**Independent Expert on Foreign Debt: Call for contributions - Guiding principles on human rights impact assessments on economic reform policies**

**International Bar Association’s Human Rights Institute (IBAHRI) contribution – 23 August 2017**

**Introduction**

This document has been prepared by the International Bar Association’s Human Rights Institute (IBAHRI) in response to a call by 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 (herein the Independent Expert on Foreign Debt). The Independent Expert requested information on the guiding principles on human rights impact assessments on economic reform policies.

The International Bar Association (IBA), established in 1947, is the world's leading organisation of international legal practitioners, bar associations and law societies. The IBA influences the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 individual lawyers and more than 190 bar associations and law societies spanning over 160 countries. It has considerable expertise in providing assistance to the global legal community.

The IBA’s Human Rights Institute (IBAHRI), an autonomous and financially independent entity, works with the global legal community to promote and protect human rights and the independence of the legal profession worldwide. The information contained in this briefing is taken form the IBAHRI’s upcoming report regarding the obligation to mobilise resources.

**Main ideas and principles from human rights monitoring bodies regarding austerity measures and the mobilisation of resources for human rights realisation:**

The obligation to mobilise resources is now clearly viewed as a stand-alone human rights obligation.

States must ensure that an adequate amount of resources are mobilised for human rights realisation in a way that is consistent with human rights principles.

The focus on resource mobilisation for the compliance with human rights is particularly timely given the renewed emphasis on this question by the international community, as reaffirmed in the 2030 Agenda for Sustainable Development, adopted in 2015.

The 2030 Agenda is explicitly anchored in human rights norms and principles and recognises that a rights-based approach should underpin all poverty reduction efforts (2030 Agenda paragraphs 18–20).

In recent years, special procedures and treaty bodies have addressed the obligation to mobilise resources in regard to the impact of austerity measures implemented by states after the 2007-08 global economic and financial crises, according to the following principles:

* **Economic crises and the economic damages that they caused cannot be a justification by States for actions or omissions that amount to violations of basic human rights obligations**;

States cannot explain and justify cutting social benefits and services because of the financial crises.

Even during times of severe resource constraints -whether caused by a process of adjustment, economic recession, or by other factors-, when available resources are demonstrably inadequate, the obligation remains for states to demonstrate that every effort has been made to mobilise all resources at its disposal in an effort to satisfy, as matter of priority, minimum essential levels of ESCR and to protect society’s most disadvantaged and marginalised members or groups. [[1]](#footnote-1)

* One of the obligations related to resource mobilisation is the prima facie prohibition of retrogressive measures, which imposes a strict form of scrutiny and must include a high level of justification.[[2]](#footnote-2) This is particularly important in the face of austerity measures.
* The CESCR has also stressed that when states implement austerity measures they must ensure they do not undermine the minimum core content of all economic, social and cultural rights[[3]](#footnote-3)
* It is evident from the work of the human rights monitoring bodies that these obligations are not dispensed with during times of crisis and recovery, and on the contrary **in these circumstances, states should “maximise means of harnessing resources specifically for the realisation of economic, social and cultural rights**.” [[4]](#footnote-4)
* To this end, “States should identify additional sources of fiscal space to increase resources for social and economic recovery. From an array of options, States should particularly consider widening the tax base, improving the tax-collection efficiency and reprioritizing expenditures. Such reforms could help States achieve a more progressive, equitable and sustainable tax structure while complying with a human-rights framework”.[[5]](#footnote-5) Thus, **a fiscal austerity plan should be based on an appropriate balance between cutting expenditures and increasing taxes**.
* When public expenditures must be cut, **the CESCR has developed strict criteria to assess austerity-measure compliance** in accordance with the ICESCR.[[6]](#footnote-6) In a letter sent to states on the matter, [[7]](#footnote-7) the Committee Chairperson acknowledged that decisions to “adopt austerity measures are always difficult and complex,” […] “especially when these austerity measures are taken in a recession,”[[8]](#footnote-8) but emphasised that “[a]ny proposed policy change or adjustment has to meet the following requirements:
* First, the policy must be a temporary measure covering only the period of crisis.
* Second, the policy must be necessary and proportionate, in the sense that the adoption of any other policy, or a failure to act, would be more detrimental to economic, social and cultural rights.
* Third, the policy must not be discriminatory and must comprise all possible measures, including tax measures, to support social transfers to mitigate inequalities that can grow in times of crisis and to ensure that the rights of the disadvantaged and marginalised individuals and groups are not disproportionately affected.
* Fourth, the policy must identify the minimum core content of rights or a social protection floor, as developed by the International Labour Organisation, and ensure the protection of this core content at all times.”[[9]](#footnote-9)
* Four years after the above-mentioned letter, the CESCR issued a **Statement on “Public debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights**.” This statement was triggered by the fact that the Committee frequent faced situations where State parties to the ICESCR did not comply with their obligations owing to the adoption of fiscal consolidation programmes, “including structural adjustment programmes and austerity programmes as a condition for obtaining loans.”[[10]](#footnote-10) In its statement, the Committee further developed the legal framework that was previously applied in concluding recommendations in order to provide guidance to State parties and other actors regarding the scope of Covenant obligations in relation to incurring debt.
* The statement clarified that:

