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DESIGNING HUMAN RIGHTS-ALIGNED REFORMS FOR DEBT RESTRUCTURINGS

CENTER for ECONOMIC and SOCIAL RIGHTS

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ACRONYMS AND ABBREVIATIONS

CACs	Collective Action Clauses
CDSs	Credit Default Swaps
DSAs	Debt Sustainability Assessments
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of Racial discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFIs	International Financial Institutions
IMF	International Monetary Fund
HIPC	Highly Indebted Poor Countries
SDRM	Sovereign Debt Restructuring Mechanism
UDHR	Universal Declaration of Human Rights
UN	United Nations

EXECUTIVE SUMMARY

The world is undergoing a global debt crisis as debt servicing is crowding out expenditure on education, health, social protection, climate action, and other socio-economic rights. The International Monetary Fund has indicated that more than half of low-income developing countries are at risk of debt distress. This crisis disproportionately affects countries in the Global South, exacerbating inequalities within and between countries, and hindering sustainable development.

In response to this crisis, debt restructurings play an important role. However, restructuring processes have been sparse and when they have occurred, they have often failed to achieve sustainable outcomes, perpetuating cycles of unsustainable debt. The absence of a coherent international legal framework further complicates these issues, leaving negotiations inequitable and opaque. At present, there is neither a coherent nor comprehensive effective framework to address the debt crisis.

There is an urgent need for a common international framework for sovereign debt restructuring underpinned by normative human rights principles for a fairer, less fragmented, and more transparent debt restructuring framework. International human rights norms support progressive reforms to the international debt architecture which would be responsive to the distinct needs of countries in the Global South. First, human rights law requires that the fundamental needs of every person should be met even in times of debt distress. Human rights law provides a universal set of norms that the majority of the world's nations have agreed to and ensure a measure of fairness and equity in debt workout mechanisms. Since countries in the Global South face similar developmental and structural challenges in the global financial system, human rights law provides them with a strong normative basis to advance the interests of their nations and their citizens. The human rights emphasis on securing dignity for all provides a strong normative basis to refute and reject processes that only consider creditors' interests at the expense of human rights.

In this paper, we outline the normative human rights principles that States can rely on to argue for more permanent, less fragmented, more transparent, and more predictable sovereign debt restructurings. These include the right to self determination; the right to development, the principle of equality and non-discrimination; the principle of good faith; minimum standards of living and essential levels of socio-economic rights; and private actors responsibilities; transparency, participation, and accountability.

We suggest policy recommendations based on those standards include: 1) explicitly recognising the need to make debt restructuring compatible with human rights standards; 2) including human rights considerations in debt sustainability assessments and, if a restructuring happens, conducting Human Rights Impact Assessments; 3) ensuring essential levels of economic and social rights in all circumstances, that sufficient fiscal space is freed for this end, and that the resources made available after the process are allocated, as matter of priority, to expenditures that promote equality; 4) observing the principle of good faith, which requires at least that creditors and debtors have constructive engagement and participate actively in restructurings, cooperate towards a speedy and orderly resolution, abstain from abusive behaviour, and negotiate a debt arrangement once debt has become unsustainable; 5) ensuring participation of affected people and organisations; and 6) recognising the need for debt cancellation under certain circumstances.

Finally, we explain the importance of statutory approaches and independent mechanisms to multilateral debt restructuring, to offer a more comprehensive framework and provide a systematic way to incorporate human rights considerations into debt restructuring. We therefore argue that an independent, multilateral, legally binding process under the auspices of the United Nations should be established to oversee debt restructuring processes. Its universal and equal-basis membership, its technical potential, its mandate to protect and promote human rights, and lack of financial interests make the United Nations an ideal candidate for this role.

1

INTRODUCTION

For a long time, countries in the Global South have been calling for reforms to the international financial architecture, in order to ensure they have sufficient resources to meet their developmental and human rights needs. The Africa Group's leadership to transform international tax governance, which has resulted in the ongoing process to negotiate a Tax Convention within the United Nations (UN), is an example of how coordinated efforts amongst States can lead to positive results. Similar to the patchwork that exists for addressing international tax abuse, there is currently no systematic or comprehensive approach to addressing sovereign debt, which covers all types of debt and all categories of creditors[1], whether private[2], bilateral[3], or multilateral[4].

Data suggests that 85% of the global population might be impacted by public budget cuts in the coming years (Eurodad et al. 2024). The constraining impact of debt is evident from the fact that debt service, including both domestic and external debt payments, is absorbing an average of 38% of budget revenue and 30% of public spending across the Global South, while it is at 54% of revenue and 40% of spending in Africa (ibid).

Debt servicing costs are crowding out expenditure on education, health, social protection, and climate action in low and middle-income countries, and exceeds it by 50% in Africa. It is 2.5 times the spending on education, 4 times the spending on health and 11 times the spending on social protection (ibid). Given the constraints posed by debt distress, countries in the Global South are spending far too little on climate action. Research indicates for example that "In Sub-Saharan Africa, 9 out of 25 countries are spending less than 2% of their overall budget on climate adaptation, and in 4 of these, it is less than 1% (Development Finance International et al. 2023).

The International Monetary Fund (IMF) has indicated that more than half of low-income developing countries are at risk of debt distress (Romeu 2024). We are, therefore, in the midst of a debt crisis which requires a coordinated and comprehensive solution, similar to the Highly Indebted Poor Countries (HIPC) Initiative and the Multilateral Debt Relief Initiative. Debt restructuring is "a negotiated agreement to cancel (usually only part of) the outstanding debt, e.g., by lowering the interest rate, moving the payments further into the future without additional interest, waiving fees, or reduction of the principal still owed" (CESR 2023, 5).

