Sovereign debt and human rights

*Cephas Lumina**

I. Introduction

Over the last two decades the international community has made numerous political commitments to address the debt crisis of developing countries and implemented a number of schemes to address it. Nevertheless, these have either not been fully translated into action or have failed to deliver an equitable and lasting solution to the debt problem. The debt crisis continues to constrain the development prospects of many low- and middle-income countries and to undermine the capacity of poor countries to create the conditions for the realization of human rights, particularly economic, social and cultural rights and the right to development.[1] Empirical evidence indicates that in many of the poorest countries debt repayment is often carried out at the expense of basic human rights, including the rights to food, health, education, adequate housing and work. In addition, debt servicing and harmful conditions linked to loans and debt relief often limit investment in and undermine the provision of accessible public services.

This chapter discusses the link between external debt and human rights, focusing on the impact of debt on the realization of economic, social and cultural rights and the right to development.[2] The chapter is organized as follows. Section II provides a brief overview of the global debt crisis. Section III discusses the impact of debt servicing on the realization of human rights. The section highlights how the diversion of scarce national resources from public programmes threatens the realization of human rights, including the right to development, and how conditions linked to debt relief undermine country ownership of national development strategies. Section IV highlights the shortcomings of current creditor-driven responses to the debt crisis and proposes a rights-based approach to debt sustainability, and underscores the need for the principle of shared responsibility of creditors and debtors to inform the design and implementation of international debt restructurings. Section V is the conclusion.

II. The global debt crisis: a brief overview

The external debt crisis of developing countries has been on the international agenda for several decades and, although a number of official initiatives to address it have been implemented over the years, the debt of these countries has continued to grow. The total external debt of emerging and developing economies rose from $2,678.4 billion in 2003 to $5,414.6 billion in 2010 and was projected to

* United Nations 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; human rights consultant and Extra-Ordinary Professor of Human Rights Law, University of Pretoria.

[1] It is accepted that external financing (including loans) can contribute to countries' economic development. However, this depends on a variety of factors, including responsible lending and borrowing, the loan conditions, prudent use of loans and proper debt management. See "Consolidation of findings of the high-level task force on the implementation of the right to development" (A/HRC/15/WG.2/TF/2/Add.1 and Corr.1), para. 52.

[2] The chapter focuses on these rights because of their close relationship and complementarity. See Committee on Economic, Social and Cultural Rights, "Statement on the importance and relevance of the right to development, adopted on the occasion of the twenty-fifth anniversary of the Declaration on the Right to Development" (E/C.12/2011/2), paras. 1 and 5-7.

rise to $6,446.3 billion in 2012.[3] In 2010, a significant portion of this debt ($4,339.9 billion) was held by banks and other private creditors, while the balance ($1,074.7 billion) was official debt. Debt service payments rose from $795.2 billion in 2003 to $1,743.7 billion in 2010, and were projected to rise to $2,010.8 billion and $2,265.5 billion in 2011 and 2012, respectively.

In 2003, the total external debt of the heavily indebted poor countries (HIPCs)—those countries whose debts are deemed "unsustainable" by the International Monetary Fund (IMF) and World Bank—was $172 billion. In 2010, it decreased marginally to $147.9 billion, presumably due to debt cancellation under international debt relief schemes. However, it was projected to rise to $163.3 billion in 2011 and $178 billion in 2012 largely as a consequence of new loans taken out to mitigate the impacts of the global financial crisis.

The non-HIPCs have debts that are deemed "sustainable" by the World Bank and IMF based on the debt sustainability criteria devised by the two institutions.[4] Although ineligible for debt relief under the HIPC Initiative, many of these countries continue to struggle under the burden of high external debt repayments that significantly reduce their available resources for social investment.

Creditors have often cast the debt crisis of the developing countries as a problem of poor debt management on the part of the debtor countries and have largely failed to acknowledge their role in the development of the crisis.[5] This is evident from the design of current international mechanisms to address the crisis. Although endogenous factors, such as corruption and poor decisions taken by national Governments which often resulted in investment in public projects that yielded little or no long-term social or economic benefit, played a role in the development of the crisis, it is above all external factors such as profligate lending (due to excess liquidity in the global financial system), uncertainty in domestic production, volatility in global prices, deteriorating terms of trade and increases in interest rates that played a critical role in the development of the debt crisis.[6] These factors adversely impacted on the fragile economies of many developing countries. In particular, the high interest rates made the repayment of debt extremely difficult. Thus, many countries were left with huge debts, even after repaying far more than the amounts originally borrowed. For example, by 1993, the debt-to-gross domestic product (GDP) ratio for sub-Saharan Africa had reached 80 per cent.

Many affluent countries also lent money to corrupt or oppressive regimes in return for support during the cold war. Some loans were extended by private companies in return for contracts which were often overvalued and of little or no value to the borrowers. Thus, many of the debts are questionable.

Although it appears that the debt problem is largely confined to the poor developing countries that have participated or are participating in the HIPC Initiative and Paris Club debt restructuring process, many countries that do not meet the threshold criteria for participation in the HIPC Initiative are also faced with heavy debt burdens.[7] Further, as the European sovereign debt crisis demonstrates, debt crises are not the exclusive preserve of poor developing countries.[8]

[3] IMF, *World Economic Outlook September 2011: Slowing Growth, Rising Risks,* World Economic and Financial Surveys (Washington, D.C., 2011).

[4] Sustainable debt is the level of debt which allows a debtor country to fulfil its current and future debt service obligations in full, without recourse to debt relief or restructuring, while allowing an acceptable level of economic growth. For the debt sustainability criteria used by the two institutions for low-income countries, see IMF, Factsheet, "The joint World Bank-IMF debt sustainability framework for low-income countries", available at www.imf.org/external/np/exr/facts/pdf/jdsf.pdf.

[5] See Jubilee Australia, Australian Council for International Development (ACFID) and Institute for Human Security, "Alternatives to debtors prison: developing a framework for international insolvency", ACFID Research in Development Series Report No. 4 (October 2011), pp. 9-10. The exception is Norway. In 2006, the Government of Norway acknowledged as a "development policy failure" its Ship Export Campaign (1976-1980) and unilaterally and unconditionally cancelled the debt of five countries arising out of the Campaign, partially acknowledging its responsibility for the debts.

[6] For a discussion of the causes of the debt crisis of developing countries, see, among others, William R. Cline, *International Debt: Systematic Risk and Policy Response* (Washington, D.C., Institute for International Economics, 1984); Michael P. Dooley, "A retrospective on the debt crisis", National Bureau of Economic Research Working Paper No. 4963 (December 1994); Christopher G. Locke and Fredoun Z. Ahmadi-Esfahani, "The origins of the international debt crisis", *Comparative Studies in Society and History*, vol. 40, No. 2 (1998), pp. 223-243; David Roodman, *Still Waiting for the Jubilee: Pragmatic Solutions for the Third World Debt Crisis*, Worldwatch Paper 155 (Washington, D.C., Worldwatch Institute, 2001); South Centre, "Third world debt: a continuing legacy of colonialism", *South Bulletin*, Issue 85 (August 2004); Stephen Kretzmann and Irfan Nooruddin, "Drilling into debt: an investigation into the relationship between debt and oil" (Oil Change International, Institute for Public Policy Research and Jubilee USA, 2005); Noel G. Villaroman, "A fate worse than debt: an alternative view of the right to development and its relevance in the external debt problem of developing countries", unpublished LLM thesis, Monash University, Australia (2010), pp. 17-22; "Alternatives to debtors prison", pp. 5-6. Editor's note: this paper is available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1895449.

