The Need for Debt Relief: How Debt Servicing Leads to Violations of State Obligations under the ICESCR

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INTRODUCTION

The aim of this article is to illustrate how the large repayments of external debts undermine a debtor country’s ability to comply with its obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR)1 and to argue that adequate debt relief to the poorest debtor countries is imperative. First, this article will briefly introduce the magnitude and extent of developing countries’ external debt problem. Second, it will argue that creditor countries have human rights obligations beyond their borders to the people of debtor countries, based on the states’ legal duty to engage in “international cooperation and assistance.” Third, it will identify a State Party’s obligations under the ICESCR and demonstrate how making huge debt repayments infringe on these obligations. Fourth and finally, this article will propose that adequate debt relief — in the form of a substantial reduction of outstanding external debts — be granted to the poorest of debtor countries in order to allow them to progressively realize the economic, social, and cultural (ESC) rights of their people.

EXTERNAL DEBTS OWED BY DEVELOPING COUNTRIES

The World Bank lists 134 low- and middle-income countries that report to its Debtor Reporting System and had outstanding arrears in their external debt servicing as of June 2008.2 Out of these 134 developing countries, 42 are considered heavily indebted poor countries (HIPCs) because their level of indebtedness has become unmanageable relative to their capacity to pay.3 Consequently, they satisfy the criteria of the “HIPC Initiative,” a mechanism created and managed by the International Monetary Fund (IMF) and the World Bank to grant debt relief to HIPCs.4 The remaining 92 countries have varying levels of external debt which, according to the IMF and the World Bank, is “sustainable” and therefore ineligible for any debt relief.

Over recent decades, the external debt owed by the developing countries as a group has increased significantly. Low- and middle-income countries’ external debts rose from U.S. $500 billion in 1980, to U.S. $1 trillion in 1985, and to more than U.S. $2 trillion in 2003.5 It increased again to U.S. $3.125 trillion in 2006.6 Between 2000 and 2005, 29 of the world’s poorest countries paid around U.S. $15.3 billion to service their combined external debts.7 This figure, which roughly translates to about U.S. $210 million in debt repayments every month, represents the amount of wealth transferred from these poor countries to the developed world. More specifically, however, there is an actual human cost behind these seemingly innocuous figures: real people and real lives adversely affected by huge debt servicing, including children who had to stop studying because their government imposed school fees they could not afford; families who reside in makeshift shelters because their government could not provide affordable housing; and infants who died because the government lacks adequate programs to address malnutrition and disease.

“EXTRA-TERITORIAL” HUMAN RIGHTS OBLIGATIONS OF CREDITOR COUNTRIES FOR THE PEOPLE OF DEBTOR COUNTRIES: THE URGENT NEED FOR DEBT RELIEF

It is traditionally asserted that states assume the responsibility of realizing human rights by ratifying human rights instruments, thus creating a “vertical” relationship between the state as the duty-bearer and its people as the rights-holders. However, in recent years, scholars have advocated the idea that human rights transcend national boundaries.8 They argue that one state may be held liable, at least in theory, for human rights violations committed in the territory of another. Although still controversial, such a “horizontal” dimension of human rights has since gained support from many human rights experts.9

Scholars have attempted to advance this horizontal dimension in both civil and political rights and ESC rights areas. With respect to civil and political rights, scholars Mark Gibney, Katarina Tomasevski, and Juns Vested-Hansen argue that states that aided and abetted violations of civil and political rights in another state do incur “transnational state responsibility.”10 Their analysis is confined to violations of civil and political rights, for example, when a developed state manufactures and exports arms or torture implements to another state, which in turn uses them to repress its own people. On the other hand, with respect to ESC rights, Ashbjørn Eide, the former Special Rapporteur on the Right to Food, has argued that “[s]tates have obligations also to the peoples of other [s]tates and to the international community . . . derived from provisions found within human rights law and from a set of principles of international law.”11 In the same vein, human rights scholar Sigrun Skogly contends that developed states have “transnational human rights obligations” to respect the ESC rights of the people of developing countries, citing customary international law and ICESCR provisions for support.12

Both Eide13 and Skogly14 expressly recognized that the “extraterritorial” obligations of developed countries to respect ESC rights in developing countries directly stem from the legal duty of international cooperation and assistance. Articles 55 and

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56 of the UN Charter are the most categorical and authoritative sources of the duty of international cooperation and assistance among states. This duty directs them to effectively cooperate with one another in order to achieve the goals set forth in the UN Charter, including the realization of human rights. International law scholar Louis Sohn argues that Articles 55 and 56 carry the force of positive international law and impose clear obligations that all UN Member States must fulfill. Indeed, states have consented to be bound by the duty of international cooperation and assistance by ratifying the UN Charter, which according to Louis Henkin, “epitomize[s] the principle of consent.”