Borrowing states should:

* Ensure that any conditions attached to loans do not unreasonably reduce their ability to respect, protect and confer Covenant rights.
* Take all measures possible to ensure that any negative impacts on the exercise of economic, social and cultural rights are reduced to a bare minimum.
* If the adoption of retrogressive measures is unavoidable, such measures should be necessary and proportionate (i.e., “in the sense that the adoption of any other policy or failure to act would be more detrimental to economic, social and cultural rights”). “They should not result in discrimination; they should mitigate inequalities that can grow in times of crisis and ensure that the rights of disadvantaged and marginalised individuals and groups are not disproportionately affected; and they should not affect the minimum core content of the rights protected under the Covenant.”

Lender states should:

* Ensure they do not impose obligations on borrowing states that would lead them to adopt retrogressive measures in violation of their Covenant obligations.
* In stronger language, the statement notes that both lending and borrowing states seeking loans with certain conditionalities **are required to carry out a human-rights impact assessment prior to the loan’s provision**, **to ensure such conditionalities do not disproportionately impact economic, social and cultural rights or lead to discrimination.**
* The statement also reiterates international financial institutions such as the International Monetary Fund (IMF) and the World Bank’s obligations to comply with human rights as well as states’ obligations as international organization members.

In reviewing states’ reports and country visits, treaty bodies and special procedures have also addressed austerity measures. They have expressed concerns that **austerity measures and other structural adjustments have a disproportionately negative impact on women, children, persons with disabilities, older persons, people with HIV/AIDS, ethnic minorities, migrants or the unemployed**, often with devastating social consequences.[[11]](#footnote-11) They have also applied the legal framework mentioned above to specific country situations, such as those of the Ukraine,[[12]](#footnote-12) Greece,[[13]](#footnote-13) Thailand,[[14]](#footnote-14) Portugal,[[15]](#footnote-15) Ireland,[[16]](#footnote-16) Slovenia,[[17]](#footnote-17) and Iceland.[[18]](#footnote-18) **They have particularly emphasised a need to undertake human-rights impact assessments for austerity measures and conduct comprehensive assessments of the cumulative impact these measures have on disadvantaged and marginalised groups’ enjoyment of economic, social and cultural rights**. In reviewing the United Kingdom of Great Britain and Northern Ireland’s report, the Committee expressed concern regarding regressive tax measures such as increasing the value-added tax and gradually reducing corporate income tax. The Committee considered that these measures impacted the State’s ability to collect sufficient resources to achieve a full realisation of economic, social and cultural rights, as well as the State’s ability to address persistent inequality.[[19]](#footnote-19) Consequently, it calls on the State to **conduct a human-rights impact assessment of the changes the fiscal policy introduces, “including an analysis of the distributional consequences and the tax burden of different income sectors and marginalised and disadvantaged group**s.”[[20]](#footnote-20)

Thus, the austerity measures’ compatibility with human rights will depend partly on whether the State has sought revenue-raising alternatives before making cuts in areas that are important for ensuring the guarantee of economic, social and cultural rights, such as public sector employment, public services or social protection.[[21]](#footnote-21) Then states should take measures to ensure that austerity measures do not deprive the enjoyment of their rights to disadvantaged and marginalised individuals or groups.[[22]](#footnote-22)

Instead of adopting fiscal-consolidation measures, some special procedures have recommended states undertake counter-cyclical measures (such as fiscal stimulus packages and social-protection interventions) as a means of mitigating some of the most severe impediments to guaranteeing human rights, particularly for vulnerable and disadvantaged groups, and leveraging a more rapid recovery from an economic crisis.[[23]](#footnote-23)

Directly related to resource-mobilisation, some special rapporteurs, including the Independent Expert on a democratic and equitable international order, have suggested that to ensure the maximum use of available resources for the realisation of economic, social and cultural rights, consideration should also be given to reprioritizing spending on social sectors (such as education and health) over military spending.[[24]](#footnote-24) This would be in line with the obligation to accord a degree of priority to human rights in resources allocation (see section 2.2).