The G20's Common Framework and Debt Suspension Service Initiative have not offered a coherent nor comprehensive framework to address the debt crisis. Unlike the debt crisis in the 90's, when the main creditors were members of the Paris Club or international financial institutions like the IMF or World Bank, today a significant percentage of debt (about 39% according to the IMF debt monitor 2023) is owed to private creditors (UNCTAD 2023). In addition, bilateral creditors who are not members of the Paris Club like China, the UAE, and Saudi Arabia hold a significant percentage of sovereign debt. Private creditors pose new challenges because current debt frameworks like the G20's Common Framework do not make it compulsory for private creditors to participate (Eurodad 2020). Whilst there is a combination of treaty and soft law obligations imposed by international human rights law on debt, imposing such norms on private actors has proved difficult (Bohoslavsky et al. 2023). There are also some challenges applying these norms to multilateral creditors like the IMF (Bohoslavsky and Cantamutto 2022).

Joseph Stiglitz has described the global approach to debt restructuring as "a non-system" that "makes sovereign debt crisis resolution a complex process, marked by inefficiencies and inequities" (Guzman and Stiglitz 2023), and in which the IMF often plays a facilitator role, leading to unfair, burdensome, and unjustifiable outcomes, particularly for Global South countries. There is an urgent need for a common international framework for sovereign debt restructuring that draws on human rights principles.

1. Guzman and Stiglitz refer to the current system as a "non-system". See Guzman and Stiglitz "A Soft Law Mechanism for Sovereign Debt Restructuring: based on the UN Principles" (October 2016). Available online: https://library.fes.de/pdf-files/iez/12873.pdf
2. Private creditors refer to businesses that provide loans or buy debts created by loans. This includes commercial banks.
3. Bilateral creditors refer to a situation where a country owes another government debt.
4. Multilateral creditors arise from a situation where a country is indebted to an international financial institution or development bank like the IMF, or World Bank.

2

HUMAN RIGHTS PRINCIPLES AS GUIDELINES TO RESHAPE DEBT RESTRUCTURINGS

There are normative, human rights principles that can be used to argue for a fairer, less fragmented, and more transparent debt restructuring framework. As set forth in the UN Guiding Principles on Foreign Debt and Human Rights, "All States … have the obligations to respect, protect, and fulfil human rights. They should ensure that any and all of their activities concerning … debt repayments … do not derogate from these obligations" (Independent Expert on Foreign Debt 2012).

Human rights law, both in terms of treaty obligations and soft law principles, provides a basis for a more just and equitable approach to debt (CESR 2023). Firstly, human rights law requires that the fundamental needs of every person, especially marginalised groups, should be met even in times of debt distress

FIGURE 1

Human rights principles as guidelines to reshape debt restructurings

(Corkery and Saiz, 2023). Human rights law arguably softens the harshness of market-based rules which have resulted in countries, particularly in the Global South, spending more on debt service repayments than their expenditure on economic and social rights (Corkery and Saiz 2023).

Because human rights law provides a universal set of norms that the majority of the world's nations have agreed to, they also ensure a measure of fairness and equity in debt workout mechanisms as opposed to the inequitable, unjust, and unsystematic approach which flows from contractual negotiations.

Since countries in the Global South face similar developmental and structural challenges in the global financial system, human rights law provides them with a strong normative basis to advance the interests of their nations and their citizens (Bantekas 2023). The emphasis in human rights on securing dignity for all provides a basis upon which to refute and reject processes and frameworks which only consider creditors' interests.

The UN Basic Principles on Debt Restructuring set out a set of nine principles to be observed in sovereign debt restructuring procedure: sovereignty, good faith, transparency, impartiality, equitable treatment of creditors, sovereign immunity, legitimacy, sustainability, and the principle of majority restructuring. Many of these principles derive from human rights treaties and norms. For example, the principle of transparency is derived from the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights (Art. 19). Similarly, the principle of sovereignty aligns with the right to self-determination, guaranteed in the International Covenant on Civil and Political Rights (Art. 1). The UN Guiding Principles on Foreign Debt and Human Rights further distill human rights principles as they apply to debt.

While debtor States must honour their debt agreements, debt becomes unsustainable when it compromises states capacity to observe its human rights obligations (Independent Expert on Foreign Debt 2012). For this and other reasons, human rights are powerful tools to reform debt restructuring. The following human rights principles, emerging from soft law and international law, are of special importance for this goal.

2.1. The right to self-determination and sovereignty

The right to self-determination stems from several international instruments including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Whilst the normative content of the right to self-determination is contested[5], there is a general consensus that at the very least it entails the right of peoples to freedom from colonial subjugation (Mustafa 1971). Although, the literature usually conveys this in terms of political independence, an expansive interpretation encompasses decolonial scholars' warning of neo-colonialism (Nkrumah 1965) and the need for substantive economic autonomy as well. Some scholars argue that the right to self-determination is a malleable concept and its meaning varies depending on the vantage point from which it is invoked (Senaratne 2013). The invocation of self-determination is always an expression of politics (Senaratne 2013).

Based on this particular understanding of the right to self-determination, the right contains the following elements. First, it encompasses the right of peoples to freely dispose of their natural wealth and resources and entails that a State's population has a right to enjoy a fair share of the financial and social benefits that natural resources can bring (Senaratne 2013). This means "ensuring participation, access to information, and high standards of transparency and accountability in decision-making about the use of natural resources" (Senaratne 2013). Second, the right to self-determination is an incident of the right to development: the two rights should therefore be read together and as mutually complementary and reinforcing (Expert Mechanism on the Right to Development 2021). Third, it includes the right to fiscal self-determination, which imposes an obligation not to interfere with the legitimate fiscal self-determination of States and peoples (Bantekas 2023).