In addition to Articles 55 and 56 of the UN Charter, the duty of international cooperation and assistance also finds its legal basis in several provisions of the ICESCR. First among these is the clause “to take steps, individually and through international assistance and cooperation, especially economic and technical” found in Article 2(1). The second provision is Article 11(1) which mandates that States Parties fulfill the “right to an adequate standard of living” for their people, while recognizing “the essential importance of international co-operation based on free consent” to achieve this goal. The last provision is Article 11(2) which, although concerning the specific “right to be free from hunger,” directs States Parties to take steps “individually and through international co-operation” to fulfill this right. Interpreting the right of international cooperation and assistance, the Committee on Economic, Social and Cultural Rights (CESCR), the body of independent experts that monitors the implementation of the ICESCR by its States Parties, stated,

In accordance with Articles 55 and 56, ... with well-established principles of international law, and with the provisions of the [ICESCR] itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard.

Human rights commentator Stephen Marks places heavy significance on the Article 2(1) duty “to take steps, individually and through international assistance and cooperation” as providing a legal basis for reciprocal obligations between and among States Parties to the ICESCR. According to Marks, this duty provides the ICESCR a “horizontal” dimension which presupposes the existence of an obligation among the States Parties inter se, as opposed to a mere “vertical” dimension that involves obligations owed by a State Party to its own population. Marks argues that each State Party has legal obligations “not only to alter its internal policy but also to act through international cooperation and assistance toward the same end.”

In the context of the external debt problem, creditor countries’ extraterritorial human rights obligations imply that they are legally bound to ensure that their debt-related policies do not adversely affect the fulfillment of human rights in debtor countries. On this point, Skogly argues that creditor countries “are obliged to consider how individual projects, programs, and policies may affect the population in the countries where they are to be implemented and to alter them when necessary to avoid possible human rights violations.” Speaking generally about the monetary policies being pursued by creditor countries, Sanjay Reddy similarly argues that “substantial external effects of monetary decisions can generate obligations to take into account the concerns of non-citizens or justify claims on the part of non-citizens that they be consulted about, or included in the making of, the decisions.”

What is expected, therefore, is prudence and foresight by the creditor countries to ensure that their actions with transnational ramifications do not undermine or frustrate efforts of debtor countries towards ESC rights realization. Before engaging in an activity or adopting a policy that has transnational ramifications, creditor countries must exercise due diligence and defer or discontinue a policy if there are reasonable grounds to suspect that it will bring adverse consequences to the debtor countries.
Creditor countries’ hardened insistence on continued debt repayments, which weaken a debtor country’s ability to fulfill its ICESCR obligations to its people, as the next section will demonstrate, must be subjected to this due diligence requirement.

**Article 2(1) of the ICESCR and “Progressive Realization” of ESC Rights**

Under the ICESCR, States Parties are not expected to immediately bring about the full realization of the rights recognized therein. Instead, they may realize these rights step-by-step and over a period of time. This is the essence of the CESCR’s notion of “progressive realization.” The language of Article 2(1) reflects both the utopian goal of full realization and the harsh reality of resource constraints.

Article 2(1) has been described as the lynchpin of the obligations of States Parties to the ICESCR. Notwithstanding its phraseology and claims to the contrary, Article 2(1) does not imply that States Parties do not have immediate obligations towards full realization. Rather, the Limburg Principles on the Implementation of the ICESCR (Limburg Principles), a set of interpretative guidelines on the implementation of the Covenant, prescribe States Parties from indefinitely delaying the full realization of ESC rights and require their realization as expeditiously as possible.

