

COMPLICITY OF INTERNATIONAL FINANCIAL INSTITUTIONS IN VIOLATION OF HUMAN RIGHTS IN THE CONTEXT OF ECONOMIC REFORMS

Juan Pablo Bohoslavsky*

ABSTRACT

This Article 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 circumstances in which States usually find themselves when seeking assistance from international financial institutions, lender institutions often impose conditionalities that have not necessarily been negotiated with borrower States. States' populations are even less involved than their governments in the associated consultations, discussions, or negotiations. The broad scope of such conditionalities, which has been continuously expanded over recent decades, helps to explain their pervasiveness and

* Coordinator of the postgraduate program on "Public policies and human rights in Covid-19 times," Universidad Nacional de Río Negro, Argentina. United Nations Independent Expert on Foreign Debt and Human Rights (June 2014–May 2020). The author wishes to extend his gratitude to Stephen Connelly, Nicolò Fraccaroli, Rafael Quintero Godínez, and Celine Tan for their research and contributions to the report to the General Assembly (A/74/178, 16 July 2019) on which this article is based, and to the staff of the Office of the United Nations High Commissioner for Human Rights (OHCHR) for supporting the mandate. The author also wishes to thank Radhika Balakrishnan, Giuseppe Bianco, Danny Bradlow, Emma Burgisser, Meghan Campbell, Jernej Letnar Černič, Diane Desierto, Alexander Kentikelenis, Vladyslav Lanovoy, Kunibert Raffer, Margot Salomon and Ingo Venzke for their insights, critiques and questions. Finally, the author thanks Anna van Niekerk and the rest of the *Columbia Human Rights Law Review* team, who made invaluable edits and contributions to this piece. The views and conclusions reflected in this article are solely those of the author and are in no way intended to reflect the views of any of the institutions with which the author is affiliated.

omnipresence in key sovereign businesses. These conditionalities are even seen in the context of the COVID-19 pandemic.

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 by international financial institutions (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. An institution's knowledge of the wrongful nature of the act can 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.

TABLE OF CONTENTS

Introduction	206
I. Conditionalities Promoted by International Financial Institutions: Weak Processes and Expanding Scope.....	212
A. Problematic Procedures.....	214
B. Number and Scope of Conditionalities	217
II. What Does Austerity Really Do to the Economy?	221
A. Effects of Austerity on Growth, Debt Sustainability, and Equality.....	222
B. Deconstructing the “Expansionary Austerity” Theory	225
III. The Impact of Austerity on Human Rights	228
IV. Complicity of International Financial Institutions	233
A. Arguments Behind Responsibility for Complicity	233
B. Analyzing IFIs’ Counterarguments	238
C. Consequences of Responsibility	243
Conclusions and Recommendations for Discussion.....	244

INTRODUCTION

In 2017, responding to the lack of guidance under international law on assessing the human rights impacts of economic reform policies, the U.N. Human Rights Council asked the author, as U.N. Independent Expert on Foreign Debt and Human Rights, to develop guiding principles on the topic. The product of two years of research and collaborative work,¹ the Guiding Principles on Human Rights Impact Assessments of Economic Reforms (the “guiding principles”) were submitted to the Human Rights Council and voted on in 2019.²

This Article builds on these guiding principles while focusing more specifically on the complicity of international financial institutions (IFIs) in the implementation by States of economic reforms that violate economic, social, and cultural rights.³ This Article responds to the following question: can international financial institutions be held responsible for complicity in States’ implementation of economic reforms which violate human rights, and, if so, under what conditions?

This Article also provides an opportunity to consider some practical implications of Guiding Principles 14 and 15, entitled, respectively, “External influence and policy space”⁴ and “Obligations of public creditors and donors.”⁵ At the heart of these two principles is the obligation of States and other actors “not [to] exert undue

1. A Special Issue of the *International Journal of Human Rights* is devoted to studying the implications of the guiding principles on a wide range of issues, including the COVID-19-induced recession. See Aoife Nolan & Juan Pablo Bohoslavsky, *Human Rights and Economic Policy Reforms*, 24(9) INT’L J. HUM. RTS. 1247, 1249–50 (2020).

2. *Rep. of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of Human Rights, Particularly Economic, Social and Cultural Rights, Guiding Principles on Human Rights Impact Assessments of Economic Reforms*, U.N. Doc. A/HRC/40/57 (Dec. 19, 2018) [hereinafter *Guiding Principles*], approved by Human Rights Council Res. 40/8, U.N. Doc. A/HRC/RES/40/08 (Mar. 21, 2019).

3. International financial institutions (“IFIs”) include, most notably, the International Monetary Fund (IMF), and the World Bank (World Bank Group, or WBG). For the origins and political ideas behind the Bretton Woods institutions, see generally BENN STEIL, *THE BATTLE OF BRETTON WOODS: JOHN MAYNARD KEYNES, HARRY DEXTER WHITE, AND THE MAKING OF A NEW WORLD ORDER* (2013) (describing the process which led to the establishment of international rules for monetary management and the original international financial institutions).

4. *Guiding Principles*, supra note 2, princ. 14.

5. *Id.* princ. 15.

external influence on other States so that they are able to take steps to design and implement economic programs by using their policy space in accordance with their human rights obligations, including when trying to cope with economic or financial crises.”⁶ Furthermore, General Principle 15 specifically instructs international financial institutions, bilateral lenders, and public donors to “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.”⁷

Pursuant to the guiding principles, the conduct of human rights impact assessments in the design of economic reform programs by international financial institutions is essential.⁸ The systematic consideration of the human rights impacts of such programs aims to ensure that harm is prevented, compensated for, and not repeated. Such assessments should be conducted in harmony with existing safeguards and mechanisms to contribute to informed decision-making, and to complement findings from a human rights perspective.⁹

Facilitation of an internationally wrongful act by a lender may violate civil and political rights as well as economic, social, and cultural rights.¹⁰ For instance, in a thematic study on financial

6. *Id.* princ. 14 (footnote omitted).

7. *Id.* princ. 15.

8. *Id.* pmb., ¶ 7; *see also* OFF. OF THE U.N. HIGH COMM’R FOR HUM. RTS., U.N. DEV. PROGRAMME & U.N. SUSTAINABLE DEV. GRP, CHECKLIST FOR A HUMAN RIGHTS-BASED APPROACH TO SOCIO-ECONOMIC COUNTRY RESPONSES TO COVID-19 17 (July 2020) (recommending that human rights impact assessments be carried out prior to instituting fiscal and economic reform policies) [hereinafter U.N. CHECKLIST FOR HUMAN RIGHTS AND COVID-19]; *The OPERA Framework*, CTR. FOR ECON. & SOC. RTS., <https://www.cesr.org/opera-framework> [<https://perma.cc/M42K-D4KD>] (presenting “a simple, yet comprehensive four-step framework to analyze various aspects of the obligation to fulfill economic and social rights.”).

9. *Id.* pmb., ¶¶ 8–9.

10. Civil and political rights—such as the rights to life, a fair trial, and free speech—and economic, social, and cultural rights—such as the rights to water, housing, and education—are both protected at the international level. The basic division between these two sets of rights was established with the U.N. General Assembly’s adoption in 1966 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both of which entered into force in 1976. OFF. U.N. HIGH COMM’R FOR HUM. RTS., *THE UNITED NATIONS HUMAN RIGHTS TREATY SYSTEM* 6–7 (2012). Today, rights in both categories are protected at the international level

complicity submitted to the Human Rights Council in 2014, this author concluded that lending to States that commit gross human rights violations may contribute to regime consolidation and increase the likelihood of further gross rights violations.¹¹ In 2018, the author reiterated this argument in an *amicus curiae* brief submitted in connection with the alleged failure of two banks to comply with guidelines promulgated by the Organisation for Economic Co-operation and Development (OECD) regarding the U.N. arms embargo against the apartheid regime in South Africa.¹² The complaint was examined by the National Contact Points of Belgium and Luxembourg¹³ under the OECD Guidelines for Multinational Enterprises.¹⁴

Policy and academic debates have devoted much less attention,¹⁵ however, to whether lenders can be regarded as accomplices for financing and promoting policies or measures that

by a web of treaties and covenants, as well as an ever-expanding body of customary international law. *Id.* 4, 18.

11. *Rep. 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 on Financial Complicity: Lending to States Engaged in Gross Human Rights Violations*, U.N. Doc. A/HRC/28/59 (Dec. 22, 2014).

12. *Submission: Complaint Brought to the OECD by Open Secrets and the Centre for Applied Legal Studies Concerning the Conduct of KBL European Private Bankers and KBC Group Belgium*, U.N. HUM. RTS. SPECIAL PROC. (May 28, 2018). The U.N. Security Council imposed a mandatory arms embargo against South Africa in 1977 in condemnation of the violent and racist governing apartheid regime. S.C. Res. 418 (Nov. 4, 1977). This embargo was subsequently expanded throughout the 1980s. *See* S.C. Res. 558 (Dec. 13, 1984) (requesting States to refrain from importing South African-made military equipment); S.C. Res. 591 (Nov. 28, 1986) (further tightening and expanding the arms embargo).

13. *Apartheid and Bank Complicity Case: UN Expert Urges Reform of OECD Review Mechanism to Protect Human Rights*, OFF. U.N. HIGH COMM'R FOR HUM. RTS. (Apr. 27, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25831&LangID=E> [<https://perma.cc/DXM8-97CS>]. The complaints were dismissed at a preliminary stage without full consideration of the evidence and the *amicus curiae* submitted. *Id.* Allegedly, there was a serious conflict of interest in that one of the representatives of the private sector's National Contact Point committee, which made the decision, was also one of the reported lenders. *Id.*

14. ORG. FOR ECON. COOP. & DEV., *OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES* (OECD Publishing 2011).

15. *See* Sabine Michalowski, *Introduction to CORPORATE ACCOUNTABILITY IN THE CONTEXT OF TRANSITIONAL JUSTICE* 1, 1 (Sabine Michalowski ed., Routledge 2013) (noting that scholarship analyzing "the links between corporate accountability and transitional justice" is "almost non-existent").

violate economic, social, and cultural rights.¹⁶ 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.¹⁷ Nevertheless, what can be considered an international socioeconomic crime is obviously rather limited and does not fully account for violations of economic, social, and cultural rights relating to impermissible retrogressive economic measures.¹⁸

While austerity measures—which include fiscal consolidation, structural adjustment reforms, privatization, deregulation of financial and labor markets, and lowering environmental protection standards—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.¹⁹ States' responsibility for the violation of economic, social, and cultural rights by the imposition of such measures can be directly established,

16. See, e.g., Antonio Cassese (Special Rapporteur), *Study of the Impact of Foreign Economic Aid and Assistance on Respect for Human Rights in Chile*, U.N. Doc E/CN.4/Sub.2/412 (Vols. I-IV) (July 20, 1978) (considering, in a four-volume report, the adverse human rights consequences of economic aid and assistance given to the Chilean government—but focusing exclusively on civil and political rights violations); Rob Howse, *The International Criminal Court Should Investigate Germany's Finance Minister for Crimes Against Humanity in Greece*, INT'L ECON. L. & POL'Y BLOG (Dec. 15, 2016, 12:00 AM), <https://worldtradelaw.typepad.com/ielpblog/2016/12/the-international-criminal-court-should-investigate-germanys-finance-minister-for-crimes-against-hum.html> [<https://perma.cc/5VC7-Z5WH>] (suggesting that Germany's finance minister could be held accountable for causing “great suffering” by forcing punitive austerity measures on Greece, and recommending an investigation into the effects of those measures in part because “human rights advocates, especially those concerned with social and economic rights, have a large stake in a case that illustrates that . . . grave human rights violations occur in contexts other than armed conflict or police-state oppression”).

17. See generally EVELYNE SCHMID, *TAKING ECONOMIC, SOCIAL AND CULTURAL RIGHTS SERIOUSLY IN INTERNATIONAL CRIMINAL LAW* (James Crawford & James S. Bell eds., 2015) (providing legal and jurisprudential evidence to argue that economic, social, and cultural rights violations can amount to international crimes: for example, cutting access to water supplies in the context of a conflict).

18. The situation would have to simultaneously constitute a violation of an economic or social right and an international crime under the Rome Statute of the International Criminal Court. See *id.* at 22–26 (arguing that international criminal law, as defined by the articles in the Rome Statute establishing the jurisdiction of the International Criminal Court, covers economic, social and cultural rights violations).