A decolonial approach also contends that sovereignty is a component of self-determination because it implies that States enjoy freedom from

5. See for example Matthew Saul "The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?" Human Rights Law review 11: 4 and Deborah Z. Cass "Re-thinking self-determination"

interference and recognition (Bantekas 2023). Scholars argue that the nominal end of colonialism did not result in substantive sovereignty for countries in the Global South, but only to the extent that their interests were subordinate to those of countries in the Global North (Achiume and Carbado 2021). We advance an interpretation of self-determination and sovereignty which addresses the power imbalances between countries in the Global North and Global South.

Sovereignty is one of the principles of the UN Resolution on the Basic Principles on Sovereign Debt Restructuring, which recognise sovereign immunity regarding restructurings is a "right of States before foreign and domestic courts", and that sovereign States have the right to design their macroeconomic policies, including the restructuring of their debt. These principles require that the legitimate authorities of a State (and not their creditors) have independent control over the direction of the economy (Bohoslavsky 2023).

Current approaches to debt restructurings, which lack an unbiased "mediator", create a tension with State sovereignty. Arguably, this principle calls for the establishment of an independent restructuring mechanism that avoids any potential conflict of interest. In line with the sovereignty and self-determination principles, such a mechanism should be independent of creditors and debtors, and allow for assessments of "neutral" bodies.

Sovereignty and the right to self-determination also mean that a State could unilaterally refuse to pay odious, illegitimate debt (notwithstanding that such action could attract other legal, political, or moral consequences) (Bantekas 2023). States could consider defining "odious debt" in a legal norm (Bohoslavsky 2023). While a state's decision to take on debt can be an act of self-determination and exercise of sovereignty, unsustainable levels of debt may act as a constraint to the right to self-determination because they may limit a state's autonomy to decide its policies on its own terms and pursue its own nationally determined priorities.

2.2. The right to development

The right to development is enshrined in the Declaration on the Right to Development and consists of several components (Expert Mechanism on the Right to Development 2021). First, the right to development is an inalienable self-standing human right. Second, rights holders are guaranteed three entitlements: to participate in, contribute to, and enjoy economic, social, cultural, and political development. Third, the right to development implies the full realisation of the right to self-determination.

Fourth, operationalising the right to development entails respecting, protecting, and fulfilling all other human rights. Fifth, the right to development requires a focus not only on outcomes that are to be realised from a development plan or agenda (the "what" question), but also on the process by which those outcomes are achieved (the "how" question). Both the processes and outcomes of development must be consistent with and based on all other human rights. Lastly, human beings are individually (that is, all human persons) and collectively (that is, all peoples) the rights holders of the right to development. Every State is entitled, as an agent of all persons and peoples subject to its jurisdiction, to demand respect for the right to development from other States and international organisations.

The Declaration entails duties for all States to respect, protect, and fulfill the right to development at three levels. States acting: (i) collectively in global and regional partnerships; (ii) individually as they adopt and implement policies that affect persons not strictly within their jurisdiction; and (iii) individually as they formulate national development policies and programmes affecting persons within their jurisdiction. Importantly, the right to development includes a duty to cooperate in ensuring and realising the right to development.

Evidently, the right to development means that obstacles and impediments which prevent countries in the Global South from realising their full potential and which keep them trapped in a state of dependency are inconsistent with this right. Unsustainable levels of debt over time trap countries in the Global South into a cycle of dependency that robs them of the ability to devote their resources to their developmental needs. Because the eradication of poverty is the first step towards the realisation of the right to development, it would require priority to be given to human rights and human development above debt service repayments, and would, therefore, require a loan conditionalities to

be responsive to this right (Mazur 2004). Because unsustainable debt can fundamentally obstruct development, there is a need for a spectrum of relief options, including, in certain circumstances, debt cancellation. While the technical mechanisms for implementing such relief require separate detailed analysis, a rights-based framework helps to establish the conceptual foundation for considering these options (Bunn 2000).

The right to development also requires the principle of solidarity to be strictly adhered to. Solidarity places an obligation on States in the Global North to not place impediments and obstacles on States in the Global South's capacity to pursue their developmental goals. It also means States must take collective action to overcome obstacles to development including the burden of debt and ensure that when acting individually they do not impose any new obstacles on the development of other States and peoples (Expert Mechanism on the Right to Development 2021).

When multilateral creditors impose onerous conditionalities on debtor States in restructurings that undermine their ability to meet their developmental goals this arguably infringes the right to development. Because the right to development encompasses the duty to cooperate, and applies to States when acting collectively, multilateral creditors should provide for technical assistance and capacity building for debtor countries. Importantly, "international organisations, including international financial institutions, that as subjects of international law, must respect human rights and fulfill all obligations imposed by general rules of international law. In particular, international financial institutions, as specialised agencies of the UN, are bound by the human rights provisions contained in the UN Charter"[6].

Similarly, because private creditors should conduct human rights impact assessments (see below), these assessments should include an evaluation on how the restructuring may impede the right to development as well as other human rights. The principles that could guide such assessments have been discussed extensively by the Independent Expert on Debt and Human Rights in its "Guiding principles on human rights impact assessments of economic reforms"[7].

2.3. Equality and non-discrimination

Equality and non-discrimination are core principles of international human rights law appearing in nearly every treaty.[8] Equality is meant to be substantive, meaning in certain circumstances special measures must be taken to achieve equitable treatment among groups[9] – including for developing countries. Achieving substantive equality means for example that "States parties must ... adopt the necessary measures to prevent, diminish, and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination" (CESCR 2009). The International Convention on the Elimination of Racial discrimination (ICERD) specifically requires all forms of racial discrimination to be eliminated. In its stead, ICERD requires substantive racial equality to be achieved both within and between States, as racial discrimination under ICERD includes "differential treatment of and outcomes for countries and territories that were subject to prolonged exploitation and degradation during the colonial era on the basis of racist theories and beliefs" (UN Special Rapporteur 2022).