This obligation is further bolstered by General Comment No. 3, which identifies two immediate obligations on the state despite resource constraints: (1) the “undertaking to guarantee” that the relevant rights “will be exercised without discrimination;” and (2) the undertaking “to take steps . . . to the maximum of available resources.” Further, the CESCR holds that the latter obligation cannot be delayed because it “in itself, is not qualified or limited by other considerations.”

Three separate and distinct obligations spring from Article 2(1) of the ICESCR: (1) to use “maximum available resources” towards the realization of ESC rights; (2) to immediately fulfill “minimum core requirements” of each right; and (3) not to retrogress in their realization, which would constitute a *prima facie* violation of the ICESCR. The following sub-sections will discuss how debt servicing negatively impacts each of these obligations.

**Debt Servicing and the Obligation to Devote the “Maximum of Available Resources”**

The obligation to devote the maximum available resources to the realization of ESC rights is expressly provided for by Article 2(1) of the ICESCR. However, the question is whether States Parties infringe on this obligation by prioritizing debt repayments over social expenditures that promote ESC rights. Analysis of this issue depends on whether the amounts allocated to States Parties’ debt repayments are part of their “available resources” within the intent of Article 2(1). If so, the question remains whether States Parties have absolute discretion over how they should allocate their available resources, or whether allocation of available resources is subject to review under the ICESCR.

The first step requires a determination of what constitutes “available resources” as intended by the ICESCR drafters. Human rights scholars Philip Alston and Gerard Quinn went back to the ICESCR’s *travaux preparatoires* to conclude that the term “available resources” should be interpreted in its broadest sense. They found general agreement among the drafters that available resources should include both available national and international resources. Likewise, the Limburg Principles understood the phrase “its available resources” as referring to both state resources and “those available from the international community through international co-operation and assistance.” Moreover, the CESCR ascribes the same meaning to the phrase “the maximum of its available resources” as that adopted by the Limburg Principles.

Some argue, to the contrary, that the money an indebted country owes another country or international organization is
a resource not to be included in the “maximum of its available resources” meant for the full realization of ICESCR rights. Implicit in this argument is the claim that a State Party is as much under a legal obligation to respect its financial agreements, such as loan contracts, with other countries as its obligations under the ICESCR. Writing on the human rights obligations of international organizations, Sabine Michalowski argues that this position ignores that contractual obligations do not necessarily mean that “funds . . . are therefore not at the free disposition of the debtor” and thus available for its use. In the same vein, Eric Friedman argues that such interpretation of available resources would mean that States Parties have a greater duty to meet their debt obligations than their obligations to their people. This “perverse implication,” Friedman argues, makes a mockery of the centrality of human rights as enshrined in the UN Charter.

In his seminal article on “maximum available resources,” human rights expert Robert Robertson identifies financial, natural, human, technological, and informational resources as the most important in achieving ESC rights. He first asks whether a resource is potentially available for ICESCR use, and then determines whether that resource should be available for ICESCR use. The latter is a more difficult question that requires a State Party to make a value judgment.

Regarding what resources are potentially available for ICESCR use, Robertson argues that “all domestic resources must be considered for use by the state, and all available international resources must be obtained.” According to Robertson, because human rights theoretically enjoy priority over all other considerations, states should muster all resources needed for their satisfaction. Robertson cites the reports of Danilo Turk, the Special Rapporteur on the Realization of ESC Rights, who also suggested a broad interpretation of resource availability for the purpose of realizing the rights in the ICESCR. Turk recognizes not only the need to gather together all domestic and international resources but also, and more importantly, the need for States Parties to allow the use of private resources to contribute towards realizing ESC rights.

Based on the foregoing, government allocations for debt servicing are part and parcel of a State Party’s available resources. Following Robertson’s analysis, one could argue that allocations for debt servicing should be first made available for ICESCR use. Robertson opines that there are two standards for this analysis: one standard is used if there is an extreme deprivation of ESC rights in the debtor country, and the second if there is no extreme deprivation.

Where there is extreme deprivation — which for Robertson is akin to a failure to meet minimum core requirements — a state has an obligation “to intrude without limit into both private and state resources previously used for other purposes, in order to ensure that its population receives ‘core’ entitlements.” In this situation, amounts allocated for debt servicing like all other state resources previously used for other purposes may be diverted and channeled to ICESCR expenditures to avoid extreme deprivation.