[7] For example, in 2004, Ecuador's external debt was $16.9 billion and its debt service payments amounted to $3.7 billion (more than six times its expenditure on health care); in 2006, Kenya spent more on debt servicing than on health; in 2006, the Philippines spent over 32 per cent of its annual budget on servicing interest payments compared with about 14 per cent on education and 1.3 per cent on health. See Jubilee Debt Campaign, briefings on debt and health (December 2007); debt and education (April 2007); and debt and public services (October 2007). Available from www.jubileedebtcampaign.org.uk.

[8] In recent years, Europe has experienced a series of debt crises affecting Greece, Iceland, Ireland, Portugal and Spain.

III. Debt and its impact on human rights

A. External debt as a human rights problem

Developed and developing countries hold divergent views, reflected in decisions and resolutions of the Human Rights Council and its predecessor, the Commission on Human Rights, on whether foreign debt should be treated as a human rights issue.[9] The developed (mainly creditor) countries oppose consideration of the impact of foreign debt on the realization of human rights by the United Nations human rights bodies, arguing that these bodies are not the "appropriate" ones to address the debt problem. For example, at the sixteenth session of the Human Rights Council, in March 2011, the United States delegate, in a statement made in explanation of the delegation's vote on a draft resolution on the mandate 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, argued:

> [W]e continue to believe that it is incorrect to treat the issue of foreign debt as a human rights problem to be addressed by this Council. Rules other than human rights law are most relevant to the contractual arrangements between States and lenders. There are other international fora which are much better equipped to deal with the questions of foreign debt and debt forgiveness, which are principally economic and technical in nature. Unfortunately, continuing the mandate of the Independent Expert does not simply further the inappropriate treatment of this important issue as a human rights problem. It also diverts the focus and finances of this Council away from serious human rights issues that more urgently require our attention.[10]

A number of comments on the above statement are apposite. First, the "rules other than human rights law" and "other international fora which are much better equipped to deal with the questions of foreign debt and debt forgiveness" have thus far failed to deliver an equitable and durable solution to the sovereign debt problem. Further, these rules provide no protection for States that experience debt repayment difficulties in much the same way that domestic insolvency laws do for individuals and entities at the national level,[11] nor do they acknowledge or address the unjust circumstances in which some of the debt was incurred.[12]

Secondly, the position reflected in the statement is arguably inconsistent with the core principle of the indivisibility, interdependence and interrelatedness of all human rights. In this regard, it is noteworthy that the Declaration on the Right to Development underscores in its preamble that, in order to promote development, "equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights and that, accordingly, the promotion of, respect for, and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms".

Thirdly, the argument put forth in the statement is inconsistent with the holistic approach to the promotion and protection of human rights that is envisaged in the Vienna Declaration and Programme of Action, which calls upon States to "eliminate all violations of human rights and their causes, as well as obstacles to the enjoyment of these rights" (part I, para. 13).[13]

Fourthly, article 22 of the International Covenant on Economic, Social and Cultural Rights provides that the Economic and Social Council "may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports [submitted by the States parties to the Covenant] which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to

[9] See, for example, Commission on Human Rights resolution 2004/18, adopted by a recorded vote of 29 votes (Argentina, Bhutan, Brazil, Burkina Faso, China, Congo, Cuba, Dominican Republic, Egypt, Eritrea, Ethiopia, Gabon, Guatemala, Honduras, India, Indonesia, Mauritania, Nepal, Nigeria, Pakistan, Russian Federation, Sierra Leone, South Africa, Sri Lanka, Sudan, Swaziland, Togo, Uganda and Zimbabwe) to 14 (Australia, Austria, Croatia, France, Germany, Hungary, Ireland, Italy, Japan, Netherlands, Republic of Korea, Sweden, United Kingdom of Great Britain and Northern Ireland and United States of America), with 10 abstentions (Armenia, Bahrain, Chile, Costa Rica, Mexico, Paraguay, Peru, Qatar, Saudi Arabia and Ukraine); and Human Rights Council decision 12/119, adopted by a recorded vote of 31 votes (Angola, Argentina, Bahrain, Bangladesh, Bolivia (Plurinational State of), Brazil, Burkina Faso, Cameroon, Chile, China, Cuba, Djibouti, Egypt, Gabon, Ghana, India, Indonesia, Jordan, Kyrgyzstan, Madagascar, Mauritius, Nicaragua, Nigeria, Pakistan, Philippines, Qatar, Russian Federation, Saudi Arabia, Senegal, South Africa and Uruguay) to 13 (Belgium, Bosnia and Herzegovina, France, Hungary, Italy, Japan, Netherlands, Republic of Korea, Slovakia, Slovenia, Ukraine, United Kingdom of Great Britain and Northern Ireland and United States of America), with 2 abstentions (Mexico and Norway).

[10] Available at http://geneva.usmission.gov/2011/03/23/eov-foreign-debt/.

[11] See, for example, Kunnibert Raffer, "Internationalizing US municipal insolvency: a fair, equitable and efficient way to overcome a debt overhang", *Chicago Journal of International Law,* vol. 6, No. 1 (Summer 2005), p. 361.

[12] The Office of the United Nations High Commissioner for Human Rights (OHCHR) has stressed the need, from a human rights perspective, for developed countries and international financial institutions to "acknowledge that a significant portion of the debt was not acquired fairly". See *Claiming the Millennium Development Goals: A Human Rights Approach* (United Nations publication, Sales No. E.08.XIV), p. 47.

[13] Although the Vienna Declaration and Programme of Action does not create binding obligations on States, it provides an indication of global opinion on the issues that it covers.

contribute to the effective progressive realization of the present Covenant". According to the Committee on Economic, Social and Cultural Rights, this provision includes "virtually all United Nations organs and agencies involved in any aspect of international development cooperation". The Committee goes on to express the view that "it would be appropriate for recommendations in accordance with article 22 to be addressed, inter alia, to the Secretary-General, subsidiary organs of the Council such as the Commission on Human Rights, the Commission on Social Development and the Commission on the Status of Women".[14] It is therefore within the competence of the Human Rights Council to consider the impact of foreign debt on the realization of the rights under the Covenant and other human rights treaties.

Fifthly, the "other international fora" (presumably, the international financial institutions) adverted to in the statement lack the expertise to properly factor human rights into their policies and strategies. Consequently, in line with the provisions of article 22 of the Covenant, the United Nations human rights bodies (including the Council) are competent to address this issue and to bring the recommendations made by its independent experts to the attention of, inter alia, the international financial institutions dealing with foreign debt and debt relief. Thus, for example, the Committee and other treaty bodies have often urged international financial institutions to pay greater attention to the protection of human rights in their lending policies, credit agreements and debt relief initiatives. In addition, it may be argued that creditors cannot realistically be expected to focus on finding a solution to the debt crisis, which prioritizes social and economic justice over debt repayment.[15]

Sixthly, the human rights obligations of States are clearly relevant in the context of their external debt arrangements. Thus, for example, the Committee on Economic, Social and Cultural Rights has often urged borrower States to take into account their obligations under the Covenant in all aspects of their negotiations with international financial institutions in order to ensure that economic, social and cultural rights, particularly of the most vulnerable sectors of society, are not undermined. It has also encouraged creditor countries to do all they can to ensure that the policies and decisions of the international financial institutions of which they are members, in particular the International Monetary Fund and the World Bank, are in conformity with the obligations of States parties to the Covenant, particularly the obligations contained in articles 2 (1), 11, 15, 22 and 23 concerning international assistance and cooperation.[16]

Seventhly, the declarations, resolutions and decisions of major United Nations conferences and bodies as well the concluding observations of the various treaty bodies have confirmed the link between debt, human rights and development.[17] Since the 1990s, the Commission on Human Rights and its successor, the Human Rights Council, have in numerous decisions and resolutions referred to the challenges that excessive external debt burdens and economic reform policies (particularly structural adjustment policies) pose to the realization of human rights in the developing countries.[18] With respect to the issue of debt, the Committee on Economic, Social and Cultural Rights has underscored that "international measures to deal with the debt crisis should take full account of the need to protect economic, social and cultural rights through, inter alia, international cooperation. In many situations, this might point to the need for major debt relief initiatives."[19]

Eighthly, under international human rights law, States have the primary responsibility for ensuring that all people under their jurisdiction enjoy basic human rights, such as the rights to health care, education, food, safe drinking water and adequate housing. Thus, Governments should not be placed in a situa-

[14] Committee on Economic, Social and Cultural Rights, general comment No 2 (1990) on international technical assistance measures, para. 2.