19. See *infra* Section I.B. (describing the prevalence of austerity-based conditionalities in agreements between States and international financial institutions).

but international financial institutions can also contribute to the violations of such rights in the context of their lending, surveillance, and technical assistance operations.²⁰ By prescribing economic reforms with foreseeable negative effects on human rights, IFIs may thus be considered responsible for complicity.

Although the term complicity usually pertains to criminal law,²¹ this Article 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.²² In accordance with international law, responsibility for complicity requires: (a) the commission of an act considered wrongful under international law; (b) knowledge by the State or the facilitator (such as an international organization) of an element of wrongfulness, which includes willful blindness; and (c) a causal link—facilitation—between the goods or services provided by the facilitator and the harm caused—here, violation of human rights by an economic policy implemented by a given State.²³

Where an IFI includes conditionalities in its technical assistance, surveillance, and loans without considering whether the terms imposed might be detrimental to economic, social, and cultural rights, serious concerns are raised.²⁴ When human rights violations occur as a result of the implementation of such conditionalities, it is important to determine the responsibility of those involved, so that

20. See *infra* Section III.A. (describing the complicity of international financial institutions in economic, social and cultural rights violations flowing from such agreements).

21. Criminal law tends to account for complicity by establishing liability for aiding and abetting another individual to commit a crime. See, e.g., CONG. RSCH. SERV., R43770, ACCOMPLICES, AIDING AND ABETTING, AND THE LIKE: AN ABBREVIATED OVERVIEW OF 18 U.S.C. § 2, summ. (2020) (stating that under U.S. law, “[a]iding and abetting means assisting in the commission of someone else’s crime.”).

22. VLADYSLAV LANOVOY, *COMPLICITY AND ITS LIMITS IN THE LAW OF INTERNATIONAL RESPONSIBILITY* 11 (2016).

23. G.A. Res. 66/100, art. 14, Responsibility of International Organizations (Dec. 9, 2011) [hereinafter *Draft Articles on the Responsibility of International Organizations*].

24. See Margot E. Salomon, *Of Austerity, Human Rights and International Institutions*, 21 EUR. L.J. 521, 525–27 (2015) (describing how the imposition of austerity measures on countries with already-struggling economies can lead to an abdication of State responsibility for social and human rights, resulting in, among other effects, a weakening of trade unions and social policy institutions—meaning that the ill effects of austerity are distributed inequitably).

both the direct, or primary, perpetrators—States—and their accomplices—IFIs—can be held accountable.

IFIs' responsibility for complicity in human rights violations that result from economic reforms is currently a pressing legal issue. Despite broad agreement on the need to strengthen the fiscal space of States in order to cope with the COVID-19 crisis,²⁵ on March 23, 2020, during the initial COVID-19 outbreak peak, the President of the World Bank explained that while countries need to “boost health spending, strengthen social safety nets, support the private sector, and counter financial-market disruption,” they also “will need to implement structural reforms to help shorten the time to recovery and create confidence that the recovery can be strong.”²⁶ In addition, it seems the new rapid procurement modalities through which the World Bank plans to bulk-purchase medical supplies would finance private health services that might take much-needed staff from public health systems.²⁷

Similarly, while acknowledging the urgent need to increase social spending in order to protect those most exposed to the economic consequences of the pandemic, the International Monetary Fund (“IMF”) highlighted in April 2020 that “once the COVID-19 crisis is over, prudent fiscal policies call for appropriately paced, inclusive, and credible adjustments to put debt ratios on a firm downward trajectory.”²⁸ In other words, the IMF believes that as soon as the immediate economic crisis precipitated by COVID-19 has passed, “a more ambitious, credible medium-term fiscal consolidation path is needed to bring debt and interest expenditure down.”²⁹

These statements indicate that the World Bank and the IMF have no intention of abandoning their austerity and orthodox agenda despite a global crisis which, as they recognize, has drastically

25. See, e.g., U.N., A UN FRAMEWORK FOR THE IMMEDIATE SOCIO-ECONOMIC RESPONSE TO COVID-19 (2020) (identifying a “necessary surge in fiscal and financial stimulus” at the outset of the COVID-19 crisis).

26. David Malpass, President, World Bank Grp., Remarks by World Bank Group President David Malpass on G20 Finance Ministers Conference Call on COVID-19 (Mar. 23, 2020), <https://www.worldbank.org/en/news/speech/2020/03/23/remarks-by-world-bank-group-president-david-malpass-on-g20-finance-ministers-conference-call-on-covid-19> [https://perma.cc/QD2U-WMKH].

27. Alexander Kentikelenis et al., *Softening the Blow of the Pandemic: Will the International Monetary Fund and World Bank Make Things Worse?*, 8(6) LANCET GLOB. HEALTH e758, e758–59 (2020), <https://www.thelancet.com/action/showPdf?pii=S2214-109X%2820%2930135-2> [https://perma.cc/96KH-4XS7].

28. IMF, *Policies to Support People During the COVID-19 Pandemic*, Fiscal Monitor 20 (Apr. 2020).

29. *Id.*

heightened the need for government spending on health and social services in nearly every country in the world.³⁰ Underscoring this intent is the fact that, as of July 2020, Ecuador was still undergoing IMF-mandated structural reforms.³¹ Moreover, its latest loan agreement includes stringent fiscal consolidation commitments³² that risk further dismantling the Ecuadorian health system.

This Article will begin by exploring the notion of conditionality, policymaking processes, and main areas of prescription. By focusing on economic reforms and austerity as the basis for many conditionalities, Part I will explain their effects on growth, debt sustainability, and equality. Part II will then deconstruct economic theories supporting austerity. Part III will describe the impact of economic reforms on the enjoyment of human rights. These findings and arguments will set the scene for Part IV, which will examine the concept of legal responsibility for complicity, and investigate its applicability to international financial institutions that support policies that foreseeably lead to the violation of human rights. Finally, the Conclusion of this Article will present conclusions and recommendations intended to provoke discussion.

I. CONDITIONALITIES PROMOTED BY INTERNATIONAL FINANCIAL INSTITUTIONS: WEAK PROCESSES AND EXPANDING SCOPE

In general, when a country borrows from an international financial institution, its government must agree to adjust its

30. Malpass, *supra* note 26; IMF, *supra* note 28, at 20; Press Release, OXFAM INT'L, IMF Paves Way for New Era of Austerity Post-COVID-19 (Oct. 12, 2020), <https://www.oxfam.org/en/press-releases/imf-paves-way-new-era-austerity-post-covid-19> [<https://perma.cc/A6T6-JYFG>]; DANIEL MUNEVAR, EUR. NETWORK ON DEBT & DEV., ARRESTED DEVELOPMENT: INTERNATIONAL MONETARY FUND LENDING AND AUSTERITY POST COVID-19 (Oct. 2020); *Over 500 Organisations Call on IMF to Stop Promoting Austerity in Coronavirus Recovery Period*, PUB. SERVS. INT'L (Oct. 6, 2020), <https://publicservices.international/resources/news/over-500-organisations-call-on-imf-to-stop-promoting-austerity-in-coronavirus-recovery-period?id=11190&lang=en> [<https://perma.cc/8K3C-A448>].

31. IMF, *Ecuador: Request for Purchase Under the Rapid Financing Instrument and Cancellation of Arrangement Under the Extended Fund Facility—Press Release; Staff Report; and Statement by the Executive Director for Ecuador*, Country Report No. 20/178, 50 (May 2020).

32. *Id.* at 15–17; see also Comm. on Econ., Soc. & Cultural Rts., *Concluding observations on the fourth periodic report of Ecuador*, ¶¶ 5, 7, 8, 68, U.N. Doc. E/C.12/ECU/CO/4 (Nov. 14, 2019) (expressing concern over the impact of IMF-mandated austerity measures as well as Ecuador's response to protests which broke out over the terms of those measures, and recommending that Ecuador improve community consultation when adopting new economic policy).

economic policies to overcome the problems that, in the view of the IFI, led it to seek financial aid from the international community.³³ The inclusion of such conditions is intended to ensure that the country will be able to repay the loan.³⁴

For IFIs, conditionalities are key elements of financing agreements. As explained by the 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.”³⁵ As a result, resources can only be released by the IMF “[o]nce an understanding has been reached on policies and a financing package”³⁶ Nevertheless, human rights impact assessments—a serious effort to foresee the consequences of the loans and conditionalities on human rights³⁷—are not being systematically or even occasionally conducted prior to the conclusion of financing agreements or the adoption of reforms to ensure that agreements and conditionalities are compliant with international human rights standards.³⁸

The World Bank’s International Development Association component specializes in credits, which can be described as loans free of interest, while its International Bank for Reconstruction and Development lends to “middle-income and creditworthy low-income countries.”³⁹ Like other development banks, these World Bank subsidiaries attach conditions to the loans that they grant to member States.⁴⁰ The Bank also provides project financing for various discrete projects, which often carry their own range of conditions.⁴¹ This

33. IMF, *IMF Conditionality*, Fact Sheet (Mar. 30, 2020), <https://www.imf.org/en/About/Factsheets/Sheets/2016/08/02/21/28/IMF-Conditionality> [https://perma.cc/U76B-DVGC].

34. *Id.*

35. IMF, *IMF Lending*, Fact Sheet (Mar. 27 2020), <https://www.imf.org/en/About/Factsheets/IMF-Lending> [https://perma.cc/3C4E-YCBC] (citation omitted).

36. *Id.*

37. *Guiding Principles*, *supra* note 2, princ. 17–18.

38. Nolan & Bohoslavsky, *supra* note 1, at 1248–49.

39. WBG, *About the World Bank*, <http://www.worldbank.org/en/about> [https://perma.cc/ZAM8-QDXV].

40. *Id.*

41. *See generally* ACTIONAID INT’L, WHAT PROGRESS? A SHADOW REVIEW OF WORLD BANK CONDITIONALITY (2006) (discussing project financing in the context of the failure of conditionality to abide by certain core principles like transparency, local ownership, and customization).

Article, however, focuses on IFIs' policy lending operations, which often attach macroeconomic conditionalities.⁴² Similar conditions are also included in agreements by the European Commission and the European Central Bank,⁴³ including as part of economic adjustment programs—which in fact resemble the much-criticized structural adjustment programs implemented in the past.⁴⁴

The following Sections will present and discuss the procedural and substantive aspects of IFIs' conditionalities. Section I.A. will discuss the power asymmetries inherent in the processes by which IFIs arrive at loan agreements. Section I.B. will then explore the content of the conditionalities included in such agreements.

A. Problematic Procedures

Looking at the policymaking processes of international financial institutions helps in understanding their outcomes. The process surrounding the conclusion of an agreement with the IMF, for example, includes several steps: in general, IMF staff and representatives of the requesting government first participate in a series of meetings aimed at assessing the economic and financial situation specific to the country.⁴⁵ 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.⁴⁶

Compounded by the urgency or direness of specific country situations,⁴⁷ the circumstances surrounding the conclusion of

42. See *infra* Section I.B. (describing the macroeconomic conditionalities included in IMF agreements).

43. *Rep. of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of Human Rights, Particularly Economic, Social and Cultural Rights on His Mission to Greece*, ¶¶ 5, 19–20, U.N. Doc. A/HRC/31/60/Add.2 (Apr. 21, 2016) [hereinafter *Report of the Independent Expert on his Mission to Greece*].

44. Scott Greer, *Structural Adjustment Comes to Europe: Lessons for the Eurozone from the Conditionality Debates*, 14(1) GLOB. SOC. POL'Y 51, 54–60 (2013).

45. Giuseppe Bianco & Filippo Fontanelli, *Enhancing the International Monetary Fund's Compliance with Human Rights: The Issue of Accountability*, in MAKING SOVEREIGN FINANCING AND HUMAN RIGHTS WORK 213, 227–28 (Juan Pablo Bohoslavsky & Jernej Letnar Čerňič eds., 2014).

