

A FEMINIST PERSPECTIVE ON POST-CONFLICT RESTRUCTURING AND RECOVERY

THE CASE OF BOSNIA
AND HERZEGOVINA

WOMEN'S INTERNATIONAL LEAGUE FOR
PEACE & FREEDOM



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A FEMINIST PERSPECTIVE ON POST-CONFLICT
RESTRUCTURING AND RECOVERY – THE STUDY OF BOSNIA
AND HERZEGOVINA

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ABBREVIATIONS

BiH	Bosnia and Herzegovina
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CoM	Council of Ministers
DPA	Dayton Peace Agreement
ECHR	European Court of Human Rights
EU	European Union
FBiH	Federation of Bosnia and Herzegovina
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
GFC	Global Financial Crisis
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICISS	International Commission on Intervention and State Sovereignty
IFI	International Financial Institution
ILO	International Labour Organization
IMF	International Monetary Fund
ODA	Foreign Direct Aid
OECD	Organisation for Economic Co-operation and Development
OSCE	Organization for Security and Co-operation in Europe
RA	Reform Agenda
RS	Republika Srpska
SFRY	Socialist Federative Republic of Yugoslavia
UN	United Nations
WB	World Bank

1 INTRODUCTION

Understanding Bosnia and Herzegovina (BiH) today requires acknowledgment of political and economic dynamics of the country taking place already before and during the war, as well as seeing the post-conflict restructuring and recovery interventions as ideologically driven processes of economic and political transformation of a society.¹ Much of BiH's political and economic processes are framed within the Dayton Peace Agreement (DPA). The DPA played an important role in ending the military violence, but it also provided space for political and economic interventions and subsequent transformation of the BiH society without public interference.

In the best of scenarios, a peace agreement would secure up front the rights which form the bedrock of social and economic order, and would serve to construct a context in which a sustainable and just transition from conflict to peace can be made. Only rarely however, are economic, social and cultural rights included. The DPA is no exception: while recognizing that the "observance of human rights" is of "vital importance" for securing a lasting peace, priority was given to civil and political rights over economic, social and cultural rights. Non-discrimination on the grounds of belonging to specific three ethnicities (defined as constituent to BiH and represented on specific territory), over-rode all other prohibitions of discrimination, including those of sex and gender.²

This played a significant role in the depolitization of the society. Through the different interventions human rights were presented as being introduced to BiH for the first time, disregarding their application in the pre-war BiH. Without the historical and contextual understanding of the human rights framework, those rights were easily directed exclusively to selected political and civil rights, while the economic and social rights were ignored. The position of women and women's rights in BiH needs to be considered against this background. Women's rights have continuously been conditioned with the overall situation in BiH but also, given the patriarchal society and their de-prioritization in the DPA, women's rights have received marginal attention. Subsequently, women's agency in the society is not considered an important issue on the public policies agenda.

Equal social and economic participation is critical in order to be reflective of the range of views and experiences from within and across different social groups. Especially important is participation in economic decision-making, such as policies and plans for post-conflict reconstruction and

1 For further reading see Klein, Naomi 2007. *The Shock Doctrine*. London: Penguin Press; and Jansen, Stef, 2006. "The Privatisation of Home and Hope: Return, Reforms and the Foreign Intervention in BiH-Herzegovina". *Dialectical Anthropology*, 30:177–199.

2 See *Sejdić and Finci v. BiH*, ECtHR GC, application nos. 27796/06 and 34836/06, 22 December 2009.

recovery. In political terms, DPA exemplifies a clinical distribution of internal power between the belligerent factions with constitutional arrangements and processes that served to institutionalise the antagonisms. Tragically missed, was the inclusion of those who had opposed the conflict, had not been part of its prosecution and who could have represented an alternative to the binary narrative of competing hegemonic masculinities³ that sustain violence.

Economic and social rights often constitute part of the root causes of conflict.⁴ Access to, and delivery of them is therefore essential to post-conflict transitions. Inevitably, the rights to healthcare, employment, social assistance, housing, and education are a major preoccupation in the post conflict moment. They are a precondition for access to justice, to participation and to citizenship, and are highly gendered (Chinkin, 2014). The downplaying of economic and social rights in the DPA is consonant with the frequent practice of peace negotiations and liberal peace and peacebuilding assumptions that have privileged securing political order and stabilization over individual economic and social security and rights. In general, arrangements for economic development are broadly left outside the peace negotiations to be subsequently determined by government negotiations with international financial institutions, donors' conferences, foreign investors, and in the case of BiH – ethno-national political elites.

However, most economic development strategies pursued are based on neo-liberal assumptions underpinning all their interventions, such privatization and introduction of austerity measures. Instead of understanding economic development as an integral part of the peace package immediately after the war, in BiH, there was a strong push towards 'structural market reforms' by using both direct political interventions and conditional aid. For example, the Office of the High Representative, as the ad hoc institution established to oversee the implementation of civilian aspects of the Peace Agreement, was in 2000 pushing for laws and amendments related to taxation, benefit payments and privatization (Jansen, 2006:188). Such an approach inevitable led to a disconnect between resource allocation and economic and social rights with particular implications for women.⁵

The post-conflict recovery and reconstruction processes in BiH have been underpinned by neoliberal assumptions that liberalisation of the market, facilitated by a minimal state administration (often termed 'good governance') is most likely to sustain the conditions of peace;⁶ that low labour costs

3 See RW Connell – *Gender and Power* (1987) hegemonic masculinity: 'hegemonic in the sense that it is the dominant, culturally glorified form of masculinity in a particular cultural, social and historical setting.'

4 See U.N. Office of the High Commissioner on Human Rights [OHCHR], Transitional Justice and Economic, Social and Cultural Rights (2014); see also Rees and Chinkin, 'Exposing the Gendered Myth of Post Conflict Transition: The Transformative Power of Economic and social Rights, 48 *New York University J Int'l L and Policy* (2016) 1211.

5 "[L]arge-scale foreign investments in the aftermath of conflict tend to focus on infrastructure, markets, extractive industries and commercial agriculture, areas where women are traditionally under-represented." U.N. S.C. *Report of the Secretary-General on Women, Peace and Security*; UN Doc. S/2015/716, 17 September, 2015, para 25.

6 This assumption "that the surest foundation for peace, both within and between states, is market democracy" (Paris, 1997) has flourished due to the perception that market democracy is not only the best of all possible forms of rule but the only possible system on offer (recalling Fukuyama's (1992) "end of history" thesis). **Peacebuilding** both follows from and is consistent with the liberal peace. It involves the use of military force in order to build the institutions of liberal peace (Boutros Boutros Ghali, 1992). Thus, international organisations, financial institutions and donor states have championed "free and fair" democratic elections but preferred controlled election outcomes generally rejecting temporary special measures such as targets or quotas for women's political representation (see Krook 2011; Hall and True 2008 on Timor Leste). They have promoted economic reconstruction of war-torn areas but also the privatization of state-assets (or socially-owned as in the case of BiH) privileging foreign investors and elites in terms of access to resources. They have encouraged simultaneous state building and state shrinking and argued for freedom of the media and for suppression of dangerous voices. They worked to strengthen civil society and state's repressive capacities in the realm of law and order. The absence of women in any capacity in the negotiation and signing of the Dayton Peace Accord ensured that gender equality and justice issues were excluded from that liberal peace and subsequent peace-building efforts (Mlinarevic, Porobic and Rees 2015).

are necessary for successful development of the economy; that privatization will lead to greater efficiency in social services and a better response of the public sector toward those living in poverty; and that holding ‘free’ elections leads to democracy and broad public participation. The direction the transformation of the BiH society took has had tremendously negative effects on the citizens of BiH across the board, but also some very specific consequences on the lives of the women.⁷

This paper examines post-conflict restructuring and recovery approaches in BiH by using feminist political economy approach. It particularly focuses on the Reform Agenda for BiH as the latest framework for the reforms in the country. It looks at political and economic processes over the years leading up to adoption of the Reform Agenda and analyses its likely outcomes on the structural gender equality and social justices in the country. It argues that a reform agenda that is not underpinned by a rigorous feminist conflict and gender analysis will contribute to entrenched structural inequalities (including gender inequalities) which will contribute to the ongoing social conflict in the country.

We argue that the implementation of the current Reform Agenda – which lacks a gender and conflict analysis - will make women and men of this country beneficiaries of low-skilled and poorly paid jobs; of a profit-driven health system which enables quality services only for those who can pay; of a trimmed public sector with less community services and social support for the care of children and the elderly; and a targeted welfare system that will force already impoverished citizens into an exploitative labour market and likely push civilian victims of war, among them many women, out of the welfare system without a proper mechanism to deal with their most immediate needs.

We also take a look at the linkages between international human rights obligations and the role international financial institutions (IFI) play in post-conflict recovery and reconstruction. In particular, we analyse economic and social rights, and the recognition that ‘observance of human rights’ is of ‘vital importance’ for securing a lasting peace, especially as regards to their indivisibility. We argue that international human rights obligations persist throughout any programme for economic reconstruction. The financial restructuring (including privatization of key public services and austerity measures) in the name of economic reform, and undertaken in accordance with International Bank for Reconstruction and Development (World Bank)⁸ or International Monetary Fund’s (IMF)⁹ conditionalities, may have an adverse effect on the enjoyment of human rights within the state (SSenyonjo, 207:109, 129). Accordingly, there is a need to determine international and national responsibility for such violations. Based on legal precedents, we argue that there is a responsibility by international institutions for violations of economic and social rights within a state. Therefore, there must be liability on behalf of both the member states and the international institutions when international economic agreements, with for example the IMF and World Bank, have a negative impact on, or are in breach of, the realization of state’s human rights obligations.

Supported by these analysis, we propose a series of concrete recommendations for governments, international organisations, international financial institutions and donors, stressing the importance of prioritising gender equality and socio-economic justice to achieve economic prosperity and sustainable and just peace in conflict-affected societies.

7 The initiative Women Organizing for Change has extensively researched the effects of both the war and post-war interventions on the lives of women.

For various reports please refer to our website <http://womenorganizingforchange.org/en/>

8 <http://www.worldbank.org/en/who-we-are/ibrd>

9 <http://www.imf.org/external/index.htm>

INFOBOX 1

There is no statistical baseline for the BiH economy because, prior to the war, it was part of SFRY. World Bank economists, however, estimate that living standards as judged by per capita GDP have yet to be restored to 1989/1990 levels before the dissolution of SFRY. From a macro-economic perspective, BiH is considered a poorly performing economy. Consumption has outpaced production output (equivalent to more than 100 per cent of GDP), imports of goods and services significantly exceed exports (56.9 per cent compared 33.9 per cent of GDP), and government spending is high (approximately 50 per cent of GDP) requiring successive IMF budgetary support loans since 1995.*

After the massive economic contraction caused by the war, economic data for BiH that begins from 1995 with the end of the war shows steady growth rates until the Global Financial Crisis (GFC) in 2007-8 with growth falling from 5.5 per cent in 2008 to -2.8 per cent in 2009. Much of the decline in macroeconomic indicators above (growth rates, exports, unemployment, even population) can be traced to the GFC – rather than to the domestic factors frequently cited by IFIs to explain BiH's under-performance, such as: the high cost and tax burden of labour, ** the bloated state of the public sector due in part to war-related social transfers, *** the rent-seeking nature of public officials constraining the business environment, the weak competitiveness of the export sector and widespread corruption (Goldstein et al, 2015). The BiH economy has not recovered since the shock of the 2008 GFC as total GDP reveals 19.1 bill USD in 2008 compared 16 bill USD in 2015.

TABLE 1: BiH economy and sources of income (source: World Bank)

BiH Data	2008	2015
GDP ¹	19.1 billion USD	16 billion USD
Remittances ¹	2.7 billion USD	1.8 billion USD
ODA ¹	465 mill USD	355 mill USD
FDI ¹	1.005 bill USD	293.5 mill USD

* See World Bank 2017 at <http://www.worldbank.org/en/country/BiHandherzegovina/overview>; World Bank 2015b; Goldstein et al 2015)

**This is a term used in the reform agenda documents by economists to refer to the social insurance contributions of employees and employers that apparently make wages too high, dissuading employers from creating new jobs. As well as tax burden, World Bank economists refer to taxes, which are biased against employment. We might also refer to these as taxes, which support the reproduction of the labor force. To quote World Bank economist, Simon Davies: "the costs of employing them are high. Wages, taxes, and social security absorb two-thirds of the value an average worker produces. In the lowest-paying sectors, the minimum wage alone absorbs two-thirds of worker output. It may seem fair that workers get to take home the fruits of their labor but this has consequences." See "What Makes Investors consider BiH and Herzegovina?" Brookings Future Development Blog, <http://www.simon-davies.co/blog/what-might-make-investors-consider-BiH-and-herzegovina>

*** Statistics show that disabled war veterans received approximately 90 per cent of all war related payments in BiH in 2009, while the civilian victim of war received the remaining 10 per cent. Furthermore, the combined budgetary spending for war related payments from that year amounted to 19,4 per cent of the overall budget of FBiH, and 10,3 per cent of Republika Srpska (for more information see Popić, Linda and Panjeta, Belma, 2010. *Compensation, transitional justice and conditional international credit in BiH*. Sarajevo.)

2 FEMINIST POLITICAL ECONOMY

Mainstream economics has a generally one-sided view of macro-economy. It exclusively considers the monetary aggregates of the productive economy rather than including the human resource aggregates of the reproductive economy such as indicators of population, health, nutrition, education and skills (Elson 1991: 42). It counts on the formal economy that can be measured through national systems and tends to discount informal, cash, remittance, care and barter based economies (Waring, 1989). On the other hand, feminist economics looks at the economy from “the perspective of those on the margins, at the intersection of gender, race and class hierarchies and exclusions” (Hojić and True, 2017).

Feminist political economy is uniquely positioned to address the interconnections between production and reproduction, formal and informal, care and remittance economies, and asymmetric power relations (with respect to ownership and control over economic and political resources). In addition, it uncovers masculinist, militarist political discourses and identity politics that uphold the current world order (Hojić and True, 2017). Feminist political economy enables us to observe the society in question from multiple perspectives and to take into account “global and local, private and public, bottom up and top down” (ibid.). Therefore, it perceives both distributional and representational effects of economic policies and crisis in ways that cannot be captured by traditional quantitative measurements and statistics (ibid.).

Complementing a human rights approach, feminist political economy argues that socio-economic inequalities lie at the basis of political inequalities including between women and men; and that these inequalities concentrate political and economic power with men. It “reveals and clarifies how gender determines or influences the social and political relationships and structures of power and the differentiated economic effects that flow from these relationships and structures” (Peterson, 2005).

The bias toward looking into formal economy and discounting the informal (inclusive of remittances) and care economies¹⁰ is not gender-neutral and indeed has gender-specific implications. As a basic rule, treating all members of the population the same when there are significant differences between groups will likely result in increasing rather than ameliorating inequalities, including gender inequalities. Consequently, in order to overcome the inequalities in a society, we must be able to understand the differentiated impact economic interventions have on the various groups. Decisive for that understanding is conducting rigorous feminist gender analysis both in relation to adoption of various policy documents and throughout the implementation period.

For example, feminist gender analysis challenges the assumption that minimal state and social conditions will drive growth. The approach taken by the IFI's, such as IMF, towards gender equality since 2013 is to add female labour force participation to the list of issues considered “macro-critical” (Bretton Woods Project 2016). While this recognition is indeed important, this approach still requires substantial adjustment as it neglects to analyse how conventional IFI policies may already impact or

¹⁰ We differentiate between formal, informal and care economy. With informal economy, we refer to the vast remittance economy, barter and bribes, as well as activities, enterprises, jobs, and workers that are not regulated or protected by the state, but are financially valued (i.e. agricultural production and informal market sales of those products, knitting and other sorts of handy craft, market activities, and informally paid care work). Care economy refers to the unpaid domestic labour, and unpaid care work, usually within family.

even undermine gender equality in range of spheres, including upon the capacity of women to engage in decent paid work.¹¹ Not only do these policies operate in unequal societal contexts, but they are also themselves premised on structural unequal power-relations. This is especially the case in a conflict-affected society such as BiH.

A feminist political economy strives towards a just, productive and sustainable economy; and in post-conflict countries we might add, an economy for peace. Various feminist studies have increased our knowledge and understanding for how exclusion of women and gender in economic analysis and subsequent policies jeopardise this aim. As Peterson points out

feminists produce more accurate analysis of intra-household labour and resource allocation; move beyond quantitative growth indicators to improve measurements of human wellbeing; and document the value of “women’s work” and its centrality to development. They investigate gender patterns in wages, migration, informalisation, subcontracted “home-working” and foreign remittances (2005).

Furthermore, women’s agency in identifying problems and negotiating solutions is deemed imperative for development (ibid.).

In BiH the formal economy appears to be the tip of the iceberg of the overall political economy. While the World Bank (2015) observes the significant gender gap in formal labour market participation in their analysis of the BiH economy, they do not ask why women’s formal economic participation might be so low in BiH? The answer lies in making visible the significant economic activity that women participate outside of the formal economy. The informal economy of bribes and barter (Bojičić-Dželić, 2013) the remittance economy (Oruč, 2013) and the unpaid care economy constitute a significant amount of economic activity not visible in GDP or IFI’s analysis. The remittance economy, for instance, is large but underestimated given personal cash transactions across borders. Moreover, the unpaid care economy, which is reliant on predominantly women’s labour, has additional burdens due to post-war issues and family and community members recovering from trauma and injury.¹² These aspects of the BiH economy are marginalized or completely absent in the analysis of the overall economy of the country. Post-conflict reconstruction is an opportunity to establish new institutional rules and norms and it is thus an opportunity to redress inequalities, including gender inequalities, which may have contributed to the causes of war/conflict and that may contribute to the construction of sustainable peace.

11 Under Structural Adjustment Programmes (SAPs) IMF and the WB provided loans to countries in economic crisis. Those loans come with requirements for implementation of certain policies and programmes aiming at restructuring the countries’ economies to be more market oriented, most notably through privatization and deregulations. Feminist analyses have shown how structural adjustment reforms impact gender equality and women’s wellbeing. Women were more vulnerable than men in terms of working conditions. They were more likely to be under-employed or to face difficulties finding employment. Women frequently lacked proper social protection and had limited access to, and control, over economic and financial resources (UNICRI, 2014).

12 See WILPF, 2015.

3 FEMINIST PERSPECTIVES ON POLITICS AND ECONOMY OF BiH LEADING UP TO THE REFORM AGENDA

The political and economic context in BiH should not be understood by starting from the vacuum created after the war 1992 – 1995. By their nature wars have a devastating effect on both individual and societal level. The war in 1992 – 1995 was destructive on the infrastructure, political and economic processes and societal fabric. What is problematic is that many post-war interventions, by multiple actors, into the BiH politics, economy and society have been made on an assumption that BiH is starting from a clean slate; and the intervention policies were presented as “neutral, technical toolkit for post-war recovery” (Jansen, 2006). On the contrary, understanding BiH today requires acknowledgment of the political and economic dynamics of BiH taking place already before and during the war, as well as seeing that the post-conflict recovery interventions, presented as “neutral”, were in fact ideologically driven processes of economic and political transformation of a society.¹³ The creators and negotiators of these intervention policies were both domestic ethno-national political elites (exclusively male) and foreign intervention agencies¹⁴ (predominantly male), which include individual donor countries, UN agencies and international financial institutions. They sometimes act and negotiate bilaterally or engage through a joint EU platform.

Significant political and economic transformations of the BiH society were happening during the war through adoption of laws that regulated the process of conversion of social ownership into state ownership (in Federation of BiH this law was adopted in 1994¹⁵, and in Republika Srpska in 1993¹⁶). The legal reforms taking places in the midst of war opened up for establishment of firm control over common properties¹⁷ by nationalist parties and warlords, without any oversight mechanisms. The expedient procedures under which these laws were adopted, and the fact that it was done during the war, completely disregarded the inherent rights of the BiH workers to participate in disposal of the property, and enabled corruption in the privatization wave that followed immediately after the war. As Jansen points out “There was a strong overlap between the most successful war-profiteers, smugglers and black marketers, and those holding positions of influence in the post-war political and economic order” (2006:189).