[15] It has been asserted that the Bretton Woods institutions "helped create the very situation of indebtedness that they themselves had responsibility for fixing" (see "Alternatives to debtors prison" (footnote 5), pp. 19-22).

[16] See the concluding observations of the Committee on Belgium (E/C.12/1/Add.54), para. 31; Italy (E/C.12/1/Add.43), para. 20; Germany (E/C.12/1/Add.68), para. 31; Sweden (E/C.12/1/Add.70), para. 24; France (E/C.12/1/Add.72), para. 32; Ireland (E/C.12/1/Add.77), para. 37; and the United Kingdom (E/C.12/1/Add.79), para. 26. It is also notable that the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (see E/C.12/2000/13) deem a human rights violation of omission "[t]he failure of a State to take into account its international legal obligations in the field of economic, social and cultural rights when entering into bilateral or multilateral agreements with other States, international organizations or multinational corporations" (para. 15 (j)).

[17] Examples include the Universal Declaration on the Eradication of Hunger and Malnutrition, adopted in 1974 by the World Food Conference (E/CONF.65/20, chap. I)); the Copenhagen Declaration on Social Development, adopted in 1995 by the World Summit for Social Development (A/CONF.166/9, chap. I, resolution 1, commitments 1 (k) and 7 (c)); the Beijing Declaration and Platform for Action, adopted in 1995 by the Fourth World Conference on Women (A/CONF.177/20/Rev.1, chap. I, resolution 1, annex II, para. 13); the Programme for the Further Implementation of Agenda 21 (General Assembly resolution S/19-2, annex, paras. 20 and 8); the United Nations Millennium Declaration (General Assembly resolution 55/2, paras. 15 and 28); the Plan of Implementation of the World Summit on Sustainable Development, adopted in 2002 (A/CONF.199/20 and Corr.1, chap. I, resolution 2, para. 89); the Vienna Declaration and Programme of Action, adopted in 2003 by the World Conference on Human Rights (A/CONF.157/23, part I, para. 12).

[18] See Commission resolutions 1998/24, 1999/22, 2000/82, 2001/27, 2002/29, 2003/21, 2004/18 and 2005/19 and Council decision 2/109.

[19] General comment No. 2 (1990) on international technical assistance measures, para. 9.

tion where they are unable to ensure the realization of basic human rights because of excessive debt repayments. It may be contended that States' responsibility to ensure the enjoyment of basic human rights may take priority over their debt service obligations, particularly when such payments further limit the ability of States to fulfil their human rights obligations. The primacy of this responsibility becomes stark when the large gap in the fulfilment of basic human rights is quantified: 67 million children of primary school age (53 per cent of whom are girls) are not in school;[20] nearly 9 million children a year die before their fifth birthday, mostly of largely preventable causes;[21] and an estimated 1.1 billion people lack clean water and sanitation.[22]

Finally, there is extensive evidence that excessive debt service burdens undermine poor countries' development and significantly diminish the capacity of these countries to create the necessary conditions for the full realization of human rights, particularly economic, social and cultural rights.

B. Impact of debt servicing on human rights

Excessive external debt burdens have an adverse impact on the realization of human rights and development in debtor countries in two main interrelated ways: (a) through diversion of resources from basic social services; and (b) through policy conditionalities attached to international debt relief mechanisms which undermine country ownership of national development strategies.

1. Diversion of resources from basic social services

As stated above, there is extensive evidence that the diversion of scarce national resources from fundamental programmes of education, health and infrastructure to debt servicing significantly reduces the capacity of developing countries to create the conditions for the realization of human rights and undermines countries' development.[23] In these circumstances, several human rights, including the rights to education, health, adequate housing, work and development, are placed under threat or violated, and millions face poorer living conditions.[24] In addition, conditions that debtor countries have to fulfil to qualify for international debt relief often compel further reductions in Government spending on basic social services (see below).

According to a 2005 study by the New Economics Foundation, 20 countries spent more than 20 per cent of their budget on debt service.[25] That year, Lebanon spent 52 per cent of its budget on debt service as compared with 23.1 per cent on education and health; Jamaica spent 27.9 per cent on debt service and 16.1 per cent on education and health; and Bulgaria spent 23 per cent on debt service and 11.6 per cent on education and health.[26] In a similar vein, the MDG Gap Task Force reported in 2008 that, despite the increase in social expenditures as a result of debt relief, "a large number of countries [were] still spending more on debt servicing than on public education or health".[27] According to the Task Force, in 2006, there were 10 developing countries spending more on debt service than on public education and 52 where debt servicing exceeded the public-health budget.[28] Other independent studies have confirmed the high level of spending on debt servicing relative to expenditure on basic social services such as education and health care.[29]

Various United Nations human rights bodies have consistently recognized that high debt burdens constrain the ability of many States to fulfil their human rights obligations. For example, in its concluding observations on Ecuador, the Committee on Economic, Social and Cultural Rights stated that "[i]t especially notes the high percentage of the annual national budget (around 40 per cent) allocated to foreign debt servicing [which] seriously limits the resources available for the achievement of effec-

---

[20] United Nations Educational, Scientific and Cultural Organization (UNESCO), *UNESCO and Education* (Paris, 2011), p. 6. See also UNESCO, *EFA Global Monitoring Report 2010: Reaching the Marginalized* (Paris, 2010), p. 5.

[21] World Health Organization (WHO) and United Nations Children's Fund (UNICEF), *Countdown to 2015 Decade Report (2000-2010): Taking Stock of Maternal, Newborn and Child Survival* (Geneva, 2010), p. 7.

[22] See United Nations Environment Programme (UNEP), *Vital Water Graphics: An Overview of the State of the World's Fresh and Marine Waters,* 2nd ed. (Nairobi, 2008).

[23] "Report of the high-level task force on the implementation of the right to development on its fifth session" (A/HRC/12/WG.2/TF/2), para. 87. See also Isabella Bunn, "The right to development: implications for international economic law", *American University International Law Review,* vol. 15, No. 6 (October 2000), pp. 1452-1467.

[24] See Jubilee Debt Campaign briefings.

[25] See Lucie Stephens, "Debt relief as if justice mattered: a framework for a comprehensive approach to debt relief that works" (New Economics Foundation, 2008), p. 3.

[26] Ibid., p. 11.

[27] United Nations, *Millennium Development Goal 8—Delivering on the Global Partnership for Achieving the Millennium Development Goals: MDG Gap Task Force Report 2008* (United Nations publication, Sales No. E.08.I.17), p. 30.

[28] Ibid.

[29] See, for example, Christian Barry, Barry Herman and Lydia Tomitova, eds., *Dealing Fairly with Developing Country Debt* (Wiley-Blackwell, 2008) p. 2; Jubilee Debt Campaign, briefing on debt and public services; Alcino Ferreira Camara Neto and Matías Vernengo, "Lula's social policies: new wine in old bottles?", University of Utah, Department of Economics Working Paper No. 2006-07, p. 11.

tive enjoyment of economic, social and cultural rights" (E/C.12/1/Add.100, para. 9).

