such as IMF, that do not yet have such mechanisms to create them, ensuring that they are accessible and widely known.**

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[146] See Thomas Stubbs and Alexander Kentikelenis, "Targeted Social Safeguards in the Age of Universal Social Protection: the IMF and Health Systems of Low-Income Countries", *Critical Public Health*, vol. 28, Issue 2 (2018).