46. *Id.*

47. Argentina and Greece are compelling cases. See generally Alfredo Fernando Calcagno, *Managing Public Debt Crisis in Argentina: Between Sovereignty and Subordination*, in SOVEREIGN DEBT CRISES: WHAT HAVE WE

agreements often reflect a certain asymmetric dynamic. Discussions mainly take place at the expert level: representatives of the borrowing government typically negotiate the national program directly with IMF staff before they submit it to the IMF Executive Board.⁴⁸ There is normally no participation of parliamentarians, corporate chambers, trade unions, or civil society organizations, despite the fact that loans and the conditionalities attached to agreements will regularly affect all of these stakeholders.⁴⁹

In terms of timing, what are sometimes referred to as “prior actions”⁵⁰ and are effectively preconditions which borrowing States are expected to meet in order to be eligible for a loan, are now often an essential aspect of the lending process.⁵¹ While not binding per se, such preconditions play a powerful role in domestic policies.⁵² In the view of many IFIs, preconditions allow a greater “ownership” of the reforms that are put in place.⁵³ 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.⁵⁴ The aim of prior actions is to reward the “good behaviour” of States in implementing those requirements.⁵⁵

When it is ready to be presented, the twenty-four directors of the IMF Executive Board decide on the agreement, usually by

LEARNED? 12 (Juan Pablo Bohoslavsky & Kunibert Raffer eds., 2017) (describing Argentina’s long struggle to manage its sovereign debt); Kunibert Raffer, *Greece: An EU-Inflicted Catastrophe*, in SOVEREIGN DEBT CRISES: WHAT HAVE WE LEARNED? 65 (Juan Pablo Bohoslavsky & Kunibert Raffer eds., 2017) (describing Greece’s long struggle to manage its sovereign debt). The experiences of Argentina and Greece show that countries in dire need of financial assistance have a much-constrained ability to negotiate over the terms of that assistance. *See also* Menéndez, *infra* note 65 and accompanying text (laying out the lack of public discussion regarding Argentina’s loan agreement).

48. Bianco & Fontanelli, *supra* note 45, at 228.

49. *Id.*

50. *IMF Conditionality*, *supra* note 33.

51. CELINE TAN, GOVERNANCE THROUGH DEVELOPMENT: POVERTY REDUCTION STRATEGIES, INTERNATIONAL LAW AND THE DISCIPLINING OF THIRD WORLD STATES 119–21 (2011).

52. *Id.*

53. Stanley Fischer, First Deputy Managing Dir., IMF, Priorities for the IMF, Remarks to the Bretton Woods Committee (Apr. 27, 2001), <https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp042701> [<https://perma.cc/E5LM-VFGD>] (stating that “excessive conditionality [as opposed to less formal pre-conditionality] undermines the sense of ownership of those policies . . . for the policies are seen to be imposed from outside”).

54. TAN, *supra* note 51, at 119.

55. *Id.* at 119–21 (2011).

consensus and sometimes through a voting process.⁵⁶ While uncommon, a plan may be submitted to the Executive Board so that country representatives sitting on the Board are able to revisit components of a program that might put the enjoyment of human rights at risk, in line with their obligations under international law.⁵⁷ However, not only does the lack of input by a range of relevant stakeholders prevent States from having first-hand information about the level of acceptance or “ownership” of the agreement by the country, but the decision-making process also does not easily allow for any potential opposition to programs.⁵⁸

Furthermore, it seems that the more a State needs a loan, the less bargaining power and negotiating space it has.⁵⁹ 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 adhesion than it is the result of a meeting of the minds through a fully negotiated bilateral agreement. Scholars have highlighted that under IMF guidelines on conditionalities, arrangements are not considered to be “agreements” and contractual language is avoided, demonstrating the unilateral nature of the decisions of the IMF Board.⁶⁰ Finally, the asymmetrical relationship between borrower States and the IMF is accentuated by the fact that the IMF is effectively a lender of last resort given the

56. IMF, *How the IMF Makes Decisions*, Fact Sheet (Mar. 8, 2019), <https://www.imf.org/en/About/Factsheets/Sheets/2016/07/27/15/24/How-the-IMF-Makes-Decisions> [<https://perma.cc/AY75-XTDD>].

57. In this way, the duties of States parties to the ICESCR have an “indirect effect” on the IMF. François Gianviti, *Economic, Social and Cultural Rights and the International Monetary Fund*, 3 CURRENT DEVS. IN MONETARY & FIN. L. 3, 13 (2005); Comm. on Econ., Soc., & Cultural Rts., *Public Debt, Austerity Measures and the International Covenant on Economic, Social, and Cultural Rights*, ¶ 9, U.N. Doc. E/C.12/2016/1 (July 22, 2016) [hereinafter *Public Debt, Austerity Measures, & ICESCR*] (clarifying “that States parties to the Covenant have obligations as States members of international financial institutions, in general, and of IMF, in particular”).

58. See YILMAZ AKYÜZ, REFORMING THE IMF: BACK TO THE DRAWING BOARD 20 (2005) (pointing to the dominance of a few nations on the Board of the IMF and asserting the need to “remove the veto power of the Fund’s major shareholders over key decisions” and reallocate voting rights “to increase the voice of developing countries”).

59. TAN, *supra* note 51, at 120; 1 PAUL MOSLEY ET AL., AID AND POWER: THE WORLD BANK AND POLICY-BASED LENDING 130–31 (2d ed. 1995) (proposing that “[t]he cost of doing no deal will be more serious for the recipient . . . the graver its economic predicament and the smaller its capacity for raising development finance from other sources”).

60. Bianco & Fontanelli, *supra* note 46, at 228.

absence of an alternative global mechanism to respond to debt crises.⁶¹

When the social impact of such reforms is being considered, consultation with and participation of the affected population in the negotiation processes is rather limited, often amounting to a mere “box-ticking” exercise.⁶² Nor are the views of the population reflected in the contents of the conditionalities.⁶³ In this regard, in a mission report to the European Union the author underlined the importance of respecting certain obligations when economic policies are negotiated and designed, including in terms of transparency, participation, and accountability.⁶⁴ This presents a significant challenge, since too often governments may want to limit transparency and public participation in such discussions and negotiations.⁶⁵

B. Number and Scope of Conditionalities

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 through policies such as lowering labor law protection standards.⁶⁶ The IMF conditionalities system evolved over

61. Catherine Schenk, *The IMF Remains the Lender of Last Resort—Literally*, CHATHAM HOUSE, <https://www.chathamhouse.org/2018/06/imf-remains-lender-last-resort-literally> [<https://perma.cc/JXB4-CN8C>].

62. *Rep. 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 on His Mission to Institutions of the European Union*, ¶¶ 69–70, U.N. Doc. A/HRC/34/57/Add.1 (Dec. 28, 2016) [hereinafter *Rep. of the Independent Expert on His Mission to the European Union*].

63. *Id.*

64. *Id.* ¶ 36.

65. When resorting to the IMF, governments are usually in a weak economic and political position and may therefore be open to considering inconvenient conditions for their countries when accepting the conditions might afford them short-term political advantages. For example, an agreement signed by Argentina and the IMF in 2019 did not follow any public discussion, giving rise to a legal case premised on the argument that the agreement was not preceded by any technical report from the pertinent national authorities, such as the Central Bank. Carmen Menéndez, *Denuncian al Presidente Argentino, Mauricio Macri, por el Acuerdo de Préstamo con el FMI*, EURONEWS (Dec. 4, 2019), <https://es.euronews.com/2019/12/04/denuncian-al-presidente-argentino-mauricio-macri-por-el-acuerdo-de-prestamo-con-el-fmi> [<https://perma.cc/9Q7K-NTDH>].

66. Thomas Stubbs & Alexander E. Kentikelenis, *Conditionality and Sovereign Debt: An Overview of Human Rights Implications*, in DEBT & HUMAN

decades, and despite a discourse stressing its fundamental transformation, recent studies suggest that changes have been rather limited.⁶⁷ Austerity and other orthodox economic policies form the theoretical underpinnings of most macroeconomic conditionalities, even in the context of COVID-19.⁶⁸

While the 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,⁶⁹ the materialization of these views is in question.⁷⁰ Despite a series of reforms at the beginning of this century, including an effort to focus on program goals within the limit of its competencies in response to criticism about the scope and level of “intrusiveness,” both the number and latitude of conditionalities appear to be growing.⁷¹ Later initiatives aimed at increasing the flexibility of the IMF’s approach to structural adjustment were followed by an effort to streamline conditionalities.⁷² The most recent adjustments in this regard include a greater consideration for issues such as economic and gender inequality.⁷³

Even where the IMF has made serious new commitments to important social policies, it has not gone far enough in integrating those commitments into the proposed economic reforms it includes in conditionalities. For instance, the IMF’s commitment to address gender inequality is clearly an important initiative. However, the

RIGHTS 359, 359, 374–77 (Ilias Bantekas & Cephias Lumina eds., 2018); Peter Bakvis, *Orthodoxy, Evidence and Action: Labour Rights at the World Bank*, 24 INT’L UNION RTS. 3, 3 (Apr. 2017) (highlighting the World Bank and the IMF’s resistance to abandon their “belief that unregulated labour markets are a necessary ingredient” in economic growth, in spite of copious evidence to the contrary).

67. See, e.g., Alexander E. Kentikelenis et al., *IMF Conditionality and Development Policy Space, 1985–2014*, 23 REV. INT’L POL. ECON. 543, 543 (2016) (examining the use of policy conditionality in IMF loan agreements between 1985 and 2014 and finding “little evidence of a fundamental transformation of IMF conditionality”).

68. Kentikelenis et al., *supra* note 27, at e758.

69. INDEP. EVALUATION OFF., IMF, *The IMF and Social Protection* 6 (2017); IMF, *A Strategy for IMF Engagement on Social Spending*, Policy Paper 7 (June 2019) (responding).

70. See *infra* note 80.

71. GINO BRUNSWIJCK, EUR. NETWORK ON DEBT & DEV., UNHEALTHY CONDITIONS: IMF LOAN CONDITIONALITY AND ITS IMPACT ON HEALTH FINANCING 3, 5–6 (2018).

72. *Id.*

73. *Id.* at 5; IMF Gender Advisory Grp., *How to Operationalize Gender Issues in Country Work* (2018) (providing guidance on how to account for gender issues and reduce gender gaps in IMF country work).

author has previously highlighted that the IMF must go beyond efforts deployed solely to close the gender gap in labor force participation.⁷⁴ A commitment to gender equality should also guide changes in the coverage of social protection benefits, the fiscal space for social services, and investments in sustainable and gender-inclusive infrastructure.⁷⁵

Some argue that the IMF's claims about its transformation⁷⁶ resemble nothing more than a superficial "rebranding" exercise rather than an effort to foster deeper changes in existing practices.⁷⁷ For instance, a study comparing policies recommended before 2011 to more recent prescriptions in four States in the Middle East and North Africa region finds that IMF policies have not dramatically changed from one period to the other.⁷⁸ And in its 2019 World Economic Outlook, the IMF called once again for structural reforms focusing on liberalization and deregulation, particularly in low-income countries, to promote economic growth.⁷⁹ Labor and social policy changes have not found their way into IMF advocacy efforts, nor do they consistently stem from the implementation at the country level of its program segments aimed at social protections, such as social spending floors.⁸⁰

The conditionalities which continue to be included have not only grown in number, but also the policy areas they cover have expanded.⁸¹ The 2018 IMF Review of Programme Design and Conditionality noted the marked increase in the volume of structural

74. *Rep. 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 on the Impact of Economic Reforms and Austerity Measures on Women's Human Rights*, ¶¶ 17–19, U.N. Doc. A/73/179 (July 18, 2018) [hereinafter *Rep. of the Independent Expert on the Impact of Economic Reforms and Austerity Measures on Women's Human Rights*].

75. *Id.* ¶ 73.

76. See IMF, *Development Committee: The Managing Director's Written Statement 2–4* (Oct. 19, 2019) (on file with the *Columbia Human Rights Law Review*) (citing IMF policy priorities and reforms designed to better support emerging and developing economies in developing stable fiscal policies).

77. Kentikelenis et al., *supra* note 67, at e547.

78. MOHAMMED MOSSALLEM, BRETTON WOODS PROJECT, *THE IMF IN THE ARAB WORLD: LESSONS UNLEARNED* 6–13, 15 (Nov. 2015).

79. IMF, *Global Manufacturing Downturn, Rising Trade Barriers*, *World Economic Outlook* 96–103 (Oct. 2019).

80. Kentikelenis et al., *supra* note 67, at 563–65 (reporting that the IMF continues to advocate liberalization of the labor market and that social spending floors are often unmet).