In a similar vein, the Committee on the Rights of the Child has acknowledged that "the external debt, the structural adjustment programme and the limited availability of financial and skilled human resources [have] had a negative impact on social welfare and on the situation of children and impeded the full implementation of the Convention" in Madagascar (CRC/C/15/Add.218, para. 4).[30]

Apart from undermining obligations on economic, social and cultural rights, heavy debt burdens pose major obstacles for some low-income countries in achieving the Millennium Development Goals (see A/HRC/15/WG.2/TF/2/Add.1 and Corr.1, para. 54).[31] In 2011, the World Bank and IMF, while reporting that HIPCs had increased their poverty-reducing expenditure, noted that "HIPCs have made uneven, and in some cases limited, progress towards achieving" the Goals.[32] Only a quarter of completion point HIPCs were on track to achieve goal 1 (to eradicate extreme poverty and hunger), with progress towards goal 5 (to improve maternal health) less certain.[33] Further, only "a few HIPCs" were on track to meet goal 8 (to build a global partnership for development).[34]

The lack of progress towards the Millennium Development Goals has also been noted in a report by WHO and UNICEF covering 68 countries where more than 95 per cent of all maternal and child deaths occur. The report indicates that 49 of the countries surveyed are off track for achieving goal 4 (to reduce child mortality) and goal 5.[35] Moreover, 53 of those countries were experiencing acute shortages of doctors, nurses and midwives.[36] It is interesting to note that while the report does not identify the external debt burden as the cause of this lack of progress,[37] 33 of the countries surveyed are HIPCs (including 27 post-completion HIPCs).

In circumstances where debt has been cancelled, countries have been able to invest more in public services such as health care, education, water and sanitation and to abolish user fees for some of these services (such as fees for health care and primary education previously introduced as part of austerity measures imposed by the international financial institutions), thereby enhancing the enjoyment of the rights to health care, education, water and sanitation.

2. Undermining country ownership of national development strategies

It is widely accepted that country ownership of national development strategies is the foundation of development effectiveness and aid effectiveness.[38] According to the United Nations Conference on Trade and Development (UNCTAD), country ownership does not mean "some form of national commitment (or buy-in) to the policy reforms advocated by the [international financial institutions]", as it is often understood; rather it "implies that national Governments should have the ability to freely choose the strategies which they design and implement, and take the lead in both policy formulation and implementation".[39]

The Declaration on the Right to Development recognizes the importance of country ownership of national development strategies. Article 3 (1) of the Declaration underscores that "States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development of peoples".

[30] See also the concluding observations of the Committee on Economic, Social and Cultural Rights on Zambia (E/C.12/1/Add.106), Benin (E/C.12/1/Add.78), Algeria (E/C.12/1/Add.71), Nepal (E/C.12/1/Add.66), the Syrian Arab Republic (E/C.12/1/Add.63), Senegal (E/C.12/1/Add.62), the Plurinational State of Bolivia (E/C.12/1/Add.60), Honduras (E/C.12/1/Add.57), Morocco (E/C.12/1/Add.55), Kyrgyzstan (E/C.12/1/Add.49) and the Sudan (E/C.12/1/Add.4); the Committee on the Rights of the Child on Eritrea (CRC/C/15/Add.204), Sri Lanka (CRC/C/Add.207), the Republic of Korea (CRC/C/15/Add.197), Burkina Faso (CRC/C/15/Add.193), the Sudan (CRC/C/15/Add.190), the Netherlands Antilles (CRC/C/15/Add.186), Niger (CRC/C/15/Add.179), Malawi (CRC/C/15/Add.174), Mozambique (CRC/C/15/Add.172), Kenya (CRC/C/15/Add.160), Turkey (CRC/C/15/Add.152), the Central African Republic (CRC/C/15/Add.138), Suriname (CRC/C/15/Add.130), Georgia (CRC/C/Add.124) and India (CRC/C/15/Add.115); and the Committee on the Elimination of Discrimination against Women on Uganda (A/57/38, part three, para. 149), Trinidad and Tobago (ibid., part one, para. 155), Jamaica (A/56/38, part one, para. 227), Guyana (ibid., part two, para. 161), the Netherlands (ibid., para. 227) and Cameroon (A/55/38, part two, para. 44).

[31] It should be noted that there are many linkages between the Millennium Development Goals and human rights. See *Claiming the Millennium Development Goals* (footnote 12), pp. 3-4 and 7-48.

[32] International Development Association (IDA) and IMF, "Heavily Indebted Poor Countries (HIPC) Initiative and Multilateral Debt Relief Initiative (MDRI): status of implementation and proposals for the future of the HIPC Initiative", p. 4 (hereinafter HIPC and MDRI: status of implementation 2011).

[33] Ibid.

[34] Ibid.

[35] WHO and UNICEF, *Countdown to 2015 Decade Report* (see footnote 21), p. 1.

[36] Ibid., p. 2.

[37] The report identifies user fees and inadequate levels of official development assistance as the key financial barriers (ibid).

[38] UNCTAD, *The Least Developed Countries Report 2010: Towards a New International Development Architecture for LDCs* (United Nations publication, Sales No. E.10.II.D), p. 162.

[39] Ibid.

However, as UNCTAD has pointed out, achieving country ownership of national development strategies is very difficult in a situation of chronic aid dependence, and even more so where the country concerned is heavily indebted. Indeed, severe indebtedness renders debtor countries subject to the control of international financial institutions and other creditors,[40] thereby eroding the ability of these countries to freely determine and pursue policies favourable to their development in line with the Declaration on the Right to Development. As Sabine Michalowski puts it:

> [T]he debt burden adversely affects the protection of economic and social rights not only because of the diversion of money from social purposes to debt servicing. Rather, the dependency in which it puts the debtor countries might result in a factual loss of sovereignty over their economic and social policies, and in the imposition of policies with potentially negative consequences for the protection of social rights. Even where the governments of debtor countries are willing to accept such policies, the dependency on the country's creditors might provide them with a powerful tool to sell these policies to the people of the country as inevitable and non-negotiable.[41]

Several commentators have made similar observations concerning the influence that the international financial institutions have over the design of macroeconomic policy in poor countries, including the preparing of programme documents supposedly "owned" by debtor countries.[42]

Poor countries' eligibility for new loans or debt relief is typically subject to conditionalities set by the international financial institutions.[43] For example, in order to complete the HIPC Initiative and have their debts cancelled, debtor countries often have to comply with a large number of onerous conditions.[44] These conditions include privatization of State-owned enterprises (such as electricity generation and distribution facilities, water utilities and telecommunications); reduction of Government expenditures for public services; wage ceilings; redundancies from the public service (the major employer in many countries); introduction of user fees for basic services like health and education; trade liberalization (involving removal or reduction of subsidies and import tariffs and promotion of exports); deregulating investment; financial sector liberalization; fiscal and monetary reforms (strict inflation targeting, accumulation of international reserves, currency devaluation and expansion of domestic credits); taxation reforms (such as introduction of a value added tax and other regressive taxes, tax holidays for foreign corporations and improvement of customs collection); and land reform (i.e., changes to laws governing ownership of land by foreigners).