The Dayton Peace Agreement (DPA), that played an important role in ending the military violence, entrenched political and economic interventions and subsequent transformation of the BiH society

13 For further reading see Klein, Naomi 2007. *The Shock Doctrine*. London: Penguin Press; and Jansen, Stef, 2006. “The Privatisation of Home and Hope: Return, Reforms and the Foreign Intervention in BiH-Herzegovina”. *Dialectical Anthropology* (2006) 30:177–199.

14 While we borrow Stef Jansen’s term *foreign intervention agencies*, we broaden it to include a wider set of actors. Jansen refers to inter-governmental structures such as the Office of the High Representative (OHR), the Organisation for Security and Co-operation in Europe (OSCE), the agencies of the United Nations present in BiH, various armed forces major non-governmental organisations involved in post conflict reconstruction (see Jansen, 2006).

15 Official Gazette RBiH no. 33/94.

16 Official Gazette RS no. 4/93, 29/94, 31/94, 9/95, 19/95, 8/96, 20/98 i 83/07.

17 *Social ownership* refers to a specific form of ownership created in Socialist Federal Republic of Yugoslavia whereby the workers were perceived as owners of factories they worked in and as such they were personally contributing to factory’s development, improvement and so on (financially and in labour).

without a democratic dialogue within the country. The negotiations around the Agreement were marked by the selective inclusion of men belonging to, or supporting the ethno-national elites. Their participation in the peace negotiations further secured their control over political and economic resources through the institutionalization of ethno-national division of power. The absence of gender perspective in the peace negotiations led to an outcome unreflective of the range of views and experiences from within and across social groups. The DPA entered into force immediately upon its signing in December 1995 without allowing for any mechanisms of consultations with the citizens of BiH. This marginalization stripped the citizens of BiH of their agency. While the claim could be made that the acknowledgment and recognition of both the DPA and the Constitution included within it happened through the elections that were held in September 1996, the election took place within the parameters of the already set political, economic, ethnic, territorial and other divisions.

DPA facilitated the introduction of capitalist economic model that were embedded in a wider depoliticised discourse of reforms (Jansen, 2006). The various reforms (judiciary, police, military and so forth) introduced under the auspices of “transitioning from war to peace” made the political and economic transformations of the society invisible within a wider process of post-war reconstruction. The invisibility of the post socialist transition allowed for an *active politics of forgetting* of the lives prior to the war, but also for the efficient depolitization of society (the references to the pre-war lives became either nostalgic or demonizing) (ibid). The socially progressive things introduced under the socialist doctrine, such as class and gender equality principles addressed through policies of equal access to social benefits, such as free quality education, health care, housing and to some extent pensions, social security, etc., were the first to be revised under the new system. Simultaneously, the political behaviour and authoritarian segments and practices of the previous socialist system remained unchanged.

Understanding women’s position in today’s BiH must also be viewed through this *active politics of forgetting*. Historically speaking, the focus on the economic and social rights in BiH - as part of the former Socialist Federative Republic of Yugoslavia (SFRY) - played significant role for improvement of women’s positions in the society. Civil law reforms introduced after the Second World War formally guaranteed women rights such as the right to vote, equal property rights in marriage, universal education etc. The number of women in the workforce increased significantly, and the burden of childcare and housework was reduced due to accessible childcare services. A significant percentage of women were able to use the opportunities for educational and occupational advancement, cultural and material enrichment, and social engagement. However, the state approaches to sex/gender equality focused on shaping women’s roles, practices and identities, in both the public and the private sphere, in order to suit economic, demographic and political priorities. Women’s roles in the society were to significant extent instrumentalized for the ideological purposes. Gender equality, as regards to political power, was more at the level of *pro forma* than reality.

It was in this context of gender equality that the war started in 1992 and the effects of it on the lives of women were tremendous. The women took on the burden of feeding the families; some of them were in charge of running civilian affairs in some towns; some went to work under indiscriminate sniper fire and constant shelling; many of them were forced to leave their homes; some were detained in concentration camps and survived different elements of torture; many of them survived rape and sexual violence; some were wounded; some were killed; some suffered the losses of their children and family members; some were separated from their families; and many women were actively involved in mitigating the consequences the war left on the civilian population through providing different forms of assistance to refugees, wounded, women who survived rape and so forth. While the women struggled to maintain some levels of economic production, family and societal functions, and some of them even went to the front to fight, none of these contributions was recognized in the post-war

society. At the same time, considerable effort was invested by the male ethno-national elites in an attempt to appease war veterans, exclusively male ones, since they were considered powerful agents in any potential power contestations.

The post-war and post-socialist transitions of the BiH society affected women in multiple ways. The transformations associated with the war have been reflected through issues affecting women survivors of war crimes, generally wartime rape survivors and genocide survivors, reducing the women of BiH to mainly victims. The ethno-religious nationalism promoted by the ruling elites placed women's needs in subordinated position to ethno-religious identity and as a consequence women have been depoliticized and deprived of the distribution of power and wealth. This is even visible in how the society has been addressing the needs and requests of women survivors of war. Unlike male war veterans, who were seen as active agents, women who were exclusively understood as civilian victims of war were seen as passive. Only when they publicly mobilized and demonstrated their agency did they secure limited rights and benefits eventually granted to them.

Parallel to the transition from war to peace, the transition of the political and economic system influenced the changes in gender equality and women's position in the society. In the context of post-socialist transition everything "Western" was uncritically received and neoliberal politics were uncontestedly implemented. The unchallenged interventions resulted, among other things, in parliaments becoming almost entirely male, reduction of social services that disproportionately affected women, turning state property into private property of (mostly) men, increased class and ethnic differentiation, rise in unemployment and financial uncertainty that had greater impact on women, and made the service sector largely the province of women. Moreover, transitional interventions into gender equality ignored previously existing women's rights and were mostly intended to re-establish the classical colonial image of helpless women and barbarian men. Many focused on violence against women, not as a structural issue, but rather through prism of victimization of women and identity belonging (in this case biological sex). The obvious gender-based division of labour or asymmetrical power between women and men (both with respect to decision making and access and use of resources) was largely ignored.

While the war caused considerable destruction of industrial infrastructure, not all destruction and shutting down of factories were due to the war. Numerous factories employing significant numbers of women were, as part of the post-socialist reconstruction of the economy, either shut or have been partially "revitalized", placing women in a precarious position, via neoliberal interventions and austerity measures. Reforms of the labour laws¹⁸ resulted in poor working conditions, underpaid and insecure jobs and more often than not, violations of worker's rights to health and pension insurance.¹⁹ Women in the formal economy have mainly been left to choose between clerical job positions in the public sector (which is not necessarily well paid but provides the security with respect to tenure), underpaid and insecure service sector (supermarket chains, shops etc.) or positions in the non-governmental organizations (which potentially do not promise security of a permanent job but are better paid than

18 The access, understanding, and enjoyment of the right to work underwent considerable reconceptualization in comparison to the pre-war period. The right to work was central for the socialist public discourse while in the post-war period it was completely disregarded. The ideology of the previous political system was based on the idea of the right to work as being the most significant human right. In the post-war period, while many rights related to labour remained *pro forma* the ideological commitment to the right to work disappeared, leading to loosing oversight and punitive mechanisms.

19 Inconsistent implementation of the legislation has caused many violations of labour rights, often taking the form of exploitation. Among other things: undermined collective bargaining and safety at work-regulations, debt in paying salaries for a considerable length of time (even for several years), frequently unpaid overtime work, depriving employees of their right to annual leave, irregular pay checks accompanied by the practice of the employer taking back half of the paid salary, failing to pay benefits and thus depriving the workers of their legal right to health and pensions etc. (for more details see Vasa Prava, 2016).

clerical jobs). The majority of women that contribute to the household budget are forced to participate in the informal economy sector working under really bad working conditions, and without any access to health and/or pension insurance.

The effects of the political and economic transitions are clearly gendered. Nevertheless, the vast majority of the society has been negatively affected by the transitions. This led to massive loss of employment opportunities as “military violence and neoliberal transformation amplified each other’s effects, as economic institutions, markets and infrastructure were dismantled physically and ideologically” (Jansen, 2006:192). The post-conflict reconstruction and recovery interventions aiming at correcting the situation, such as income generating initiatives, “often relied on self-employment through micro-credit schemes, craft, agriculture, etc. – all aimed at encouraging entrepreneurialism and discouraging a sense of entitlement to employment” (ibid.). On top of all this, women are still in a vast majority of those providing invisible care economy, within households and family (this especially needs to be put in the perspective of the post-conflict context of BiH with many suffering from war-related harms).

BiH has very high rates of unemployment with just one in every four Bosnians in formal employment and poverty stands at 15 percent; and according to the World Bank estimates around half of the population live in a precarious situation. Youth unemployment stands at 63 per cent (World Bank Group, 2015). Women’s participation rate is at 31 per cent compared with 25 per cent for men, and is the lowest in the OECD.²⁰ The World Bank argues that the gender gap in labour market participation in BiH represents a 16.4 per cent loss to BiH’s GDP (Cancho and Elwan, 2015). According to International Labour Organization the informal employment in BiH comprises around one third of all employment, and is most prominent in agricultural sector (ILO, 2011).

Despite high levels of unemployment and high levels of working-age population excluded from the labour market, with subsequent high poverty levels, the social welfare system in BiH is inefficient, underdeveloped and unable to address the needs of those in need.²¹ Health and education that were once singular and universal are today decentralized and discriminatory systems with limited access and of poor quality. It is estimated that around 15 % of population is not covered with any form of health insurance and the majority of those not covered are the ones working in the informal economy (UNICEF, 2013:15). Furthermore, significant number of those that are insured through their employment have limited, or non-existent access to health because their employers do not fulfil their legal obligation to pay contributions for health benefits (ibid.). This affects women two-fold: like the rest of the population they have limited access to health but they are also additionally burdened by providing care to the family members. In addition, for those that have access to healthcare they are met with severely degraded services and many healthcare service providers are in the state of collapse.

Like the health system, the quality of the educational system in BiH has been degraded. Since the end of the war, primary and secondary education has been based on apartheid principles, as demonstrated by “two schools under one roof” system. In BiH only primary education is compulsory. Significant numbers of children from families receiving social assistance are for different reasons prevented from attending secondary education. Girls who drop out of school do it in order to assume traditional

²⁰ Young educated women, in particular, have difficulty in gaining employment taking longer than any other group to obtain a job, indicating possible sex discrimination.

²¹ For detailed analysis of the issues and problems within the welfare system please refer to Malkić and Hadžiristić, 2016. *Intersecting inequalities in social protection in BiH: results of an empirical study*. Sarajevo: Analitika. and Numanović, A., 2016. *Social assistance system in BiH: The neglected potential of active social policies*. Sarajevo: Analitika.

women's roles in care and household work (Malkić and Hadžiristić, 2016). The loss of adequate systems for childcare, coupled with patriarchal norms, prevents many women from continuing their education (ibid.). With respect to higher education there has not been any significant investment in the infrastructure, research and human resources, all while significant number of private universities have opened up around the country without any quality control.

In a situation of perpetual reforms in every segment of the society and growing sense of disillusionment, created by both domestic economic and political uncertainties and global dynamics, the ethno political elites were buying social peace by introducing "promises" in laws that were not financially implementable, and expanding the number of employments in the already vast public administration. Similarly, the peace "was ensured" by extending the social welfare system to cover categories such as war veterans and civilian victims of war.²² In parallel to this, the process of destruction of public goods, including the healthcare sector and public services (such as utility services, child care and education etc.) has continued without any obstructions. The ultimate goal of the destruction of the public service was to prepare the ground for privatization. This perpetuated corruption and minimized the space for meaningful participation and influence of the BiH citizens in the political and economic processes and widened the gap between the rich political elite (that completely lost contact with the 'ordinary' people) and the increasingly poor citizens.

This situation led to social unrests in February 2014 in BiH. The demands were oriented towards social justice, revision of privatization, ending impunity of the politicians as well as war(transition)lords, accountability of governments, and end of corruption. The action from various actors, including the foreign intervention agencies, that followed the protests, although presented as reacting to the demands, did not correspond to the demands of the protestors, neither to substance or process (meaningful participation of BiH citizens).

Reacting to the social protests Germany and the United Kingdom launched a joint initiative aiming at revitalization of the BiH's EU integration process, which was followed by EU adopting the initiative as the Union's own new BiH initiative. The content of the initiative was not underpinned by a broad, social dialogue either with the people protesting on the streets or the society at large. This new initiative pushed the ECHR's Sejdić-Finci²³ (and two other subsequent) judgement(s) aside as a gesture of goodwill to the BiH ethnonational elite²⁴ that was unable to reach a consensus on its implementation for years, thus blocking BiH's EU Accession process. The new requirement from EU on BiH were laid down in three steps – signing of a letter of intent, a written commitment to implementation of reforms framed within the language of socio-economic reforms, good governance and rule of law; the signing would then be followed by the membership application to EU; and the full implementation of the agenda would lead to Commission opinion (Weber, 2017). The tools for enforcement of these three steps were "financial conditionality" in cooperation with finance institutions (ibid.). Although the change in the 'master narrative' from focus on Constitutional reforms (through implementation of Sejdić-Finci and two subsequent ECHR judgments) to economic reforms was presented as a reaction to the social unrests, civil society and the public at large, were kept in the darkness from the process leading up to the centre piece of this new approach – namely the Reform Agenda.

22 Immediately after the war even civilian victims of war were mainly seen as being men, given that war was understood as a 'male issue'. Women became visible only when they started demanding expansion of definition of a civilian victim of war.

23 In addition to the European Court for Human Rights judgment Sejdić-Finci vs. BiH, two more judgments (Zornić vs. BiH and Pilar vs. BiH) need to be viewed in a package that demands constitutional and election law reforms that should have finally lead to abandonment of discrimination and DPA-created ethno-national political identities that keep ethno-national elite in power.

24 This process resonates DPA negotiations.

4 DECONSTRUCTING THE REFORM AGENDA

The Bosnian Reform Agenda is outlined in the BiH Government paper “The Reform Agenda for Bosnia and Herzegovina 2015-2018”.²⁵ It was agreed and endorsed by the BiH Council of Ministers (CoM), Government of Republika Srpska and Government of the Federation of Bosnia and Herzegovina in July 2015. Following the signing of the Reform Agenda document, the CoM adopted a Strategic Framework for BiH for the period 2015- 2018; Republika Srpska (RS) and the Federation of Bosnia and Herzegovina (FBiH) developed detailed Action Plans to implement the Reform Agenda (World Bank, 2015:11).

The Reform Agenda for Bosnia and Herzegovina 2015 – 2018 (RA) claims to have the following ambitious aims: to rehabilitate and modernize the BiH economy; to foster sustainable, efficient, socially just and steady economic growth; create new jobs; increase and more-appropriately target social assistance; and create a favorable and just social environment. All of this is supposed to be achieved within a period of 3 years.

Prior to the adoption of the RA, the EU Special Representative in BiH convened a major conference in April 2014, with the aim to support economic recovery in BiH. A Forum was organized in cooperation with the International Monetary Fund, the World Bank, the European Bank for Reconstruction and Development and the Embassy of the US, and resulted in a Compact for Growth and Jobs agenda.²⁶ The Government’s Reform Agenda is the result of recommendations that emerged from this Compact for Growth and Jobs agenda and is further influenced by the country analysis provided by the international finance institutions.

The RA rests on 6 main pillars to foster socio-economic and related reforms, at all governmental levels, with a focus on fiscal consolidation for macroeconomic stability. The pillars are a) Public finance, taxation and fiscal sustainability, b) Business climate and competitiveness, c) Labour market, d) social welfare and pension reform, e) Rule of law and good governance and f) Public administration reform. A driver for the effective implementation of the plan is that successful implementation is required in order to comply with the EU *aqui* for future application and negotiations towards EU accession. The implementation also relies on lending agreements with IMF, WB and the EU.

In this section, we do not go into detailed analysis with respect to suggested reforms, but provide insights into functioning of power-relations and distribution and management of resources in the context of BiH. This should have been looked at by IFIs before negotiating and agreeing on the loans in connection to the RA. These insights should be seen as guidelines for deeper analysis of post-conflict restructuring and recovery.

²⁵ This document can be downloaded at <http://europa.ba/wp-content/uploads/2015/09/Reform-Agenda-BiH.pdf>

²⁶ http://europa.ba/?page_id=547

4.1 GENERAL OVERVIEW

Even though the RA has major implications for gender equality in BiH, a gender impact analysis was absent in the decision-making process and very few (if any) analysis on the progress of the implementation of the Reform Agenda are gender sensitive. Some IFI reports that were used to inform RA, such as the World Bank Country Diagnostic for 2015, contain some analysis on gender equality.²⁷ However, none of the identified gaps from the report seem to be addressed in the Reform Agenda. Furthermore, although the IMF began piloting analysis of gender inequalities in its 2015 annual country reports for 10 countries, mainly to redress gaps in labour market participation, not even this has been done for BiH (Nissan, 2016).

In addition, the provided gender equality analysis is very limited. The reports, such as The World Bank report on BiH - *Gender disparities in endowments, access to economic opportunities and agency*, are indicative (Cancho and Elman, 2015). In analysing the impact of gender disparities in economic opportunities only the negative effects of domestic violence on women's economic participation are mentioned; not the fact that this is a country in which thousands of cases of sexual violence and other gender specific harms took place during the war,²⁸ and where there are survivors whose health, wellbeing and livelihoods are affected by this legacy. There is no mention of the BiH war and its ongoing effects on households in the IMF, World Bank or the RA documents. There is no mapping of the care economy and of female-headed households especially those headed by war widows and sexual violence survivors. Government policies and the conditions of the IMF, World Bank and European Union must be monitored against these indicators in order to assess their impacts and likely outcomes on social and gender equality, both before and during implementation.

The World Bank adopted a more comprehensive Gender strategy in 2016, encouraging gender analysis at both strategic and program level. This is however not mandatory, apart from checking gender indicators in the impact assessment framework prepared before approval of an agreement.

Research on macroeconomic effects on gender has shown adverse consequences of gender blind macroeconomic policies, especially on access to livelihood and social and economic services. If we add the absence of conflict sensitivity, the effects become even more complex and profound. Inequality is not only a constraint on achievement of human wellbeing, it translates into unequal power that affect all parts of the economy, including resource distribution and opportunities for just economic growth.

As it stands now, the goals set in BiH RA are unlikely to be achieved. The macro policy changes, while intended to bring growth and social transformation, may generate further structural inequalities and gendered power dynamics that both marginalize women and motivate men to fight. Moreover, instead of post-conflict and post-GFC recovery of BiH, the reforms, by reinforcing the inequalities, will fuel the drivers of conflict. In an increasingly militarized and globalized order, the production of a narrative of (negative) peace that does not address the structural inequalities and gendered power dynamics, will keep BiH in a perpetual state of conflict.

In a conflict-affected context, the purpose is to prevent the recurrence of violent conflict as well as

²⁷ The report identifies gender gaps in the labour market, especially large in rural areas, noting that women face many barriers to work, such as social norms with respect to the role of women in the household, lack of access to child care services and to productive inputs (including land and credit), and others (2015:9-10)

²⁸ WILPF's paper *Concept and framework for development of gender-sensitive reparations programme for civilian victims of war in BiH* discusses this the gender-specific harms at length. Can be found at <http://womenorganizingforchange.org/Development/wp-content/uploads/2016/02/Reparations-BiH.pdf>

bring economic recovery (and growth). In the past decade, ninety per cent of the civil wars occurred in countries that had already had a civil war in the last 30 years. (World Bank 2011:2). We know that conflict has a long-term adverse impact on economic development (World Bank 2011) and that conflict-affected developing states experience major lags in growth compared to other developing states.²⁹ The cost of fighting is expensive and a significant burden on the economies of conflict-affected countries. Governments and aid agencies according to some estimates spend forty times more responding to crises as they do trying to prevent them (Levenson and Madsbjerg 2016). The Institute for Economics and Peace (2015) estimates that total cost of conflict is equivalent to 13.4 per cent of global GDP.³⁰ Moreover, we know that defence spending has lesser spill over effects on the economy than spending on education and health (Global Peace Index 2016). By contrast, a high degree of positive peace operationalized as stable institutions and governance and greater social and economic equality result is associated with less grievances and more non-violent (rather than violent) movements.

Given all this evidence, rather than engaging in deep cuts in public spending after conflict to create a good global investment climate as in the BiH reform agenda, IFIs and donors should support post-conflict states to reinvest in public service and value, as well as help the country to live up to its obligation to redress its citizens for the harms they've suffered during the war. The guiding principle should be to minimize the numbers of those in need for social provisioning, not to minimize the social provisioning itself. Investments in good roads, schools, health care systems and alike, would increase people's capacities and opportunities and lead to stability and development.