Where there is no extreme deprivation, Robertson adopts the approach of Alston and Quinn who propose to subject the States Parties’ determination of their “available resources” to a “process requirement by which [they] might be requested to show that adequate consideration has been given to the possible resources available to satisfy each of the Covenant’s requirements, even if the effort was ultimately unsuccessful.”

If States Parties are expected to seek and pool resources from international sources to arrive at “the maximum of its available resources,” then there is all the more reason for States Parties to look for sources right in their own backyards by reevaluating resource allocation to channel more to ICESCR expenditures if available resources are found to be insufficient. This reorientation of national budget priorities is supported by the United Nations Development Program (UNDP). Rather than allocate more than half of spending on military, debt repayments, inefficient state enterprises, and mistargeted social subsidies, the UNDP urges governments to restructure their budget allocations to prioritize ICESCR expenditures.

Like military spending, debt repayments are expenditures which should take the back seat if they conflict with a State Party’s obligations under the ICESCR. This is not to say, however, that States Parties must completely neglect their military and defense requirements or wantonly violate their duty to repay under an international loan agreement. Rather, it is incumbent upon them, in situations other than where there is extreme deprivation, to adequately justify divergence from the priorities set by the ICESCR. The Limburg Principles support this point by providing that “due priority shall be given to the realization of rights recognized in the Covenant, mindful of the need to assure to everyone the satisfaction of subsistence requirements as well as the provision of essential services.” A State Party that fails to convincingly justify its divergence from this priority fails to comply with its obligation to devote “the maximum of its available resources” to ESC rights.

A State Party’s decision to allocate its available resources in a manner it sees fit, therefore, is reviewable in the light of its human rights commitments under the ICESCR. Matthew Craven, a commentator on the ICESCR, notes that some members of the CESC have used the ratio between a country’s expenditures on social services and its gross national product (GNP) or gross domestic product (GDP) to gauge compliance with the Covenant. Ultimately, in view of its potential impact on rights recognized in the ICESCR, resource allocation is too important a matter to be left to the unfettered discretion of States Parties.

DEBT SERVICING AND “MINIMUM CORE OBLIGATIONS”

While Article 2(1) of the ICESCR does not mention “minimum core obligations,” the term’s invention proved useful in the CESC’s work, specifically in monitoring the performance of States Parties. Its progenitor is paragraph 25 of the Limburg Principles, which provides that States Parties have the responsibility to ensure minimum subsistence rights for everyone, regardless of the state’s level of economic development. The CESC subsequently modified this principle by making resource constraints a valid justification for non-compliance.

The relationship between minimum core obligations and minimum essential levels is clear: a State Party must meet a minimum core obligation to ensure the minimum essential levels of every right in the ICESCR. Each minimum core obligation contains the minimum standards a state must comply with to
meet its ESC rights obligations. Minimum essential levels of a right, on the other hand, are defined by Fons Coomans as the “essential elements without which a right loses its substantive significance as a human right.”

According to the CESCR, for a State Party to legitimately blame the failure to meet its minimum core obligations on the lack of available resources, “it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.” The Committee’s statement makes the “lack of available” resources an exculpatory defense that a State Party may plead to justify its failure to perform its minimum core obligations. To overcome the prima facie presumption, the burden of proof rests upon the State Party to show that “every effort has been made to use all resources . . . to satisfy [those obligations] as a matter of priority.” This defense is successful only if States Parties can prove that, above all other considerations and despite all their other commitments, they have chosen to use “all resources” to satisfy those obligations. Thus, a State Party that prioritized debt servicing in the midst of widespread hunger and disease of its people will not overcome the prima facie presumption. This analysis is important because it corresponds with the standard that Robertson proposed for determining what resources should be made available when people lack minimum core entitlements.

There is, however, a different view espoused in the Limburg Principle that the minimum core obligations are required of States Parties regardless of their level of economic development. In other words, lack of resources is not a valid defense for failure to satisfy minimum essential levels of ICESCR rights. The Maastricht Guidelines similarly support the view that “[s]uch minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties.”