Although the ostensible aim of conditionalities is to promote economic growth and prosperity, as well as to restore the debt repayment capacity of a country,[45] studies indicate that in fact they have an adverse impact on the realization of human rights in the longer term and have contributed to increasing poverty and the marginalization of the poor in many debtor countries.[46] Illustratively, the privatization of public enterprises often results in large-scale retrenchments, thereby depriving many individuals of a liveli-

---

40 See Jubilee Debt Campaign briefing on debt and women (July 2007).

41 Sabine Michalowski, "Sovereign debt and social rights: legal reflections on a difficult relationship", *Human Rights Law Review*, vol. 8, No. 1 (2008), p. 5.

42 See, for example, Villaroman' "A fate worse than debt" (footnote 6), pp. 65-69; Angela Wood, "Power without responsibility? enhancing learning and policy accountability at the IMF", in *Accountability of the International Monetary Fund*, Barry Barin and Angela Wood, eds. (Ashgate Publishing, 2005), pp. 67 and 70; Margot E. Salomon, "International economic governance and human rights accountability", London School of Economics Law, Society and Economy Working Paper 9/2007, p. 2; Anne Orford, "Globalization and the right to development", in *Peoples' Rights*, Philip Alston, ed. (Oxford University Press, 2001), p. 152; Gerry Helleiner, "External conditionality, local ownership and development", in *Transforming Development: Foreign Aid for a Changing World*, Jim Freedman, ed. (University of Toronto Press, 2000), pp. 90-91. Creditor leverage over policymaking in debtor countries is also inconsistent with the Paris Declaration on Aid Effectiveness of 2005 and the Accra Agenda for Action of 2008, both of which underscore alignment of international assistance with national development priorities and country ownership.

43 The term "conditionality" refers to macroeconomic targets, policy and institutional reforms that a debtor State must achieve or implement in order to receive (or continue to receive) loans or relief on old debts. For a discussion of typical conditionalities, see N. Molina and J. Pereira, "Critical conditions: the IMF maintains its grip on low-income governments" (Eurodad-European Network on Debt and Development, 2008); James Raymond Vreeland, *The International Monetary Fund: Politics of Conditional Lending* (Routledge, 2007), pp. 23-25; Robin A. King and Michael D. Robinson, "Assessing structural adjustment programs: a summary of State experience", in *Debt Disaster? Banks, Governments, Multilaterals Confront the Crisis*, John F. Weeks, ed. (New York University Press, 1989), p. 103; and Villaroman, "A fate worse than debt" (see footnote 6), pp. 115-116. It has been estimated that IMF imposes an average of 13 conditions per low-income country loan. See Molina and Pereira, p. 4. Although the international financial institutions claim that there has been a shift in their policies from conditionalities in the form of structural adjustment policies to "country-owned" poverty reduction strategy papers (PRSPs), independent analyses have shown that there is very little difference, if any, in terms of substance. As long ago as 2001, a UNDP review of poverty reduction strategy papers concluded: "A review of the macroeconomic policies in different countries' PRSP indicates that they are not significantly different from earlier stabilisation and structural adjustment lending" (UNDP review of the poverty reduction strategy paper (PRSP) (December 2001), p. 5).

44 When a country enters the HIPC Initiative, a decision point document sets out what the country needs to do to qualify for HIPC. Typically, these conditions include measures to reduce poverty but also include various economic policy conditions (see Villaroman, footnote 6).

45 See IMF, Factsheet, "IMF conditionality" (30 March 2012). Available at www.imf.org/external/np/exr/facts/conditio.htm. See also IMF Independent Evaluation Office, "Structural conditionality in IMF-supported programs: background documents" (29 October 2007), available at www.ieo-imf.org/ieo/files/completedevaluations/01032008SC_background_documents.pdf.

46 See, for example, Jeffrey D. Sachs, *The End of Poverty: Economic Possibilities for Our Time* (Penguin Press, 2005), pp. 81-88, 280-281 and 342; Martin Dent and Bill Peters, *The Crisis of Poverty and Debt in the Third World* (Ashgate, 1999), pp. 73-79. For concerns expressed by the United Nations human rights mechanisms on the adverse impacts of conditionalities, see the concluding observations cited in notes above. See also the reports of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari (E/CN.4/2001/51 and E/CN.4/2002/59 and Corr.1) and the annual report of the Special Rapporteur on the right to education, Katarina Tomasevski (E/CN.4/2001/52).

hood; the reduction of Government expenditures for public services (such as education, health and housing) and/or the introduction of user fees for these services) limit access to them for many sectors of the population, especially the poorest; and a decrease in tax revenues arising from the general impoverishment of the population and from tax incentives offered to transnational corporations leaves Governments with little income for social investment. UNCTAD has reported that the rapid and extensive trade liberalization undertaken by the least developed countries during the 1990s failed to benefit the poor and in fact resulted in increased unemployment, wage inequality and poverty.[47]

Policy conditions linked to current international debt relief mechanisms not only significantly reduce a debtor country's prerogative regarding its own process of economic development (including regulating for the benefit of vulnerable groups and in favour of their development agendas),[48] they also limit investment in social services such as education and health in many low-income countries. A few case studies can illustrate the gravity of the problem.

In 2004, the IMF condition that Zambia freeze public sector wages resulted in the Government's failure to address the massive shortage of teachers by recruiting 9,000 newly qualified teachers. Similarly, a study by the United Nations Development Programme (UNDP) International Poverty Centre in 2006 found that "the net fiscal gain from debt relief had been marginal because of the external policy conditionalities linked to the relief and associated ODA".[49] Thus, even after receiving debt cancellation, Zambia would still not be able to significantly scale up public spending or investment owing to the continuing demands for exceedingly tight fiscal and monetary policies in its IMF loan arrangements.[50]

In the United Republic of Tanzania, debt cancellation was made conditional on the privatization of water utilities in Dar es Salaam, the country's largest city. This significantly reduced access to water for the poorest, both through cuts in services and higher user fees.[51]

As a condition for debt relief, IMF and the World Bank insisted that the Government of Malawi privatize its agricultural marketing agency (which used to store crops and provide subsidized fertilizer to small-scale farmers), end agricultural subsidies and sell maize stocks in order to reduce fiscal deficits and because they were considered to be trade distortions. In 2001/02 and 2004/05, the removal of support for farmers and the sale of grain stocks, combined with drought, undermined food security for 7 million of the country's population of 11 million.[52]

The impact of debt and related conditionalities extends to civil and political rights. Thus, for example, the implementation of harsh austerity measures (involving cuts to pensions and public spending), as well as privatization of public services, imposed by the European Union and IMF as part of their efforts to address the Greek sovereign debt crisis since 2009, has not only led to job losses and impoverishment, but also to widespread social unrest in the country. Efforts by the authorities to deal with the protests have resulted in violations of the rights to life, personal security and freedom of association, to mention a few.

Further, it is evident that women are more adversely affected by debt and related conditionalities than men.[53] For example, shortages of basic health care or other social services or the introduction of user fees for health-care services often result in women assuming the burden of the extra work arising from caring for the young, sick and elderly. For younger women, this is often at the expense of their education. In addition, since women and children are the most frequent users of health-care facilities, they often bear the brunt of reductions in health-care budgets in the context of the implementation of fiscal adjustment policies. Privatization of water services can reduce access to water, through cutbacks in services and increased fees or the introduction of user fees. This can increase the workload of women, who tend to bear the burden of fetching water in poor countries.[54] To compound matters, women are often marginalized and routinely excluded from decision-making at all levels and often lack independent control over resources.

---

47 UNCTAD, *The Least Developed Countries Report 2002: Escaping the Poverty Trap* (United Nations publication, Sales No. E.02.II.D.13).

48 Regulation is a duty: human rights law enjoins States to take appropriate legislative, administrative, budgetary, judicial and other measures to fulfil their human rights obligations. See, for example, International Covenant on Economic, Social and Cultural Rights, art. 2 (1).