Guided by the feminist political economy analysis the aim of our next section is to deconstruct the intentions and aims of the RA, and highlight some of the outcomes of the proposed reforms. The fact that the RA is set for period 2015 – 2018, means that BiH is near the end of the implementation period allowing us to analyse not just the RA document itself but also the outcomes of some of the reforms.

4.2 FISCAL CONSOLIDATION AND STRUCTURAL REFORMS

One of the main goals of the Reform Agenda is fiscal consolidation, meaning reduction in the governments deficits and depth. This implies massive cuts in public spending. While recognising that fiscal stability and sustainability is necessary in BiH, the reform plan runs counter to a paper published by three IMF economists which issues a strong warning that harsh austerity policies can do more harm than good. These economists challenge the neoliberal doctrine that has dominated IFI thinking for the past three decades. There is no evidence, they argue, that fiscal consolidation leads to growth.³¹ The reduction in public spending must be analyzed in relation to BiH obligations on progressive realization of socio-economic rights of its citizens, as the responsibility for implementation does not stop during need for economic restructuring, as will be argued later in this document (see chapter 5).

The RA claims that positive growth is conditioned by structural reforms in labour legislation, public administration, employment policy in the public sector, improvements in business climate (including

29 For every three years, a country is affected by major violence (battle deaths or excess deaths from homicides equivalent to a major war), poverty reduction lags behind by 2.7 percentage point (World Bank 2011: 5).

30 IEP (2015) argues that if global violence were to decrease by 10 per cent, it would give the world economy an additional \$1.43 trillion - more than three times more than the total earnings of some 1.1bn of the world's poorest people.

31 <https://www.theguardian.com/business/2016/may/27/austerity-policies-do-more-harm-than-good-imf-study-concludes>

restructuring of public enterprises), social welfare (including pensions), health sector, and rule of law. These priorities were discussed with the IFIs and EU in advance of its adoption and the agenda has become a basis for the negotiation of individual programs for financial and technical assistance with the WB, IMF and EU. The BiH lending agreements with IFIs come with huge financial commitments and severe austerity conditionalities. The burden of the austerity measures will be carried by the larger portions of the BiH society, and without conflict and gender analysis informing these measures, it can be expected that women will be affected more than any other group.

So, while structural reforms in these areas might lead to ‘positive growth’, the question is for whom? – war(transitional)lords and ethnonational elites or the BiH citizens that took to streets during the protests in 2014? The exclusion of wider masses looks like reminiscence of the DPA negotiation in which exclusion of the general population meant that they became the losers of the post-war transition. The ethnonational political elite (the men with the guns in the DPA negotiations) that today monopolize both ‘the private’ and ‘the public’ sphere, are again taking part in devising the ‘solution’ for BiH, while those that will be affected the most are (again) excluded from decision-making and distribution of resources, being pushed further into poverty.

The Head of the World Bank for South-East Europe, Ellen Goldstein and colleagues argue that BiH “could end poverty and achieve prosperity within one-two generations if it rebalanced its development model” (Goldstein et al 2015). The winners from the reform and from fast growth are stated to be “the poor and often voiceless masses”. These masses presumably include women, with just over 20 per cent representation in the BiH parliament, as well as victims of war. The economic logic is that women may ‘win’ because more jobs will be opened up for them due to the flexibilisation of the labour market and infrastructure projects, which, it is assumed, will increase foreign investment in BiH. At the same time, the expectation is that the privatisation of the health system will improve the quality of services. What the key actors in the RA do not recognise is that most Bosnians, and disproportionately women, will be the losers of austerity based economic reforms.

We know this from the study of the similar “roll-out” of austerity policies after the Global Financial Crisis (GFC) in other European countries (Hozic and True 2016; Fawcett Society 2011; Kantola and Lombardo 2017). In particular, the UNICRI (2014) study on the impacts of the crisis on gender equality and women’s wellbeing in European Union Mediterranean countries found that during and after the GFC women were more vulnerable than men in terms of working conditions. They were more likely to be under-employed or to face difficulties finding employment. Women frequently lacked proper social protection and had limited access to, and control, over economic and financial resources. Various feminist research has increased our knowledge about women’s and men’s lives “and how gender both structures and differentially valorises masculinised and feminised identities, desires, expectations, knowledge, skills, labour, wages, activities and experiences (Peterson, 2005; True 2012; Enloe 2013). On top of these variations BiH is also a post-conflict country with gendered experiences of violations committed against its citizens. These gendered experiences of war influence the ability of women and men to participate in political, economic and social development of the country. It is thus crucial to take into account the post-war context of BiH in ascertaining the impact of war on economic participation as well as the indirect impact of economic reforms on gender equality.

4.2.1 PUBLIC ADMINISTRATION AND EMPLOYMENT POLICY IN THE PUBLIC SECTOR

The RA presents public administration reform as “one of the key priorities in ensuring fiscal sustainability”. However, the proposed solutions that include strict controls on employment and total public-sector wages are not based on adequate analyses of the problem with oversized public administration. The fact is that BiH has had the Office of the Coordinator for the Reform of Public Administration since 2004, which points to the fact that a reform of public administration is something that BiH has been struggling with for a considerable amount of time. That also shows that this is not an issue that BiH can deal with overnight (or within the 3 years of the scope of the RA). The intention of RA in this segment needs to be understood in the light of this: Did the decision-makers think that something that did not make any progress for the last 10 years could be reformed within 3 years or is the real intent of the decision-makers to ensure additional funding through IFI loans by making ‘empty’ promises? Were those who were deciding about the content of RA, and subsequently about the IFI loans, uninformed about the context of BiH, or were they just negligent?

The underlying problem for the non-functional, massive and costly public administration is the administrative divisions/solutions created in the DPA. The outcome of the recent decision made by EU not to insist on implementation of ECHR judgment *Sejdic and Finci vs. BiH* (and subsequently ECHR judgments *Zornic vs. BiH* and *Pilav vs. BiH*) is that any potential for meaningful public administration reform was lost. Through the implementation of those three judgments, the foundation for adoption of the non-discriminatory Election law and organization of the state, in which the ethnonational elites (war and transitional profiteers) would lose political power, could have been laid. Consequently, the need for parallel institutions on 13 or 14 different levels would disappear. Additionally, the responsibility and accountability of institutions would be clearer. This would likely have created the space for addressing the issues of corruption, nepotism and the mechanism of “buying peace” and loyal voters and party members through employment in the public administration.

With respect to the cuts in public administration several issues seem to have been ignored in the RA. In addition to the fact that administration is massive (which, as already pointed above, will not be reduced unless there is new organization of the state), the fact is that wages of employees in the administration are not high (around average consumer basket in the country).³² High are the wages and benefits of the elected and appointed officials (at all levels). The additional high expenditure can be found around luxury items such as official luxury cars, police escorts and other VIP privileges used by named officials who are, given the organization of the country, also numerous. The politicians have thus far not demonstrated any intentions to lower their earnings and benefits. On the contrary, they have increased them from time to time. Cutting wages of employees in the administration will most likely create more poverty in the country. This was not addressed in the RA.

The situation is similar with respect to the wages of employees in the public sector. Furthermore, what we can see from the cantons where reforms of certain areas of the public sector have started – such as in the Canton Sarajevo – is that the ‘public sector reforms’ have been (ab)used by ethno-national elites to confront political enemies and disobedient employees. The ‘reform’ of the health sector in Canton

32 When discussing the level of wages in the public administration it is most often compared to the wages in the private sector. However, that comparison is irrelevant in a situation where the private sector maintains exploitative levels of salaries, and the living costs are way above the affordable. The cost of the consumer basket for a four-member family is 1,800 BAM, while the minimal wage is 395 BAM in RS, and 410 in FBiH. (see Statistica Agency of BiH consumer price index for 2016. Available at http://www.bhas.ba/tematskibilteni/TB_Indeks%20BiH_CPI_%202016_BS_Eng_www.pdf)

Sarajevo resulted in more than 20 medical experts, just within the last year, leaving the University Clinical Centre without adequate replacement.³³ This is negatively impacting the access to health of the citizens, since there are no medical practitioners who can provide services (such as for example pediatricians).

Although reform of the education is not visible within the RA, the adoption of new laws within this sphere are presented as part of the public-sector reforms. The new proposed Law on higher education in Canton Sarajevo enables the cantonal government to appoint and resolve deans and rectors of the public university, effectively bringing in direct political meddling in the public education. The newly adopted Law on Primary Education, under the excuses of expenditure cuts, created conditions for closure of selected schools. This will lead to an increase in number of children in one class to as much as 40. Activists, employees, and parents of the children attending the schools 'marked' for closure claim that the real reasons behind this are the locations of the schools considered to be of high real estate value. No consideration is given to the quality of education and what placing of up to 40 children in the same class would mean for the children's right to education. Furthermore, the same law provided the excuse for the curricular reform in order to secure additional political and ideological control over primary education.

Thus, just brief look into the implementation of the RA in Canton Sarajevo shows us that when actual reforms take place, under the overall RA framework, there are no functional oversight and corrective mechanisms when the intention of the proposed reforms in the RA do not correspond to the actual intentions and effect of implemented reforms. Moreover, the likely impact of the BiH governments' reform plan of massive reduction in the size of the public sector and cuts in civil service salaries and wages is that women, disproportionately employed in that sector, will lose their jobs. There may also be differential negative gender impacts of the reduction in wages. The contraction in the public sector will involve efficiency cuts in public services and increases in prices, which will likely be compensated for by women's unpaid work in the household and informal economies.

4.2.2 HEALTH SECTOR

The RA envisages a reorganisation of the health sector, with attention to be paid on 'outstanding debts' and more 'precise regulation of the network of health care institutions'. According to the RA these reforms will be supported by the World Bank. Up to May 2017, no health sector reform project has been approved between the World Bank and BiH.³⁴

As previously noted, RA is not contextualized and does not address the real causes of the serious deterioration of the health sector. While the public health care, considering the circumstances, managed to provide health care during the war, it seems less able to do so today. One of the major causes for this situation is the privatization of the health care system that started immediately after the war. This created the situation in which there was lots of space for conflicts of interest (as the laws allowed simultaneous work both in public and private clinic), and corruption (along with intentional deterioration of the health system in order to provide space for private sector). Also, after the war there

33 see <http://zurnal.info/novost/20514/otjerala-30-ljekara-zauzela-komoru-smijenila-dekanesu-ignorisala-sud>

34 The World Bank are supporting 3 major projects under its IBRD lending mechanism, in the area of strengthening the banking sector, public financial development, private sector employment, and road modernisation (see World Bank website <http://projects.worldbank.org>).

was visible lack of investments in education of medical staff that resulted in lack of certain medical professions as well as with 'up to date' educated medical personnel.

The analysis of this deterioration of the health care system should have been the basis for finding proper solutions for this sector. Because this has not been done, the proposed reforms cannot address the corruption and mismanagement of the healthcare institutions (including public healthcare insurance funds) that occurred, and is continually occurring, under the control of the ethno-national political elites and their appointees in health care institutions. Ignored in the analysis is also the intentional destruction of the public health sector. Benefitting from this are politically privileged private medical institutions. Significant numbers of medical interventions that were conducted in public health clinics 30 or more years ago are now only available in the private sector. Furthermore, it is worth investigating whether the 'outstanding debts' are caused by lack of finances, or years of mismanagement and corruptive spending of existing (potentially sufficient) resources.

So, whereas the potential intention of the reform of the health care system was to create quality health services for the citizens of BiH, up until now the reform of the health sector has led to abolishment of different segments of the public healthcare sector, such as dental care (which served as preventive protection within the system of public health), specialised institutions for health protection of school-age children, students and women and maternity care. The abolishment of these specialised units will likely lead to overburdening of the primary public healthcare sector, like general practice, that are already working under severe constraints. This situation will only benefit private clinics, which are not necessarily providing better health services than public ones. As is the case in Canton Sarajevo, the shutdown of specialized clinics will most likely lead to the buildings used by these institutions, to be sold as prime real estate locations.

Thus, it is unclear how profit-driven health system, which enables services only for those who can pay, will lead to quality health for citizens of BiH. In addition to limitations to access to health for all, women will be forced to absorb the deficiency in health services through labour in the household and care economy, further constraining women's formal labour market participation.

4.2.3 SOCIAL WELFARE

Various research and analyses over the Bosnian welfare system point to several major deficiencies of the system. The system is said to be fiscally unsustainable; most of the benefits are status-based benefits (with majority of them being related to war-veterans, and civilian victims of war); and the distribution of available resources is skewed (benefits not reaching those in most need). Furthermore, the system is considered to be discriminatory with respect to its preferential treatment of war veterans, and civilian victims of war, and their family members.³⁵ Overall expenditure on social protection makes 17,1% of the gross GDP; and around 4% of GDP are spent on social transfers that are not based on insurance (permanent social assistance, assistance to families with children, assistance to persons with non-war-related disability, assistance to civil war victims and assistance to the veteran population and similar categories). Only 17% of those social transfers are directed towards the poor and socially excluded (Numanović, 2016; Malkić and Hadžiristić, 2016).

35 See for example OSCE, 2012. *The Right to Social Protection in Bosnia and Herzegovina Concerns on Adequacy and Equality*. Sarajevo: OSCE; and Malkić, A. and Hadžiristić, T., 2016. *Intersecting inequalities in social protection in BiH: results of an empirical study*. Sarajevo: Analitika.

With respect to social welfare, the RA claims to be looking to create a modern and caring society that can take care of those who cannot care for themselves. To meet this goal the RA is requesting the governments to improve 'targeting of social assistance' so it really works for those who are in need or pay for it, and to make it fiscally sustainable. Because the RA lacks a gender-sensitive conflict analysis it makes it oblivious to the fact that without proper mechanisms for reparations of civilian victims of war it will make its intention 'to better target those in need' (which indeed needs to happen) counterproductive, especially as there are no serious analysis of the real poverty levels in BiH.

The fact that the social welfare system covers compensations for harms and violations of the international humanitarian law and international human rights law makes the right of civilian victims of war to reparations susceptible to significant changes within the BiH Reform Agenda. While it was imperative to early on after the war address the right to reparations for civilian victims of war it should never have been placed within the social welfare system to begin with. However, the fact that the reparations system has *de facto* been conflated with social welfare must now be taken into consideration, as it aggravates the understanding of the victims, and the society in general, about the relation between the general obligation of the State to ensure basic economic and social rights to all BiH citizens, and the obligation of the State to specifically redress the harms suffered during the war (because the State failed to protect its citizens). Adequate mechanisms for reparations of civilian victims of war must be put in place in order to ensure the rights and the needs of civilian victims of war are not just simply lost through the RA measures. Through previous work WILPF has discussed how a comprehensive and gender-sensitive reparations program for all civilian victims of war could look like; and how a creation of such a programme would unburden the social welfare system and contribute to the creation of a functional social welfare system for all the citizens in BiH.³⁶

4.2.4 LABOUR LEGISLATION

Reform of the labour legislation in the two entities in BiH was undertaken in 2015. Passing of the new labour laws drew much public attention, and provoked more social and political resistance than any other reform thus far. Trade unions protested the new draft law that they identified as neo-liberal, aiming to dismantle workers' rights (Weber, 2017). While the RA claims to want to strengthen the culture of collective bargaining and social dialogue the process of introducing new labour legislation has done even further damage (*ibid.*). The laws were passed despite the fact that an agreement with the social partners was not reached. The major effects of the new labour law reforms have been deregulation in the realm of employment protection legislation; flexibilisation of working conditions without a proper understanding of which aspects of the employment protection framework prevent from hiring and firing of workers (and to what extent); and side-lining of the labour dispute resolution mechanisms (for detailed account please refer to Jusic and Numanovic, 2015).

As previously noted in the document, labor rights have been consistently violated throughout the years, to the extent of exploitation: undermined collective bargaining and safety at work-regulations, debt in paying salaries for a considerable length of time (even for several years), frequently unpaid overtime work, depriving employees of their right to annual leave, irregular pay checks accompanied by the practice of the employer taking back half of the paid salary, failing to pay benefits and thus

³⁶ WILPF's paper *Concept and framework for development of gender-sensitive reparations programme for civilian victims of war in BiH* discusses this the gender-specific harms at length. Can be found at <http://womenorganizingforchange.org/Development/wp-content/uploads/2016/02/Reparations-BiH.pdf>

depriving the workers of their legal right to health and pensions etc. (Vaša Prava, 2016). As noted by Vaša Prava the new laws did not bring forth any positive changes with respect to the above described problems, they did not introduce mechanisms to discourage grey economy, and they did not include appropriate sanctions (ibid.), despite the fact that the RA stated that it is necessary to step up labour inspections and increase penalties for labour law violations and other efforts to protect workers' rights. The reforms of the labour law will lead to increase in job insecurity, more temporary, part-time, non-unionised jobs with fewer benefits, lower-wages (that for many continue to be unpaid by the employer) and deterioration in the safety at work.

The RA is focused on lowering labour costs and reducing labour protections to attract foreign investors and transnational business. Reducing the cost of labour, however, does not necessarily mean more jobs or better jobs involving skill development and good working conditions. This we know from the experiences of other countries (see Hozić and True 2016; Kantola and Lombardo 2017; UNICRI 2014).

The women of BiH will be double-burdened by this. As Peterson argues flexibilisation of working conditions must be assessed in the context of availability of support services, such as childcare and elderly care (2005). Cutting down on public sector, as proposed by the Reform Agenda, will lead to women being disproportionately affected because they are more likely to depend on public resources in support of reproductive labour and are culturally expected to fill the gap with respect to caring labour. Effects include more women working triple shifts, the feminisation of poverty, and both short and long term deterioration in female health and human capital (Peterson, 2005). Job creation plans, mainly in the private sector, will not provide sufficient opportunities or job security for women. Most of these plans are developed without a proper gender analysis or understanding of the work demographic of women.

4.2.5 BUSINESS CLIMATE AND COMPETITIVENESS

The RA bases economic growth in BiH on 'attracting investments'. In the brief analysis of the business climate in Bosnia the RA states that the playing field for investment is constrained. The 'remedy' is among other things sought in adoption of new or improvement of existing laws³⁷, examination of 'the feasibility to pursue fiscally sound public-private partnerships', increase in private sector participation in infrastructure development; restructuring, privatization/liquidation of public enterprises (with special attention to railroads in both entities and mines in FBiH; BH telecom specifically identified for partial privatization); and safeguarding financial sector stability.

The existing analyses or monitoring reports with respect to this particular area of the RA focus only on the overall business climate in BiH - whether it has improved or not. The analyses or discussions over this segment do not pay attention to how 'private-public partnership' solution will play out in BiH with the current constellation of ethno-national elites monopolising both 'the private' and 'the public' sphere; what 'improved investment climate' means for working conditions and salaries; or how the restructuring, privatization/liquidation of public enterprises, considering the track-record of similar processes thus far, will play out with respect to workers in those enterprises.

³⁷ Specifically mentioned are new Laws on Companies and FDI in FBiH, investor protection laws, legislation on bankruptcy, financial sector legislations, and a new Law on Customs Policy.

The way these ‘reforms’ are playing out in BiH, it is possible to claim that the ethno-national political elites will be among the major winners. The new laws on public and private partnership and concessions (as it can be seen in Canton Sarajevo) provide basis for an unhindered allocation of public goods to preferential or politically suitable private ventures. This will allow the ethno-national political elite to continue to extort political influence and ultimately have access to the profit from public resources and goods even if they lose their political mandate.

Furthermore, what is visible is that tourism and real estate, and consequently constructions, are seen as the most profitable industries. The ‘investments’ in these sectors most often take form of closing down of institutions that deliver public services, such as schools and healthcare, in order to provide physical space for yet another residential and business complex.

The goals defined in RA, such as increase in private sector participation in infrastructure development, in BiH translates into individual BiH citizen being burdened with additional taxes on petrol for improvement of infrastructure. Even though the additional taxes have been voted down by the BiH parliament (several times) because it was seen as something that will push the BiH citizens further into poverty (due to causal effect of the increase in prices) and potentially create more space for renewed mass protests, the EU Special Representative has provided substantial pressure on domestic politicians to adopt the taxes. This is highly unusual, as EU delegation in BiH has generally not taken publicly proactive role in lobbying local politicians for elements of individual reforms.