Because debt is rooted in the legacy of colonialism, it can be regarded as a contemporary structure of historic racial oppression. This means that debt is an impediment to the advancement of countries in the Global South, thus widening racial equality between States because it disproportionately impacts the predominantly non-white nations of the Global South. Because debt is an impediment

6. See Committee on Economic, Social and Cultural Rights Statement on Tax Policy and the International Covenant on Economic, Social and Cultural Rights, E/C.12/2025/1.
7. 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 human rights, particularly economic, social and cultural rights, A/HRC/40/57.
8. See Article 2(1) of International Covenant on Civil and Political Rights, Article 2(2) of International Covenant on Economic, Social and Cultural Rights, Article 1(1) on the Convention on the Elimination of All Forms of Racial Discrimination (ICERD) Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
9. See Article 1(4) of ICERD, Article Article 4 of CEDAW, supra note 32, CESCR General Comment no. 20 on non-discrimination in the enjoyment of economic, social and cultural rights.

to the advancement of racial equality between States, it has been argued (UN Special Rapporteur on Racism 2019) that countries in the Global South are entitled to reparations, which may entail debt cancellation, and the removal of aid conditionalities (African Futures Lab 2024).

In structural terms, full reparations for colonial debt means a transformation of "the systems, structures, and asymmetrical power dynamics" that created the debt crisis in the first place (African Futures Lab 2024). Overall, creditors must make a genuine attempt to restructure debt in a way which does not exacerbate racial inequality between States in the sense that it traps Global South countries in a cycle of debt and unable to break its dependency.

Furthermore, the social costs of debt are not distributed evenly; to the contrary they disproportionately impact marginalised groups (CESR 2022) (including racialised communities and women), widening inequality within countries. This stems both from discriminatory practices and policies at a domestic level whilst being compounded by the impact of decisions made by outside conditionalities imposed by debt obligations. Debt restructurings must ensure that sufficient fiscal space is freed to avoid draconian austerity measures that disproportionately impact marginalised groups, and that the resources made available after the process are allocated to expenditures that promote equality.

2.4. The principle of good faith

In addition to the core human rights principles discussed above, which provide broad, general guidelines to state action around debt, there are also a variety of sources that contain relevant soft law standards, particularly relevant towards debt restructuring. One such principle is the principle of good faith, the general principle of law that mandates legal parties act honestly, fairly, and sincerely in their interactions.

Good faith also has bearing more specifically around debt restructuring. While creditors may invoke pacta sunt servanda ('agreements must be kept') to demand full repayment and argue that good faith itself requires honouring the original terms of debt contracts, good faith in the context of sovereign debt operates more broadly. According to the UN Basic Principles on Sovereign Debt Restructuring Processes, good faith entails promoting productive negotiations that require creditors and debtors a constructive engagement and to participate actively, with the goal of achieving "prompt and durable reestablishment of debt sustainability and debt servicing, as well as achieving the support of a critical mass of creditors through a constructive dialogue regarding the restructuring terms" (United Nations General Assembly 2015). It also ensures fairness and equity in this process, stressing that creditors "behave cooperatively to reach a speedy and orderly resolution" (United Nations 2015). It prevents abusive practices by underscoring that creditors who acquire distressed debt with the intent of securing preferential treatment outside a consensual restructuring process are acting abusively.

Furthermore, good faith manifests in several key obligations on the involved parties. First, it imposes a duty to negotiate the terms of a debt arrangement once debt has become unsustainable. Notably, this principle is clearly violated by vulture funds, which seek preferential treatment to other creditors through holdout methods that deny active participation[10]. The good faith principle calls for a standstill on this sort of abusive holdout litigation, and could lead to rules limiting the enforceability of claims by creditors who refuse to abide by this principle. Abusive and prolonged litigation of holdout creditors delay debt restructuring, further aggravating negative impacts on the enjoyment of human rights (Bohoslavsky 2023), and is in tension with the principle of good faith.

Good faith also mandates equitable treatment of creditors, barring "group(s) of creditors which extract excessive advantages to the detriment of other groups" (Guzman and Stiglitz 2023). Finally, it also necessitates the avoidance of behaviors undermining negotiations, obliging creditors to refrain from actions like negative voting that could derail a restructuring process.

10. These funds can purchase distressed debt on secondary markets, and then pursue aggressive litigation for full repayment, often at the expense of a country's ability to provide essential services and meet its human rights obligations.

The principle of good faith can also be used more obliquely. One such way relates to the nature of the bargaining process. As enumerated by Joseph Stiglitz, "creditors who purchase instruments that include a compensation for risk cannot in good faith bargain to receive treatment as if the lending were risk-free" (Guzman and Stiglitz 2023). To take this principle even further, "odious debt", should be seen as illegitimate and canceled, given that it was negotiated under unfair conditions (Corkery et al. 2021).

2.5. Transparency, participation, accountability and impact assessments

Transparency is another cornerstone human rights principle crucial within the realm of debt restructuring. The Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) establish rights to freedom of expression and access to information, which are foundational to transparency. This principle is further concretised within debt restructuring through its inclusion in the UN Guiding Principles on Debt Restructuring, which dictate that "transparency should be promoted in order to enhance the accountability of the actors concerned, which can be achieved through the timely sharing of both data and processes related to sovereign debt workouts".

Upholding the transparency principle within the debt restructuring context demands a range of obligations from stakeholders. One key way is through the honest public disclosure of conflicts of interests and investment positions. For instance, creditors must reveal any positions in credit default swaps (CDSs) that could influence the restructuring process. The current market for CDSs lacks transparency, often obscuring the true extent of these positions. During Greece's sovereign debt restructuring, certain creditors stood to profit from a default event triggered by the restructuring, even as they participated in negotiations to resolve the crisis (Grady and Lee 2012). Without disclosing these conflicts of interest, there is a risk that negotiations may be skewed, leading to unequal and unjust solutions.