49 See John Weeks and Terry McKinley, *Does Debt Relief Increase Fiscal Space in Zambia?: The MDG Implications,* Country Study No. 5 (Brasilia, UNDP International Poverty Centre, 2006).

50 Ibid.

51 See Jubilee Debt Campaign briefing on debt and women.

52 See K. Owusu and F. Ng'ambi, "Structural damage: the causes and consequences of Malawi's food crisis" (World Development Movement, October 2002). See also Anne Pettifor, "Resolving international debt crises fairly", in *Dealing Fairly with Developing Country Debt.*

53 See, for example, concluding comments of the Committee on the Elimination of Discrimination against Women on Uganda (A/57/38, para. 149) and Guyana (A/56/38, para. 161) and concluding observations of the Committee on Economic, Social and Cultural Rights on Zambia (E/C.12/1/Add.106).

54 See Jubilee Debt Campaign briefing on debt and women.

In short, while conditionalities can be beneficial,[55] the overwhelming view is that they have destroyed livelihoods, increased poverty and inequality and left many poor countries ensnared in externally prescribed or approved policy frameworks that not only make it difficult for them to comply with their human rights obligations but also undermine their development and result in impoverishment of their citizens.[56]

The Declaration on the Right to Development also highlights that development is a participatory process and that the human person "is the central subject of development and should be the active participant and beneficiary of the right to development" (arts. 1 (1), 2 (1) and (3), and 8 (2)). It further provides that States are entitled and have the duty "to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom" (art. 2 (3)). In order for a development process to be characterized as "participatory", however, the people must have control over its direction, rather than being merely consulted about policies or projects that have already been decided upon.[57] Further, as one scholar has observed, there is no accountability when economic policy decisions are "externally imposed by international financial institutions which are far removed from the people in terms of effective remedial measures".[58]

It is clear that high debt burdens continue to constrain development prospects and the realization of human rights, as well as the attainment of the Millennium Development Goals, in many developing countries. Moreover, country ownership of national development strategies is undermined and the right to development violated when external actors (including creditors) influence economic policymaking or effectively restrict policy choices in indebted countries through their economic policy prescriptions or "suggestions".[59] Thus, the facts that people in heavily indebted poor countries are often unable to participate in making the decisions that affect their lives and welfare, are deprived of control over their own natural resources, cannot assure basic public services for the needy and suffer the diversion of their resources to debt repayment constitute violations of the right to development.

IV. A rights-based approach to sovereign debt

A. Limitations of creditor responses to the debt crisis

In response to the debt crisis of developing countries, creditors have devised and implemented two main measures with the aim of reducing the external debt of poor countries pursuing IMF and World Bank adjustment and reform programmes and helping them achieve debt sustainability: the Heavily Indebted Poor Countries (HIPC) Initiative and the Multilateral Debt Relief Initiative (MDRI). The HIPC Initiative, which was first launched in 1996 by IMF and the World Bank and revised in 1999, links debt relief to poverty reduction, macroeconomic stability and structural reform. In order to qualify for debt relief under HIPC, a country must (a) be eligible to borrow from the International Development Association (IDA, the World Bank arm which provides interest-free loans and grants to the world's poorest countries) and from the IMF Extended Credit Facility, which provides loans to low-income countries at subsidized rates; (b) face an unsustainable debt burden that cannot be addressed through traditional debt relief mechanisms; (c) have established a track record of reforms and sound policies through World Bank- and IMF-supported programmes; and (d) have developed a poverty reduction strategy paper through "a broad-based participatory process" in the country.[60] Thus, as mentioned in section III above, debt relief is conditional on the progress made by qualifying countries in the preparation and implemen-

[55] For example, trade liberalization may lead to more competition and lower commodity prices.

[56] For a discussion of the long-term impact of conditionalities, see Sachs, *The End of Poverty* (footnote 46), pp. 81-82, 280-281 and 342; Peter Hardstaff, "Treacherous conditions: how IMF and World Bank policies tied to debt relief are undermining development" (World Development Movement, May 2003); Dent and Peters, *The Crisis of Poverty and Debt* (see footnote 46), pp. 73-79; Eric Toussaint, *Your Money or Your Life!: The Tyranny of Global Finance* (Pluto Press, 1999) pp. 155-165.

[57] Human Rights Council of Australia, *The Rights Way to Development—A Human Rights Approach to Development Assistance: Policy and Practice* (1995), pp. 118-121.

[58] Villaroman, "A fate worse than debt" (see footnote 6), p. 55.

[59] Michalowski, "Sovereign debt and social rights" (see footnote 41), pp. 4-5.

[60] IMF, Factsheet, "Debt relief under the Heavily Indebted Poor Countries (HIPC) Initiative" (December 2011). PRSPs describe a country's macroeconomic, structural and social policies and programmes to promote growth and reduce poverty, as well as related external financing needs. They are supposed to be prepared by Governments through a "participatory" process involving civil society and development partners, including the World Bank and IMF. In reality, however, PRSPs are subject to joint review and final approval by IMF and the World Bank. See IMF and World Bank, "2005 review of the poverty reduction strategy approach: balancing accountabilities and scaling up results", p. 1; Jim Levinsohn, "The poverty reduction strategy paper approach: good marketing or good policy?", in *Challenges to the World Bank and IMF: Developing State Perspectives*, Ariel Buira, ed. (Anthem Press, 2003), pp. 119 and 123; IMF Independent Evaluation Office, *Evaluation of the IMF's Role in Poverty Reduction Strategy Papers and the Poverty Reduction and Growth Facility* (Washington, D.C., 2004), pp. 16-17.

tation of social policies and strategies for reducing poverty.

As of November 2011, 36 out of 40 HIPCs had reached decision point under the HIPC Initiative and 32 had reached completion point and also benefited from debt relief under MDRI.[61] According to the World Bank and IMF, debt relief under the Initiatives "has substantially lowered the debt burdens of HIPCs" and "[f]or the 36 post-decision point countries, poverty reducing spending increased by more than three percentage points of GDP, on average, between 2001 and 2010, while debt service payments declined by a somewhat smaller amount".[62] It is not the purpose of this chapter to assess these claims. Nevertheless, it is important to underscore that HIPC and MDRI have reduced debt burdens only for a small group of indebted countries (that is, it excludes many countries that need or deserve debt cancellation),[63] after long delays and at high cost in terms of loss of policy space. It is also important to stress that debt service reductions as a result of relief under the initiatives is largely offset by an equivalent reduction in future concessional borrowing.[64] Thus, they do not offer much additionality. Moreover, there are indications that a number of countries (including some post-HIPC completion countries) are at risk of debt distress.[65] In March 2009, IMF reported that the debt-to-GDP ratios of 28 low-income countries exceeded 60 per cent[66]—twice the official threshold level for debt sustainability for countries with weak institutions. In 2011, IMF and World Bank reported that "a third of low income countries [were] either in debt distress or at high risk of debt distress" and that "a quarter of the post-completion point HIPCs" were at "high risk of debt distress".[67]

Apart from the foregoing issues, the HIPC Initiative has a number of other shortcomings. These include that it does not cancel all unpayable and unjust debt; it comes with harmful and unfair conditions attached (which are not necessarily consistent with the poverty reduction goals of debt relief); and it is entirely controlled by creditors who typically fail to accept responsibility for their role in creating and maintaining the debt crisis or to allow poor countries to have a say. Further, not all creditors have participated in the Initiative. In particular, the voluntary nature of the Initiative has created opportunities for some commercial creditors holding defaulted sovereign debt (which they have purchased at significant discounts) to refuse to participate, hold out for other creditors to cancel their debts and then aggressively pursue repayments vastly in excess of the amount they paid for the debt obligation.[68]

B. The need for a new debt sustainability framework

One of the most contentious elements of the current international debt relief schemes is the joint World Bank-IMF Debt Sustainability Framework (DSF) for low-income countries. According to IMF, the main aim of the Framework, introduced in 2005 and periodically reviewed, is "to help guide countries and donors in mobilizing the financing of low-income countries' development needs, while reducing the chances of an excessive build-up of debt in the future".[69] However, under DSF, "debt sustainability" has been defined narrowly according to the ability of debtor countries to repay their debts in terms of their export earnings, irrespective of other pressing demands on these countries' resources.