The reforms sought will make it easier to start businesses but there is very little or nothing offered in the RA for those that are not seeking to become private business owners, or that are reluctant to enter into risks attached to investing in private businesses. From previous experiences of the private small-scale business development in post-war BiH, significant numbers end in foreclosure and debt. Given that the consumer power is really low in the country, it is difficult to expect that private small-scale businesses in BiH will have a major impact on the economy at an individual household level. Specifically, in relation to women, they experience more difficulties in finding new opportunities and securing private sector jobs and cannot capitalize on these reforms because they have limited access to asset/collateral, credit and networks compared with men.

Although the RA does not reflect on the effects of the suggested reform on gender equality, we can guess by the ‘usual’ neoliberal logic that there is a belief that an increase in investment will lead to more jobs, which will enable greater number of women (and citizens in general) to enter the labour market. As discussed in the earlier section on *Labour market*, the flexibilisation of jobs, has had negative consequences on the overall job security which leads to the question – will these jobs, created through a ‘better investment climate’ and in combination with a downsized public sector (which includes cutting down on services such as health and education), actually lead to decent salaries that the citizens of BiH can live off? Furthermore, most frequent investments discussed are those in infrastructure and resource sectors that benefit men, such as in telecommunication, construction, transport and hydropower³⁸, but there is no mentioning of the investments in sectors and social infrastructure where women frequently work in, such as hospitals, schools, community projects.

Additionally, there is no discussion on what can the state and other actors consciously do to facilitate the participation of women in private sector jobs. The most frequent neoliberal intervention is tailoring loans for female start-ups, supported by targeted training programmes for particular groups of

³⁸ The way how the exploitation of hydropower is approached in BiH is by itself hugely problematic as it creates negative environmental impact, and consequently influences further pollution and impacts on global warming.

women and establishment of women's business networks. While this can be one of the interventions, it only addresses individual women (usually in privileged positions) that are able to break the glass ceiling (usually for detriment of other women). Thus far, the targeted loans and support to women entrepreneurship provided through various projects and programmes, that have attempted to reach women outside of the above described privileged group, have revolved around knitting, small-scale agricultural or similar businesses, not leading to any real economic empowerment. It is extremely difficult, almost impossible, for small-scale businesses, especially run by women, to compete in the globalized economic order.

4.2.6 RULE OF LAW

One of the clearly articulated demands on the streets during the protests in 2014 was addressing the corruption within justice system. This demand was partially translated in the RA's task to governments and rule of law institutions at all levels with the twofold aim to: "ensure the irreversible entrenchment of the rule of law which must be built on a foundation of concrete progress in the fight against organised crime, terrorism and corruption" and "restore overall citizens' trust in rule of law institutions by developing capacities, accountability, professionalism and integrity". However, by ignoring the context and political dynamics in the country, this aim was doomed to fail.

As is the case with many other segments of the BiH society, the rule of law institutions (and especially judiciary) have continuously been subject to reforms since immediately after the war. These reforms have demanded huge financial and human resources. The international community has been directly engaged with these reforms throughout. However, no matter almost 20 years of continuous work and huge financial investments, the system continues to be highly non-functional.

It appears that non-functionality of the system greatly stems from the DPA and complicated administrative divisions with overlapping authorities. Such system has proven to be ideal for developing and sustaining corruption and organized crime that goes up to the highest levels of the government. Leniency of the international community towards the ethno-national politicians' unjustified demands additionally contributed to this situation. For example, just as the state level prosecution and courts started addressing high level organized crime and corruption, the ethno-nationalist elites found a way to challenge it. In 2011 the ethnonational political elites in Republika Srpska announced referendum on the State Prosecution and Court. Instead of flatly rejecting this referendum because it would be in contravention with the decision of the Constitutional Court of BiH,³⁹ the international community decided to be lenient towards the senseless demands. This resulted in the Structural dialogues about the reform of judiciary, but there was never any intention from BiH politicians' side to agree and establish functional judiciary and rule of law system in BiH. The Structural Dialogues were just another compromise made by international community to the rambunctious ethno-nationalist political elite that keeps calling bluffs in order to prolong their power and control.

The Structural Dialogues were still in progress when the social unrests happened in 2014. Instead of listening to the citizens, the international community made another compromise with the ethno-nationalist elites when it decided to postpone the implementations of the ECHR judgments.⁴⁰ The prevention and obstruction of implementation of the ECHR judgments is criminal act punishable with

39 Constitutional Court of BiH, Decision U 26/01, 28 September 2001, Official Gazette of Bosnia and Herzegovina 4/02

40 ECHR judgments Sejdic and Finci vs. BiH, Zornic vs. BiH and Pilav vs. BiH

up to 5 years of imprisonment according to the Criminal Law of BiH.⁴¹ In this way, the legal uncertainty is furthered as it obviously points out to preferential treatment of those in political power position to 'ordinary' citizens. So the fact that only 37% of citizens in BiH trust judicial institutions should not be surprising.⁴²

However, the problem of the non-implementation of the mentioned ECHR decisions has created at least two additional issues regarding the judiciary system in BiH. The first one is that it prevents potentially better and more efficient reorganization of the judiciary system. The implementation of the ECHR judgments could have resulted in new, more simplified, administrative organization of the state. The second, and at this time more worrying issue, is that this provided time and space for the ethno-nationalist elites to regroup and formulate their demands for the new organization of the state. The new proposals of the ethno-nationalist elites are directly in contravention with the ECHR decisions *Zornic vs. BiH* and *Pilav vs. BiH* and only represent the way in which they are trying to prolong their political and economic power. While it is obvious that the current complicated and discriminatory administrative organization of state of BiH needs to be improved, due diligence needs to be exercised to secure democratic non-discriminatory process in which meaningful participation of all citizens is granted, rather than being an exclusive right of ethno-nationalistic elites.

The low trust in the rule of law mechanisms directly impacts lives of women. Law reflects power relationships within societies, including gender power asymmetries. As noted earlier, reforms aiming at overall improvement of the social justice must include addressing gender injustice, exploitation, or restriction that are reflective in rule of law institutions and legal frameworks. The main interest of the 'rule of law' is not necessary with the *content* of the rules. As argued by Ní Aoláin and Hamilton "the rule of law-infused transitions can arguably sustain, without contradiction persistent discrimination against women, systematic and normalized private violence, and immovable barriers to equality in the public sphere" as it does not promise any substantive social, political or cultural goal (2009:385). In the case of BiH the continuous reforms of the rule of law institutions have not made any major impact on the gender equality. This can be seen through example of weak implementation of the prevention mechanisms for stopping violence against women (including domestic violence), or through weak legal implementation of labour rights. The point is, that BiH is once again entering a phase of reforms within the rule of law without asking the question *what are possibilities for advancement of gender equality and justice?* Given the high costs of prolonged judicial processes and the fact that women are earning less money, one of the assumptions is that women would be less likely to undertake judicial processes for realization of their rights. Furthermore, even where some progress with respect to prosecution of crimes committed against women has been made, as is the case with the prosecution of wartime sexual violence, it has been far from an adequate gender competent response and has addressed only very limited scope of gender justice.

41 Criminal Code of BiH, Official Gazette of Bosnia and Herzegovina 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 47/14, 22/15 and 40/15.

42 The claim of High Judicial and Prosecutorial Council that this trust increased by 7% within a year of implementation of project should be taken with reserve given that this is just short-term indicator and only project based. Still this is the indicator of low trust. See <https://www.klix.ba/vijesti/bih/vstv-sudijama-i-tuziocima-u-bih-vjeruje-samo-34-posto-gradjana/170612068>

4.3 THE IMPACT OF THE REFORM AGENDA ON THE OVERALL SECURITY

The RA only understands security with respect to countering terrorism and organized crime, which can only play out through further militarization of the society. Interventions in public sector and investments, on the other hand are seen as something completely separate from security, and only in relation to creation of a favourable climate for businesses. We argue that any reforms presented with the aspiration to achieve overall security in the society must strive towards achieving socially just economic development and growth. Moreover, it must be implemented with a gender, conflict sensitive, and human rights oriented approach, in order to be sustainable and efficient, especially in a post-conflict society such as BiH.

Viewing public policies as investments holds the possibility of changing popular narratives concerning the role of government in society. The details of their design are critical. An adequate public investment approach should encourage more public discussion of values and trade-offs among government spending choices. Such investment approach should be gender and conflict sensitive to enable explicit consideration of how policy choices affect different groups of people. Moreover, it strengthens the relevance of a human rights approach. If better economic outcomes can be achieved while conserving government expenditures then society has the potential to allocate resources to the truly disadvantaged. We do this because it is the right thing to do – not because it makes sense on narrow investment terms. Furthermore, it also creates better conditions to sustainable peace and overall security.

The conflict in the former Yugoslavia was ignited by reactions to unequal and uneven development, the result of a global capitalist system that is perennially in crisis. These reactions played out, among others, in gendered and sexualised ways, particularly on women's body. Gendered inequalities make women vulnerable to violence and to being targeted as markers of ethnic identity. In post-conflict societies, violence against women is one of major barriers to women accessing public space, resources and civil liberties. Improvement in women's economic livelihoods and their control over resources empower women in households and communities to confront the male violence against women and to prevent its outbreak and spread (Aggarwal and Panda 2007; Grabe, Grose and Dutt. 2014; Vyas, Mbwambo and Heise 2014).

Because of the RA's narrow view on security we can expect the BiH economic reform program to exacerbate the conditions for social and gender inequalities as well as gendered violence. Economic instability and financial stress has an adverse impact on both women and men. But for men, particularly for those who have been breadwinners and whose identity is closely tied to this role due to gender divisions of labour and power, joining an armed group may have rational utility in terms of receiving rents and status within the group. To the extent that economic reform increases gender inequalities and discrimination, it affects some of the root causes of conflict, exacerbating grievances and encouraging the mobilisation of militarised masculinities while marginalising women and their capacities to prevent violence. Unemployment, for example, leads to greater stress in families and communities and in a post-conflict context where individuals have previously engaged in violence and the use of weapons that violence carries over into the household and community.⁴³ This directly impacts on women's lives and their participation in the economy and civil society.

43 See (Tilman Bruck 2016 on Angola; *Gender and Development Special Issue on Fragile, Conflict-Affected States* 2016)

The current state of BiH demands political, economic and social reforms of the country. There is a broad societal consensus on that. At the same time, there is no consensus on how those changes are to be delivered. As it stands now, the impoverished, disenfranchised and disempowered citizens of BiH, still dealing with consequences of the war, are faced with irreversible neoliberal post-conflict restructuring to detriment of their human rights, in particular social and economic rights. Rather than reducing the public sector, it would be more equitable to conduct budget trade-offs through comparing the impact of reducing budget deficits with the impact of strengthening investments in human capacities and needs on economic growth, poverty reduction and gender equality. Complementary to that, the country must deal with the consequences of the past war through comprehensive, gender sensitive reparations programmes that are included in the overall economic recovery of the country, thus laying the grounds for creation of a socially just and equal society.

Taking into account human development indicators as well as care economies provides for a more comprehensive picture of BiH's political economy than the IFI's largely macro-economic analysis. Counter-intuitively, life expectancy after the war has actually increased despite that one would think that circumstances such as war would lead to a decrease. Similarly, there is an increase in indicators for health and education levels, and other quality of life indicators.⁴⁴ How did this happen? Though we can draw on no direct evidence, we suggest that these human development outcomes have been achieved in large part due to the legacy of the public service support systems BiH inherited from SFRY, the resilience at the household level, and women's informal economic participation. Women and female-headed households have picked up the slack of the state and the IFIs through their labour in the care economy, contributing to improvements in human development outcomes despite the extraordinary human injury and needs following a major war. Human development, a broader concept than economic development, has likely occurred as much due to activity in the informal, care economy as to that in the formal market economy. However, BiH's human development, and an explanation of how it has occurred despite poor economic conditions in the formal economy, is not the focus of the current Reform Agenda or the rebalancing of the development model proposed by the World Bank and IMF (World Bank Group 2015). Given that it seems that the proposed reforms are going to negatively affect all the aforementioned structures and agencies that assisted in improvements in human development outcomes, it is to be expected that human development outcomes will deteriorate. This could further increase overall insecurity in the society.

We also need to take into account the contribution of the remittance economy on family households. Women's labour market participation is lower than men's and therefore we expect their income to be lower than men's, particularly affecting female-headed households who are more likely to be poor. However, the remittance economy appears to mitigate some of this gender-based income inequality. Based on the 2007 Household Budget Survey female-headed households receipt of remittances is higher than male-headed households. For example, 21.7% of Female-Headed Households (FHH) receive remittances compared with 14.6 per cent of all households and 12 per cent of male-headed households (Oruč 2013: 1). Poverty is more present among remittance-receiving households than in non-remittance receiving households, indicating that remittances are being sent to support poor relatives. However, incidence of poverty for female-headed households is more present among non-receiving households, indicating that remittances to female-headed households effectively alleviate poverty (where government social transfers do not).⁴⁵ After the GFC, remittances dropped dramatically (see table 1 on pg 7). We can hypothesise, therefore, that the drop in remittances have increased

44 See UNDP Human Development Report http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/BIH.pdf

45 32% of all remittances go to Female-Headed Households (compared 21.6 per cent of all households are FHH) (Oruč 2013: 11-12).

poverty within FHH and increased the strain on the care economy, further constraining women's formal labour market participation. The Reform Agenda was not informed by a gender impact analysis of decreased overseas remittances, nor could this analysis be found in the World Bank 2015 report on gender disparities in endowments, access to economic opportunities and agency. Again, as with the human development outcomes, the decrease in remittances warrants scrutiny as it represents potential conditions for increase in overall insecurity in society due to increase in poverty.

The reform plan includes many strategic issues that should be subject to public discussion when embarking on the process of economic recovery after conflict. Such a discussion could lead to the development of an alternative gender-sensitive 'investment' reform approaches to fiscal consolidation and FDI-led infrastructure development routinely carried out in countries emerging from conflict. Such an investment-focused approach could be designed to support all groups within society not just the ethno-national elites, and other interest groups. In such way, conditions for sustainable overall security of society can be created.

Various financial models can help people predict the stream of future benefits they are likely to realize over a period of years as the result of specific investment choices. Politicians are required to make investment decisions based on the collective interests of citizens. Decisions about funding the development of roads, hydropower schemes, funding schools, funding prisons and defence technology are all examples of investment decisions. Well-informed investment decisions are guided by knowledge of how much an element of government activity will cost and what benefits are likely to result from it (Weimer and Vining eds. 2009; Mintrom 2012). In a post-conflict context, the potential costs of recurring conflict need to be factored in.

In this way, the investment approach to post-conflict development can address efficiency in the use of public resources while also promoting human rights and social equity, and subsequently the overall security in the society. Such an outcome depends on the use of rigorous evidence that is able to show the broad benefits to individuals, families, business and society of investments relative to the costs. This approach requires a longer time horizon and broader scope of analysis than the conventional macro-economic analysis informing austerity policies and conventional government micro-economic, cost-benefit analysis.

5 FEMINIST PERSPECTIVES ON THE RESPONSIBILITY OF INTERNATIONAL ACTORS TO GUARANTEE ECONOMIC AND SOCIAL RIGHTS

An extended and more elaborated legal argument to this chapter can be found in Appendix of this document.

The May-June 2016 IMF budgetary support loan to BiH is conditional on the progress of the structural reforms. Generally speaking, BiH was the country with the highest number of conditionalities on an IMF loan in the world in 2013 (85 conditions) and in 2014 (92 conditions).⁴⁶ While this does not indicate whether the conditions are mandatory or agreed upon by governments it does reveal an extremely high burden of meeting the expected conditionalities and demands. Contrary to the prevailing wisdom that the IMF no longer takes a strict “structural adjustment” approach to developing or transition countries, analysis show that there has been a substantial increase in the number of conditions and policy areas under reform since the Global Financial Crisis (Kentikelenis et al, 2016:11).

The BiH Government, and other involved actors (EU and IFIs) are not only collectively responsible to ensure the reforms are aligned with progressive realization of its economic and social rights obligations, and the broader human rights framework, but also other global policy agendas such as the Sustainable Development Goals. In this section, we look at the linkages between international human rights obligations, in particular economic and social rights, the recognition that “observance of human rights” is of “vital importance” for securing a lasting peace,⁴⁷ especially as regards to their indivisibility, and the role international financial institutions (IFI) play in post-conflict recovery and reconstruction.

International human rights obligations persist throughout any programme for economic reconstruction. We argue that financial restructuring (including privatization of key public services and austerity measures) in the name of economic reform and undertaken in accordance with International Bank for Reconstruction and Development (World Bank) or International Monetary Fund’s (IMF) conditionalities may have an adverse effect on the enjoyment of human rights within the state (Ssenyonjo, 2007:109, 129) and accordingly there is a need to determine international and national responsibility for such violations.

The actors which fall to be considered, and are very relevant to the specific context of BiH are:

- the state in which the reform measures are to be implemented (BiH is not relieved of its obligations under human rights treaties or customary international law to individuals within its territory and jurisdiction);

⁴⁶ The number of conditions is used by scholars and the IMF itself to indicate the degree of conditionality. The average was 34 in 2013 (among 35 countries) and 44 in 14 (among 40 countries). 2014 is the most recent year for which data is available.

⁴⁷ The General Framework Agreement for Peace in BiH, 21 November 1995, Dayton; signed in Paris 14 December 1995, article VII.

- member states of the IFI in question that continue to be bound by the human rights obligations they have accepted when they engage in decision-making within an international organisation;
- the IFI itself and the question of the human rights obligations it may have.

Furthermore, where the adverse effect of such measures falls especially upon women, it may constitute indirect discrimination under article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

5.1 INTERNATIONAL OBLIGATIONS FOR THE GUARANTEE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

States are bound by the international human rights obligations they have accepted through becoming a party to a particular treaty or through customary international law. Their obligations continue in time of crisis, such as post-conflict or economic crisis, unless there has been formal derogation where this is provided for within a treaty,⁴⁸ in accordance with its terms. There is no provision for derogation in either the International Covenant on Economic, Social and Cultural Rights (ICESCR) or CEDAW emphasising their continued applicability during and post-conflict.⁴⁹

A brief summary of the obligations are as follows: states are to respect, protect and fulfil (promote) rights. The concept of “progressive realisation” set out in article 2 of the ICESCR “imposes an obligation to move as expeditiously and effectively as possible” towards the Covenant’s objectives and “any deliberately retrogressive measures [...] would require the most careful consideration” and “if such measures are applied, the State party has the burden of proving their necessity”.⁵⁰ This is compatible with the obligation of conduct (as distinct from the obligation of result), which is an accepted concept of international law.⁵¹ In short, coupled with the availability of temporary special measures,⁵² the State’s obligation is to move forward and there is no exception whereby any backward steps could be justified by the conflict or the need for economic stringency.

A State cannot attribute failure to meet its “minimum core obligations” to a lack of available resources unless it can “demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations”. All economic and

48 E.g., ICCPR, article 4; ECHR, article 15.

49 CEDAW, General Recommendation No. 30, on women in conflict prevention, conflict and post-conflict situations

50 Committee ESCR, General Comment No. 22, on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/22, 2 May 2016, para 38.

51 E.g. the ICJ in the Threat or Use of Nuclear Weapons stated that ‘The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result - nuclear disarmament in all its aspects - by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.’ 1996 ICJ Reports 226, para 99.

52 CEDAW, article 4, reinforced by the CESCR in General Comment, 16 with respect to equality between women and men in economic, social and cultural rights: ‘Temporary special measures may sometimes be needed in order to bring disadvantaged or marginalized persons or groups of persons to the same substantive level as others.’

social rights must be accessible, appropriate, affordable and adequate. Economic and social justice too has minimum core content in ensuring equality and freedom from want.⁵³

These are minimum core obligations on the State and ensuring compliance has crucial implications as to how and on what terms conditionalities are negotiated with international lenders.