Additionally, the bias of major credit ratings agencies towards Global South countries has been a longstanding transparency problem. These ratings' methodologies are often based on subjective factors such as expert opinion, often prone to be shaped by political influence and corruption.

Transparency, in its connection with accountability, calls for human rights impact assessments. These assessments help identify and mitigate potential adverse impacts of debt restructuring on human rights, with the goal of preventing negative outcomes such as increased poverty, reduced access to essential services, or other human rights violations. Structural debt adjustment measures and decisions around restructuring should undergo rigorous human rights impact assessments to ensure that they do not exacerbate inequality or lead to human rights violations. States' due diligence when conducting risk assessment before granting or renewing a loan should include the capacity of the debtor State to fulfill its human rights obligations towards its own population under a given financial situation.

In connection to the analysis on race above, these human rights impact assessments should incorporate a racial dimension which could for instance ask whether the terms of the restructuring might exacerbate or entrench existing racial hierarchies. A robust assessment of the impact of the restructuring on racial equality should incorporate an intersectional approach which evaluates the compounded vulnerabilities faced by marginalised groups such as women and children.

2.6. Minimum standards of living and debt sustainability

Under the International Covenant on Economic, Social and Cultural Rights (ICESCR), States must dedicate their maximum available resources to the realisation of economic, social, and cultural rights. The ICESCR also prohibits retrogressive measures, which are actions that would result in an unjustified reduction of existing rights or standards. Importantly, under ICESCR States also have the duty to ensure the minimum core content of rights (such as basic education and access to primary health care) that States must ensure in all

circumstances. Because debt restructurings often involve prioritising the interests of creditors in ways which minimise fiscal space to resource rights, it can be argued that where these negotiations require States to abrogate the minimum core obligations they are defeating the object and purpose of the ICESCR[11]. Debt servicing must not lead to a deterioration of the minimum essential levels of rights, such as access to food, primary healthcare, or basic education.

The obligation of ensuring essential levels of rights under ICESCR has been interpreted to apply consistently, even during crises. This means that States cannot neglect their obligation to ensure minimum standards of living and essential rights, regardless of economic conditions. When faced with debt restructuring, a State must prioritise fulfilling these essential obligations in all cases, including over servicing debt. Failure to do so would violate international human rights norms and undermine the purpose of debt restructuring.

Debt restructuring and sustainability are pivotal in addressing national and international economic inequity, and it is essential to ensure that these processes respect and uphold minimum standards of living and the enjoyment of essential human rights. Notably, debt sustainability assessments (the tools to determine whether a country is able to continue servicing its loan for debt repayment) have traditionally focused on the interests of the creditor in getting back all their money rather than on broader consideration, such as the impact of a country's debt burden on its people. Essential services like education, healthcare, and social protection are often underfunded to prioritise debt repayment, undermining the economic and social rights of citizens.

Against this backdrop, debt sustainability assessments (DSAs) should incorporate human rights considerations.[12] Juan Pablo Bohoslavsky and Matthias Goldman argue that sovereign debt sustainability today involves balancing the private interests of creditors with the public interests of debtor nations (Bohoslavsky and Goldmann 2016). This balance is crucial for ensuring that debt restructuring processes do not disproportionately harm the most vulnerable populations. Sustainability requires that debt restructuring should support the long-term well-being and development of the nation, rather than perpetuating cycles of debt dependency. Sustainability would mean imposing an obligation to negotiate a restructuring that truly enables an indebted country to have a fresh start as opposed to being trapped in a cycle of debt dependency.

2.7. Private actors responsibilities under international human rights' law

Private creditors have responsibilities for upholding human rights obligations and should agree to sufficient debt relief to prevent adverse human rights impacts. The responsibilities of private actors under international human rights law, particularly in the context of debt restructurings, are increasingly critical in light of their significant impact on human rights and environmental sustainability. Private financial investors, specifically corporations holding sovereign debt securities, are not exempt from observing human rights standards, such as those enumerated in the UN Guiding Principles on Business and Human Rights. Their responsibilities include due diligence, identifying potential human rights impacts, integrating human rights impact findings into their processes, and tracking these responses.

Unfortunately, a recent study on debt restructurings conducted by Open Global Rights revealed a lack of consideration for human rights due diligence by private creditors (Bohoslavsky et al. 2023). Findings indicated no significant correlation between the debt relief achieved and the intensity of the preceding socio-economic crises.

11. We base this argument on an interpretation of article 18 of the Vienna Convention on the Law of Treaties which places an obligation on states parties to not take any measure that would defeat the purpose and object of the treaty. See Vienna Convention on Law of Treaties, 1969, available online: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

12. See, e.g., https://www.ohchr.org/sites/default/files/Documents/Issues/Development/IEDebt/DebtRestructuring.pdf; see also CESR, Country visit submission – Argentina, available online: https://www.cesr.org/argentina-cesr-highlights-human-rights-implications-of-sovereign-debt/

3

STATUTORY APPROACHES TO DEBT RESTRUCTURING AS AN OPPORTUNITY TO ADVANCE HUMAN RIGHTS PRINCIPLES

3.1. Why are statutory approaches to multilateral debt restructuring relevant from a human rights perspective

Currently, multilateral debt is restructured under a contractual, free-market option where sovereign creditors and debtors negotiate the restructure. However, without an overarching regulatory framework, restructuring is often guided by the policies and interests of the creditor institutions themselves, which has resulted in the inequitable, opaque, and often ineffective processes discussed at the introduction of this document. These problems are most acute when a country is at risk of defaulting, when large haircuts are needed to reestablish sustainability, and when debt instruments do not include collective action clauses, discussed below (IMF 2013).