Under the Framework, the World Bank and IMF conduct debt sustainability assessments that involve making projections of intended borrowings and economic variables over a 20-year period and then using ratios comparing debt stock, present value or service with GDP, exports or budget revenue to assess payment capacity. This approach simply assesses whether, given certain analyses of economic growth, external trade dynamics and availability of external financial resources, a debtor country is able to service its debt.[70] Accordingly, the criteria for assessing debt

61 HIPC and MDRI: Status of implementation 2011 (see footnote 32).

62 Ibid, pp. 3-4.

63 According to the World Bank and IMF, HIPC was not meant to be a permanent mechanism to relieve the external debts of low-income countries and it was effectively closed to new entrants in 2006 when the sunset clause took effect and the list of potentially eligible HIPCs was ring-fenced (ibid., p. 17).

64 See Gail Hurley, "Multilateral debt: one step forward, how many back?: HIPC and MDRI update", Eurodad-European Network on Debt and Development, 2007, pp. 8-12.

65 See Jürgen Kaiser, Irene Knoke and Hartmut Kowsky, *Towards a Renewed Debt Crisis?: Risk Profiles of the Poorest Countries in the Light of the Global Economic Slowdown*, Dialogue on Globalization Occasional Paper No. 44 (Berlin, Friedrich-Ebert-Stiftung, 2009), pp. 3 and 13. Drawing mainly on existing debt analyses from the international financial institutions but also considering the medium- and long-term effects of climate change and other ecological challenges, largely ignored in official assessment of debt sustainability, this study concludes that there is "strong evidence" that the global financial economic slowdown was likely to have major consequences for the external debt sustainability of many poor developing countries and that there is a need to overhaul the international strategies.

66 IMF, "The implications of the global financial crisis for low-income countries" (March 2009), available at www.imf.org/external/pubs/ft/books/2009/globalfin/globalfin.pdf. See also UNCTAD, *The Least Developed Countries Report 2009: The State and Development Governance* (United Nations publication, Sales No. E.09.II.D.9).

67 HIPC and MDRI: Status of implementation 2011 (see footnote 32), pp. 14-15.

68 See "Report of the independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephas Lumina" (A/HRC/14/21).

69 See IMF, Factsheet, "The joint World Bank-IMF Debt Sustainability Framework for low-income countries" (October 2007).

70 The assumptions underlying the World Bank and IMF debt sustainability assessments are questionable. This is confirmed by the IMF Independent Evaluation Office which has reported that "there is evidence that invest-

sustainability under the Framework focus almost exclusively on the ability of debtor countries to repay their debts; they do not take into account a country's ability to provide basic public services such as safe water, sanitation, health care, education and housing. Thus, the Framework ignores the primary human rights obligation of States to provide for the basic social needs of their people.

In August 2009, the DSF was reviewed to address concerns that it had "unduly constrained the ability of [low-income countries] to finance their development goals".[71] The ostensible aim of the review was to afford countries greater space to borrow more to cope with the challenges of the global economic downturn. Thus, the framework was "flexibilized" to enable countries to take on more debt without being deemed in debt "distress". The revised Framework overlooks certain State liabilities (i.e., debts of State-owned enterprises) and includes migrant remittances as contributions to countries' capacities to repay sovereign debt. In January 2012, the Framework was further reviewed "to assess whether it [remained] adequate in the light of changing circumstances" in low-income countries.[72]

It is worthy of note that while the review focused on options to enhance the flexibility of the Framework, this flexibility does not include human rights concerns, nor does it take human development and ecological challenges into consideration. It is clear that the IMF-World Bank concept of debt sustainability is very narrow and does little to advance the poverty reduction goals of debt relief, let alone sustainable development. The key objective of assessing debt sustainability should be to balance financing needs for development with sustainable debt levels. From a human rights and human development viewpoint, debt sustainability analyses should take account of the need to protect Government spending required to meet basic human development needs and to create the conditions for the realization of human rights, particularly economic, social and cultural rights. In other words, debt sustainability analyses should include an evaluation of the level of debt a country can carry without undermining its capacity to fulfil its human rights obligations (including the right to development) and to pursue its own development agenda.

The omission of human rights considerations from the "flexibilized" Framework is scarcely surprising because both the World Bank and IMF often justify their failure to incorporate human rights considerations into their policies and programmes by asserting that this is outside their respective mandates. Nevertheless, in view of the broadly accepted position that international organizations such as the World Bank and IMF have obligations under international law, including those arising under the Charter of the United Nations and human rights law, this position must be considered untenable.[73] It is also notable that in 2006, the General Counsel of the World Bank opined that the Bank's Articles of Agreement "permit, and in some cases require, the Bank to recognize the human rights dimensions of its development policies and activities".[74] It can therefore be contended that taking human rights into account during debt sustainability assessments would be wholly consistent with the Bank's development mandates.

In addition, it is well established that States must adhere to their international law obligations when they act through international organizations.[75] Thus, for example, the European Court of Human Rights has held that the human rights obligations of member States continue even after the transfer of competences to international organizations.[76]

Other grounds for contending that human rights considerations should be factored into debt sustain-

ment is consistently overestimated in IMF-supported programmes". See IMF Independent Evaluation Office, *Evaluation Report: Fiscal Adjustment in IMF-Supported Programs* (Washington, D.C., 2003), p. 4. See also Weeks and McKinley, *Does Debt Relief Increase Fiscal Space in Zambia?* (see footnote 49),p. 6.

[71] IMF and World Bank, "A review of some aspects of the low-income country Debt Sustainability Framework" (5 August 2009).

[72] See IMF and World Bank, "Revisiting the Debt Sustainability Framework for low-income countries" (12 January 2012).

[73] See, for example, Salomon, "International economic governance" (footnote 42), p. 5; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006), pp. 137-159; C. Lumina, "An assessment of the human rights obligations of the World Bank and the International Monetary Fund with particular reference to the World Bank's Inspection Panel", *Journal for Juridical Science*, vol. 31, No. 2 (2006), pp. 108-129; August Reinisch, "The changing international legal framework for dealing with non-State actors", in *Non-State Actors and Human Rights*, Philip Alston, ed. (Oxford University Press, 2005); Mac Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (Hart, 2006); Sigrun Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (London, Cavendish Publishing, 2001); Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions,* 5th ed. (Sweet and Maxwell, 2001), pp. 458-459; Thomas Buergenthal, "The World Bank and human rights", in *The World Bank, International Financial Institutions and the Development of International Law*, E. Brown Weiss, A. Rigo Sureda and L. Boisson de Chazournes, eds. (American Society of International Law, 1999); Daniel D. Bradlow, "The World Bank, the IMF and human rights", *Transnational Law and Contemporary Problems*, vol. 6, No. 1 (1996), pp. 48-89.

[74] See Robert Dañino, "Legal opinion on human rights and the work of the World Bank: Senior Vice President and General Counsel" (27 January 2006), para. 25.

[75] The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights provide that "the obligations of States to protect economic, social and cultural rights extend also to their participation in international organizations, where they act collectively" (para. 19).