81. BRUNSWIJK, *supra* note 71, at 6.

conditions in programs between 2011 and 2017.⁸² Furthermore, twenty-three out of twenty-six IMF loan programs approved between 2016 and 2017 were conditional on fiscal consolidation—policies designed to reduce country deficits and debt, and a hallmark of austerity.⁸³

A detailed examination of IMF agreements concluded between 1980 and 2014 likewise revealed that the number of conditions attached to loans had increased, and their scope expanded.⁸⁴ While conditionalities related to core economic policy areas accounted for nearly 87% of the total number of conditionalities, the remaining 13% were related to the privatization of State-owned enterprises, labor issues in both the public and private sector, institutional reforms, and poverty reduction policies.⁸⁵ Despite a widespread belief on the part of those backing these policies that austerity-driven labor reforms result in labor market deregulation and thus spur economic growth, such policies have not necessarily contributed to economic growth or increased employment, to say nothing of their negative human rights impacts.⁸⁶

As the author recently pointed out in an open letter addressed to the President of the World Bank regarding the draft World Development Report 2019, many contemporary issues including labor informality, the breakdown of social contracts, and gender and income inequality “have been worsened by austerity and earlier labour reforms, including the freezing or lowering of minimum wages, labour market deregulation, social security privatization and targeted social protection schemes.”⁸⁷

In addition, the “Maximizing Finance for Development” approach, which was recently launched by the World Bank and is aimed at fostering investment by the private sector to enable sustainable development, confirms that the Bank continues to

82. IMF, *2018 Review of Program Design and Conditionality* 35 (May 2019) [hereinafter *IMF Review of Program Design and Conditionality*].

83. BRUNSWIJK, *supra* note 71, at 3.

84. Stubbs & Kentikelenis, *supra* note 66, at 364–65.

85. The privatization of State-owned enterprises being the most common, followed by labor issues. *Id.* at 367–68.

86. *Guiding Principles*, *supra* note 2, princ. 51–56; *see infra* Parts II, III (explaining the faulty economic theory on which austerity is premised and the severe human rights violations that flow from its imposition).

87. Letter from Juan Pablo Bohoslavsky, Indep. Expert on the Effects of Foreign Debt & Other Related Int'l Fin. Obligations of States on the Full Enjoyment of All Hum. Rts., Particularly Econ., Soc. & Cultural Rts., to Jim Yong Kim, Pres., World Bank (Aug. 3, 2018).

promote “leveraging the private sector” when available, in order to limit public “debt and contingent liabilities.”⁸⁸ Shifting the provision of essential services to profit-driven corporations can negatively impact human rights and the viability of the public sector.⁸⁹

A study of conditionalities attached to the World Bank’s development financing in 2017 highlighted the Bank’s influence on “domestic economic policies” and the “shaping of institutions” in developing countries.⁹⁰ The study revealed that unlike the IMF, the number of conditionalities imposed by the World Bank decreased in comparison to previous years.⁹¹ The study went on to state, however, that even “a small number of controversial economic policy conditions can be very detrimental to a country’s development agenda.”⁹² Moreover, nearly 28% of the conditions listed were “directed at increasing the role of the private sector” across all policy areas.⁹³

II. WHAT DOES AUSTERITY REALLY DO TO THE ECONOMY?

In the immediate aftermath of the global financial crisis in 2008 it was widely acknowledged that international economic stimulus was necessary to overcome the social and economic impacts of the recession crisis.⁹⁴ In this situation, as a recent study notes, the IMF would normally have recommended that austerity measures be imposed to contract public purses.⁹⁵ Instead, the Fund encouraged

88. WBG, *Maximizing Finance for Development*, Brief 1 (2018); see also *Rep. of the Special Rapporteur on Extreme Poverty and Human Rights*, ¶ 20, U.N. Doc. A/73/396 (Sept. 26, 2018) (explaining how, pursuant to the “Maximizing Finance for Development” agenda, “profitable enterprises will be reserved to the private sector, while unprofitable activities will be publicly financed”).

89. *Rep. of the Special Rapporteur on Extreme Poverty and Human Rights*, *supra* note 88, ¶¶ 82–83.

90. The study examined 56 World Bank operations in 43 countries. GINO BRUNSWIJK, EUR. NETWORK ON DEBT & DEV., *FLAWED CONDITIONS: THE IMPACT OF THE WORLD BANK’S CONDITIONALITY ON DEVELOPING COUNTRIES 2* (Apr. 2019).

91. *Id.* at 2.

92. *Id.*

93. *Id.* at 5.

94. Camilla Anderson, *IMF Spells Out Need for Fiscal Stimulus*, IMF (Dec. 29, 2008), <https://www.imf.org/en/News/Articles/2015/09/28/04/53/soint122908a> [https://perma.cc/YH64-NTLE].

95. Isabel Ortiz et al., *The Decade of Adjustment: A Review of Austerity Trends 2010–2020 in 187 Countries* 8 (Int’l Lab. Org., Working Paper No. 53, 2017).

fiscal stimulus, fearing a worsening of the economic situation.⁹⁶ This approach prevailed for two years after the crisis but a widespread trend of fiscal consolidation emerged soon afterwards, with two thirds of the world's countries instituting austerity measures.⁹⁷ Affecting economic growth and equality and public resources by definition, such measures have a negative impact on the realization of human rights, yet international financial institutions keep recommending them.⁹⁸ It is thus essential to deconstruct the economic theory supporting austerity.

A. Effects of Austerity on Growth, Debt Sustainability, and Equality

Evidence shows the adverse impact of austerity on the economy in times of recession. 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.⁹⁹ A significant body of literature demonstrates that austerity measures do not contribute to economic recovery, but in fact have negative consequences for the economy while lowering public debt as a percentage of the gross domestic product (GDP).¹⁰⁰ A study examining the severity of austerity measures adopted by a group of European

96. Anderson, *supra* note 94; Alasdair Scott, *Making Fiscal Stimulus Effective During Downturns*, IMF (Oct. 2, 2008), <https://www.imf.org/en/News/Articles/2015/09/28/04/53/sores100208b> [<https://perma.cc/2E4K-8U8R>] (promoting “timely, targeted, and temporary” fiscal stimulus).

97. Isabel Ortiz & Matthew Cummins, *Austerity: The New Normal A Renewed Washington Consensus 2010–24* 11 (Initiative for Pol’y Dialogue et al., Working Paper, Oct. 2019).

98. *See infra* Part III (outlining the negative human rights impacts of austerity).

99. Alan M. Taylor, *When is the Time for Austerity?*, CTR. FOR ECON. & POL’Y RSCH. (July 20, 2013), <https://voxeu.org/article/when-time-austerity> [<https://perma.cc/M7FV-3JDP>]; Óscar Jordà & Alan M. Taylor, *The Time for Austerity: Estimating the Average Treatment Effect of Fiscal Policy*, 126 ECON. J. 219, 220 (2016) (finding that “on average, fiscal consolidations generate a drag on GDP growth”). In the words of famed economist John Maynard Keynes: “The boom, not the slump, is the right time for austerity at the Treasury.” 21 JOHN MAYNARD KEYNES, *COLLECTED WRITINGS, 1931–1939* 390 (Donald Moggridge ed., 1937).

100. W. D. McCausland & Ioannis Theodossiou, *The Consequences of Fiscal Stimulus on Public Debt: A Historical Perspective*, 40 CAMBRIDGE J. ECON. 1103, 1114 (2016).

countries from 2009 to 2013 established that the harsher austerity measures were, the lower the GDP growth rate was.¹⁰¹

As these scholars and others have demonstrated repeatedly, austerity does not result in economic growth.¹⁰² 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.¹⁰³ The organization also highlighted that austerity in Europe and an overreliance on monetary policy have affected the stability of international financial markets, contributed to financial imbalance in developing and emerging economies, and largely failed to boost consumer demand.¹⁰⁴

Taking empirical concerns into account, it is not possible to conclude that fiscal contraction causes economic expansion.¹⁰⁵ Some scholars have found that cases used to demonstrate the allegedly positive effects of austerity, such as Denmark or Ireland,¹⁰⁶ should be considered cautionary tales rather than externally valid models, to say nothing of the human rights issues that have arisen in those countries.¹⁰⁷ While comparing Ireland's experience in the 1980s to the worldwide adoption of austerity measures following the latest global crisis, it was suggested that the impact of austerity on growth was

101. ROBERT SKIDELSKY & NICOLO FRACCAROLI, AUSTERITY VS STIMULUS: THE POLITICAL FUTURE OF ECONOMIC RECOVERY 45–47 (2017); *see also* Axel Dreher, *IMF and Economic Growth: The Effects of Programs, Loans and Compliance with Conditionality*, 34 *WORLD DEV.* 769, 781 (2006) (finding that “the impact of compliance with conditionality on growth is quantitatively small.”).

102. Jordà & Taylor, *supra* note 99, at 221.

103. Press Release, U.N. Conference on Trade and Development, *Austerity Did Not Lead to Growth; Supportive Government Policies Are Still Needed*, UNCTAD Report Says, U.N. Press Release UNCTAD/PRESS/PR/2012/030 (Sept. 12, 2012).

104. U.N. CONF. ON TRADE & DEV., *TRADE AND DEVELOPMENT REPORT* 162 (2016).

105. *See* Robert Boyer, *The Four Fallacies of Contemporary Austerity Policies: The Lost Keynesian Legacy*, 36 *CAMBRIDGE J. ECON.* 283, 308 (Jan. 2012).

106. Giavazzi and Pagano, for instance, have argued that Denmark and Ireland's experiences with fiscal contraction support the notion that an expansionary effect will follow from such policies. Francesco Giavazzi & Marco Pagano, *Can Severe Fiscal Contractions Be Expansionary? Tales of Two Small European Countries* (Nat'l Bureau Econ. Rsch., Working Paper No. 3372, 1990).

107. *See* MARK BLYTH, *AUSTERITY: THE HISTORY OF A DANGEROUS IDEA* 236 (2013) (noting that Ireland's welfare and social spending have been cut as a result of austerity measures); *see also* Stephen Kinsella, *Is Ireland Really the Role Model for Austerity?*, 36 *CAMBRIDGE J. ECON.* 223, 234 (2012) (predicting that Ireland's austerity measures will lead to “large cuts to pay and pensions and social welfare transfers”).

not as clear as had been projected, and, in the short term, it would have been difficult to see Ireland's recovery "as a result of austerity measures alone."¹⁰⁸

The latest IMF Review of Program Design and Conditionality highlights that, between 2011 and 2017, three quarters of the programs implemented with the support of the Fund were at least partly successful, but that "growth assumptions were often too optimistic."¹⁰⁹ In response to these findings, the IMF suggested that it would enhance the credibility of these programs. It recommended, *inter alia*, the reassessment of certain "tradeoffs in program design," advising, for instance, a more "granular fiscal conditionality" promoted on a more case-by-case basis, and a "sharper debt sustainability analysis."¹¹⁰

A rise in inequality and unemployment often follows the introduction of fiscal consolidation. As the IMF has pointed out, between 1978 and 2009, fiscal consolidation measures instituted in seventeen country members of the OECD significantly entrenched structural inequalities, in addition to decreasing wage income and contributing to a rise in unemployment in the long term.¹¹¹

The ensuing threat to social cohesion is already visible in a number of countries. In some cases, austerity measures have briefly contributed to economic growth—partly due to high domestic demand—and a number of countries adopted austerity measures preemptively after the crisis.¹¹² Since that time, austerity measures in various forms are estimated to have been adopted in two thirds of countries worldwide.¹¹³ Scholars have observed that wage caps and cuts, along with lower subsidies, are more common in developing countries, while labor and pension reforms are more evident in high income countries.¹¹⁴ All this clearly has deep implications for the right to social protection, which has a renewed importance in the context of the pandemic.

108. Kinsella, *supra* note 107, at 235.

109. IMF *Review of Program Design and Conditionality*, *supra* note 82, at 3.

110. *Id.* at 3, 5, 8, 54.

111. Laurence Ball et al., *The Distributional Effects of Fiscal Consolidation* 10 (IMF, Working Paper, No. WP/13/151, 2013).

112. OFF. HIGH COMM. FOR HUM. RTS., REPORT ON AUSTERITY MEASURES AND ECONOMIC AND SOCIAL RIGHTS, para. 5 (2013) (explaining that such measures were adopted to reduce fiscal deficits preventively in order "to avert negative reactions from financial markets").

113. Ortiz et al., *supra* note 95, at 3.

114. *Id.* at 24.