With this different view in mind, there is another way of establishing the relationship between debt servicing and a State Party’s ability to perform its minimum core obligations under the ICESCR. In this approach, the lack of resources is not an exculpatory defense but is instead the very reason why a State Party fails to ensure the minimum essential levels of ESC rights. Robertson suggested developing ratios that compare ICESCR expenditures with expenditures that cannot claim priority over ICESCR rights. Consequently, the CESCR criticized Canada for allocating insufficient funds towards the right to adequate housing. Robertson concluded such comparisons on government spending will lead to greater insight as to whether a State Party has devoted its maximum available resources to ESC rights.

While the CESCR has not set specific benchmarks or indicators on the level of expenditures that States Parties should devote to ensure minimum essential levels of a particular right, it categorically stated that an “insufficient expenditure or misallocation of public resources which results in the non-enjoyment of a particular right” is a violation of obligations under the ICESCR. Developed and developing countries have the obligation to devote sufficient resources towards the realization of ESC rights. Consequently, the CESCR criticized Canada for allocating insufficient funds towards the right to adequate housing. As for measuring the sufficiency of financial resources, Robertson suggested developing ratios that compare ICESCR expenditures with expenditures that cannot claim priority over ICESCR rights. Robertson concluded such comparisons on government spending will lead to greater insight as to whether a State Party has devoted its maximum available resources to ESC rights.

**Retrogressive Measures as Prima Facie Violations of the ICESCR and Debt Servicing**

A third and separate obligation is for State Parties to avoid retrogressive measures that will hinder or halt the continuous improvement of ESC rights. Human right scholar Magdalena Sepúlveda defined a deliberate retrogressive measure as any that “implies a step back in the level of protection accorded to the rights contained in the Covenant which is the consequence of an intentional decision by the State.” The obligation with respect to retrogressive measures is a negative duty, or an obligation to refrain from committing certain acts that have the effect of impairing advancements in ESC rights.
On the basis of their extraterritorial human rights obligations — a necessary offshoot of their duty of international cooperation and assistance — creditor countries have a corresponding obligation not to undermine or frustrate debtor countries’ efforts to realize their peoples’ ESC rights. Creditor countries’ insistence on debt repayments, despite the clearly adverse impact on debtor countries’ ability to realize ESC rights, is legally incompatible with such a duty.

The CESC has criticized States Parties for their adoption of retrogressive measures. For example, in its Concluding Observation for Mauritius in 1994, the Committee stated its concern over the reintroduction of fees for tertiary education, describing it as “a deliberate retrogressive step.”67 In addition, in its Concluding Observation for Nigeria in 1998, the Committee criticized the introduction of fees in primary schools, hospital charges,68 and skyrocketing university fees during the previous year.69

Insofar as retrogressive measures are limitations on rights, the ICESCR imposes an additional requirement that they should be “determined by law . . . and solely for the purpose of promoting the general welfare in a democratic society.”70 In General Comment No. 13, the CESC clarified the nature of retrogressive measures as *prima facie* violations of the ICESCR.71 A State Party adopting a retrogressive measure can overcome the presumption that such a measure is impermissible if it can prove three criteria: (1) the measure was introduced only as a last resort after carefully considering all alternatives; (2) it is fully justified “by reference to the totality of the rights” in the ICESCR; and (3) it is fully justified “in the context of the full use of the State Party’s maximum available resources.”

The relationship between debt servicing and the adoption of retrogressive measures is an indirect one. Certain levels of debt servicing severely deplete a country’s resources, which then leads to the adoption of retrogressive measures, including *inter alia*, the imposition of certain fees on social services. For example, school fees and related costs are a hindrance to realizing the right to education for children in many countries. A 2001 World Bank survey found that such fees are being levied in 77 out of 79 low-income countries.72 In countries without formal fees, the survey found that public schools imposed “informal fees” to make up for the lost revenue.73

While a decrease in government expenditures for a particular right is not a *per se* retrogressive measure, a sustained decrease is usually to the detriment of ICESCR rights. Moreover, the CESC has frequently criticized States Parties when the proportion of their expenditures for social services declines relative to its GDP.74 The Committee has also implied that a State Party may be in violation of its ICESCR obligations if it cannot adequately justify a reduced expenditure for a particular right.75 A researcher with wide experience in human rights law, Brigit Toebes, argued that “[g]iven the fact that Article 2(1) speaks of ‘progressive realization,’ a cut back in the expenses is difficult to justify and requires a heavy burden of proof on the part of States.”76