* **Recommendation:**  **Strengthen the legal standards used to better assess states’ claims of lack of resources when austerity measures have been implemented.**
1. See for example, the CESCR, general comments No. 3, para. 12, No. 12, para. 28 and No. 14, para. 18; Statement on 16 May 2012. See also E/C.12/ISL/CO/4 (2012); E/C.12/UKR/CO/6 (2014); E/C.12/PRT/CO/4 (2014) and A/HRC/25/50/add.1 (2014) and Report of the Independent Expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona, (on human rights-based approach to recovery) (2011) UN Doc A/HRC/17/34. [↑](#footnote-ref-1)
2. CESCR, ‘General comment No. 14 para 43; ‘General comment No. 12 para 17; ‘General comment No. 15 para 41; and ‘Report of the Special Rapporteur on poverty, Magdalena Sepúlveda Carmona’ (Taxation and human rights) (2014) UN Doc A/HRC/26/28. [↑](#footnote-ref-2)
3. See for example CESCR, ‘Concluding observations on the sixth periodic report of Canada’ (2016) UN Doc E/C.12/CAN/CO/6 para 10. [↑](#footnote-ref-3)
4. Report of the Independent Expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona, (on human rights-based approach to recovery) (2011) UN Doc A/HRC/17/34 para 80. [↑](#footnote-ref-4)
5. Report of the Independent Expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona, (on human rights-based approach to recovery) (2011) UN Doc A/HRC/17/34 para 80. [↑](#footnote-ref-5)
6. The analysis here focuses on the obligation to mobilise resources. Yet treaty bodies and special procedures have addressed several aspects of the crisis. For example, they have identified its causes, expressed concern over the most vulnerable groups, identified harmful policies States have implemented as well as recommended policy measures that would be in line with a human-rights-based approach. See for example Report of the Independent Expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona, A/HRC/17/34 (human rights-based approach to recovery) and ‘Report of the Special Rapporteur on the right to adequate housing, Raquel Rolnik’ (the financial crisis and its causes) (2009) UN Doc A/HRC/10/7. [↑](#footnote-ref-6)
7. Letter, dated 16 May 2012, to State Parties to the International Covenant on Economic, Social and Cultural Rights from the Chairperson of the Committee on Economic, Social and Cultural Rights. [↑](#footnote-ref-7)
8. Letter, dated 16 May 2012, to State Parties to the International Covenant on Economic, Social and Cultural Rights from the Chairperson of the Committee on Economic, Social and Cultural Rights. [↑](#footnote-ref-8)
9. Letter dated 16 May 2012 addressed to State Parties to the International Covenant on Economic, Social and Cultural Rights from the Chairperson of the Committee on Economic, Social and Cultural Rights. [↑](#footnote-ref-9)
10. CESCR statement on Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights”, of 22 July 2016, UN Doc E/C.12/2016/1 para 1. [↑](#footnote-ref-10)
11. ‘See for example ‘Report of the Working Group on the issue of discrimination against women in law and in practice, Mayra Gomez’ (Discrimination against women in economic and social life, with a focus on economic crisis) (2014) UN Doc A/HRC/26/39, paras 28 and 114; 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’ (Mission to Greece) (2016) A/HRC/31/60/Add.2; ‘Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises’ (Visit to the United States of America) (2014) UN Doc A/HRC/26/25/Add.4; ‘Report of the Special Rapporteur on the right to adequate housing, Raquel Rolnik’ (Mission to the United States) (2010) UN Doc A/HRC/13/20/Add.4. [↑](#footnote-ref-11)
12. E/C.12/UKR/CO/6 (2014). [↑](#footnote-ref-12)
13. A/HRC/25/50/Add.1 (2014). [↑](#footnote-ref-13)
14. CRC/C/THA/CO/3-4 (2012). [↑](#footnote-ref-14)
15. E/C.12/PRT/CO/4 (2014). [↑](#footnote-ref-15)
16. E/C.12/IRL/CO/3 (2015). [↑](#footnote-ref-16)
17. E/C.12/SVN/CO/2 (2014). [↑](#footnote-ref-17)
18. E/C.12/ISL/CO/4 (2012). [↑](#footnote-ref-18)
19. E/C.12/GBR/CO/6 (2016) para 16. In 2015, it made similar recommendations to Greece and to Italy. [↑](#footnote-ref-19)
20. E/C.12/GBR/CO/6 para 17. [↑](#footnote-ref-20)
21. See for example, ‘Report of the Independent Expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona on the human rights based approach to recovery from the global economic and financial crises, with a focus on those living in poverty (2011) UN Doc A/HRC/17/34. [↑](#footnote-ref-21)
22. CESCR, E/C.12/ITA/CO/5 (2015). [↑](#footnote-ref-22)
23. ‘Report of the Working Group on the issue of discrimination against women in law and in practice, Mayra Gomez’ (Discrimination against women in economic and social life, with a focus on economic crisis) (2014) UN Doc A/HRC/26/39, para 30. See also Report of the Independent Expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona, A/HRC/17/34 (human rights-based approach to recovery). [↑](#footnote-ref-23)
24. See, for example, ‘Report of the Independent Expert on the promotion of a democratic and equitable international order, Alfred de Zayas’ (Exploring the adverse impacts of military expenditures on the realisation of a democratic and equitable international order) (2014) UN Doc A/HRC/27/51, para 45 and Report of the Independent Expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona, A/HRC/17/34 (human rights-based approach to recovery) para 81. [↑](#footnote-ref-24)