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 labor rights and the rights to food, housing, and social security.¹¹⁵ Furthermore, a 2015 paper specifically underlined the impact of fiscal consolidation on lowering an economy's aggregate incomes and its especially harsh effects on the poorest segment of the population.¹¹⁶

In this regard, the author 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 a contributor to economic crises.¹¹⁷ The evidence suggests that following the 2008 financial crisis, conventional austerity-related labor reforms did not help recovery, nor did they increase access to employment or help realize other social rights.¹¹⁸ Similar conclusions have been drawn regarding the impact of austerity on human rights in general and on women's rights in particular.¹¹⁹

B. Deconstructing the "Expansionary Austerity" Theory

While the subject of fiscal consolidation has been at the center 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.¹²⁰ The expansionary effects of orthodox economic policies have been the economic driving idea behind conditionalities, but a few scholars have lately suggested that *austerity* would have an "expansionary" effect, arguing that fiscal

115. *Public Debt, Austerity Measures, & ICESCR*, *supra* note 57, at 1 (noting that these rights, among others, may be adversely affected if austerity programs are "not implemented with full respect for human rights standards [or] do not take into account the obligations of States towards the rights holders").

116. Davide Furceri et al., *Fiscal Consolidation and Inequality in Advanced Economies: How Robust Is The Link?*, in *INEQUALITY AND FISCAL POLICY* 141, 155–56 (Benedict Clements et al. eds., 2015).

117. See, e.g., Juan Pablo Bohoslavsky, *Economic Inequality, Debt Crises and Human Rights*, 41 *YALE J. INT'L L.* 177, 177–79 (2016) (describing the impact of austerity measures on human rights and inequality).

118. *Rep. of the Independent Expert on His Mission to the European Union*, *supra* note 62, at ¶ 57.

119. *Rep. of the Independent Expert on the Impact of Economic Reforms and Austerity Measures on Women's Human Rights*, *supra* note 74, ¶¶ 3–8.

120. Robert Skidelsky & Nicolò Fraccaroli, *Introduction to AUSTERITY VS STIMULUS: THE POLITICAL FUTURE OF ECONOMIC RECOVERY*, *supra* note 101, at xv–xvi.

consolidation would contribute to economic recovery.¹²¹ 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.”¹²²

This approach is usually referred to as the “expansionary fiscal contraction” theory.¹²³ According to its advocates, avoiding further increase in the fiscal deficit in times of shock allows for an economic revival.¹²⁴ Despite widespread evidence showing that austerity does not contribute to economic recovery or growth,¹²⁵ this idea seems to keep influencing mainstream economic thinking to a disproportionate degree.¹²⁶

Other economists have, however, argued that fiscal deficit can be helpful for economic recovery, and that stimulus and redistributive measures can go hand in hand, resulting in positive outcomes from a human rights standpoint and at an economic level.¹²⁷

The rationale supporting the resort to austerity is thus based on the oversimplified idea that, in times of economic downturn, further fiscal deficit should be avoided. Increasing (or maintaining) public spending, the theory goes, would result in deepening fiscal deficit, thus either reducing consumer spending, according to the “Ricardian” school, or negatively impacting investments, according to the “new classical” school.¹²⁸

While economists base their results on a number of explanatory elements, the impact of fiscal deficits on the level of confidence (be it of consumers or investors) is without any doubt the

121. Alberto F. Alesina et. al., *What Do We Know About the Effects of Austerity?* 5 (Nat’l Bureau Econ. Rsch., Working Paper No. 24246, 2018).

122. *Id.* at 1.

123. Skidelsky & Fracarroli, *supra* note 120, at xviii.

124. Alesina et. al., *supra* note 121, at 2.

125. *See, e.g.*, Jordà & Taylor, *supra* note 99, at 220 (“[O]n average, fiscal consolidations generate a drag on GDP growth.”).

126. *See* Skidelsky & Fracarroli, *supra* note 120, at xxii (“The austerity story, though shaken, is today still the dominant one in Europe.”).

127. *See, e.g.*, Robert Skidelsky, *Stimulus, Not Austerity, is the Key to Global Economic Recovery*, in *AUSTERITY VS STIMULUS: THE POLITICAL FUTURE OF ECONOMIC RECOVERY*, *supra* note 101, at 52–53 (arguing in favor of fiscal stimulus and an expansion of fiscal deficits in times of crisis, and suggesting that “[r]edistributive measures go quite well with stimulus policies, because they may be expected to increase aggregate demand in the short term”).

128. Skidelsky & Fracarroli, *supra* note 120, at xviii.

most questionable.¹²⁹ Positing that a fiscal deficit necessarily affects business and consumer confidence in the economy, a number of economists claim that deficits result in decreased private spending and business investment, thus reducing the potential for economic recovery.¹³⁰ In their view, austerity contributes to the restoration of confidence and induces economic growth.¹³¹

These assumptions have been challenged many times.¹³² The main issue lies in the research methodology 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.¹³³ While fiscal consolidation is considered an exogenous variable by advocates of expansionary austerity, other economists have demonstrated that this approach is fundamentally biased, and that fiscal consolidation should be considered endogenous.¹³⁴ An exogenous variable is an economic instrument used to identify a variable outside the economic model (such as the occurrence of a shock), while an endogenous variable is determined by the economic model itself or cannot be considered as an external phenomenon.¹³⁵

In the case of the IMF, the implementation of austerity measures can actually be “predicted using predetermined macroeconomic controls,” and thus cannot be qualified as

129. Alesina and others also examine the accompanying policies, labor supply, and network effects as explanatory elements for their empirical results on the effects of austerity. Alesina et al., *supra* note 121, at 8–12.

130. Skidelsky & Fraccaroli, *supra* note 120, at xix.

131. *Id.*

132. *See, e.g., id.* (“In the real world, though, it is extremely difficult to forecast business’ reaction to fiscal policies.”); Christian Breuer, *Expansionary Austerity and Reverse Causality: A Critique of the Conventional Approach* 3–9 (Inst. for Econ. Thinking, Working Paper No. 98, 2019), https://www.ineteconomics.org/uploads/papers/WP_98-Breuer.pdf [<https://perma.cc/7UTJ-DJP5>] (identifying previous critiques of the economic studies undergirding these theories, and pointing to methodological errors which distort the results of these studies).

133. Breuer, *supra* note 132, at 7–9.

134. *See, e.g.,* Alberto Alesina, *Some Evidence in Favour of Austerity*, in *AUSTERITY VS STIMULUS: THE POLITICAL FUTURE OF ECONOMIC RECOVERY* *supra* note 101, at 20–21 (treating fiscal consolidation as an exogenous variable). *But see* Breuer, *supra* note 132, at 23 (suggesting that fiscal consolidation should instead be treated as endogenous).

135. Alesina, *supra* note 134, at 20.

exogenous.¹³⁶ 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.¹³⁷

III. THE IMPACT OF AUSTERITY ON HUMAN RIGHTS

As described in Parts I and II, IFIs have advised, promoted, and even pushed countries to adopt fiscal consolidation, frequently including it among the conditions attached to loans.¹³⁸ At the same time, the devastating consequences of fiscal consolidation on human rights are well-known and documented. Treaty bodies, special procedures mandate holders, civil society organizations, and scholars have repeatedly reported both actual and potential harmful impacts of fiscal consolidation on a wide range of human rights and on specific groups, underscoring that people confronting cumulative and intersecting inequalities are disproportionately affected.¹³⁹

Time and again, experts have demonstrated how conditionalities, particularly those which prescribe fiscal consolidation and structural adjustment policies, can directly undermine the enjoyment of economic, social, and cultural rights.¹⁴⁰ Following are a number of examples which illustrate how the

136. Taylor, *supra* note 99; *see also* Jordà & Taylor, *supra* note 99, at 228–31 (evaluating “whether the IMF narrative variable might be a legitimate instrument” of predictive ability in macroeconomics).

137. *See generally* Breuer, *supra* note 132 (introducing the “Blanchard method” to correct the misguided assumptions of the conventional cyclical adjustment method established by Alesina and Perotti, which supports the notion of expansionary austerity).

138. *See IMF Review of Program Design and Conditionality, supra* note 82, at 1, 25, 50 (finding a need for “more granular fiscal conditionality” and “further tailoring” to deliver a higher quality of fiscal adjustment and improve the quality of public expenditures without burdening countries’ macroeconomic positions).

139. *See, e.g.,* REP. ON AUSTERITY MEASURES AND ECONOMIC AND SOCIAL RIGHTS, *supra* note 112, ¶¶ 49–68 (profiling the effects of austerity measures on women, migrants, and older persons in particular); *see generally* ECONOMIC AND SOCIAL RIGHTS AFTER THE GLOBAL FINANCIAL CRISIS (Aoife Nolan ed., 2014) (noting the harmful impact of national and supranational fiscal contraction policies on populations with pre-existing vulnerabilities and disadvantages).

140. *See, e.g.,* Rep. of the Independent Expert on His Mission to the European Union, *supra* note 62, ¶ 5 (highlighting human rights concerns such as increases in the number of people at risk of poverty, social exclusion, and homelessness, as well as increased risk of social unrest and extremist ideologies as a result of austerity measures in Europe); *see also* Rep. of the Independent Expert on His Mission to Greece, *supra* note 43, ¶¶ 55–74 (detailing the impact of austerity measures on economic, social, and cultural rights in Greece).

negative effects of austerity on economic growth, debt sustainability, and economic equality easily translate into adverse consequences for human rights.

To start, labor-related reforms implemented in the context of structural adjustment programs have contributed to the erosion of collective and individual labor rights, and the implementation of wage caps or employment limits has affected the right to just and favorable work and working conditions.¹⁴¹ Labor reforms can also negatively impact gender 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 the form of unpaid care work on women.¹⁴²

In addition to fiscal consolidation, specific reforms proposed in similar situations can be of particular concern. For instance, a series of conditionalities, including the privatization of a significant number of State-owned enterprises, were attached to Ukraine's most recent loan agreement with the IMF.¹⁴³ When pursuing privatization, countries must have effective mechanisms in place to ensure that the economic results of this process benefit the population that is most disenfranchised or at risk of falling into poverty, rather than exclusively addressing fiscal consolidation. This is in part due to the fact that privatization can put access to a range of services, including essential services such as water and electricity, at risk.¹⁴⁴ 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

141. Stubbs & Kentikelenis, *supra* note 66, at 375.

142. *Rep. of the Independent Expert on the Impact of Economic Reforms on Women's Human Rights*, *supra* note 74, ¶¶ 24–56.

143. *Rep. 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 on His Visit to Ukraine*, ¶¶ 29, 83–86, U.N. Doc. A/HRC/40/57/Add.1 (Dec. 31, 2018) [hereinafter *Rep. of the Independent Expert on His Visit to Ukraine*].

144. This is particularly the case when infrastructure projects are privatized, according to a 2018 report submitted by the Special Rapporteur on extreme poverty and human rights, Philip Alston. See *Rep. of the Special Rapporteur on Extreme Poverty and Human Rights*, ¶¶ 31–37, U.N. Doc. A/73/396 (Sept. 26, 2018). The privatization of infrastructure disadvantages the poor because, in general, they “are badly placed to pay, cannot afford to use many services, and often live in distant or otherwise underserved areas.” *Id.* ¶ 36. Furthermore, services including “[w]ater, sanitation, electricity, roads, transport, education, health care, social services and financial services are far less likely to be provided adequately or at good quality levels to the poor.” *Id.*

can have serious consequences for livelihoods and jeopardize the realization of economic, social, and cultural rights.¹⁴⁵

Measures put in place to better target the beneficiaries of social protection systems can also be a source of concern. In Tunisia, for example, the author highlighted that redirecting benefits exclusively to the ultra-poor can result in inadequate coverage for others in situations of poverty.¹⁴⁶ Relatedly, in its concluding observations on Portugal, the Committee on the Rights of Persons with Disabilities expressed concerns about the impact of austerity measures on support services available to persons with disabilities, underlining that “in the absence of family support or assistance networks” they are at risk of living in poverty or extreme poverty.¹⁴⁷

Similarly, the Committee on the Elimination of Discrimination against Women has underlined that, in general, public services cuts made in the context of economic crises have “specific negative consequences” for women and girls, including potentially excluding them from education and burdening them with additional unpaid care work.¹⁴⁸ Underscoring that the current global economic system is sustained by gender inequality and multiple forms of gender discrimination, the author has highlighted that austerity-driven fiscal consolidation measures and economic reforms, such as encouraging labor market flexibilization reductions in the

145. *Rep. of the Independent Expert on His Visit to Ukraine*, *supra* note 143, at ¶¶ 37–39. Pursuant to its 2014 IMF loan agreement, the Ukraine raised the cost of residential gas to market price, in doing so eliminating long-standing subsidies. *Id.* at ¶ 37. The move led to much higher prices for “goods and services related to fuel use,” negatively impacted “not only marginalized groups but also the so-called middle class,” and had a disproportionate impact on rural populations. *Id.* at ¶ 39.