[76] See European Court of Human Rights, *Mathews* v. *United Kingdom*, application No. 24833/94, Grand Chamber judgement of 18 February 1999, paras. 29, 32 and 34; *Waite and Kennedy* v. *Germany*, application No. 26083/94, Grand Chamber judgement of 18 February 1999, para. 67; *Bosphorus Airways* v. *Ireland*, application No. 45036/98, Grand Chamber judgement of 20 June 2005, paras. 152-156.

ability analyses can be found in the observations and recommendations of the United Nations human rights treaty bodies. For example, the Committee on Economic, Social and Cultural Rights has emphasized that international agencies "should scrupulously avoid involvement in projects" that infringe human rights and should promote projects and approaches that contribute not only to economic growth and other defined objectives, but also to enhanced enjoyment of all human rights.[77] In a similar vein, the Committee on the Rights of the Child has recommended that the World Bank Group, the International Monetary Fund and the World Trade Organization should ensure that their activities related to international cooperation and economic development promote the full implementation of the Convention on the Rights of the Child.[78]

It is also notable that the United Nations treaty bodies have often urged international financial institutions to pay greater attention to the protection of human rights in their lending policies, credit agreements and debt relief initiatives. Thus, as noted above, the Committee on Economic, Social and Cultural Rights has recommended that full account be taken of the need to protect economic, social and cultural rights in dealing with the debt crisis.[79] Further, the Relationship Agreements between the United Nations and the Bretton Woods Institutions provide that these institutions should "consider" the decisions and recommendations of the United Nations.[80]

C. Towards a rights-based approach to sovereign debt

Despite the adverse human rights effects of high external debt burdens, creditor-driven policy responses to the sovereign debt crisis have hitherto ignored consideration of human rights. This is regrettable since human rights offer a transparent, coherent and universally recognized framework that can inform the design and implementation of a debt restructuring mechanism that can provide a just, equitable and durable solution to the debt crisis.[81] In particular, the core principles of equality, non-discrimination, participation, transparency and accountability at both the national and international levels offer a specific framework within which policies and strategies to address the sovereign debt crisis in a durable manner must be devised and implemented. Thus, for example, a human rights-based approach to external debt means that debt sustainability analyses should take into account the human rights implications of debt service.

Moreover, the effective and meaningful participation of all elements of society in the planning, implementation and evaluation of strategies, policies and national economic and social development programmes; equality of opportunity; equality of access to basic social services; and accountability of debtor Governments to their citizens for their external debt arrangements are all crucial aspects of a human rights-based approach to the debt problem.[82] Accountability also entails the scrupulous avoidance by creditors of intrusive policy conditions for new loans or relief on old debt that tend to restrict or undermine country ownership of national development strategies.

D. Reinforcing the principle of shared responsibility

As stated above, the debt crisis of developing countries has largely been presented as a problem of poor debt management. This is evident from the design of the current international debt relief mechanisms, which focus largely on "debt sustainability" and implementation of economic reforms by the countries seeking debt relief.[83] In particular, there has been a noticeable failure or reluctance on the part of the creditors who drive the debt relief mechanisms to recognize the roots of the crisis and to acknowledge their own role in its development. For this reason, it is doubtful that, in their current form, international debt relief schemes can ever provide a durable and just solution to the debt crisis that has plagued the developing countries for decades.

The burden of loans extended irresponsibly cannot rest only with borrowers, as it does at present. In most domestic legal systems, lenders have a duty to exercise due diligence when they extend a loan to an individual. National laws also typically provide guar-

77 General comment No. 2 (1990), para. 6.
78 General comment No. 5 (2003) on general measures of implementation of the Convention on the Rights of the Child, para. 64.
79 General comment No. 2 (1990), para. 6. See also general comments No. 4 (1991) on the right to adequate housing, para. 19; No. 12 (1999) on the right to adequate food, para. 41; No. 13 (1999) on the right to education, para. 60; and No.14 (2000) on the right to the highest attainable standard of health, para. 64.
80 See the Agreement between the United Nations and the International Bank for Reconstruction and Development, United Nations, *Treaty Series*, vol. 16, No. 109, p. 346 and the Agreement between the United Nations and the International Monetary Fund, ibid., p. 328.
81 See "Report of the independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights" (A/64/289 and Corr.1), para. 74.
82 Ibid., para. 34.
83 For example, IMF has stated that in order "[t]o reduce their debt vulnerabilities decisively, countries need to pursue cautious borrowing policies and strengthen their public debt management". See IMF, Factsheet, "Debt relief under the Heavily Indebted Poor Countries (HIPC) Initiative", p. 3.

antees against extortionate interest rates and penalty charges. Significantly, insolvency laws also provide for a resolution to avoid a run on the borrower's assets.[84] No such safeguards are currently available for States. It is therefore critical that lenders and borrowers jointly explore ways to resolve the debt crisis in line with the principle underscored in the Monterrey Consensus of the International Conference on Financing for Development that "[d]ebtors and creditors must share the responsibility for preventing and resolving unsustainable debt situations" (para. 47).

But what precisely does "shared responsibility" mean in the context of sovereign debt? There are two aspects to the principle. Firstly, it means that lenders and borrowers have a mutual obligation to ensure that their lending or borrowing behaviour does not contribute to or culminate in unsustainable debt situations. Thus, for example, lenders must not extend loans without conducting due diligence or, in the case of development loans, must not lend for projects that have no developmental benefit for the population of the borrower State. For their part, borrowers must not contract loans that they are not in a position to repay, or they must not conclude loan agreements in circumvention of the applicable national legal and institutional frameworks.

Secondly, it requires that lenders and borrowers accept responsibility for their role in the creation of debt crises and take appropriate remedial action. For the lender, this might entail the unconditional cancellation of loans extended by them in a profligate manner,[85] while for the borrower this might require the establishment of a transparent and accountable system for the management of public debt.

It is important that the principle of shared responsibility should inform the design and implementation of international debt restructuring schemes. Only then can the vision of "a fully inclusive and equitable global economic system" to which Heads of State and Government committed themselves in Monterrey a decade ago, become a reality.

V. Conclusion

Although the debt crisis has largely been portrayed as a problem of poor debt management, good debt management alone does not prevent crises from occurring. It is therefore important to recognize that the debt crisis, particularly of developing countries, is a multidimensional problem with economic, political, social and historical dimensions and that, as such, it cannot be resolved with an exclusively economic and technical approach. In particular, no equitable and durable solution to the debt problem can be found without the underlying causes of the crisis being addressed and creditors and debtors sharing responsibility for resolving it, taking into consideration the imperatives of sustainable human development and the realization of all human rights. Further, as the former United Nations Independent Expert on the effects of structural adjustment policies observed more than a decade ago, long-term development (and the effective realization of human rights) requires a fundamental restructuring of the international economic system (E/CN.4/1999/50, paras. 122-128). In the absence of such change, the needs of millions around the world will continue to be subordinated to commercial and national interests[86] and the right of every person to a social and international order in which the rights and freedoms enshrined in the Universal Declaration of Human Rights will remain illusory.

[84] See Raffer, "Internationalizing US municipal insolvency" (see footnote 11).

[85] Indeed, there is precedent for this. As noted above, in October 2006 the Government of Norway unilaterally and unconditionally cancelled the official debts of around $80 million incurred by five developing countries under its Ship Export Campaign, which it acknowledged as a "development policy failure". See Government of Norway, Ministry of Foreign Affairs, press release No. 118/06 (2 October 2006). See also "Report of the independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephas Lumina: missions to Norway and Ecuador" (A/HRC/21/Add.1), paras. 19-25.

[86] See the aid, debt and development page on the website of Share The World's Resources (www.stwr.org).