5.1.1 INTERNATIONAL RESPONSIBILITY OF THE HOST STATE

States are bound by the international human rights treaties to which they are parties. BiH became a party to the ICESCR in 1993 and to the Optional Protocol to the Covenant in 2012. A state's obligation to respect economic and social rights means that it must take no action that intrudes upon individuals' access to their rights, for instance through negotiations with a third party such as the World Bank. This means that when dealing with the World Bank the state must remain cognisant of those obligations and the limitations they impose on its actions, for instance in accepting economic reforms that will undermine compliance with its obligations under the ICESCR.⁵⁴

The doctrinal "need" for austerity measures does not justify failure to comply with a state's human rights obligations. For example, in 2016 in its concluding observations to the UK the Committee on Economic, Social and Cultural Rights (CESCR) recorded its serious concern at "the disproportionate, adverse impact that austerity measures introduced in 2010 are having on the enjoyment of economic, social and cultural rights by disadvantaged and marginalized individuals and groups".⁵⁵

CESCR reminded the UK "of its obligations under the Covenant to use the maximum of its available resources with a view to progressively achieving the full realization of economic, social and cultural rights".⁵⁶ It also drew the state's attention to recommendations it had made in an open letter on 16 May 2012 in which it had spelled out conditions for the imposition of austerity measures: they must be "temporary, necessary, proportionate and not discriminatory, must not disproportionately affect the rights of disadvantaged and marginalized individuals and groups and respect the core content of rights".⁵⁷ The Committee recommended that the UK

review its policies and programmes [...] and conduct a comprehensive assessment of the cumulative impact of these measures on the enjoyment of economic, social and cultural rights by disadvantaged and marginalized individuals and groups, in particular women, children and persons with disabilities, that is recognized by all stakeholders.⁵⁸

53 Louise Arbour defined 'social justice' as 'minimum legal standards guaranteeing substantive equality ... in the fulfilment of the idea of freedom from want.' Louise Arbour, *Economic and Social Justice for Societies in Transition*, 40 NYU J Int'l L & P 1, FN. 10 (2007).

54 This obligation has been spelled out by the CESCR in its concluding observations to Zambia: "The Committee recommends that Zambia's obligations under the Covenant be taken into account in all aspects of its negotiations with international financial institutions, such as the International Monetary Fund and the World Bank, so as to ensure that the rights enshrined in the Covenant are duly protected, for all Zambians, and, in particular for the most disadvantaged and marginalized groups of society". CESCR, Concluding Observations, Zambia, June 2005, E/C.12/1/Add.106

55 Concluding observations of the Committee on Economic, Social and Cultural rights on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland. E/C.12/GBR/CO/6. July 2016.

56 Ibid.

57 Ibid.

58 Ibid.

The emphasis that austerity measures must not be discriminatory is also echoed by the CEDAW Committee that considers that the disproportionate impact of austerity measures on women amounts to indirect discrimination under article 1 of the Convention (discriminatory effect). For instance in its concluding observations to Slovenia it noted “with concern that austerity measures, adopted in an effort to stabilize public finances, have had a detrimental and disproportionate impact on women in many spheres of life”.⁵⁹

The Committee noted the scarcity of studies and evaluations that monitor the gender-specific effects of such measures. It acknowledged “the exceptional circumstances” that continued in Slovenia but reminded it “that, even in times of fiscal constraints and economic crisis, special efforts must be made to respect women’s human rights, sustain and expand social investment and social protection and employ a gender-sensitive approach, giving priority to women in vulnerable situations”.⁶⁰ It was especially concerned about cuts in the health budget and that women were now required themselves to cover 20 per cent of the cost of sexual and reproductive health-care services, charges that have especially negative consequences for women’s health.⁶¹

These messages, that human rights obligations must not be subordinated to economic reform or austerity programmes, are consistent with the position of the Human Rights Council that has repeatedly reaffirmed that: “that the exercise of the basic rights of the people of debtor countries to food, housing, clothing, employment, education, health services and a healthy environment cannot be subordinated to the implementation of structural adjustment policies, growth programmes and economic reforms arising from the debt”.⁶² Rights belong to the people living in the country;⁶³ if they cannot be taken away through changes in the political structure of the state, change in government or denunciation,⁶⁴ they surely cannot be lost through acceptance of an economic programme.

Whilst the primary obligation to respect, protect and fulfil human rights falls on the host state, it is recognised that when resources are severely constrained (as is inevitably the case in the immediate post conflict context), international assistance and cooperation is necessary. One of the purposes of the UN is “to achieve international cooperation in solving problems of an economic, social, cultural or humanitarian character”⁶⁵ and member states pledge “to take joint and separate action in cooperation with the Organization” for the achievement of human rights.⁶⁶ Unlike the International Covenant on

59 Combined fifth and sixth periodic reports of Slovenia, CEDAW/C/SVN/CO/5-6, 24 November 2015

60 Ibid.

61 Recommendations included a comprehensive study on the consequences of the austerity measures on women, an action plan to mitigate the adverse effects of such measures, and seeking assistance from the European Union and the International Monetary Fund. In addition, article 4 of the CEDAW Convention could be engaged for the adoption of “temporary special measures, ... as part of a necessary strategy to accelerate the achievement of substantive equality of women and men, including in the areas of employment, education and health, and to target disadvantaged and marginalized groups of women, including Roma women, rural women, women with disabilities, migrant and refugee women and older women”. (Combined fifth and sixth periodic reports of Slovenia, CEDAW/C/SVN/CO/5-6, 24 November 2015).

62 HRC Resolution 20/10, 18 July 2012, 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 (adopted 31 in favour, 11 against and 5 abstentions); Resolution 23/11, 13 June 2013, 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 (adopted 30 in favour, 15 against, 2 abstentions).

63 Human Rights Committee, General Comment No. 26: Continuity of Obligations, 8 December 1997.

64 Human rights treaties may be terminated in accordance with a termination clause. There is no such clause in the ICESCR or CEDAW. A state cannot opt out of a customary law obligation which is binding on all states.

65 UN Charter, article 1 (3).

66 UN Charter, 55 and 56.

Civil and Political Rights (ICCPR), the ICESCR makes explicit reference to the need for international cooperation and assistance in complying with its obligations under the Covenant. Thus, under article 2 of the ICESCR states undertake to take steps “individually and through international assistance and co-operation” towards realisation of the Covenant rights and article 11(1) recognises “the essential importance of international co-operation based on free consent”. Article 11 (2) also asserts that states “shall take” measures individually and “through international cooperation”.

Giving effect to these provisions raises the questions as to whether a State must accept international assistance in securing economic and social rights and whether such international assistance must be offered by other states, either bilaterally or through a regional or international financial institution. The CESCR has explained this obligation in relation to article 11 (the right to food), asserting that “states should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right”.⁶⁷

5.1. 2 HUMAN RIGHTS OBLIGATIONS OF THE MEMBER STATES OF AN IFI

Every member state of the World Bank is a party to at least one human rights treaty, the vast majority to CEDAW (189 states parties) and most to the ICESCR (164 states parties). We argue that states do not cease to be bound by their human rights obligations (the obligations to respect, protect and fulfil) when they act as members of an international institution. This basic principle requires a member state of an international organisation to respect the human rights of those situated within its territory and in some instances outside it. Donor governments (whether acting under bilateral agreements or as members of the IFIs) remain bound by their own human rights obligations and thus responsible for human rights protections; so too when they are recipients of loans and subject to the conditions imposed by the institution.

The European Court of Human Rights (ECHR) has held that where States establish international Organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these Organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. However, the ECHR judgment in the case *Richard Waite and Terry Kennedy v. Germany* asserted that it would be incompatible with the purpose and object of the Convention if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.⁶⁸ This judgment was cited by the International Law Association in support of its view that: “States cannot evade their obligations under customary law and general principles of law by creating an IO that would not be bound by the legal limits imposed upon its Member States”.⁶⁹ The Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights similarly insist that States should “ensure that their own national obligations on economic, social and cultural rights [...] are not ignored when the very same state, headed by the very same government, is representing a multilateral organization” and that IFIs should “correct their policies and practices so that they do not result in deprivation of economic, social and cultural rights”.

⁶⁷ CESCR, General Comment No. 12, para. 36.

⁶⁸ *Richard Waite and Terry Kennedy v. Germany*, ECHR, 18 February 1999, para. 67.

⁶⁹ International Law Association, Committee on the Accountability of International Organisations, Final Report, Berlin, 2004.

We argue that agreeing to conditions or requirements imposed by the World Bank as an element of financial restructuring that fails to take account of the state's obligations under the ICESCR and causes denial of those rights in a third state, constitutes a violation of those obligations.⁷⁰

State responsibility under this analysis may arise because a state has failed to “adopt measures as necessary to protect individuals from abuses of their economic, social and cultural rights by third parties, including business entities, and to provide access to effective remedies”⁷¹ or because it has failed to “monitor and regulate the conduct of non-State actors to ensure that they do not violate the equal right of men and women to enjoy economic, social and cultural rights”. The CESCR has indicated that this obligation applies where public services have been partially or fully privatized.⁷² This might be applied to BiH which has failed to protect citizens within the state from the reform policy of the IFIs. There is no legal reason why this should not also apply where other states have acted through an international financial institution to impose conditions upon a state with inevitable consequences for the enjoyment of economic and social rights within that country. However, attribution of the failure to protect upon members of the World Bank may be made problematic by the voting structures for decision-making.

5.1.3 EXTRA-TERRITORIAL OBLIGATIONS OF STATES

The human rights obligations of BiH are of course territorial with respect to its citizens. However, for member states of the IFIs the application of their continuing human rights obligations is extra-territorial: “extra-territorial obligations arise when a state exercises control, power, or authority over people or situations located outside its sovereign territory in a way that could have an impact on the enjoyment of human rights by those people or in such situations. All states are bound to these obligations in respect to human rights”.⁷³ In the case of the IFIs decisions are taken in one state (e.g. in the case of the World Bank, Washington, USA) and made operational in another state (for instance BiH).

Various bodies have emphasised the extra-territorial applicability of the human rights treaties including the International Court of Justice, the Human Rights Committee and the CESCR.

⁷⁰ In its concluding observations to Canada recommended the state to “ensure that trade and investment agreements negotiated by the State party recognize the primacy of its international human rights obligations over investors’ interests, so that the introduction of investor-State dispute settlement procedures shall not create obstacles to full compliance with the Convention”. (CEDAW, Concluding observations on the combined eighth and ninth periodic reports of Canada, CEDAW/C/CAN/CO/8-9, 18 November 2016, para 19). The CESCR has asserted that “failure of a State to take into account its international legal obligations regarding the right to food when entering into agreements with other States or with international organizations” (CESCR, General Comment No. 12, The Right to Adequate Food (Art. 11), 12 May 1999, para 19) violates the right to food under the ICESCR.

⁷¹ CESCR, Draft General Comment on State Obligations in the context of Business Activities. Similarly, with respect to water, the Committee has recommended that the “international financial institutions, notably the International Monetary Fund and the World Bank, should take into account the right to water in their lending policies, credit ... so that the enjoyment of the right to water is promoted”. (CESCR, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, para 60). Guidelines of the Office of the High Commissioner for Human Rights assert that “When determining the policies of such global actors [as the World Bank and IMF], a State must conform to its international human rights duties and must be respectful of other States’ international human rights obligations. How a State discharges its duties when determining the policies of global actors must be subject to monitoring and accountability procedures”. (OHCHR, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, HR/PUB/06/12, para 95.).

⁷² CESCR, General Recommendation No. 16

⁷³ Olivier De Schutter and others, ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights’ 34 *Human Rights Quarterly* (2012) 1084–1169.

The doctrine has been applied in an analogous situation to that of IFI loans in relation to development assistance; the CESCR expressed concern about the use to which development assistance “that in some cases [...] has reportedly been used for activities in contravention of economic, social and cultural rights in the receiving countries”.

The situation is best summarised by Clapham’s view that ‘The customary obligation will be to avoid directly violating any human right and to avoid complicity in someone else’s violation of human rights obligations – at home or abroad (Clapham, 2006).

5.1.4 INTERNATIONAL RESPONSIBILITY OF INTERNATIONAL FINANCIAL INSTITUTIONS

International organisations constitute legal persons under international law separate from their member states. This has been accepted since the *Reparations* case⁷⁴ and is affirmed by the International Law Commission’s Draft Articles on the Responsibility of International Organizations (2011): “International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties”.⁷⁵ Under the Draft Articles international organisations are responsible for the commission of an internationally wrongful act attributable to the organization.⁷⁶ An internationally wrongful act is defined as “an action or omission...attributable to that organization under international law; and which ‘constitutes a breach of an international obligation of that organization’”.⁷⁷

What are the international obligations of International Financial Institutions? Each such institution (global and regional) is bound by the terms of its own governing documents. Two documents constitute the legal framework for the World Bank: the IBRD Articles of Agreement (as amended effective 27 June 2012) and a 1947 Treaty between the Bank and the UN.⁷⁸ Under the terms of the latter the Bank is UN specialized agency status but is allowed to operate as an “independent international organization” a “distancing” of the Bank from the UN that has been described as “more like distant cousins than sisters”.⁷⁹

As an international organization the World Bank is not and cannot be a party to the international human rights treaties;⁸⁰ accordingly it can only be bound by human rights obligations if they can be construed as “general rules of international law” or customary international law, and even if that is answered in the affirmative, there is still the question whether the Bank is bound by them, or whether they are excluded by the Bank’s own constitutive instrument, the Articles of Agreement.

⁷⁴ *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 ICJ Reports 174 (Advisory Opinion).

⁷⁵ The ILC cites the Advisory Opinion of the ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*

⁷⁶ Draft Article 3.

⁷⁷ Draft Article 4.

⁷⁸ 16 UNTS 346 (1947).

⁷⁹ Ngaire Woods, ‘The Bretton Woods Institutions’ in Thomas Weiss and Sam Daws, *The Oxford Handbook on the United Nations* (OUP) 235.

⁸⁰ Only states can become parties to the majority of the UN human rights treaties including the ICCPR, ICESCR, CEDAW, CERD, CAT, CROC. However, the Convention on the Rights of Persons with Disabilities, article 43 allows for regional integration organisations to become parties.

There are strong arguments that human rights now constitute general international law. Even if the “distancing” between the Bank and the UN means that the inclusion of promotion of human rights within the purposes of the UN is not directly applicable to the World Bank, as a specialised agency of the UN, the World Bank should at the very least ensure that its actions do not detract from this enabling environment. Alston argued that acceptance of the MDGs, as goals for the whole UN system make it “appropriate to consider that they can provide a normative framework for the international financial institutions”.⁸¹ This argument can only be strengthened by the 2015 acceptance of the Sustainable Development Goals.

The Bank’s objective of poverty alleviation is entirely compatible with human security. Accordingly, its policies must be assessed from the perspective of ensuring, not denying, human security through limiting enjoyment of the rights to food, health, and social security.

However, the World Bank argues that the application of human rights is specifically excluded from the scope of their work by the terms of its own mandate. The starting point is article IV, section 10 of the Bank’s Articles of Agreement⁸² that states that: “The Bank and its officers shall not interfere in the political affairs of any member [...] Only economic considerations shall be relevant to their decisions”. Since the 1980s successive General Counsel have adopted different interpretations of this provision, seeking to “distinguish legitimate ‘economic considerations’ from inappropriate ‘political’ factors”.⁸³ In general the current prevailing view from within the Bank is that human rights involve political considerations and thus are outside the scope of the Bank’s Articles of Agreement.

Unsurprisingly commentators have taken issue with this position and have argued that the World Bank’s mandate does not exclude human rights consideration. Arguments have been put forth that human rights cannot be viewed as exclusively political and that they transcend “political affairs”, and that both the World Bank and IMF as subjects of international law have “a duty of vigilance” to ensure that their member states follow human rights treaty obligations.⁸⁴ Andrew Clapham concludes that in his opinion if the legal personality and capacity of an entity (such as an IFI) means that it has obligations under international law, then those obligations must incorporate the obligations to respect, protect and fulfil human rights.⁸⁵ He gives as an example that that obligation to protect the right to education must require the IFI not to act ‘in a way that prevents a borrowing state from fulfilling its obligations to provide such an education’ (or affordable and adequate healthcare, accommodation, or social security).

In a careful analysis Philip Alston, as special rapporteur on extreme poverty, argues that a major flaw with the Bank’s approach is the double standards it entails, allowing it to take actions with respect to for instance criminal justice but not human rights. If human rights are “political” so too must be criminal justice and law enforcement, which themselves must accord with international human rights standards. Alston points to the fact that the World Bank has recognised that its own safeguards require it “to take account of the international environmental treaty obligations of a country when undertaking

⁸¹ Cited in Clapham, 2006:149.

⁸² International Bank for Reconstruction and Development (IBRD – World Bank), Articles of Agreement, as amended effective 27 June 2012.

⁸³ Special rapporteur on extreme poverty and human rights, Philip Alston, UN Doc, A/70/274, 4 August 2015.

⁸⁴ See Clapham, 2006 and Ssenyonio in Baderin and McCorquodale, 2007.

⁸⁵ Clapham, 151. Clapham acknowledges that he goes beyond some commentators, for instance Skogly who imputes only the obligation to respect to IFIs.

an environmental assessment”.⁸⁶ It seems inconsistent to say that the same does not apply to human rights requirements. As Alston notes, “There are innumerable ways in which human rights violations have major economic impacts and the poor are disproportionately affected”.⁸⁷ He might have added to this conclusion that women are over-represented among the poor⁸⁸ and thus are disproportionately affected by the economic effects of human rights violations.

The definitional issue of human rights is also relevant. The human rights implications of the Bank’s actions tend to arise in one of two ways:⁸⁹ whether the Bank can impose human rights conditions to its lending (in effect to dictate behaviour to the recipient state) or through the impact of its actions on the civil and political rights of the population, for example financing drug detention centres where people are arbitrarily detained, or supporting projects that use forced labour.⁹⁰ But in the context of economic and social rights of the recipient state the concern is the other way around. The Bank is concerned with economic policy. It insists “that its projects contribute to the fulfilment of economic, social and cultural rights”⁹¹ and “elimination of extreme poverty [is] one of its two central goals”.⁹² Economic and social rights are about equal access to economic goods and services. It seems perverse to argue that the Bank can support an education or health project, that is in effect to promote economic and social rights (although presented as development, with the intended beneficiaries as “clients” or “service recipients”, not rights holders),⁹³ but if those same policies in fact detract from the population’s access to education or health, or indeed that they result in falling below the “core minimum obligation” with respect to such services, this can be understood as a development project that failed to deliver rather than as a violation of economic and social rights.

Care should be taken, in line with the CESCR Committee’s general comment No. 2, paragraph 9, in any structural adjustment programme to ensure that the right to food is protected.⁹⁴ This must also apply to other economic and social rights and is even more the case where it is foreseeable that the policy will have this effect, as is the case with many policies adopted in the name of austerity. The Bank cannot put up its hands and say “we don’t do human rights” as a defence to the denial of economic and social entitlements caused directly by implementation of its policies.

⁸⁶ Ibid., para 48.

⁸⁷ Special rapporteur on extreme poverty and human rights, Philip Alston, para 20

⁸⁸ “More than 1 billion people in the world today, the great majority of women are women, live in unacceptable conditions of poverty”; Being Platform for Action, 1995, para 47. In 2016, the General Assembly expressed its concern that ‘women and girls are disproportionately affected by hunger, food and nutrition insecurity and poverty, in part as a result of gender inequality and discrimination; UN GA Resolution 70/154, 7 March 2016, The Right to Food, para 6.

⁸⁹ There is also the question whether the Bank would be acting ultra vires if it advanced a human rights programme.

⁹⁰ Human Rights Watch, ‘World Bank: Human Rights All but Absent in New Policy’ 21 July 2016.

⁹¹ Special rapporteur on extreme poverty and human rights, Philip Alston, para 22.

⁹² Special rapporteur on extreme poverty and human rights, Philip Alston, para 2.

⁹³ ‘development today is said to encompass “broad areas of human development, social development, education, protection of global public goods, governance and institutions, as well as issues such as inclusion and cohesion, participation, accountability and equity’; ibid., para 16; see also para 30.

⁹⁴ CESCR, General Comment No. 12, The Right to Adequate Food (Art. 11), 12 May 1999, para 41.

5.1.5 OTHER SUPPORTING ARGUMENTS

The Responsibility to Protect is most often referred to with respect to the pillar which justifies the international community reacting with military action when a state has failed to protect its own population against war crimes, crimes against humanity, ethnic cleansing and genocide. However, the founding document, the report of the International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect*, emphasises the importance of the obligation to prevent: “to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk”.