146. *Rep. 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 on His Mission to Tunisia*, ¶ 38, U.N. Doc. A/HRC/37/54/Add.1 (Mar. 7, 2018) [hereinafter *Report of the Independent Expert on His Mission to Tunisia*].

147. Comm. on the Rts. of Persons with Disabilities, *Concluding Observations on the Initial Rep. of Portugal*, ¶ 53, U.N. Doc. CRPD/C/PRT/CO/1 (May 20, 2016).

148. Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 36 on the Right of Girls and Women to Education*, ¶¶ 37–38, 53 U.N. Doc. CEDAW/C/GC/36 (Nov. 27, 2017). According to CEDAW, when the privatization of education forces parents to pay to send their children to school, poor parents tend to prioritize sending boys to school over girls, due in part to the perception that boys will be “able to gain access to better employment opportunities after their schooling” than girls, and in part due to “stereotypes that place girls in the domestic sphere.” *Id.* ¶ 37.

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.¹⁴⁹

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.”¹⁵⁰ It also highlighted the “disproportionately adverse impact” of such measures on the enjoyment of economic, social, and cultural rights, especially for the disadvantaged and marginalized individuals and groups.¹⁵¹

An increase in poverty-reduction conditionalities has been noted in recent years, rising from around 1% in 1998 to 5% of the total number of conditionalities in 2014.¹⁵² However, gaps remain, and as noted by scholars, these conditionalities are treated as less important to securing loan agreements than macroeconomic conditions, including fiscal consolidation.¹⁵³ While IFIs will insist that countries meet specific short-term fiscal targets in order to secure the terms of their loan agreements, poverty reduction targets tend to be treated as non-binding and are often subject to much greater negotiation.¹⁵⁴ As a result, despite the establishment of priority spending targets for poverty reduction, they often remain unmet¹⁵⁵—not to mention that poverty reduction conditionalities may not be compliant with human rights standards.¹⁵⁶

Poverty reduction and other conditionalities affect specific social sectors with important potential consequences for human rights. One 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, the budget of the health sector was decreased by half due to tight fiscal deficit

149. *Report of the Independent Expert on the Impact of Economic Reforms and Austerity Measures on Women's Human Rights*, *supra* note 74, ¶¶ 11–12, 21.

150. Comm. on Econ., Soc. & Cultural Rts., *Concluding Observations on the Sixth Periodic Rep. of Cyprus*, ¶ 11, U.N. Doc. E/C.12/CYP/CO/6 (Oct. 28, 2016).

151. *Id.*

152. Stubbs & Kentikelenis, *supra* note 66, at 370.

153. *Id.* at 371.

154. *Id.*

155. *Id.* (finding that “priority spending targets were observed only about half of the time, even though fiscal deficit conditions were almost always met”).

156. See *Report of the Independent Expert on His Mission to Tunisia*, *supra* note 146 and accompanying text.

targets.¹⁵⁷ The health budget decrease included a 70% reduction in Chad's national emergency program, and resulted in inadequate funding of hospitals and "reduced provision of healthcare services and shortages of medicines."¹⁵⁸ Furthermore, by contributing to the deregulation of a sector's market, structural adjustment can diminish the accessibility and quality of provided services.¹⁵⁹

One last example merits attention. As previously described, austerity has a particularly harsh effect on the human rights of those living in situations of vulnerability.¹⁶⁰ In this regard, regressive tax reforms that result in a shift from direct to indirect taxation policies can have significant consequences for low-income households.¹⁶¹ In 2017, however, a significant increase in the value added tax was introduced in Colombia¹⁶² and in Costa Rica,¹⁶³ following the advice of the IMF. In a report on a country visit to Sri Lanka in 2018, the author expressed concern at the significant rise in the value added tax, given that the poorest often bear the brunt of such taxes.¹⁶⁴

Although austerity measures are thought to be temporary, their effects last far beyond the period of their effective implementation. The experiences of structural adjustment programs in various regions—including in South-East Asia, Latin America, and sub-Saharan Africa a few decades ago—indicate that it can take up to twenty years to recover from the human rights impacts of austerity measures.¹⁶⁵ Austerity not only worsens inequality and poverty, but it does so in the long term.

157. BRUNSWIJK, *supra* note 71, at 19.

158. *Id.*

159. *Id.* "[S]trikes 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. *Id.*

160. *See supra* note 151 and accompanying text.

161. *Rep. of the Independent Expert on the Impact of Economic Reforms and Austerity Measures on Women's Human Rights, supra* note 74, at ¶ 54.

162. IMF, *Columbia: 2017 Article IV Consultation*, Staff Report (Apr. 2017).

163. IMF, *Costa Rica: 2016 Article IV Consultation*, Staff Report (Apr. 2016).

164. *Rep. 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 on His visit to Sri Lanka*, ¶ 26, U.N. Doc. A/HRC/40/57/Add.2 (Jan. 7, 2019).

165. TERESA CAVERO & KRISNAH POINASAMY, OXFAM, A CAUTIONARY TALE: THE TRUE COST OF AUSTERITY & INEQUALITY IN EUROPE 17 (2013).

IV. COMPLICITY OF INTERNATIONAL FINANCIAL INSTITUTIONS

Section IV.A. will examine the substantive and international legal arguments undergirding the responsibility of IFIs for complicity. Section IV.B. will then analyze the counterarguments to this responsibility emanating from the IFIs themselves and, in turn, responses to them. Finally, Section IV.C will discuss the legal and concrete implications that this responsibility brings.

A. Arguments Behind Responsibility for Complicity

International organizations are responsible for actions and omissions that violate their own obligations. This principle of independent responsibility is paramount throughout the International Law Commission ("ILC")'s draft articles on the responsibility of international organizations.¹⁶⁶ International organizations can also be held complicit in wrongful acts committed by States, and complicity with States is one of the most common means of participating in an internationally wrongful act.¹⁶⁷

Complicity is a separate area of responsibility deriving from the principal wrongful act it enables, in that the international organization is responsible for its facilitation of the principal wrongful act.¹⁶⁸ In other words, while such organizations can be held directly responsible for the commission of an internationally wrongful act, responsibility can also result from the provision of technical or financial assistance to a State that is the ultimate perpetrator.¹⁶⁹

Complicity in such instances is established when three main elements are present: (1) the aid or assistance provided by an international organization in question would be considered internationally wrongful;¹⁷⁰ (2) the international organization was aware of this fact;¹⁷¹ and (3) there exists a causal link between the goods or services provided and the harm caused—the harm in this case being the violation of human rights.¹⁷²

166. Article 3 states that: "Every internationally wrongful act of an international organization entails the international responsibility of that organization." *Draft Articles on the Responsibility of International Organizations*, *supra* note 23, art. 3.

167. LANOVOY, *supra* note 22, at 2.

168. *Id.* at 4–5.

169. *Draft Articles on the Responsibility of International Organizations*, *supra* note 23, art. 14.

170. *Id.*

171. *Id.*

172. LANOVOY, *supra* note 22, at 262.

An international organization is responsible for a wrongful act when conduct consisting of an act or an omission constitutes a breach of an international obligation of that organization.¹⁷³ While it is true that statutes prevent the World Bank¹⁷⁴ and, far less explicitly, the IMF,¹⁷⁵ from making political considerations, it is difficult to argue that violating human rights can be part of a country's domestic political affairs.¹⁷⁶ In other words, IFIs cannot simply disregard the harmful results on human rights of the policies they encourage on the basis that these impacts constitute domestic political affairs over which they have no authority. Referring to the IMF, Special Rapporteur Giorgio Gaja of the ILC held that one cannot say "that an organization is free from international responsibility if it acts in compliance with its constituent instrument."¹⁷⁷ Furthermore, although a number of IFIs provide for the principle of neutrality in their governing statutes, refraining from "making political considerations," these institutions routinely violate this principle by bypassing it or reinterpreting it artificially in order to institute structural adjustment policies.¹⁷⁸

173. *Draft Articles on the Responsibility of International Organizations*, *supra* note 23, art. 4(b).

174. Articles of Agreement of the International Bank for Reconstruction and Development, arts. IV(1), III(5)(b), Dec. 27, 1945, 60 Stat. 1440, 2 U.N.T.S. 134; *see also* 3 WORLD BANK LEGAL REV., INTERNATIONAL FINANCIAL INSTITUTIONS AND GLOBAL LEGAL GOVERNANCE 59 (Hassane Cissé et al. eds., 2012) (examining the political prohibition clauses in the World Bank Articles of Agreement).

175. Articles of Agreement of the IMF, arts. I, IV(3)(b), Dec. 27, 1945, 60 Stat. 1401, 2 U.N.T.S. 39 (stating that the IMF "shall respect the domestic social and political policies of members").

176. *See* U.N. Charter art. 2(7) (stating that "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state"); *see also* 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*, 33 CORNELL INT'L L.J. 331, 357 (2000) (summarizing evidence that international law narrowly defines a country's "political affairs" as affairs within its sovereign jurisdiction, and asserting that matters of human rights are beyond its jurisdiction).

177. Giorgio Gaja (Special Rapporteur), *Seventh Rep. on Responsibility of International Organizations*, ¶ 20, U.N. Doc. A/CN.4/610 (Mar. 27, 2009).

178. *See* Alexander E. Kentikelenis & Sarah Babb, *The Making of Neoliberal Globalization: Norm Substitution and the Politics of Clandestine Institutional Change*, 124 AM. J. SOCIO. 1720, 1731–38 (2019) (providing an account of how the IMF transformed its promotion of "structural adjustment conditionality" by bypassing formal procedures for amending the neutrality principle in its charter and instead undergoing a process of "norm substitution").

What are the relevant international obligations that must be considered when granting a multilateral loan?¹⁷⁹ It has been argued that international human rights conventions, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) only bind States parties, while the operations of international financial institutions are guided solely by their own Articles of Agreement.¹⁸⁰

However, the IMF and the World Bank are specialized agencies of the United Nations,¹⁸¹ and consequently they are required to act in conformity with the U.N. Charter. More importantly, as international organizations they are clearly subject to international law, and therefore must not violate customary international law¹⁸² or the general principles of international law.¹⁸³ In the case of responsibility for complicity, these principles—including, but not limited to, economic, social, and cultural rights—find legal foundation in a long and robust list of international instruments, cases in

179. The set of pertinent human rights obligations in the context of austerity policies has evolved over the last four decades. See Matthias Goldmann, *Contesting Austerity: Genealogies of Human Rights Discourse* (Max Planck Inst., Rsch. Paper No. 9, 2020) (tracing the “genealogy” of human rights paradigms in relation to views of austerity in the decades since the 1970s).

180. François Gianviti, *Economic, Social, and Cultural Rights and the International Monetary Fund*, in 3 IMF, CURRENT DEVELOPMENTS IN MONETARY AND FINANCIAL LAW 3, 29–30 (2005) (examining the extent to which the IMF may contribute to the objectives of the ICESCR under the IMF’s Articles of Agreement).

181. Agreement Between the United Nations and the International Monetary Fund, Apr. 15, 1948, 16 U.N.T.S. 328; Agreement Between the United Nations and the International Bank for Reconstruction and Development, Apr. 15, 1948, 16 U.N.T.S. 346; G.A. Res. A/RES/1594(XV), Agreement on the Relationship Between the United Nations and the International Development Association (Mar. 27, 1961).

182. Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73, ¶ 37 (Dec. 20); Giorgio Gaja (Special Rapporteur), *First Rep. on Responsibility of International Organizations*, art. 3(1), U.N. Doc. A/CN.4/532 (Mar. 26, 2003) (“Every internationally wrongful act of an international organization entails the international responsibility of the international organization.”); Giorgio Gaja (Special Rapporteur), *Third Rep. on Responsibility of International Organizations*, art. 8, U.N. Doc. A/CN.4/553 (May 13, 2005) (“There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, *regardless of its origin and character.*” (emphasis added)).

