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**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

Joint written statement* submitted by the Conectas Direitos Humanos, the Center for Economic and Social Rights, non- governmental organizations in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[13 February 2017]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

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Human Rights Implications of Constitutional Amendment N. 95, which Limits Public Spending for Two Decades*

The unprecedented constitutional amendment EC 95/2016, approved by Brazilian Congress last December 13th, 2016, limits public spending for the next 20 years, including the constitutionally-protected expenditures in health, education and spending in other social areas through 2036, pegging these outlays to inflation rather than objective need and government revenue.¹

Several studies have projected that EC 95/2016 will result in a serious erosion of social rights as a result of an ever smaller per capita real expenditure, as the demand for services will increase and spending will not, undermining progress on several social rights, especially for the most vulnerable groups, who depend exclusively on access to public services. The Brazilian population is set to grow 9% in the coming two decades. Estimates suggest that an increase of 37% in public healthcare expenditure would be necessary alone to deal with a doubling in Brazil's aging population.² This amendment would also have the pernicious effect of deepening existing economic inequalities resulting from the country's tax and fiscal policies, which have been shown to prevent people from escaping poverty,³ particularly for already disadvantaged groups such as black women.⁴

To put this amendment in perspective, if a similar limit had been imposed since 2003, the health budget in 2015 would have been almost half of what it is now (R\$55bn instead of R\$100bn). The reduction in total health expenditure over the next twenty years has been estimated at some R\$433 billion, a reduction of 25% in a public policy that is already seriously underfunded.⁵

According to the UN Special Rapporteur on extreme poverty and human rights, responding to the measure while it was still being appreciated by the Brazilian Senate, EC 95/2016 "will hit the poorest and most vulnerable Brazilians the hardest, will increase inequality levels in an already very unequal society, and definitively signals that social rights are a very low priority for Brazil for the next 20 years".⁶

While states have a margin of discretion to adopt policies and other measures to counter-act the effects of economic crisis or face other situations of exceptional nature, such margin of discretion is not absolute and does not escape the scrutiny of human rights norms.⁷ The UN Committee on Economic, Social and Cultural Rights has issued specific directives to be observed by states party to the ICESCR when these adopt policies or other measures in response to economic downturns. In order to act in compliance with the ICESCR fiscal consolidation measures must: be **temporary**, strictly **necessary** and **proportionate**; **non-discriminatory**; take into account all possible **alternatives**, including tax measures; identify and protect the **minimum core** content of human rights; and be adopted after the most carefully consideration with genuine **participation** of affected groups and individuals in decision-making processes.⁸

¹ The full text of EC 95/2016 is available in this [link](#).

² Camara dos Deputados "Custo da saúde vai encarecer 37% com envelhecimento da população, aponta pesquisador", see text at [this link](#)

³ Higgins, Sean and Claudiney Pereira. 2014. "The Effects of Brazil's Taxation and Social Spending on the Distribution of Household Income." In Lustig, Nora, Carola Pessino and John Scott. 2014. Editors. *The Redistributive Impact of Taxes and Social Spending in Latin America. Special Issue. Public Finance Review*, May, Volume 42, Issue 3. (November 4, 2014)

⁴ INESC. As implicações do sistema tributário brasileiro na desigualdade de renda. Brasília, 2014. Available at [this link](#)

⁵ Health National Council and National Council of Health Municipalities Secretariat. Available at <http://www.conass.org.br/nota-conjunta-conass-e-conasems-sobre-a-pec-241/>.

⁶ See more at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21006&LangID=E#sthash.WcFPvb0Y.dpuf>

⁷ See CESCR, General Comment (GC) 3, para.12; GC 12, para. 28 and GC 14, para. 18; CESCR Statement. "An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant, E/C.12/2007/1 10 May 2007, paras. 4 and 6; and, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, 22-26 January 1997, paragraphs 8 and 10.