Support for conflict prevention includes development assistance and other efforts to help address the root causes of potential conflict; or recurrence of conflict following its supposed end. The Human Rights Council’s resolution on the role of prevention in the promotion and protection of human rights⁹⁵ reaffirms the universality, indivisibility, inter-relatedness, interdependent and mutually reinforcing nature of all human rights and stresses that “States should promote supportive and enabling environments” for their prevention, including addressing factors, such as inequality and poverty that may lead to situations in which human rights violations are committed. This approach is important as too often the responsibility to protect is associated only with atrocities, typically gross denial of civil and political rights. As pointed out by Louise Arbor “large-scale past abuses” typically assumes civil and political rights violations which “obscures the need to address gross violations of economic, social, and cultural rights”. If these two principles are considered together – the need to address economic and social rights, and to act early to prevent conflict, or immediately in the “post-conflict” moment to prevent further eruption of conflict, then surely and taken to its logical conclusion this should require taking measures to ensure that the acts of IFIs do not contribute in the first instance to such violations of economic and social rights. Above all, the principle of “do no harm”⁹⁶ – to individuals, to sustainable peace – must prevail.

5.2 FINDINGS ON INTERNATIONAL RESPONSIBILITY FOR VIOLATIONS OF THE ECONOMIC AND SOCIAL RIGHTS

The detrimental impact of some economic reform programmes of the World Bank and other IFIs on the enjoyment of economic and social rights, and on gender equality,⁹⁷ has long caused concern to human rights institutions. IFIs and human rights processes operate within the framework of international law and international institutional practice. Much of the problem stems from

the historical isolation of the institutional culture of the [International Financial regime] from that of the human rights regime. The challenge, both intellectual and practical, is to end this isolation, such that the interpretation and evolution of the norms of the one regime are conducted in a manner that is consistent with the norms of the other’ (Howse and Teitel, 2007:28).

⁹⁵ HRC Resolution 33/6, 27 September 2016, *The role of prevention in the promotion and protection of human rights*.

⁹⁶ Alston, para 79.

⁹⁷ See Rees and Chinkin, ‘Exposing the Gendered Myth of Post Conflict Transition: The Transformative Power of Economic and social Rights’, 48 *New York University J Int’l L and Policy* (2016) 1211 for our understanding of this concept.

The requirement for an environment in which human rights entitlements are delivered to all people, without discrimination, supports this proposition, as do the concepts of human security, responsibility to protect (in its non-military pillar) and the SDGs, especially Goal 16 for “the promotion of peaceful and inclusive societies for sustainable development, the provision of access to justice for all, and building effective, accountable institutions at all levels”. The arguments put forth in this analysis should act as a constraint on rapid economic reform.

We argue that there is sufficient legal precedent to establish the international responsibility for violation of the economic and social rights of individuals within a state that has implemented World Bank/IMF conditions for economic reform:

- On the host state which bears the primary responsibility for the guarantee of all human rights
- On member states of the World Bank/IMF for their own actions undertaken in conformity with World Bank/IMF requirements
- On member states of the World Bank/IMF where they have failed to take measures to protect against violations of economic and social rights, both on a territorial basis and, on certain conditions, extra-territorially

We also suggest that there is sufficient legal precedent to ground an argument that:

- Member states should be responsible for violations of economic and social rights and sex and gender-based discrimination incurred through the policies and practices of the World Bank/IMF.
- That the World Bank/IMF itself should be responsible for violations of economic and social rights and sex and gender-based discrimination incurred through implementation of its demands.

We accept that much of the material is in “soft law” form (concluding observations and General Recommendations/Comments of the UN Human Rights Treaty bodies; Guidelines and Principles; GA and HRC Resolutions; Sustainable Development Goals) or used by analogy from other situations. They therefore create political or moral imperatives rather than legal obligation. However, we also argue that there are strong policy reasons for legal development in this area with respect to post-conflict transition towards a sustainable peace.

CONCLUSIONS AND RECOMMENDATIONS

In this report,

1. We argue that a reform agenda for BiH, that is not underpinned by a rigorous feminist conflict and gender analysis, will contribute to a continuum of entrenched structural and gender inequalities. We claim that failure to prioritize compliance with human rights in the macro economic reform agenda, in this case particularly economic and social rights, will contribute to the ongoing social conflict in the country and increase the risk of conflict reoccurring in BiH.
2. We argue that only a democratic and inclusive economy can adequately respond to the worsening inequalities of income and assets manifested through long standing power dynamics of gender, ethnicity, religion and social class.
3. We argue that international human rights obligations persist throughout any programme for economic reconstruction, including for international organisations such as the IFIs. We claim that financial restructuring and macroeconomic reform, may have an adverse effect on the enjoyment of human rights within the state and accordingly there is a need to determine international and national responsibility in cases of such violations.
4. We argue that socio-economic inequalities lie at the basis of political and economic inequality, and hinder social and economic development and sustainable peace and that the interrelationship of the gendered political and economic power and decision making impacts on structural norms, values and institutional practice.
5. We argue that post-conflict reconstruction is an opportunity to establish new institutional rules and norms and it is thus an opportunity to redress inequalities, including gender inequalities, which may have contributed to the causes of war/conflict and may contribute to the construction of sustainable peace.
6. We argue that rather than focusing on structural reform the international community should focus on investment in gender equality as a relief and recovery strategy for BiH and work towards creating an economy that promotes social cohesion and solidarity across BiH. In order to achieve that, the economic processes put in place must recognize and valorise women's work in the care economy; facilitate women's political agency and equal access and ownership over resources and power; as well as recognize war-related harms suffered by so many in BiH.

In the following section, we propose a series of concrete recommendations for BiH government, international or regional organisations, international finance institutions and donors. While recommendations are derived from, and focus on BiH many of them are general recommendations stressing the importance of prioritising gender equality and socio-economic justice to achieve economic prosperity and sustainable and just peace in any given conflict and post-conflict society.

FOR INTERNATIONAL/REGIONAL ORGANISATIONS, INTERNATIONAL FINANCE INSTITUTIONS AND DONORS

Developing a strategic and analytical framework

- I. Ensure an inclusive process of consultations with all relevant stakeholders in the early preparatory and analytical stages of a strategy and program process. Ensure broad meaningful consultations with civil (and wider) society, specifically including women and women civil society, in the World Bank Systematic Country Diagnostics and development of the Country Strategic Framework and the IMF “Art V” consultations and prior to approval of lending agreements.
- II. Require mandatory gender impact assessment carried out at all stages of World Bank and regional development banks and IMF processes to ensure that all actions are taken in a non-discriminatory manner and to ensure the full and meaningful participation of women; Take into account the post-war context of BiH in ascertaining the impact of war on economic participation.
- III. Ensure an analytical framework, which considers and takes into account gendered analysis that acknowledges the political and economic dynamics of BiH before and during the conflict, and challenges the prevailing neoliberal economic model as blueprint for economic recovery and growth in all contexts.
- IV. Always include gender, conflict and context expertise in the lead thematic and country teams, and ensure the inclusions of a gender and conflict analysis in the approval process of strategic documents by the Board of Directors of the IFIs.
- V. Develop a mechanism for human rights impact assessment of macroeconomic reforms before approval of any strategy or reform program. There should be a clear, systematic and independent human rights impact assessment carried out at all stages of World Bank and regional development banks and IMF processes and programmes that gives equal weight to economic, social and cultural rights as to civil and political rights and to ensure that at the minimum that implementation of such processes and programmes does no harm.

Project and lending agreements

- I. Ensure specific gender analysis on all conditionalities linked to lending agreements with IFIs or other lending institutions before approval. This means, in any situation where austerity measures are proposed by an IFI there must be a comprehensive study of the gendered impact of such measures and an action plan to mitigate the adverse consequences, especially on women and girls, by all actors;
- II. Develop positive conditionalities on budgetary support loans and private finance such as gender-related targets to facilitate and support women’s participation in education and training, employment and business.

- III. Introduce a requirement for gender sensitive reparations programme on 'positive' conditionalities to ensure that the country deals with the past war, the harms suffered by civilian victims of war, and the effects of the war on the current social and economic situation in the country.
- IV. Set targets for gender-responsive financing in line with the UN Secretary-General's recommendation that 15 % of funding be allocated to peacebuilding initiatives that address women's specific needs, advance gender equality or empower women (S/2010/466): by guaranteeing a portion of all funds dedicated to infrastructure and economic development is committed to projects that address women's specific needs and advance women's empowerment
- V. Ensure transparency of the negotiation process and approval of the public for lending agreements and aim for equal representation of women and men in the negotiation and decision-making process. This includes the setup of an information channel towards the public and feedback mechanism on the negotiation process to ensure a consultative and inclusive process.

Implementation

- I. Always include gender expertise in the project management team, and allocate resources for capacity building on a conflict sensitive gender approach to the specific area of macroeconomic reform and restructuring.
- II. Throughout project/programme implementation make use of community dialogues, feedback loops and meaningful and inclusive consultations to capture the effects of intended programmes on gender equality.
- III. Ensure meaningful consultations with civil and wider society, including women and women civil society in the implementation of economic reform programs, and make these consultations mandatory in the mid-term review process and with renewal or extension of agreements.
- IV. Ensure equal and meaningful representation of women and men in the decision-making process for any project related to economic reform and reconstruction, including large-scale infrastructure and extractive industry projects.

Monitoring and evaluation

- I. Ensure mandatory gender and human rights indicators in the monitoring and evaluation mechanisms for program and agreement reviews. Always include senior gender competent members in the lead evaluation teams, and provide adequate resources for integration of gender, conflict and context sensitive analysis.

- II. Establish an independent, effective and accessible complaints mechanism for violations of economic, social and cultural rights and sex-based and gender discrimination in the host country embedded in the framework for economic restructuring.
- III. Establish an internal human rights compliance and gender monitoring and accountability process within the IFIs, that would serve as an accountability mechanisms in relation to IFIs poverty reduction, human rights and equalities responsibilities.
- IV. Considering the fact that the RA in BiH, and subsequent loan agreements were not informed by a gender and conflict analysis, conduct frequent gender impact analysis and facilitate implementation of corrective measures in cases where adverse effects on gender and other inequalities are detected.

FOR BIH GOVERNMENTS

- I. Develop a tool that measures women's and community resilience by consolidating resilience indicators for gender security threats, and integrating baseline data on gender equality and women's empowerment with conflict, governance, livelihoods and ecosystems to identify weak capacities and develop targeted, evidence-based policy and programming responses.
- II. Introduce measures to counter gender-based division of labour or asymmetrical power relations between women and men (both with respect to decision making and access and use of resources).
- III. Increase labour market productivity through improving female labour skills, training and employment conditions as well as women's access to the labour market. These activities need to be supported by: mapping of the care-economy and female-headed households; and an understanding of how the consequences of war impact women's health and general wellbeing, and thus their ability to participate in the labour market.
- IV. Increase government expenditure on women's health services, including for maternal and child healthcare and treatment.
- V. Investment in early childhood education free of political influence and based on a curriculum that promotes a culture of tolerance and respect for all genders, religions, sexualities, abilities etc.
- VI. Conceptualize and implement a gender sensitive reparations programme for all civilian victims of war;
- VII. Compare the impact of reducing budget deficits with the impact of strengthening investments in human capacities and needs on economic growth, poverty reductions and gender equality.

- VIII. Ensure a monitoring and accountability mechanisms with respect to BiH's compliance with human rights obligations, including non-discrimination and ensuring equality, when negotiating with IFIs.
- IX. Considering the fact that the RA in BiH, and subsequent loan agreements were not informed by a gender and conflict analysis conduct frequent gender impact analysis and implement corrective measures in cases where adverse effects on gender and other inequalities are detected.
- X. Build and support capacity within civil (and wider) society to meaningfully participate and engage in macroeconomic reform processes, and provide access for mobilisation and dialogue. Support meaningful participation of women in identifying problems and negotiating solutions as this is imperative for economic and social development.
- XI. Integrate gender mainstreaming assessments and gender budgeting into financing and needs assessments, and conduct regular audits to ensure that resources on the ground benefit women and men equally.
- XII. Develop inclusive and gender competent economic planning and alternative strategies for livelihoods that enable women communities to mitigate climate change, natural disasters and displacement, as well as promoting adaptation and preparation for future changes.

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APPENDIX

The following Appendix constitutes an extended and more elaborated legal argument to chapter 5.

FEMINIST PERSPECTIVES ON THE RESPONSIBILITY OF INTERNATIONAL ACTORS TO GUARANTEE ECONOMIC AND SOCIAL RIGHTS

International human rights obligations persist throughout any programme for economic reconstruction. Financial restructuring (including privatization of key public services and austerity measures) in the name of economic reform and undertaken in accordance with International Bank for Reconstruction and Development (World Bank) or International Monetary Fund (IMF) conditionalities may have an adverse effect on the enjoyment of human rights within the state and accordingly there is a need to⁹⁸ determine international and national responsibility for such violations.

The actors which fall to be considered, and are very relevant to the specific context of BiH are:

- the state in which the reform measures are to be implemented (the host state) is not relieved of its obligations under human rights treaties or customary international law to individuals within its territory and jurisdiction.
- member states of the IFI in question continue to be bound by the human rights obligations they have accepted when they engage in decision-making within an international organisation.
- the IFI itself and the question of the human rights obligations it may have

This downplaying of economic and social rights in the DPA is consonant with the frequent practice of peace negotiations. In general, arrangements for economic development are broadly left outside the peace negotiations to be subsequently determined by international financial institutions, donors' conferences and foreign investors. They are pursued according to current neo-liberal assumptions (privatization, austerity) and not as an integral part of the peace package. This leads to an inevitable disconnect between resource allocation and economic and social rights with particular implications for women.⁹⁹

However, as we have argued elsewhere,¹⁰⁰ economic and social rights often constitute part of the root causes of conflict.¹⁰¹ Access to, and delivery of, economic and social rights are therefore essential to

98 Ssenyonjo, Manisuli, 2007. 'Non-State Actors and Economic, Social and Cultural Rights', in Mashod Baderin and Robert McCorquodale, *Economic Social and Cultural Rights in Action* (OUP, 2007) 109, 129.

99 "[L]arge-scale foreign investments in the aftermath of conflict tend to focus on infrastructure, markets, extractive industries and commercial agriculture, areas where women are traditionally under-represented." U.N. S.C. *Report of the Secretary-General on Women, Peace and Security*; UN Doc. S/2015/716, 17 September, 2015, para 25.

100 Rees, M. and Chinkin, C. 'Exposing the Gendered Myth of Post Conflict Transition: The Transformative Power of Economic and social Rights, 48 *New York University J Int'l L and Policy* (2016) 1211.

101 U.N. Office of the High Commissioner on Human Rights [OHCHR], *Transitional Justice and Economic, Social and Cultural Rights* (2014).

post-conflict transitions. Inevitably, the rights to healthcare, employment, social assistance, housing, and education are a major preoccupation in the post conflict moment. They are a precondition for access to justice, to participation and to citizenship and are highly gendered.¹⁰²

The Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) has noted that “[t]ransitional and post-conflict situations may result in increased challenges for women seeking to assert their right to access justice”.¹⁰³ It seems evident that these challenges are further increased where there is no (or only limited) access to their economic and social entitlements; survivors of and witnesses to wartime atrocities are less likely to be able participate in processes for justice whether they be court proceedings, or truth commissions, thereby sustaining perpetrator impunity. The same is true for participation in peace processes and the political, institutional, and social structures for reconstruction. Such participation would be a luxury for those lacking, for instance, adequate food, shelter, and employment. Compliance with economic and social rights, in particular CESCR articles 11 (right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing; 12 (right to the enjoyment of the highest attainable standard of healthcare) and 13 (right to education) is needed to transform transitional justice into substantive, long lasting justice.

Further where the adverse effect of such measures falls especially upon women, it may constitute indirect discrimination under article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW):

‘Discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Other articles of CEDAW that may be implicated are articles 10 (equality in education), 12 (equality in access to healthcare), article 14 (equality of women and men in rural areas, especially 14 (2) (b): health, 14 (2) (c): social security, 14 (2) (d): education, 14 (2) (h): living conditions).

The CESCR has adopted this definition of discrimination against women¹⁰⁴ and concerned itself particularly with the factors that negatively impact upon the equal enjoyment of economic, social and cultural rights by women and men.

¹⁰² Chinkin, C. ‘Gender and Economic, Social and Cultural Rights, in E Riedel, G Giacca and C Golay (eds) *Economic, Social and Cultural Rights in International Law* (OUP, 2014) 134-163.

¹⁰³ CEDAW Committee, General recommendation No 33 on women’s access to justice, CEDAW/C/GC/33, 23 July 2015. Other factors that the Committee notes that make it harder for women to access justice are also associated with conflict and post-conflict, for example trafficking of women, seeking asylum, internal displacement, statelessness, migration, women heading households, widowhood, living with HIV/AIDS. *Ibid.*, para 9.

¹⁰⁴ CESCR, General Comment No. 16, The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights).

International Obligations for the Guarantee of Economic and Social Rights

States are bound by the international human rights obligations they have accepted through becoming a party to a particular treaty or through customary international law. Their obligations continue in time of crisis, such as post-conflict or economic crisis, unless there has been formal derogation where this is provided for within a treaty,¹⁰⁵ in accordance with its terms. There is no provision for derogation in either the ICESCR or CEDAW emphasising their continued applicability during and post-conflict.¹⁰⁶

A brief summary of the obligations are as follows: states are to respect, protect and fulfil (promote) rights.¹⁰⁷ The concept of “progressive realisation” set out in article 2 of the Covenant “imposes an obligation to move as expeditiously and effectively as possible” towards the Covenant’s objectives and “any deliberately retrogressive measures [...] would require the most careful consideration” and “if such measures are applied, the State party has the burden of proving their necessity”.¹⁰⁸ This is compatible with the obligation of conduct (as distinct from the obligation of result), which is an accepted concept of international law.¹⁰⁹ In short, coupled with the availability of temporary special measures,¹¹⁰ the State’s obligation is to move forward and there is no exception whereby any backward steps could be justified by the conflict or the need for economic stringency.

A State cannot attribute failure to meet its “minimum core obligations” to a lack of available resources unless it can “demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations”. All economic and social rights must be accessible, appropriate, affordable and adequate. Economic and social justice too has minimum core content in ensuring equality and freedom from want.¹¹¹

These are minimum core obligations on the State and ensuring compliance has crucial implications as to how and on what terms conditionalities are negotiated with international lenders.

¹⁰⁵ E.g., ICCPR, article 4; ECHR, article 15.

¹⁰⁶ CEDAW, General Recommendation No. 30, on women in conflict prevention, conflict and post-conflict situations

¹⁰⁷ CEDAW, General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 2010 also asserts the layered typology of states’ obligations: “Under article 2, States parties must address all aspects of their legal obligations under the Convention to respect, protect and fulfil women’s right to non-discrimination and to the enjoyment of equality.) The Human Rights Council has engaged the same language; e.g., HRC Resolution 33/7, Unaccompanied migrant children and adolescents and human rights: ‘Encourages States to take into account the principle of the best interests of the child as a primary consideration and to promote, protect and respect the rights of children’.

¹⁰⁸ Committee ESCR, General Comment No. 22, on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/22, 2 May 2016, para 38.

¹⁰⁹ E.g. the ICJ in the Threat or Use of Nuclear Weapons stated that “The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result - nuclear disarmament in all its aspects - by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith”. 1996 ICJ Reports 226, para 99.

¹¹⁰ CEDAW, article 4, reinforced by the CESCR in General Comment, 16 with respect to equality between women and men in economic, social and cultural rights: “Temporary special measures may sometimes be needed in order to bring disadvantaged or marginalized persons or groups of persons to the same substantive level as others”.

¹¹¹ Louise Arbour defined ‘social justice’ as ‘minimum legal standards guaranteeing substantive equality ... in the fulfilment of the idea of freedom from want.’ Louise Arbour, *Economic and Social Justice for Societies in Transition*, 40 NYU J Int’l L & P 1, FN. 10 (2007).

International Responsibility of the Host State

States are bound by the international human rights treaties to which they are parties. Bosnia and Herzegovina became a party to the ICESCR in 1993 and to the Optional Protocol to the Covenant in 2012. A state's obligation to respect economic and social rights means that it must take no action that intrudes upon individuals' access to their rights, for instance through negotiations with a third party such as the World Bank. This means that when dealing with the World Bank the state must remain cognisant of those obligations and the limitations they impose on its actions, for instance in accepting economic reforms that will undermine compliance with its obligations under the ICESCR.