Under a statutory approach, debtors and creditors would be bound by an international convention that establishes a process to facilitate debt restructuring (Schwartz 2013). Statutory approaches could offer a more comprehensive and rights-based framework through a systematic incorporation of human rights considerations into debt restructuring.

A statutory mechanism for debt restructuring should be established within the United Nations to be inclusive and independent. The United Nations, with its core mandate to address critical global issues and neither being a debtor or creditor itself, is the only inclusive multilateral and democratic space with sufficient legitimacy to discuss and agree on these reforms. This is particularly crucial to move away from creditor-dominated forums and towards a more even terrain for addressing global challenges.

Several factors make the UN the appropriate venue including (Eurodad 2024):

1. Its universal membership and democratic legitimacy. Unlike creditor clubs or International Financial Institutions (IFIs), the UN provides a space where all member states can participate on equal footing.
2. Its independence from creditor interests. As neither debtor or creditor, the UN can serve as a truly neutral arbiter, unlike institutions like the IMF which face inherent conflicts of interest.
3. Its Rights-based mandate. The UN's human rights mandate ensures debt sustainability, for example, can be assessed not just on financial metrics but on impacts to human rights and development.

This aligns with longstanding civil society demands, including those heading into the Fourth Financing for Development Conference in 2025, for comprehensive UN-led reforms of the international financial architecture. Civil society organisations have specifically called for a UN Framework Convention on Sovereign Debt that would comprehensively address unsustainable and illegitimate debt, including through extensive debt cancellation when needed (Civil Society Financing for Development 2024).

Statutory approaches further facilitate the introduction of human rights considerations to debt restructuring for different reasons, including:

3.1.1. Addressing collective action and holdout problems

Holdout problems occur when a creditor strategically holds out from agreeing to a reasonable debt restructuring plan (Schwartz 2013). While private creditors may recognise that supporting a rapid restructuring is in their interest, they may hesitate to agree out of concern that other creditors may hold out and press for full repayment on the original terms. Collective action problems can, therefore, render restructuring efforts unsuccessful, and cause delays (IMF 2013). This is crucial from a human rights perspective as holdouts delaying restructurings that can prolong economic crises and the associated impacts on people, often resulting from related austerity measures (Schwartz 2013).

Contractual approaches attempt to address this problem through collective action clauses (CACs). These are provisions in debt instruments that allow for the modification to payment terms if agreed to by a supermajority of creditors and, therefore, allowing consenting creditors to compel holdout creditors into a restructure (Schwartz 2013). While useful, these clauses fail to completely resolve the holdout problem as they are not always included in refinancing arrangements[13], and they only operate on an agreement-by-agreement basis (meaning that if creditors in any single agreement fail to reach the required supermajority to approve the restructuring, they can become holdouts relative to other creditors who have agreed to restructure (Brooks and Lombardi 2015)).

According to IMF data, approximately 88% of new international sovereign bond issuances between October 2014 and October 2018 included enhanced CACs. However, a significant portion of outstanding bonds still lacked these provisions (61% as of October 2018) (IMF 2019). Despite this gap in coverage, the IMF discontinued its periodic reporting on CAC adoption in 2019, considering the inclusion of the clauses in new agreements to have become 'market-standard' – a decision which arguably understates the ongoing vulnerability created by the substantial stock of outstanding bonds without such protections.

Further, CACs can actually increase borrowing costs during crisis periods when these clauses are most likely to be needed. This occurs because investors view CACs as making debt restructuring easier and potentially compromising their future returns, leading them to demand higher yields to compensate for this perceived additional risk. For example, during recent debt restructurings in Ecuador and Argentina, the spreads of their bonds with enhanced CACs increased significantly as investors priced in their reduced ability to hold out for better terms (Chung and Papaioannou 2021).

A statutory approach could address the holdout problem more rapidly, effectively, and predictably by binding all creditors across different debt agreements to apply uniformly across all types of debt (i.e, bonds, loans, and trade debt), by establishing clear rules for equitable treatment among creditors, and implementing more efficient voting mechanisms across all debtor classes.

3.1.2. Creating a comprehensive framework

Human rights obligations are rarely incorporated into the terms agreed in debt restructurings. Statutory approaches could instead allow for human rights principles to be explicitly and comprehensively incorporated into the governing framework. For example, a statutory regime could establish clear, objective criteria for assessing debt sustainability that goes beyond purely economic indicators, or mandate the inclusion of human rights impact assessments, as discussed above. It could also provide a legal basis for debt restructuring when debt burdens are considered unsustainable from a human rights perspective.

Furthermore, States often need to borrow new money to pay expenses related to basic rights and fund public services while restructuring their debt, when their ability to fund essential services may be compromised due to the ongoing debt crisis and potential loss of market access (Balcerowicz 2010). The contractual free-market model does not address this issue and lenders are generally unwilling to lend such funds during a crisis (Bolton and Skeel 2005). A statutory approach could bridge this gap through establishing a legally enforceable framework for

13. For example, in the Greek debt crisis, 90% of the total debt was not governed by CACs.

granting priority to new-money loans; ensuring cross-border recognition of this priority status; and allowing for a better balancing of interests by giving existing creditors an opportunity to participate in new funding arrangements (Schwartz 2013). Additionally, it could provide a more balanced framework for addressing legitimate creditor concerns about risk, potentially by establishing standardised formulas for adjusting yields rather than leaving it to unilateral creditor discretion during moments of crisis when borrower vulnerability is highest.

3.1.3. Balancing interests and power

Debt restructuring processes can become hampered by unequal bargaining power between creditors and debtor countries. Statutory approaches could level the playing field in different ways depending on the type of creditor. For multilateral creditors, statutory approaches could mandate a stronger voice for debtors in the debt renegotiation process, and provide for technical assistance and capacity building for debtor countries, which would translate into the rights of debtor countries' citizens being properly considered and upheld in negotiations. For private creditors, statutory approaches could establish binding rules to mandate equitable treatment among them, preventing some creditors from gaining unfair advantages; and provide legal mechanisms to limit the enforceability of claims by private creditors who refuse to negotiate in good faith, as discussed above.