⁸ See CESCR, (2012), Letter to State Parties on the issue of human rights obligations in the context of austerity, available at [this link](#); CESCR (2016), Statement: Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights, see [here](#). See also Committee on the Rights of the Child (2016), "General Comment 19 on public spending and the rights of the

Brazilian government failed to take into account any of these criteria in its haste to constitutionally restrict spending over two decades. First, EC 95/2016 is hardly temporary, but will extend far into future economic recoveries that may occur over the next two decades. Second, this mechanism to control public spending in areas such as health and education will disproportionately affect already vulnerable groups, such as children of low-income families, Afro-Brazilian women and people living in poverty, who rely more on public services. Furthermore, education and health are not only essential rights in themselves but are also critical determinants of the enjoyment of other civil, political, economic, social and cultural rights. The results of the freezing of public expenditure in these areas could drive people deeper into poverty, with discriminatory effects that reinforce disparities across society. Third, the Brazilian government has provided no evidence that EC 95/2016 is last-resort measure, nor that less restrictive alternative measures have been explored and analyzed, especially to boost revenue in equitable ways. For example, combatting tax evasion could raise \$80 billion according to experts⁹. Improving the contributions of high-income earners could likewise offset the need for such drastic cuts to public spending.¹⁰

Evidence is abundantly clear that fiscal consolidation in times of economic crisis is simply economically inefficient. Empirical findings from the International Monetary Fund (IMF)¹¹ illustrate that cutting budgets during economic recessions has a tendency to actually increase deficits while deepening and prolonging the recession, worsening unemployment levels and decelerating economic recovery.

The constitutional change took place in the midst of narrowing opportunities for public scrutiny, as the government has allowed very little room for accountability, transparency, and access to information. The government has not conducted any assessments of the impact of its fiscal austerity measures on poverty, inequality and human rights. Affected communities and Brazilian civil society have been denied opportunities for constructive engagement and oversight in the design and implementation of this constitutional reform.

Various international and regional human rights protection mechanisms of late have expressed their views that fiscal consolidation packages, if not designed in compliance with key human rights norms and principles, could amount to a violation of these rights. The Additional Protocol to the American Convention on Human Rights (the San Salvador Protocol) contains normative provisions similar to those of the ICESCR and other international human rights treaties on the obligation of states to use the maximum of their available resources to ensure the full and progressive realization of economic, social and cultural rights.¹² The Inter-American Commission on Human Rights recently called on the Brazilian authorities “to mind the principles of progressiveness and non-regression in the area of economic, social, and cultural rights. By virtue of the obligation to adopt progressive measures, established in the Protocol of San Salvador—which was ratified by Brazil in 1996—the State, in principle, is forbidden from adopting policies, measures, and laws that, without proper justification, worsen the situation of economic, social, and cultural rights enjoyed by the population.

As the Brazilian Supreme Court has received the first lawsuits challenging the constitutionality of Constitutional Amendment 95/2016, we urge the Brazilian State:

- To conduct a judicial review of constitutional amendment 95/2016 in light of international human rights law and its basic standards for fiscal austerity measures: **necessary** and **proportionate**; **non-discriminatory**; take into account all possible **alternatives**, including tax measures; identify and protect the **minimum core** content

child”; UN Human Rights High Commissioner Office. Report on Austerity Measures and Economic and Social Rights, par. 15, at [this link](#).

⁹ Estatão. Evasão Fiscal no Brasil chega a 27% do Total Arrecadação. See [here](#).

¹⁰ Personal Income tax in Brazil, which highly benefits capital income over wage income, accounts for only 2.7% of GDP, while the average in OECD countries is 8.5%. See INESC, ‘Civil society calls for changes in the tax system for fairer taxation, available [here](#).

¹¹ Guajardo, Jaime; Leigh, Daniel and Pescatori, Andrea (2011). Expansionary Austerity: New International Evidence. IMF Working Paper, available [here](#)

¹² ICESCR, Article 2.1; Convention on the Rights of the Child, Art. 4; Convention on the Rights of Persons with Disabilities, Art. 4.2. Additional Protocol on Economic, Social and Cultural Rights (San Salvador Protocol), Art. 1.

- of human rights; and are adopted after the most carefully consideration with genuine **participation** of affected groups and individuals;
- To pass a bill modifying EC 95/2016 to safeguard the investments in health, education and all the human rights guaranteed by the Constitution and international treaties Brazil has ratified, preventing that expenditures in these areas are negatively affected by the new fiscal regime.

*Oxfam Brasil; Instituto de Estudos Socioeconômicos – INESC, NGO without consultative status, also shares the views expressed in this statement.