This obligation has been spelled out by the CESCR in its concluding observations to Zambia:

The Committee recommends that Zambia's obligations under the Covenant be taken into account in all aspects of its negotiations with international financial institutions, such as the International Monetary Fund and the World Bank, so as to ensure that the rights enshrined in the Covenant are duly protected, for all Zambians, and, in particular for the most disadvantaged and marginalized groups of society.¹¹²

This was not the first time that the Committee had made such a point; it referred to its own statement to the Third Ministerial Conference of the World Trade Organization:¹¹³

It is the Committee's view that WTO contributes significantly to and is part of the process of global governance reform. This reform must be driven by a concern for the individual and not by purely macroeconomic considerations alone. Human rights norms must shape the process of international economic policy formulation so that the benefits for human development of the evolving international trading regime will be shared equitably by all, in particular the most vulnerable sectors.

6. The Committee recognizes the wealth-generating potential of trade liberalization, but it is also aware that liberalization in trade, investment and finance does not necessarily create and lead to a favourable environment for the realization of economic, social and cultural rights. Trade liberalization must be understood as a means, not an end. The end which trade liberalization should serve is the objective of human well-being to which the international human rights instruments give legal expression. In this regard, the Committee wishes to remind WTO members of the central and fundamental nature of human rights obligations. At the World Conference on Human Rights held in Vienna in June 1993, 171 States declared that the promotion and protection of human rights is the first responsibility of Governments.

7. In its work, the Committee will continue to monitor the impact of international economic policies on the progressive realization by States parties of their obligations under the Covenant, as well as the extent to which States contribute to formulating international and national economic policies that disregard and/or impact negatively on economic, social and cultural rights.

¹¹² CESCR, *Concluding Observations, Zambia*, June 2005, E/C.12/1/Add.106 23 June 2005.

¹¹³ Third Ministerial Conference of the World Trade Organization adopted at its twenty-first session in 1999; E/2000/22-E/C.12/1999/11, annex VII.

8. The Committee urges WTO members to ensure that their international human rights obligations are considered as a matter of priority in their negotiations which will be an important testing ground for the commitment of States to the full range of their international obligations. The Committee would welcome the opportunity to collaborate with WTO on these matters and thereby be active partners towards the realization of all the rights set forth in the International Covenant on Economic, Social and Cultural Rights.

Nor does the doctrinal “need” for austerity measures justify failure to comply with a state’s human rights obligations. In 2016 in its concluding observations to the UK the CESCR recorded its serious concern at “the disproportionate, adverse impact that austerity measures introduced in 2010 are having on the enjoyment of economic, social and cultural rights by disadvantaged and marginalized individuals and groups”.

It reminded the UK “of its obligations under the Covenant to use the maximum of its available resources with a view to progressively achieving the full realization of economic, social and cultural rights”. It also drew the state’s attention to recommendations it had made in an open letter on 16 May 2012 in which it had spelled out conditions for the imposition of austerity measures: they must be “temporary, necessary, proportionate and not discriminatory, must not disproportionately affect the rights of disadvantaged and marginalized individuals and groups and respect the core content of rights”. The Committee recommended to the UK to

review its policies and programmes ... and conduct a comprehensive assessment of the cumulative impact of these measures on the enjoyment of economic, social and cultural rights by disadvantaged and marginalized individuals and groups, in particular women, children and persons with disabilities, that is recognized by all stakeholders.

The emphasis that austerity measures must not be discriminatory is echoed by the CEDAW Committee that considers that the disproportionate impact of austerity measures on women amounts to indirect discrimination under article 1 of the Convention (discriminatory effect).

For instance, in its concluding observations to Slovenia it noted “with concern that austerity measures, adopted in an effort to stabilize public finances, have had a detrimental and disproportionate impact on women in many spheres of life”. The Committee noted the scarcity of studies and evaluations that monitor the gender-specific effects of such measures. It acknowledged “the exceptional circumstances” that continued in Slovenia but reminded it “that, even in times of fiscal constraints and economic crisis, special efforts must be made to respect women’s human rights, sustain and expand social investment and social protection and employ a gender-sensitive approach, giving priority to women in vulnerable situations”.¹¹⁴ It was especially concerned about cuts in the health budget and that women were now required themselves to cover 20 per cent of the cost of sexual and reproductive health-care services, charges that have especially “negative consequences for women’s health, in particular among adolescent girls and women from disadvantaged and marginalized groups, such as women living in poverty, asylum-seeking and refugee women, Roma women and women who are victims of violence”. Recommendations included a comprehensive study on the consequences of the austerity measures on women, an action plan to mitigate the adverse effects of such measures, and seeking assistance from the European Union and the International Monetary Fund.

¹¹⁴ Combined fifth and sixth periodic reports of Slovenia, CEDAW/C/SVN/CO/5-6, 24 November 2015.

In addition, article 4 of the CEDAW Convention could be engaged for the adoption of

temporary special measures, ... as part of a necessary strategy to accelerate the achievement of substantive equality of women and men, including in the areas of employment, education and health, and to target disadvantaged and marginalized groups of women, including Roma women, rural women, women with disabilities, migrant and refugee women and older women.

There is Jurisprudence from the ECHRts in support of this argument; it has emphasized the state's international obligations to guarantee certain material conditions including accommodation, food and clothing; finding a violation of article 3 of the Convention prohibiting inhuman or degrading treatment¹¹⁵ when such provision was not made.

These messages, that human rights obligations must not be subordinated to economic reform or austerity programmes, are consistent with the position of the Human Rights Council that has repeatedly reaffirmed that: "that the exercise of the basic rights of the people of debtor countries to food, housing, clothing, employment, education, health services and a healthy environment cannot be subordinated to the implementation of structural adjustment policies, growth programmes and economic reforms arising from the debt".¹¹⁶ Rights belong to the people living in the country;¹¹⁷ if they cannot be taken away through changes in the political structure of the state, change in government or denunciation,¹¹⁸ they surely cannot be lost through acceptance of an economic programme.

The authors of the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, a statement by experts "based on over a decade of legal research",¹¹⁹ point to the Accra Agenda for Action, which asserts that "Developing countries and donors will ensure that their respective development policies and programmes are designed and implemented in ways consistent with their agreed international commitments on gender equality, human rights, disability and environmental sustainability".

Resolutions of the Human Rights Council are at best a form of "soft law", as are the statements and concluding observations of the human rights treaty bodies and Principles adopted by international "experts". But it is argued that the reiteration of shared understandings by these various bodies is indicative of agreement and practice for the interpretation of treaties in accordance with the Vienna Convention on the Law of Treaties, article 31 (3) and thus have legal weight as interpretive statements of states' obligations under the ICESCR. The authority of the Committees has been recognised by

¹¹⁵ See also Human Rights Advisory Panel, *N.M. and Others v UNMIK*, Case No. 26/08, 26 February 2016 (violation of economic and social rights of Roma people in the aftermath of conflict in Kosovo).

¹¹⁶ HRC Resolution 20/10, 18 July 2012, *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* (adopted 31 in favor, 11 against and 5 abstentions); Resolution 23/11, 13 June 2013, *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* (adopted 30 in favor, 15 against, 2 abstentions).

¹¹⁷ Human Rights Committee, General Comment No. 26: Continuity of Obligations, 8 December 1997.

¹¹⁸ Human rights treaties may be terminated in accordance with a termination clause. There is no such clause in the ICESCR or CEDAW. A state cannot opt out of a customary law obligation which is binding on all states.

¹¹⁹ Olivier De Schutter and others, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights' 34 *Human Rights Quarterly* (2012) 1084–1169.

the ICJ, which has stated that the opinion of the Human Rights Committee – “an independent body established specifically to supervise the application of that treaty” – should be given “great weight”.¹²⁰

Whilst the primary obligation to respect, protect and fulfil human rights falls on the host state, it is recognised that when resources are severely constrained (as is inevitably the case in the immediate post conflict context), international assistance and cooperation is necessary. One of the purposes of the UN is “to achieve international cooperation in solving problems of an economic, social, cultural or humanitarian character”¹²¹ and member states pledge “to take joint and separate action in cooperation with the Organization” for the achievement of human rights.¹²² Unlike the ICCPR, the ICESCR makes explicit reference to the need for international cooperation and assistance in complying with its obligations under the Covenant. Thus, under article 2 of the ICESCR states undertake to take steps “individually and through international assistance and co-operation” towards realisation of the Covenant rights and article 11(1) recognises “the essential importance of international co-operation based on free consent.” Article 11 (2) also asserts that states “shall take” measures individually and “through international cooperation.”

Giving effect to these provisions raises the questions as to whether a State must accept international assistance in securing economic and social rights and whether such international assistance must be offered by other states, either bilaterally or through a regional or international financial institution. The CESCR has explained this obligation in relation to article 11 (the right to food), asserting that “states should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right”.¹²³

As article 12 (highest attainable standard of health) makes no specific mention of international cooperation the similar assertion with respect to the achievement of reproductive and sexual health is more surprising and suggests the Committee’s commitment to requiring compliance with Covenant rights through international assistance where necessary.¹²⁴ An analogy might be drawn with the International Law Commission’s approach to assistance following a natural disaster. The Draft Articles adopted in 2016 state that “To the extent that a disaster manifestly exceeds its national response capacity, the affected State has the duty to seek assistance from, as appropriate, other States, the United Nations, and other potential assisting actors.”¹²⁵ Other states and entities “may offer assistance to the affected State” that shall not be arbitrarily withheld.

¹²⁰ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* [2010] ICJ Rep para 66.

¹²¹ UN Charter, article 1 (3).

¹²² UN Charter, 55 and 56.

¹²³ CESCR, General Comment No. 12, para 36.

¹²⁴ Committee ESCR, General Comment No. 22, on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/22, 2 May 2016, para 37: ‘A State party has the duty to establish that it has obtained the maximum available resources, including those made available through international assistance and cooperation, with a view to complying with its obligations under the Covenant.’

¹²⁵ The ILC, Draft articles on the protection of persons in the event of disasters, adopted by the ILC at its sixty-eighth session, 2016.

Human Rights Obligations of the Member States of an IFI

Every member state of the World Bank is a party to at least one human rights treaty, the vast majority to CEDAW (189 states parties) and most to the ICESCR (164 states parties). We argue that states do not cease to be bound by their human rights obligations (the obligations to respect, protect and fulfil) when they act as members of an international institution. This basic principle requires a member state of an international organisation to respect the human rights of those situated within its territory and in some instances outside it. Donor governments (whether acting under bilateral agreements or as members of the IFIs) remain bound by their own human rights obligations and thus responsible for human rights protections; so too when they are recipients of loans and subject to the conditions imposed by the institution.

Responsibility for violation may be incurred either through direct attribution of the wrongful acts to the state (violation of the obligation to respect) or attribution through the state's failure to exercise due diligence to prevent, or protect individuals from the wrongful act (obligation to protect).¹²⁶ Support for these propositions is found in the work of the human rights treaty bodies and, by analogy, the case law of the ECtHR that have made it clear that acting in accordance with the demands of an international organisation does not relieve the state of responsibility for its own actions.

The European Court of Human Rights has held that "where States establish international Organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these Organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution".¹²⁷ This judgment was cited by the International Law Association in support of its view that: "States cannot evade their obligations under customary law and general principles of law by creating an IO that would not be bound by the legal limits imposed upon its Member States."¹²⁸ The Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights similarly insist that States should "ensure that their own national obligations on economic, social and cultural rights ... are not ignored when the very same state, headed by the very same government, is representing a multilateral organization" and that IFIs should "correct their policies and practices so that they do not result in deprivation of economic, social and cultural rights."

The CESCR has spelled out its opinion that the provisions of the ICESCR "as well as the Universal Declaration of Human Rights, cannot be considered to be inoperative, or in any way inapplicable, solely because a decision has been taken that considerations of international peace and security warrant the imposition of sanctions."¹²⁹

The European Court of Human Rights has similarly held that a UN member state that is also a party to the ECHR remains fully responsible for its obligations under the ECHR when implementing targeted

¹²⁶ ILC, *Articles on responsibility of States for Wrongful Acts*.

¹²⁷ *Richard Waite and Terry Kennedy v. Germany*, ECHR, 18 February 1999, para. 67.

¹²⁸ International Law Association, *Committee on the Accountability of International Organisations*, Final Report, Berlin, 2004.

¹²⁹ CESCR, *General Comment No. 8*, 12 December 1997, E/C.12/1997/8, para. 7.

sanctions imposed by the Security Council under UN Charter article 41 by freezing the assets of a blacklisted person. The Grand Chamber of the Court has held that

when creating new international obligations, States are assumed not to derogate from their previous obligations. Where a number of apparently contradictory instruments are simultaneously applicable, international case-law and academic opinion endeavour to construe them in such a way as to coordinate their effects and avoid any opposition between them. ... Consequently, there must be a presumption that the Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights (ibid.).¹³⁰

The ECtHR has emphasised that acting within, or in accordance with, a decision of an international organisation cannot justify violations of a state's obligations under human rights law. Similarly, the ICESCR cannot be considered inoperative because economic conditions warrant the imposition of austerity measures or a particular understanding of economic reform.

As well as remaining responsible for their own actions, the obligation to respect human rights also means that states are responsible for violations if the acts or omissions of a third party can be attributed to them, for instance because a non-state party is in fact acting on that state party's instructions or is under its control or direction in carrying out the particular conduct at issue.¹³¹

It would appear from the above that the obligations are clear, but there is a "corporate veil" which has to be lifted: It is the member states who are the decision and policy-makers of international organisations but the actions are actually taken by an organisation with a separate international legal personality, hence the wrongful act will not necessarily be attributed to the member states.¹³²

There are complicating factors, in particular the membership structure of the World Bank; First voting is weighted under a formula worked out according to the size and openness of each state's economy. Second, decisions are made by a Board of Directors "who represent member countries but are paid by the institution and directed to work as members of the organization."¹³³ Third, disagreements among donor states "about goals as well as policies"¹³⁴ make attribution problematic.

Questions abound: can there be attribution to a state that disagreed with certain policies but was outvoted; can a state with considerable voting power be singled out for attribution; and how does any such proposition conform to the separate international legal personality of the organisation?

¹³⁰ *Al-Dulimi and Montana Management Inc. vs. Switzerland*, Application no. 5809/08, ECtHR, GC, 21 June 2010 (violation ECHR, article 6 on the right of access to a court).

¹³¹ CESCR, Draft General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, 17 October 2016.

¹³² *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* ECtHR, GC (States not responsible for the acts of their troops acting in accordance with Security Council resolution 1244, 1999 establishing a military presence in Kosovo). The case was distinguished in *Al-Jedda v UK* where the UK was held responsible for the actions of its forces in Iraq because the Security Council did not have effective authority or control over these forces.)

¹³³ Ngaire Woods, 'The Bretton Woods Institutions' in Thomas Weiss and Sam Daws, *The Oxford Handbook on the United Nations* (OUP) 234.

¹³⁴ *Ibid.*, at 241.

The argument may be stronger, however, under the international human rights law second tier obligation to protect that requires states to safeguard against violations committed by third parties including non-state bodies, an obligation that should not be negated by membership in an international organisation. This principle could operate to ensure that vulnerable persons are not deprived of their economic and social rights through policies adopted in multilateral institutions. The CEDAW Committee has already spelled this out with respect to private actors,¹³⁵ and how much more compelling is the argument when it is the State itself, through its membership of an international organisation which is failing to protect rights.

In its concluding observations to Canada recommended the state to “ensure that trade and investment agreements negotiated by the State party recognize the primacy of its international human rights obligations over investors” interests, so that the introduction of investor-State dispute settlement procedures shall not create obstacles to full compliance with the Convention.”¹³⁶ The CESCR has asserted that “failure of a State to take into account its international legal obligations regarding the right to food when entering into agreements with other States or with international organizations”¹³⁷ violates the right to food under the ICESCR.

Similarly, with respect to water, the Committee has recommended that the “international financial institutions, notably the International Monetary Fund and the World Bank, should take into account the right to water in their lending policies, credit ... so that the enjoyment of the right to water is promoted.”¹³⁸ Guidelines of the Office of the High Commissioner for Human Rights assert that “When determining the policies of such global actors [as the World Bank and IMF], a State must conform to its international human rights duties and must be respectful of other States’ international human rights obligations. How a State discharges its duties when determining the policies of global actors must be subject to monitoring and accountability procedures.”¹³⁹

Accordingly, we argue that agreeing to conditions or requirements imposed by the World Bank as an element of financial restructuring that fails to take account of the state’s obligations under the ICESCR and causes denial of those rights in a third state, constitutes a violation of those obligations.

State responsibility under this analysis may arise because a state has failed to “adopt measures as necessary to protect individuals from abuses of their economic, social and cultural rights by third parties, including business entities, and to provide access to effective remedies”¹⁴⁰ or because it has failed to “monitor and regulate the conduct of non-State actors to ensure that they do not violate the equal right of men and women to enjoy economic, social and cultural rights.” The CESCR has indicated that this obligation applies where public services have been partially or fully privatized.”¹⁴¹ This might

135 CEDAW GR No. 28 (CHECK)

136 CEDAW, Concluding observations on the combined eighth and ninth periodic reports of Canada, CEDAW/C/CAN/CO/8-9, 18 November 2016, para 19.

137 CESCR, General Comment No. 12, The Right to Adequate Food (Art. 11), 12 May 1999, para 19.

138 CESCR, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, para 60.

139 OHCHR, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, HR/PUB/06/12, para 95.

140 CESCR, Draft General Comment on State Obligations in the context of Business Activities.

141 CESCR, General Recommendation No. 16

be applied to Bosnia which has failed to protect citizens within the state from the reform policy of the World Bank. There is no legal reason why this should not also apply where other states have acted through an international financial institution to impose conditions upon a state with inevitable consequences for the enjoyment of economic and social rights within that country. However, attribution of the failure to protect upon members of the World Bank may be made problematic by the voting structures for decision-making, as discussed above.

Extra-territorial Obligations of States

The ECtHR in *Al-Dulimi* was considering actions of Switzerland with respect to an individual within Switzerland, the classic territorial application of human rights law.

The human rights obligations of Bosnia-Herzegovina are of course territorial with respect to its citizens. However for member states of the IFIs the application of their continuing human rights obligations is extra-territorial: “extra-territorial obligations arise when a state exercises control, power, or authority over people or situations located outside its sovereign territory in a way that could have an impact on the enjoyment of human rights by those people or in such situations. All states are bound to these obligations in respect to human rights.”¹⁴² In the case of the IFIs decisions are taken in one state (e.g. in the case of the World Bank, Washington, USA) and made operational in another state (for instance Bosnia).

Various bodies have emphasised the extra-territorial applicability of the human rights treaties including the International Court of Justice, the Human Rights Committee and the CESCR.

Where there is a jurisdictional clause in the Convention, extra-territorial application rests upon its interpretation as in the obligation under the ECHR, article 1 on all states to “secure”¹⁴³ the Convention rights. This may be contested as in the case of the ICCPR, article 2 which requires states to “respect and ensure to all individuals within its territory and subject to its jurisdiction” the Covenant rights. However, in the absence of any jurisdictional provision in the Convention the CEDAW Committee has clarified that:

The obligations of States parties apply, however, without discrimination both to citizens and non-citizens, including refugees, asylum-seekers, migrant workers and stateless persons, within their territory or effective control, even if not situated within the territory. States parties are responsible for all their actions affecting human rights, regardless of whether the affected persons are in their territory.¹⁴⁴

The Committee repeated this principle of extra-territoriality in its General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations: “the obligations of States parties also apply extra-territorially to persons within their effective control, even if not situated within the territory” (paragraph 8).

¹⁴² Olivier De Schutter and others, ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights’ 34 *Human Rights Quarterly* (2012) 1084–1169.

¹⁴³ ECHR, article 1.

¹⁴⁴ CEDAW, General Recommendation No. 28.

In most cases, such extra-territorial application is with respect to acts committed on aircraft or vessels, or the acts of state agents acting abroad where they exercise effective agency over a person, or control over the territory as in for instance military occupation or action. The rendition cases before the ECtHR raise another scenario, that of decisions taken in one country with respect to the transport of a person to another country where they are subject to torture and inhuman treatment. The rendering state has been held responsible for that ensuing torture where it knew or should have known of the risk of such treatment.¹⁴⁵ The extra-territorial applicability of the ICESCR was expressly upheld by the International Court of Justice in the *Wall* case where it was held to apply in the occupied Palestinian territories.