Furthermore, current contractual processes allow for inequitable outcomes, particularly through the activities of vulture funds, which can compound the holdout problem, outlined above. A statutory approach could disincentivise abusive behavior and establish binding rules to prevent creditors from purchasing distressed debt and then pursuing aggressive litigation, or set rules that limit the enforceability of claims by creditors who refuse to negotiate in good faith, as discussed in section II.

3.1.4. Promoting fair governance

Current contractual processes lack an unbiased mediator, contradicting the principles of sovereignty and self-determination discussed above. Debt restructurings are often facilitated by institutions with vested interests, such as the IMF, which itself is a creditor. This dual role as both creditor and adviser creates a significant conflict of interest, leading to outcomes that prioritise creditor interests over the human rights of people in debtor countries. Under a statutory approach, an independent, multilateral body could be established to oversee debt restructuring processes to prevent supremacy by creditor interests.

Furthermore, contractual approaches allow for opaque practices, such as limited disclosure of loan terms and conditions. This lack of transparency can obscure conflicts of interest and hide the human rights impacts of restructuring decisions. Additionally, the assessment methodologies used in determining debt sustainability may not be fully transparent or subject to external scrutiny. A statutory approach could mandate public disclosure of certain financial information related to all forms of sovereign debt, establish an independent and neutral debt sustainability mechanism, and require regular reporting on restructuring negotiations.

3.1.5. Addressing institutional limitations in rights-based lending

The experience with existing IFI frameworks demonstrates the limitations of relying on these institutions to self-reform toward more rights-based approaches. For example, the IMF's Social Spending Floor initiative, while acknowledging the importance of protecting social spending during fiscal adjustment, has been criticised for setting floors that fall below most governments' development spending ambitions (Kentikelenis and Stubbs 2023). This illustrates how, even when IFIs recognise the need to consider human rights impacts, institutional constraints and priorities may prevent them from implementing sufficiently robust protections. A statutory approach to multilateral restructuring would help address this problem by moving key decisions away from IFIs, whose primary focus remains financial rather than rights-based, to an independent mechanism specifically designed to balance human rights considerations with financial stability.

3.2. Learning from past statutory approaches to multilateral debt restructuring

Numerous proposals for statutory approaches to

sovereign debt restructuring have been put forward over the years by various actors. Understanding their outcomes and the reasons for them is crucial when building new efforts. The most significant and comprehensive attempts at the international level are those advanced through the IMF and UN processes.[14]

3.2.1. IMF's 2002 Sovereign Debt Restructuring Mechanism (SDRM) proposal

The IMF's 2002 SDRM proposal was the most significant attempt at a statutory approach to multilateral debt restructuring in recent years (Mooney 2015). The SDRM aimed to create a comprehensive framework to strengthen incentives for sovereign debtors and their creditors to reach agreement on restructuring debt (Schwartz 2013). The proposal emphasised creating greater predictability in the process, while minimising over-interference with contractual relations (IMF 2003). It was intended to address the moral hazard problem by minimising private sector bailouts through establishing a more timely and orderly way of resolving sovereign debt crises, therefore benefiting both creditors and debtors (Brooks and Lombardi 2015). The key features of the proposal included: the identification of claims eligible for restructuring; allowing the debtor to activate the mechanism unilaterally; a registration and verification process for creditor claims, and a 75% voting threshold for creditor approval of restructuring plans; and a dispute resolution mechanism (IMF 2003).

Despite initially strong support, it ultimately failed to gain traction due to opposition of private creditors and key officials within the United States government (Mooney 2015). There was also a broad unwillingness from IMF members to submit to a tribunal that would encroach on a state's sovereignty (Mooney 2015). Some emerging market sovereign debtors (namely Mexico and Brazil) were also against the SDRM, concerned that their support for any restructuring mechanism would compromise their perceived creditworthiness (Brooks and Lombardi 2015). Ultimately, the failed attempt led to the emergence of CACs as a potential alternative.

Despite its failure, the SDRM proposal had lasting effects on the discourse surrounding sovereign debt restructuring, sparking ongoing discussions that led to a series of alternate proposals. Calls for a formal restructuring mechanism with clear procedures for international negotiations on a multilateral framework for sovereign debt restructuring processes have persisted (Mooney 2015).

3.2.2. UN General Assembly Resolutions on Sovereign Debt Restructuring

Following the failure of the SDRM, the UN General Assembly passed a series of resolutions aimed at establishing a multilateral framework for sovereign debt restructuring. These resolutions represent a progression from recognising the need for such a framework, to establishing concrete principles for its implementation.

Initially, Resolution 68/304 (2014), tabled by the G77 and China, called for the establishment of procedures for international negotiations on a multilateral framework for sovereign debt restructuring processes. Passed by an overwhelming majority of 124 countries in September 2014, it marked a significant milestone in efforts to establish a statutory approach to sovereign debt restructuring. The following key principles were emphasised: recognition of sovereign debt problems as a global responsibility; affirmation of States' sovereign right to restructure debt; protection of States from predatory creditors; importance of good faith and cooperative spirit in crisis management; and the need for proactive crisis prevention. However, most developed countries either voted against or abstained, aligning with the consistent position of these countries that issues on sovereign debt restructuring should remain with the IMF, and not the UN.[15]

Building on Resolution 68/304, Resolution 69/247 (2014) established concrete steps toward creating a

14. For example, the International Debt Restructuring Court, suggested by a group of UN experts (A/63/838); Fair and Transparent Debt-workout Mechanism (Eurodad 2009); Sovereign Debt Adjustment Facility (suggested by the Committee on International Economic Policy and Reform); Sovereign Debt Forum (suggested by Giltin & House from the Centre for International Governance Innovation in 2014); and other guidelines from the finance industry, such as the set of non-binding Principles for Stable Capital Flows & Fair Debt Restructuring (Institute of International Finance, 2004).