183. See WILLEM VAN GENUGTEN, *THE WORLD BANK GROUP, THE IMF AND HUMAN RIGHTS: A CONTEXTUALISED WAY FORWARD* 14–17 (2015) (laying out the general principles of international law applicable to international institutions, including the principle of due diligence).

customary international law, the jurisprudence of international and national courts, and national legislation.¹⁸⁴

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.¹⁸⁵ The ICESCR emphasizes the obligation of the international community to cooperate towards the realization of economic, social, and cultural rights.¹⁸⁶ The Committee on Economic, Social and Cultural Rights (CESCR), the body tasked with authoritatively interpreting the ICESCR, has 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.”¹⁸⁷ CESCR has further specified that such organizations “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.”¹⁸⁸

It is important to note that States cannot simply deploy international financial institutions to circumvent their clear obligations under international law—including obligations emanating from the ICESCR—by deploying an international organization or IFI

184. See ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 21 (Gráinne de Búrca et al. eds., 2006) (positing that “customary international law, international treaties, and certain non-binding international instruments . . . create human rights responsibilities for non-state actors”); see, e.g., Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 47, ¶ 167 (Feb. 2006) (establishing the principle of state responsibility for complicity in genocide); see also Juan Pablo Bohoslavsky, *Tracking Down the Missing Financial Link in Transitional Justice*, 1 INT’L HUM. RTS. L. REV. 54, 72 (2012) (examining prosecutions brought against individuals for financial complicity in genocide at the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR)).

185. CHRISTIAN TOMUSCHAT, INTERNATIONAL LAW: ENSURING THE SURVIVAL OF MANKIND ON THE EVE OF A NEW CENTURY: GENERAL COURSE ON PUBLIC INTERNATIONAL LAW 138–39 (1999).

186. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3, art. 2(1) (entered into force Jan. 3, 1976) [hereinafter ICESCR].

187. *Public Debt, Austerity Measures, & ICESCR*, *supra* note 57, ¶ 7 (citing Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. Rep. 73, ¶ 37 (Dec. 20)).

188. *Id.*

to act on their behalf.¹⁸⁹ Per Guiding Principle 15.3, “delegation cannot be used as an excuse to fail to comply with human rights obligations, in abnegation of the extraterritorial character of these obligations.”¹⁹⁰ According to CESCR, this policy encourages States—themselves members of international organizations, including IFIs such as the IMF—to ensure that the policies of these organizations are in conformity with the obligations of State parties under the Covenant.¹⁹¹

States must be able to use their legal and policy space to design and implement economic programs in line with their human rights obligations.¹⁹² When international financial institutions exert undue external influence on States, doing so can amount to complicity in the harms that result.¹⁹³ The term “undue external influence” in the economic context is understood to mean direct or indirect intervention in a State’s economic affairs “through the use of economic and/or political measures that seek to influence [the State] to adopt certain economic policies or to secure from them advantages of any kind that undermine their ability to respect, protect and fulfil

189. Ian Brownlie, *State Responsibility: The Problem of Delegation*, in VÖLKERRECHT ZWISCHEN NORMATIVEM ANSPRUCH UND POLITISCHER REALITÄT 299, 300 (Ginther et al. eds. 1994); *Draft Articles on the Responsibility of International Organizations*, *supra* note 23, at art. 7 (“The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.”).

190. *Guiding Principles*, *supra* note 2, princ. 15.3. “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).” *Id.*

191. Comm. on Econ., Soc., & Cultural Rts., *Concluding Observations on the Third Periodic Report of Ireland*, ¶ 35, U.N. Doc. E/C.12/IRL/CO/3 (July 8, 2015).

192. See *Guiding Principles*, *supra* note 2, princ. 4 (prohibiting the use of economic crises “to justify a reduction of the policy and fiscal space necessary at local and subnational government levels to ensure the protection of human rights”); see also G.A. Res. 70/1, U.N. Doc A/RES/70/1, ¶ 17.15 (Sept. 25, 2015) (calling for recognition of “each country’s policy space and leadership to establish and implement policies for poverty eradication and sustainable development”); G.A. Res. 69/313, U.N. Doc A/RES/69/313, ¶ 9 (July 25, 2015) (re-affirming that “each country has primary responsibility for its own economic and social development”); G.A. Res. 2625 (XXV), at 121 (Oct. 24, 1970) (recognizing the “sovereign equality” and equal responsibilities shared by different nations).

193. *Draft Articles on the Responsibility of International Organizations*, *supra* note 23, art. 15.

their human rights obligations.”¹⁹⁴ Such economic measures can comprise not only those conditionalities which are directly attached to financial assistance programs, but also any implicit conditionalities that international or regional institutions have informally pressured countries to adopt.¹⁹⁵

B. Analyzing IFIs’ Counterarguments

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 established by the provision of financial assistance.¹⁹⁶ 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.”¹⁹⁷

In the same vein, the IMF expressed concerns regarding the interpretation provided by Article 16 of the draft articles, which assimilated aid or assistance into the facilitation or provision of financing that would be essential or had significantly contributed to the act in question.¹⁹⁸ The IMF hoped that, “given the fungible nature of financial assistance,” any responsibility that an international organization might incur in this scenario would be limited to where it had provided “assistance . . . earmarked for the wrongful conduct.”¹⁹⁹ Referring to such targeted “wrongful” assistance, the IMF underlined that:

This should be distinguished from aid and assistance, as those words are used colloquially, which international organizations regularly provide their members.

194. *Guiding Principles*, *supra* note 2, princ. 14.1.

195. *Id.*

196. Int’l Law Comm’n, *Responsibilities of International Organizations, Comments and Observations Received from International Organizations*, U.N. Doc A/CN.4/637, at 27 (2011).

197. *Id.*

198. *Draft Articles on the Responsibility of International Organizations*, *supra* note 23, art. 16.

199. Int’l Law Comm’n, *Responsibilities of International Organizations, Comments and Observations Received from International Organizations*, U.N. Doc A/CN.4/582, at 10 (May 1, 2007).

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.²⁰⁰

The IMF thus expressed its concern that it might be held liable for the “wrongful conduct” of a State over which it did not have coercive power, in that “a member always has an effective choice not to follow the conditions on which IMF assistance is provided.”²⁰¹ The IMF went on to highlight 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 State²⁰²

These arguments can be broken down into four elements.²⁰³ 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.²⁰⁴ Apart from the fact that this assertion would need to be empirically proved, this is not necessarily something to be concerned about if the financial assistance not provided would have had an adverse impact on human rights.

Second, as a matter of principle, the IMF argues that it cannot be responsible for what its financing might provoke, as borrowing States always have the choice not to follow the conditions

200. *Id.*

201. *Id.*

202. *Id.* at 10–11.

203. LANOVOY, *supra* note 22, at 169–71.

204. *Supra* note 197 and accompanying text.

under which the loans are provided.²⁰⁵ This argument is problematic. On the one hand, States temporarily going through financial turbulence and losing access to other sources of funds will usually resort to IFIs, typically the IMF.²⁰⁶ As a result, the IMF sees its bargaining power enhanced vis-à-vis the borrower, so that the borrower is not fully free to choose its own economic policies.²⁰⁷ As such, “lenders actually have an enhanced responsibility with regard to the human rights impacts of their loans and the conditions attached to them.”²⁰⁸ On the other hand, even when the borrowing State is able to freely decide which economic path to follow, should the IFI know about—or be willfully blind to—the wrongful act financed, it should bear responsibility for this assistance, provided that the causation requirement is met.²⁰⁹

Third, the financing provided by IMF is generic by nature, in that it is not designed 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.²¹⁰ But a multiplicity of causes is not sufficient to exclude responsibility; it just requires the proper allocation of responsibility among the wrongdoers. Apportioning responsibility should be done according to the actual behavior of each agent and its consequences.²¹¹ One proposed principle of joint and several liability would hold one party responsible and allow them to partially recover any losses from others, thus allowing for the balancing of the various interests of injured and responsible parties.²¹²

205. *Supra* notes 199–201 and accompanying text.

206. *See supra* Section I.A.

207. Giorgio Gaja (Special Rapporteur), *Third Rep. on Responsibility of International Organizations*, ¶ 28, U.N. Doc. A/CN.4/553 (May 13, 2005) (stating that “[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”).

208. *Guiding Principles*, *supra* note 2, princ. 14.

209. *Draft Articles on the Responsibility of International Organizations*, *supra* note 23, art. 14.

210. Such as other multilateral, bilateral, and private creditors’ and donors’ financial assistance.

211. Roger P. Alford, *Apportioning Responsibility Among Joint Tortfeasors for International Law Violations*, 38 PEPP. L. REV. 233, 237 (2011).

212. Christiane Ahlborn, *To Share or Not to Share? The Allocation of Responsibility Between International Organizations and Their Member States*, 88(3–4) DIE FRIEDENS-WARTE 45, 47 (2013).

And fourth, the IMF argues that the fungibility of IMF financial assistance would preclude it from significantly contributing to the perpetration of an internationally wrongful act.²¹³ However, fungibility of the money does not mean that loans do not ever contribute to the commission of human rights violations.²¹⁴ 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 of money 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.²¹⁵

It is important to remark that responsibility in this context is not only about the IFI's direct provision of money, but also about the so-called "catalytic effect" of such loans, which send a signal to international markets.²¹⁶ This affects investors' decisions as well as States' borrowing costs—both of which often have a much bigger impact on public finances than the modest amounts the IMF provides.

Nothing in the draft articles on the responsibility of international organizations indicates support for the IMF's argument that contributions have to be essential in order to trigger responsibility for their impacts. Such a requirement could apply to discrete project financing, but not to massive financial assistance to support macroeconomic programs. A great legal and academic debate over this issue has flourished in recent years.²¹⁷ The ILC has stressed that "the assisting State will only be responsible to the extent that its

213. *Supra* note 202 and accompanying text.

214. Sabine Michalowski & 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*, 48 COLUM. J. TRANSNAT'L L. 59, 74–80 (2009) (examining developments in judicial precedent concerning fungible money loans that go towards financing states' human rights violations, such as apartheid).

215. HELMUT PHILIPP AUST, *The Concept of Complicity in Article 16 ASR*, in COMPPLICITY AND THE LAW OF STATE RESPONSIBILITY 192, 199 (2011).

216. Thomas H. Stubbs et al., *Catalyzing Aid? The IMF and Donor Behaviour in Aid Allocation*, 78 WORLD DEV. 511, 524 (2016).

217. See, e.g., Sheldon Leader, *Project Finance and Human Rights*, in MAKING SOVEREIGN FINANCING AND HUMAN RIGHTS WORK, *supra* note 45, at 199, 202–11.

own conduct has caused or contributed to the internationally wrongful act.”²¹⁸ Therefore, “the key question to be asked is whether a given action or omission made it easier for another State or international organization” to engage in the wrongful conduct.²¹⁹ Of course, there should be a “very close connection between the authorization or recommendation [made by an IFI] and the relevant act of the member State.”²²⁰

There is a direct causal link between austerity and human rights violations, and the latter are foreseeable consequences of the former.²²¹ Therefore, if the technical advice, surveillance, or financial support granted by an IFI to a borrowing State facilitated or promoted the implementation of impermissible economic retrogressive measures that negatively and unjustifiably impacted the enjoyment of human rights, the lender should carry the burden of proving that the funding was given with no knowledge of the circumstances of the principal wrongful act.²²² This shift is legitimate, given that victims of economic and social human rights violations may have no access to the relevant evidence from international financial institutions or from States,²²³ as has long been acknowledged by the Inter-American human rights system in its decisions establishing State responsibility for enforced disappearances.²²⁴

218. *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, [2001] 2 Y.B. Int'l L. Comm'n 30, 66, U.N. Doc. A/CN.4/SER.A/2001/Add.1.

219. LANOVOY, *supra* note 22, at 185.

220. Int'l Law Comm'n, Rep. on the Work of its Fifty-Seventh Session, U.N. Doc., A/C.6/60/SR.11, at 11, (2005); *see also* IMF, *The IMF and Social Protection* 25 (July 5, 2017) (evaluating whether “IMF-supported programs inadvertently ‘[did] harm’ to social protection,” and finding that in the majority of cases analyzed, “country authorities chose to retain certain subsidies such as those on fuel products commonly used by the poor, . . . and IMF staff, recognizing their pragmatic benefits, did not object”).