The doctrine has been applied in an analogous situation to that of IFI loans in relation to development assistance; the CESCR expressed concern about the use to which development assistance “that in some cases ... has reportedly been used for activities in contravention of economic, social and cultural rights in the receiving countries.” It was particularly concerned “about the financial support provided by the State party to private actors for low-cost and private education projects in developing countries, which may have contributed to undermining the quality of free public education and created segregation and discrimination among pupils and students.”

CESCR stated that there should be “a systematic and independent human rights impact assessment prior to decision-making on development cooperation projects” along with an “effective monitoring mechanism to regularly assess the human rights impact of its policies and projects in the receiving countries and to take remedial measures when required”. Clearly such assessment and monitoring should include analysis to determine any differential impact of policies and practices on women and men and if necessary to make adjustments to eliminate any discriminatory effect.

The situation allows the analogy with commercial activities so that the state has responsibilities with respect to the decision-making of a corporation within its territory (or legally registered there) where actions are to undertaken abroad.

Statements of similar import have been made in multiple fora: the General Assembly, the CEDAW committee, CESCR adopted a statement in 2011 in which it stressed that states should “take steps to prevent human rights contraventions abroad”.¹⁴⁶ The General Assembly too has asserted that “all States should make all efforts to ensure that their international policies of a political and economic nature, including international trade agreements, do not have a negative impact on the right to food in other countries.”¹⁴⁷ The CEDAW Committee has also expressed its concern about “the negative impact of the conduct of transnational companies, in particular mining corporations, registered or domiciled in the State party and operating abroad on the enjoyment of the rights enshrined in the Convention by local women and girls’ and about the “inadequate legal framework to hold all companies and corporations from the State party accountable for abuses of women’s human rights committed abroad.” It recommended that Canada strengthen its legislative framework so as to require companies registered or domiciled in Canada to carry out human rights and gender impact assessments before making decisions about investments abroad (and presumably also carrying out

¹⁴⁵ *El-Masri v. “the former Yugoslav Republic of Macedonia”* application no. 39630/09, 13 December 2012.

¹⁴⁶ CESCR, Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights, 20 May 2011.

¹⁴⁷ UN GA Resolution 70/154, 7 March 2016, The Right to Food, para 27.

operations abroad).¹⁴⁸ The CESCR Draft General Comment on Business and Human Rights is moving in a similar direction. It reiterates “that States Parties’ obligations under the Covenant do not stop at their territorial borders.” The Committee was admittedly referring to business corporations but they also have separate legal personality from their state of incorporation (and any other state), and the principle that the state cannot abdicate responsibility can by analogy be applied to international financial institutions such as the World Bank.

The situation is best summarised by Clapham’s that “The customary obligation will be to avoid directly violating any human right and to avoid complicity in someone else’s violation of human rights obligations – at home or abroad”.¹⁴⁹

International Responsibility of International Financial Institutions

International organisations constitute legal persons under international law separate from their member states. This has been accepted since the *Reparations case*¹⁵⁰ and is affirmed by the International Law Commission’s Draft Articles on the Responsibility of International Organizations (2011): “International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.”¹⁵¹ Under the Draft Articles international organisations are responsible for the commission of an internationally wrongful act attributable to the organization.¹⁵² An internationally wrongful act is defined as “an action or omission ... attributable to that organization under international law”; and which “constitutes a breach of an international obligation of that organization.”¹⁵³

What are the international obligations of International Financial Institutions? Each such institution (global and regional) is bound by the terms of its own governing documents.

Two documents constitute the legal framework for the World Bank: the IBRD Articles of Agreement (as amended effective 27 June 2012) and a 1947 Treaty between the Bank and the UN.¹⁵⁴ Under the terms of the latter the Bank has UN specialized agency status but is allowed to operate as an “independent international organization” a “distancing” of the Bank from the UN that has been described as “more like distant cousins than sisters”.¹⁵⁵ As a specialised agency it would be “entitled to be represented at

¹⁴⁸ CEDAW, Concluding observations on the combined eighth and ninth periodic reports of Canada, CEDAW/C/CAN/CO/8-9, 18 November 2016, para 19.

¹⁴⁹ Clapham, Andrew. 2006. *Human Rights Obligations of Non-State Actors*. Oxford: Oxford University Press. But can you please confirm?

¹⁵⁰ *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 ICJ Reports 174 (Advisory Opinion).

¹⁵¹ The ILC cites the Advisory Opinion of the ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*

¹⁵² Draft Article 3.

¹⁵³ Draft Article 4.

¹⁵⁴ 16 UNTS 346 (1947).

¹⁵⁵ Ngaire Woods, ‘The Bretton Woods Institutions’ in Thomas Weiss and Sam Daws, *The Oxford Handbook on the United Nations* (OUP) 235.

the consideration of the implementation of such provisions [of CEDAW] as fall within the scope of [its] activities”¹⁵⁶ although to our knowledge this has never occurred. It has its own mandate, governance structure, and operational independence.

As an international organization the World Bank is not and cannot be a party to the international human rights treaties;¹⁵⁷ accordingly it can only be bound by human rights obligations if they can be construed as “general rules of international law” or customary international law, and even if that is answered in the affirmative, there is still the question whether the Bank is bound by them, or whether they are excluded by the Bank’s own constitutive instrument, the Articles of Agreement.

There are strong arguments that human rights now constitute general international law. One approach is to assert the entitlement of “everyone” to a “social and international order in which the rights and freedoms” of the [Universal] Declaration¹⁵⁸ can be fully realized.” This language is echoed by the Human Rights Council which has stressed “that States should promote supportive and enabling environments for the prevention of human rights violations, including by ... (f) Addressing factors, inter alia inequality and poverty, that may lead to situations in which human rights violations are committed”.¹⁵⁹ Even if the “distancing” between the Bank and the UN means that the inclusion of promotion of human rights within the purposes of the UN is not directly applicable to the World Bank, as a specialised agency of the UN, the World Bank should at the very least ensure that its actions do not detract from this enabling environment. Alston argued that acceptance of the MDGs, as goals for the whole UN system make it “appropriate to consider that they can provide a normative framework for the international financial institutions.”¹⁶⁰ This argument can only be strengthened by the 2015 acceptance of the Sustainable Development Goals.

They are asserted to “build upon the achievements of the Millennium Development Goals”, to “be applicable to all” and seek to address their unfinished business.¹⁶¹ A related approach is taken by Howse and Teitel who see the core minimum content of economic and social rights as connected to human security, which is threatened by events such as economic crisis and violence. They argue that this linkage makes economic and social rights “something more than provisions of a specialized treaty regime”, and more like a ‘normative environment’ of the international legal order, which must be taken into account in interpreting and applying particular treaties.” They demonstrate that the “WTO as a treaty community is susceptible to concerns of human security” and make concrete suggestions as to how such tensions between regimes – the WTO and the ICESCR – “can be addressed *within the idiom and structures of international law*.”¹⁶² Similar reasoning can be applied to the tension between World Bank’s approaches to development and economic and social rights;

¹⁵⁶ CEDAW, article 22.

¹⁵⁷ Only states can become parties to the majority of the UN human rights treaties including the ICCPR, ICESCR, CEDAW, CERD, CAT, CROC. However the Convention on the Rights of Persons with Disabilities, article 43 allows for regional integration organisations to become parties.

¹⁵⁸ Universal Declaration on Human Rights, 1948, article 28.

¹⁵⁹ HRC resolution 33/6. The role of prevention in the promotion and protection of human rights, 29 September 2016.

¹⁶⁰ Cited in Clapham, 2006:149.

¹⁶¹ GA Resolution 70/1, 21 October 2015, Transforming our world: the 2030 Agenda for Sustainable Development.

¹⁶² Robert Howse and Ruti Teitel, ‘Beyond the Divide The Covenant on Economic, Social and Cultural Rights and the World Trade Organization’, Friedrich-Ebert-Stiftung, *Dialogue on Globalization*, Occasional paper No. 30, Geneva, 2007.

The World Bank's objective of poverty alleviation is entirely compatible with human security. Accordingly, its policies must be assessed from the perspective of ensuring, not denying, human security through limiting enjoyment of the rights to food, health, and social security.

In relation to human rights obligations, some commentators have reflected that "human rights law has become a matter of legitimate international concern."¹⁶³ Some eminent scholars have "also suggested that economic, social and cultural rights are part of the general international law that is binding outside the treaty regimes"¹⁶⁴ and thus binding on non-state actors.

The World Bank argues that their application is specifically excluded by the terms of its own mandate. The starting point is article IV, section 10 of the Bank's Articles of Agreement¹⁶⁵ that states that: "The Bank and its officers shall not interfere in the political affairs of any member ... Only economic considerations shall be relevant to their decisions". Since the 1980s successive General Counsel have adopted different interpretations of this provision, seeking to "distinguish legitimate "economic considerations" from inappropriate "political" factors."¹⁶⁶ In general the current prevailing view from within the Bank is that human rights involve political considerations and thus are outside the scope of the Bank's Articles of Agreement.

Unsurprisingly commentators have taken issue with this position and have argued that the World Bank's mandate does not exclude human rights consideration. For instance, Thomas Buergenthal (a former Judge of the ICJ) has stated that "Human rights issues no longer can be characterized as exclusively political."¹⁶⁷ Ssenyonjo argues that "internationally recognised human rights (whether civil and political or economic, social and cultural) are of international concern that transcends political affairs". Accordingly, for him the minimum core obligation, "incumbent directly upon both the World Bank and the IMF as specialized agencies of the UN system and subjects of international law is a duty of vigilance to ensure their policies and programs do not facilitate breaches of their members states' human rights treaty obligations."¹⁶⁸

Pierre Klein too asserts that there is a duty of vigilance (or, in the language of state responsibility, "due diligence") on international organisations "with regard to activities under their control which can affect the rights of other subjects of international law",¹⁶⁹ for instance the human rights of individuals. Andrew Clapham concludes that in his opinion if the legal personality and capacity of an entity (such as an IFI) means that it has obligations under international law, then those obligations must incorporate the obligations to respect, protect and fulfil human rights.¹⁷⁰ He gives as an example that that obligation to

¹⁶³ Andrew Clapham, *Human Rights Obligations of Non-State Actors*, OUP, 143.

¹⁶⁴ Andrew Clapham cites Christian Tomuschat, David Weissbrodt and Thomas Buergenthal to this effect; Clapham, 148-9.

¹⁶⁵ International Bank for Reconstruction and Development (IBRD – World Bank), Articles of Agreement, as amended effective 27 June 2012.

¹⁶⁶ Special rapporteur on extreme poverty and human rights, Philip Alston, UN Doc, A/70/274, 4 August 2015.

¹⁶⁷ Cited Clapham, 149.

¹⁶⁸ Manisuli Ssenyonjo, 'Non-State Actors and Economic, Social and Cultural Rights', in Mashod Baderin and Robert McCorquodale, *Economic Social and Cultural Rights in Action* (OUP, 2007) 109, 132.

¹⁶⁹ Cited Clapham, 151.

¹⁷⁰ Clapham, 151. Clapham acknowledges that he goes beyond some commentators, for instance Skogly who imputes only the obligation to respect to IFIs.

protect the right to education must require the IFI not to act “in a way that prevents a borrowing state from fulfilling its obligations to provide such an education” (or affordable and adequate healthcare, accommodation, or social security).

In a careful analysis Philip Alston, as special rapporteur on extreme poverty, argues that a major flaw with the Bank’s approach is the double standards it entails, allowing it to take actions with respect to for instance criminal justice but not human rights. If human rights are “political” so too must be criminal justice and law enforcement, which themselves must accord with international human rights standards. Alston points to the fact that the World Bank has recognised that its own safeguards require it “to take account of the international environmental treaty obligations of a country when undertaking an environmental assessment.”¹⁷¹ It seems inconsistent to say that the same does not apply to human rights requirements. As Alston notes, “There are innumerable ways in which human rights violations have major economic impacts and the poor are disproportionately affected.”¹⁷² He might have added to this conclusion that women are over-represented among the poor¹⁷³ and thus are disproportionately affected by the economic effects of human rights violations.

The definitional issue of human rights is also relevant. The human rights implications of the Bank’s actions tend to arise in one of two ways:¹⁷⁴ whether the Bank can impose human rights conditions to its lending (in effect to dictate behaviour to the recipient state) or through the impact of its actions on the civil and political rights of the population, for example financing drug detention centres where people are arbitrarily detained, or supporting projects that use forced labour.¹⁷⁵ But in the context of economic and social rights of the recipient state the concern is the other way around. The Bank is concerned with economic policy. It insists “that its projects contribute to the fulfilment of economic, social and cultural rights”¹⁷⁶ and “elimination of extreme poverty [is] one of its two central goals”¹⁷⁷. Economic and social rights are about equal access to economic goods and services. It seems perverse to argue that the Bank can support an education or health project, that is in effect to promote economic and social rights (although presented as development, with the intended beneficiaries as “clients” or “service recipients”, not rights holders¹⁷⁸), but if those same policies in fact detract from the population’s access to education or health, or indeed that they result in falling below the “core minimum obligation” with respect to such services, this can be understood as a development project that failed to deliver rather than as a violation of economic and social rights. Such reasoning appears to have motivated the

¹⁷¹ Ibid., para 48.

¹⁷² Special rapporteur on extreme poverty and human rights, Philip Alston, para 20

¹⁷³ “More than 1 billion people in the world today, the great majority of women are women, live in unacceptable conditions of poverty”; Being Platform for Action, 1995, para 47. In 2016 the General Assembly expressed its concern that ‘women and girls are disproportionately affected by hunger, food and nutrition insecurity and poverty, in part as a result of gender inequality and discrimination; UN GA Resolution 70/154, 7 March 2016, The Right to Food, para 6.

¹⁷⁴ There is also the question whether the Bank would be acting ultra vires if it advanced a human rights programme.

¹⁷⁵ Human Rights Watch, ‘World Bank: Human Rights All But Absent in New Policy’ 21 July 2016.

¹⁷⁶ Special rapporteur on extreme poverty and human rights, Philip Alston, para 22.

¹⁷⁷ Special rapporteur on extreme poverty and human rights, Philip Alston, para 2.

¹⁷⁸ ‘development today is said to encompass “broad areas of human development, social development, education, protection of global public goods, governance and institutions, as well as issues such as inclusion and cohesion, participation, accountability and equity’; ibid., para 16; see also para 30.

CESCR's assertion with respect to the right to food that "the international financial institutions, notably the International Monetary Fund (IMF) and the World Bank, should pay greater attention to the protection of the right to food in their lending policies and credit agreements and in international measures to deal with the debt crisis.

Care should be taken, in line with the CESCR Committee's general comment No. 2, paragraph 9, in any structural adjustment programme to ensure that the right to food is protected."¹⁷⁹ This must also apply to other economic and social rights and is even more the case where it is foreseeable that the policy will have this effect, as is the case with many policies adopted in the name of austerity. The Bank cannot put up its hands and say "we don't do human rights" as a defence to the denial of economic and social entitlements caused directly by implementation of its policies.

Other supporting arguments

The Responsibility to Protect is most often referred to with respect to the pillar which justifies the international community reacting with military action when a state has failed to protect its own population against war crimes, crimes against humanity, ethnic cleansing and genocide. However, the founding document, the ICISS Report, *The Responsibility to Protect emphasises the importance of the obligation to prevent*: "to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk".

Support for conflict prevention includes development assistance and other efforts to help address the root causes of potential conflict; or recurrence of conflict following its supposed end. The Human Rights Council's resolution on the role of prevention in the promotion and protection of human rights¹⁸⁰ reaffirms the universality, indivisibility, inter-relatedness, interdependent and mutually reinforcing nature of all human rights and stresses that "States should promote supportive and enabling environments" for their prevention, including addressing factors, such as inequality and poverty that may lead to situations in which human rights violations are committed. This approach is important as too often the responsibility to protect is associated only with atrocities, typically gross denial of civil and political rights. As pointed out by Louise Arbor "large-scale past abuses" typically assumes civil and political rights violations which "obscures the need to address gross violations of economic, social, and cultural rights".

The same principle applies whether such violations are the result of conflict or not. The former High Commissioner for Human Rights, Navi Pillay, has also stated that the Responsibility to Protect is "a response to patterns and practices of human rights violations that include enormous disparities and distribution in wealth, the chasm between the world's rich and poor. Discrimination in all its aspects, poverty, hunger, environmental degradation and endemic diseases, all social economic conditions that feed into and exacerbate armed conflict."¹⁸¹ If these two principles are considered together – the need to address economic and social rights, and to act early to prevent conflict, or immediately in

¹⁷⁹ CESCR, General Comment No. 12, The Right to Adequate Food (Art. 11), 12 May 1999, para 41.

¹⁸⁰ HRC Resolution 33/6, 27 September 2016, The role of prevention in the promotion and protection of human rights.

¹⁸¹ Statement by former United Nations High Commissioner for Human Rights Navi Pillay at the Thematic Discussion in the UN General Assembly on 'Ten Years of the Responsibility to Protect: From Commitment to Implementation', 26 February 2016.

the “post-conflict” moment to prevent further eruption of conflict, then surely and taken to its logical conclusion this should require taking measures to ensure that the acts of IFIs do not contribute in the first instance to such violations of economic and social rights. Above all, the principle of “do no harm”¹⁸² – to individuals, to sustainable peace – must prevail.

CONCLUSIONS

The detrimental impact of some economic reform programmes of the World Bank and other IFIs on the enjoyment of economic and social rights, and on gender equality,¹⁸³ has long caused concern to human rights institutions. IFIs and human rights processes operate within the framework of international law and international institutional practice. Much of the problem stems from “the historical isolation of the institutional culture of the [International Financial regime] from that of the human rights regime. The challenge, both intellectual and practical, is to end this isolation, such that the interpretation and evolution of the norms of the one regime are conducted in a manner that is consistent with the norms of the other.”¹⁸⁴ The requirement for an environment in which human rights entitlements are delivered to all people, without discrimination, supports this proposition, as do the concepts of human security, responsibility to protect (in its non-military pillar) and the SDGs, especially Goal 16 for “the promotion of peaceful and inclusive societies for sustainable development, the provision of access to justice for all, and building effective, accountable institutions at all levels.” The proposals below would have great impact at the time of post-conflict reconstruction and should act as a constraint on rapid economic reform.

We argue that there is sufficient legal precedent to establish the international responsibility for violation of the economic and social rights of individuals within a state that has implemented IFIs conditions for economic reform:

- On the host state which bears the primary responsibility for the guarantee of all human rights;
- On member states of the World Bank/IMF for their own actions undertaken in conformity with World Bank/IMF requirements;
- On member states of the World Bank/IMF where they have failed to take measures to protect against violations of economic and social rights, both on a territorial basis and, on certain conditions, extra-territorially

¹⁸² Alston, para 79.

¹⁸³ See Rees and Chinkin, ‘Exposing the Gendered Myth of Post Conflict Transition: The Transformative Power of Economic and social Rights, 48 *New York University J Int’l L and Policy* (2016) 1211 for our understanding of this concept.

¹⁸⁴ Howse and Teitel, 2007.

We also suggest that there is sufficient legal precedent to ground an argument that:

- Member states should be responsible for violations of economic and social rights and sex and gender-based discrimination incurred through the policies and practices of the World Bank/IMF;
- That the World Bank/IMF itself should be responsible for violations of economic and social rights and sex and gender-based discrimination incurred through implementation of its demands.

We accept that much of the material is in “soft law” form (concluding observations and General Recommendations/Comments of the UN Human Rights Treaty bodies; Guidelines and Principles; GA and HRC Resolutions; Sustainable Development Goals) or used by analogy from other situations. They therefore create political or moral imperatives rather than legal obligation. However, we also argue that there are strong policy reasons for legal development in this area with respect to post-conflict transition towards a sustainable peace.

Since 2013 Women's International League for Peace and Freedom (WILPF) is facilitating an initiative in Bosnia and Herzegovina that focuses on the importance of taking into consideration existing experiences and empirical knowledge of women who went through an armed conflict and struggled for human rights, in an attempt to change the dominant narrative of women as victims. The initiative Women Organizing for Change in Bosnia and Herzegovina advocates for women's perspectives to be represented at all levels in the peace-building process, it puts the spot light on the peace activism of women during war, defends the human rights of women and promotes social, economic and political justice.

Women Organizing for Change

Čekaluša 16

Sarajevo, Bosnia and Herzegovina



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