15. Specifically regarding Resolution 68/304, 11 States voted against, and 41 abstained.

multilateral legal framework, such as establishing an Ad Hoc Committee to develop such a framework, and calling for Member States to submit comments on the framework. However, considering the opposition from certain nations to the previous resolutions and timing constraints, the G77 countries adjusted their strategy. Instead of pursuing a full legal framework, the focus turned to establishing a set of guiding principles, considered to be more achievable to attract broader support. These efforts culminated in the "Basic Principles on Sovereign Debt Restructuring Processes" (Resolution 69/319, passed by a majority of 136 countries) which translated the broad calls from the previous resolutions into a concrete set of principles.

Key developments of this resolution included introducing the concept of majority approved restructuring; focusing on the independence of institutions involved in restructuring processes; emphasising the importance of inclusiveness and adherence to rule of law norms; and introducing a broader definition of sustainability for the benefit of the debtor state, including preserving creditor rights while ensuring respect for human rights considerations. The resolution invited Member States and other stakeholders to promote the basic principles. However, the principles remained largely aspirational due to two key limitations. First, they were not transformed into any form of binding treaty or instrument that could compel compliance. Second, there was broad reluctance from key creditor jurisdictions to codify these principles into their domestic law. Six countries voted against them, including two major jurisdictions for sovereign lending, the United States and the United Kingdom (Guzman 2018). Most of these principles have not been respected in recent restructurings – an unsurprising outcome given that principles alone, without either binding international mechanisms like a treaty or domestic legal recognition, lack meaningful enforcement.

3.2.3. Lessons learned

The majority support for resolutions 68/304 (124 countries) and 69/319 (136 countries) indicates that most nations support a comprehensive, treaty-based approach, and do not see the IMF as the best channel through which to pursue reforms (Brooks and Lombardi 2015). Support grew through subsequent resolutions, indicating sustained momentum. However, the opposition from major financial centers who voted against the UN resolutions (including the United States, United Kingdom, Germany and Japan), highlights enduring tensions between debtor and creditor nations in establishing a statutory framework. This tension likely influenced the more balanced approach seen in Resolution 69/319, which explicitly addressed both debtor and creditor rights through including both majority restructuring provisions and the preservation of creditors' rights.

The objections to resolution 69/319 were both substantive and jurisdictional. The United States expressed concerns that a statutory mechanism would create market uncertainty and undermine contractual enforceability. The European Union raised several objections: they viewed the IMF as the appropriate forum for such discussions, questioned how the impartiality principles would work in practice, worried about protecting IFI's preferred creditor status, and argued that the majority principle conflicted with the reality of sovereign debt issuance under foreign law. These concerns reveal fundamental disagreements about both the appropriate forum for debt restructuring and how to balance creditor rights with sovereign autonomy (Bustillo and Marinozzi 2016).

The fact that this watered down resolution was still voted down by most creditor nations indicates that even a softer, principles-based approach failed to bridge the gap between debtor and creditor interests suggesting that the path towards a comprehensive, universally accepted framework remains complex and contested. Future efforts should continue to address these tensions, and keep in mind the importance of attracting broader support from critical stakeholders.

Importantly, there is an evolving emphasis on development and human rights across the resolutions. Resolution 68/304 primarily focused on development, stressing the importance of addressing sovereign debt problems in developing countries and considering economic growth and development goals in the restructuring process. This focus expanded in Resolution 69/319, which explicitly integrated human rights considerations into its definition of sustainability. This trend has continued with subsequent initiatives, such as the UN Guiding Principles on HRIAs, which emphasise the importance of assessing the human rights impact

of economic reforms. Further statutory approaches should consider how to continue this momentum.

The human rights principles of transparency and accountability were specifically stressed from the SDRM through to the UN resolutions underscoring their importance in debt restructuring. Transparency can serve, in part, to address concerns over potentially arbitrary statutory arrangements, or interfering with market mechanisms (Brooks and Lombardi 2015). Transparency and good faith, introduced in 68/304, were expanded in 69/319 to include impartiality and legitimacy. This evolution shows a deepening understanding at the UN of the principles necessary for effective debt structuring. However, the ultimate outcome – a set of non-binding principles rather than a comprehensive framework – suggests that while transparency and accountability are necessary, they are not sufficient to overcome objections from those who favour creditor biased solutions. Future efforts could build on this trend by further integrating transparency and accountability measures, including through requirements for human rights impact assessments.

4 CONCLUSION

Countries across the Global South are devoting significant amounts of resources to debt servicing, which are crowding out expenditures on the goods and services needed to secure basic social and cultural rights. While debts become increasingly unsustainable from a human rights' point of view, debt restructurings have been sparse, and often unable to achieve sustainable outcomes, perpetuating cycles of unsustainable debt. The absence of a coherent international legal framework makes the problem more serious, leading to inequitable and opaque results.

International human rights principles offer valuable guidance for designing comprehensive reform of debt restructuring frameworks. Key human rights principles that could guide a more equitable global debt architecture include the right to self-determination; the right to development; equality and non-discrimination; good faith; transparency; extraterritorial obligations; maximum available resources, minimum standards of living and essential levels of social and economic rights.

In this context, the establishment of an independent mechanism for debt restructuring, embedded within the United Nations, has been a longstanding goal for debt justice advocates. This mechanism could codify the human rights-based principles discussed above. Indeed, a multilateral statutory framework for debt restructuring hosted by the UN remains the most effective and fair solution to sovereign debt restructuring.

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