221. *See supra* Parts I–II.

222. LANOVOY, *supra* note 22, at 234–40.

223. *See Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, 2010 I.C.J. 639, 661, ¶ 55 (Nov. 30) (sanctioning a similar shift of the burden of proof given that, in contrast to an alleged victim of governmental abuses, “[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”).

224. *Velásquez Rodríguez v. Honduras, Merits, Judgement, Inter-Am. Ct. H.R.*, ¶¶ 122–39 (Jul. 29, 1998).

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.²²⁵ This is particularly crucial in the context of the COVID-19 pandemic.²²⁶ 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,²²⁷ as outlined in the guiding principles.²²⁸ As such, the continual neglect of IFIs to conduct human rights impact assessments in the design, imposition, and implementation of country loan agreements evinces a stubborn insistence on ignoring or disregarding the harmful impact austerity measures have on human rights.²²⁹

C. Consequences of Responsibility

Being held responsible for complicity brings a number of legal consequences,²³⁰ which include three main obligations: cessation, non-repetition, and reparation.²³¹ If the internationally wrongful act is of a continuing character—as most economic reforms and their impacts

225. *Guiding Principles*, *supra* note 2, princ. 3.

226. U.N. CHECKLIST FOR HUMAN RIGHTS AND COVID-19, *supra* note 8, at 8–9, 17.

227. *See Public Debt, Austerity Measures, & ICESCR*, *supra* note 57, at 2 (explaining that “[i]f the adoption of retrogressive measures is unavoidable, such measures should be necessary and proportionate, in the sense that the adoption of any other policy or failure to act would be more detrimental to economic, social and cultural rights,” and asserting that such measures should “remain in place only insofar as they are necessary; . . . not result in discrimination; . . . mitigate inequalities that can grow in times of crisis and ensure that the rights of disadvantaged and marginalized individuals and groups are not disproportionately affected,” and above all should not interfere with the fundamental core of human rights protected under the ICESCR.).

228. *See Guiding Principles*, *supra* note 2, princ. 10.

229. *See Guiding Principles*, *supra* note 2, princs. 17–18 (asserting the fundamental importance of human rights impact assessments); *see also* Nolan & Bohoslavsky, *supra* note 1, at 1248–50 (discussing the “side-lining and undermining of human rights in the design and implementation of economic policy reform” and noting the IMF’s resistance to undertaking human rights impact assessments, as it expressed in a letter sent in connection with the Guiding Principles: “the IMF is precluded from using its powers to . . . directly engage in the promotion of human rights”).

230. *See generally* *Jam v. Int’l Fin. Corp.*, 139 S. Ct. 759 (2019) (holding that international organizations enjoy the same immunity to which foreign sovereigns are currently entitled; i.e. they are not granted absolute immunity).

231. LANOVOY, *supra* note 22, at 261.

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.²³² In terms of reparation—which includes restitution, compensation, and satisfaction²³³—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.

Another important implication of the responsibility of the international financial institutions for complicity is their obligation to bear some financial losses in the case of State default,²³⁴ taking into account their level of recklessness towards the sovereign debtor, its population and the other creditors.²³⁵

CONCLUSIONS AND RECOMMENDATIONS FOR DISCUSSION

As discussed herein and in a number of reports to the U.N. General Assembly and the Human Rights Council, austerity measures regularly result in a series of negative human rights impacts.²³⁶ There is thus a solid legal basis to make the case for a

232. *Guiding Principles*, *supra* note 2, princ. 18; Nolan & Bohoslavsky, *supra* note 1, at 1253 (stating that human rights impact assessments “should be a mandatory element in the design of all economic reform and adjustment programmes, including in the context of debt management and financial assistance activities”).

233. LANOVOY, *supra* note 22, at 269; *see also Draft Articles on the Responsibility of International Organizations*, *supra* note 23, arts. 35–37 (providing descriptive outlines of the three forms of reparation).

234. Kunibert Raffer, Preferred or Not Preferred: Thoughts on Priority Structures of Creditors (Oct. 16, 2009) (unpublished paper) (on file with the *Columbia Human Rights Law Review*).

235. Juan Pablo Bohoslavsky, *Lending and Sovereign Insolvency: A Fair and Efficient Criterion to Distribute Losses Among Creditors*, 2 GOETTINGEN J. INT’L L. 387, 396–98 (2010) (positing that “domestic bankruptcy laws have tried to discourage abusive loans” by forcing creditors granting such loans to “collect less money in insolvency procedures”).

236. *Rep. 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, Development of Guiding Principles for Assessing the Human Rights Impact of Economic Reform Policies*, ¶¶ 4–7, U.N. Doc. A/HRC/37/54 (Dec. 17, 2017); *Rep. of the Independent Expert on the Impact of Economic Reforms and Austerity Measures on Women’s Human Rights*, *supra* note 74, ¶¶ 24–56 (detailing the negative human rights impact of austerity on women’s human rights); *Rep. of the*

prima facie inconsistency between the implementation of austerity policies during times of recession and the obligation to protect the enjoyment of human rights.²³⁷

There is no evidence that the so-called expansionary austerity even exists from an economic standpoint. It is much clearer that structural adjustment programs are linked to declines in economic growth, employment, debt sustainability, and equality.²³⁸ 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 threats to government expenditures, when and where they are most needed, create a high risk of human rights violations.²³⁹

It is not that all economic reform policies responding to economic crises are intrinsically contrary to the protection of human rights,²⁴⁰ but austerity lacks any serious theoretical and empirical justification from a human rights perspective. Given the well-established negative human rights records of austerity policies, it is striking that economic reforms and measures adopted by States to implement austerity-based conditionalities are rarely accompanied by *ex ante* human rights impact assessments.²⁴¹ While States remain the main duty bearers in this domain,²⁴² IFIs can also be held accountable for their complicity when prescribing policies with clear potential

Independent Expert on His Mission to Greece, *supra* note 43, ¶¶ 55–74 (detailing the negative human rights impacts of austerity measures on human rights in Greece).

237. *Guiding Principles*, *supra* note 2, princ. 10; *see also* Comm. on Econ., Soc. & Cultural Rights, Rep. on the Fifth Session, U.N. Doc. E/1991/23, at 85–86 (1991) (identifying a “minimum core obligation [on the part of States parties to the ICESCR] to ensure the satisfaction of, at the very least, minimum essential levels” of economic, social, and cultural rights, and reasoning that “a State party in which any significant number of individuals is deprived of essential foodstuffs, . . . health care, . . . basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the [ICESCR].”).

238. *Supra* Section II.A.

239. *Supra* Part III.

240. *Guiding Principles*, *supra* note 2, princ. 1.

241. U.N. Secretary-General, *Estimates in Respect of Special Political Missions, Good Offices and Other Political Initiatives Authorized by the General Assembly and/or the Security Council*, ¶ 63, U.N. Doc. A/71/365 (Oct. 17, 2016).

242. ICESCR, *supra* note 186, art. 2; *Guiding Principles*, *supra* note 2, at princ. 2 (“Economic choices made by States, whether acting alone or as members of international financial institutions, must comply with their international human rights obligations at all times, including during times of economic crisis.”).

human rights impacts and/or contributing to violations of human rights in this context.

The fact that human rights impact assessments are neither regularly conducted nor requested by IFI²⁴³ or by States²⁴⁴ is inconsistent with their (albeit imperfect) practice of undertaking environmental and social impact assessments when dealing with project financing.²⁴⁵ 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?

In this context, the present Article 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.²⁴⁶ The knowledge of the wrongful nature of the act can 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 prevention, cessation, non-repetition, and reparation.²⁴⁷

Because of the usual circumstances in which States find themselves when seeking assistance from IFIs, lenders often impose conditionalities that are not necessarily negotiated with borrower States and their populations are even less involved in the associated consultations, discussions or negotiations.²⁴⁸ Furthermore, the scope of conditionalities has been continuously expanding over the last decades.²⁴⁹ 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 by

243. Nolan & Bohoslavsky, *supra* note 1, at 1248–49.

244. *Id.*

245. *See, e.g.*, WBG, ENVIRONMENTAL AND SOCIAL FRAMEWORK (2018) (discussing how the use of environmental and social impact assessments enable the World Bank and borrowers to better manage environmental and social risks of projects and to improve development outcomes).

246. *Supra* Section IV.A.

247. *Supra* Section IV.C.

248. *Supra* Section I.A.

249. *Supra* Section I.B.

respective populations and the social-oriented goals of IFIs, according to their own statutes.²⁵⁰

IFIs should learn from the successful implementation of both counter-cyclical measures and adjustment programs that are largely human rights compliant, such as those in Malaysia (1997–1998), which imposed capital controls on short-term outflows,²⁵¹ 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.²⁵²

In the 1960s, the General Assembly requested that the World Bank and other international institutions to refrain from lending to South Africa because of its poor human rights record.²⁵³ The World Bank stopped approving loans to the apartheid regime in 1966.²⁵⁴ There can be no legal justification for IFIs to refrain from facilitating civil and political rights violations and yet 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, yet IFIs nonetheless regularly promote and advance them; the present Article explains how this gives rise to their legal responsibility for complicity.

Alongside some efforts to strengthen social safety nets for humanitarian reasons, IFIs continue to promote austerity and other retrogressive economic policies even in the context of the COVID-19 crisis response.²⁵⁵ The macroeconomic and fiscal assumptions as well as the underlying economic policies behind IFIs' loans to States to help them overcome the COVID-19-induced economic recession clearly indicate that fiscal discipline and pro-market options will continue to be prioritized once the global health emergency subsides.²⁵⁶ This is in spite of the fact that economic recovery has

250. See Articles of Agreement of the International Bank for Reconstruction and Development, *supra* note 174, art I; Articles of Agreement of the IMF, *supra* note 175, art. I(ii).

251. Marion Pircher, *Short-Term Capital Controls and Malaysia's Fast Recovery After the East-Asian Crisis*, in SOVEREIGN DEBT CRISES: WHAT HAVE WE LEARNED?, *supra* note 47, at 163.

252. Juan Pablo Bohoslavsky, *Iceland: A Human Rights-Sensitive Approach to Deal with Financial Crises*, in SOVEREIGN DEBT CRISES: WHAT HAVE WE LEARNED?, *supra* note 47, at 103.

253. See Samuel A. Bleicher, *UN v. IBRD: A Dilemma of Functionalism*, 24 INT'L ORG. 31, 34–41 (1970).

254. *Id.*

255. See *supra* Introduction.

256. *Id.*; Nolan & Bohoslavsky, *supra* note 1, at 1259.

been recognized as a precondition for fiscal consolidation, and not the reverse.²⁵⁷

In light of these concluding remarks, a number of policy, institutional, and normative recommendations are herein presented for academic discussion. The recommendations were part of a report discussed with States at the General Assembly meeting on October 21, 2019.²⁵⁸

It is recommended that international financial institutions:

(a) Include in their policy documents an explicit commitment to respect all human rights, including labor 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:²⁵⁹ 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

257. UNCTAD, TRADE AND DEVELOPMENT REPORT: FROM GLOBAL PANDEMIC TO PROSPERITY FOR ALL: AVOIDING ANOTHER LOST DECADE 94 (2020).

258. Nolan & Bohoslavsky, *supra* note 1, at 1251.

259. *Guiding Principles*, *supra* note 2, princs. 17–20.

make sure that these mechanisms provide redress to those directly negatively impacted by the policies of international financial institutions;

(e) Regard human rights priority spending targets as binding conditions, with concrete financial implications if they are not met;²⁶⁰

(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.

Also recommended is 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;

260. Thomas Stubbs & Alexander E. Kentikelenis, *Targeted Social Safeguards in the Age of Universal Social Protection: The IMF and Health Systems of Low-Income Countries*, 28 *CRITICAL PUB. HEALTH* 132, 136–37 (2018).

(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.

The importance of conducting human rights impact assessments prior to implementing economic policies is even greater now in the context of the COVID-19 pandemic, as economic policies have epidemiological implications that policy design and implementation must take into consideration.²⁶¹ This article has demonstrated that disconnects between human rights and economic policy can help us to understand why poverty and inequality increase. Now, those same disconnects risk the survival of humanity.

261. IMF, *A Long and Difficult Ascent*, World Economic Outlook 66–76 (Oct. 2020).