**Conclusions and Recommendations:**
**Proposing an International Debt Restructuring Mechanism that Respects and Promotes ESC Rights in Debtor Countries**

Massive debt repayments undermine the capacity of the poorest debtor countries to perform their obligations under the ICESCR. First, a debtor country that diverts its resources to debt servicing and fails to use them optimally (“to the maximum”) to realize ESC rights violates the ICESCR. Second, when a debtor country fails to satisfy the minimum essential levels of these rights because debt repayments have drained its finances, it also violates the ICESCR. Third and finally, a debtor country that deliberately adopts a retrogressive measure in order to save and allocate more funds for debt repayments also breaches the Covenant. On the basis of their extraterritorial human rights obligations — a necessary offshoot of their duty of international cooperation and assistance — creditor countries have a corresponding obligation not to undermine or frustrate debtor countries’ efforts to realize their peoples’ ESC rights. Creditor countries’ insistence on debt repayments, despite the clearly adverse impact on debtor countries’ ability to realize ESC rights, is legally incompatible with such a duty.
Providing adequate debt relief to debt-distressed countries is one way creditor countries may observe their duty of international cooperation and assistance. The most recent expression of creditor countries’ adherence to this duty is the declaration of the Millennium Development Goals (MDGs). Specifically, one MDG demands dealing comprehensively with the debt problems of developing countries through national and international measures to make debt more sustainable in the long run. The Millennium Declaration reiterates the need for creditor countries to engage in effective international cooperation through “a global partnership for development.” Renowned economist Jeffrey Sachs posits that such a global partnership requires tackling the poorest countries’ national debt through debt relief and cancellation. Sachs’s point confirms the weakness of present mechanisms designed to solve the unsustainable level of developing countries’ external debts. Diffused and uncoordinated, the present mechanisms suffer from serious flaws, at least from the perspective of the peoples of debtor countries.

In November 2009, the United Nations Conference on Trade and Development (UNCTAD) warned that developing countries’ debt burdens would increase by over seventeen percent in 2010. This debt burden, according to UNCTAD, has adverse effects on the economic growth of developing countries and jeopardizes their capacity to meet the MDGs. UNCTAD also warned of the negative impact of high debt burden on 49 least developed countries. This negative prognosis was despite the debt restructuring mechanisms that have been in operation for years. For many debtor countries, incurring unsustainable external debt is a chronic problem, and the existing mechanisms only offer palliative relief. The only logical conclusion is that such mechanisms are seriously deficient in achieving their main objectives — namely, to get a debtor country out of debt crisis and to prevent similar predicaments in the future.

Therefore, this article proposes the establishment of a new international debt restructuring mechanism that will comprehensively resolve the debtor countries’ repayment difficulties while, at the same time, respecting the state’s obligation to realize the ESC rights of its people. Reforming the external debt restructuring process for developing countries is not a novel idea; it has occupied public policy debates regarding sovereign lending and borrowing since the late 1970s, when the first symptoms of the debt overhang became manifest. This article nevertheless continues the debate, highlighting the need to prioritize ESC rights in any future international debt restructuring mechanism.

Whatever form this new mechanism ultimately takes, it must be capable of remedying a debtor country’s unsustainable level of indebtedness in a timely, transparent, and fair manner. It is in the interest of all parties, but most crucial for a troubled debtor country, to immediately establish restructuring terms that are aimed at sustainability and growth. It is also important that the restructuring process be transparent, most especially to the people of the debtor country. The existing debt restructuring mechanisms are non-transparent because only a limited group of officials from the debtor country’s finance ministry or central bank takes part in the process, excluding members of the legislature and other elected officials who are directly accountable to the people. Finally and perhaps most importantly, a fair international debt restructuring process must ensure that the taxpayers of a debtor country would only pay those debts that have actually redounded to their benefit. If the loaned money did not in fact reach them or, worse, was used to oppress them, then it would be the height of injustice to require them to repay it.

The ultimate aim of any debt restructuring is to make the burden sustainable in the long run, either through cancellation or reduction of a particular class of debts. Assessing the sustainable level of indebtedness is, therefore, crucial in any restructuring process. Once ascertained, this level will help to determine the sufficient amount of debt relief and the reorganization plan most suited to the debtor country’s circumstances. This plan is successful if it allows a debtor country a “fresh start” similar to what domestic bankruptcy procedures provide individual or corporate debtors. Under the current mechanisms, debt sustainability analysis is carried out exclusively by the creditors themselves, using an arbitrary formula and employing their own analysis of a debtor country’s economic condition.

Fair international debt restructuring mechanisms for developing countries ought to, rather, take into consideration other possible “evidence” of the level of debt that a debtor country can realistically sustain without sacrificing important ESC rights-related expenditures. Such an important issue should not be left to the unfettered discretion of the creditors alone. While creditors’ sustainability analyses should be one factor, they should not be the only assessments of a debtor country’s economic situation. To this end, debt sustainability analyses should ideally be performed by an independent body of experts, preferably a UN agency or some judicial bankruptcy court. At the very least, a proposed international debt restructuring mechanism ought to independently determine a debtor country’s level of sustainable debts after hearing and considering “evidence” presented by both the creditors and the debtor country.

An appropriate debt sustainability analysis should incorporate the need to prioritize ESC rights. Current mechanisms for debt restructuring do not take into account the public expenditures needed to progressively realize the ESC rights of the debtor state’s population. In the IMF and World Bank HIPC Initiative, for example, a debtor country’s eligibility to receive debt relief is based on purely economic measures: it fixes a ratio of 150 percent for a country’s debt-to-export levels or, if a country has an unusually high level of exports, a ratio of 250 percent for debt-to-government revenues. Critic Charles Mutasa observes that “[t]he HIPC Initiative’s focus on purely economic criteria in assessing a country’s debt burden betrays an utter lack of concern for human development and for the capacity of poor countries to meet the needs of their own people.”

Excluding ESC rights-related expenditures from debt sustainability analyses has led to steep declines over time in public expenditures for services such as health and education. A new type of analysis is needed to determine the sustainable threshold of a debtor country’s debt stock by factoring in ESC rights-related required expenditures. Similarly, Anne Pettifor argues that it is “necessary to develop reasonably precise principles for
determining levels of debt sustainability that are consistent with the protection of human rights.”

This article proposes two appropriate guides to determine the amount of a debtor country’s resources that must be shielded from creditor claims. First, an insolvency mechanism that aggregates the resources a debtor country requires to meet the MDGs by 2015 would pin the financing needs of a debtor country to these goals. UNDP previously proposed a broader concept of debt sustainability that “satisfies the financial requirements for achieving a sustainable growth path necessary for achieving the Millennium Development Goals.”

Because each debtor country has unique levels of development and possesses different resources, these financing needs necessarily vary from country to country. Although this is an admittedly tedious task, it is not impossible. In fact, a previous study equated the sustainability of external debts with a debtor country’s ability to meet the MDGs, while continually being able to repay a reduced external debt stock.

Second, an insolvency mechanism could aggregate the amount of resources that a debtor country would need to satisfy the minimum essential levels of each of the ESC rights. This option is more difficult because, as discussed above, there is no consensus on the minimum essential levels of each of the ESC rights. Whether the first or second suggestion is adopted, the basic idea is that either the MDGs or the minimum essential levels of ESC rights are more appropriate benchmarks in an independent debt sustainability analysis than purely economic measures, such as debt-to-export or debt-to-revenue ratios, uniformly applied to debtor countries regardless of their level of ESC rights’ realization.

ENDNOTES: The Need for Debt Relief: How Debt Servicing Leads to Violations of State Obligations under the ICESCR

9. Id. at 267.
10. Id.
15. U.N. Charter arts. 55, 56.
18. Emphasis added.
19. The CESC was established under ECOSOC Resolution 1985/17 dated May 28, 1985 to carry out the monitoring functions assigned to the United Nations Economic and Social Council in Part IV of the ICESCR.
22. Id.
25. General Comment No. 3, supra note 20, ¶ 9. With respect to the desired goal of progressive realization, Article 2(1) is largely similar to Article 11(1) of the ICESCR which calls on States Parties to take steps towards the “continuous improvement of living conditions” of their population.
26. ICESCR, supra note 1, art. 2(1) (“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures” (emphasis added)).

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