HAUT-COMMISSARIAT AUX DROITS DE L'HOMME • OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS
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Mandates of the Special Rapporteur on extreme poverty and human rights and the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights

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Excellency,

We have the honour to address you in our capacity as Special Rapporteur on extreme poverty and human rights and Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights pursuant to Human Rights Council resolutions 26/3 and 25/16.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **court orders secured by NML Capital Limited, a subsidiary of the United States-based investment firm Elliot Capital Management, which may have the effect of limiting the ability of the Argentinian authorities to fully respect and ensure the enjoyment of human rights by the country's population**. In addition to this letter we have sent separate communications in relation to this matter to the Government of Argentina and to NML Capital Limited.

According to the information received:

NML Capital sued Argentina on the basis of debts arising from the country's defaulted bonds, which were the object of bond swaps in 2005 and 2010. Reportedly, about 93 per cent of the investors holding bonds participated in these debt swaps, but a few creditors refused to accept the conditions of the swaps. Creditors specializing in distressed debt, so called "vulture funds", purchase the defaulted debt at significant discounts, hold out for other creditors to cancel their debts and then aggressively pursue repayments that are vastly in excess of the amount that they paid for the debt. Thus NML Capital allegedly purchased the majority of their Argentinian bonds from June to November 2008, paying roughly 20 per cent of face value.

Reportedly, after failed legal efforts to seize Argentinian assets directly, the holdout bond holders took out lawsuits based on the *pari passu* or equal treatment clause in bond contracts, which would deny any future payments on restructured

bonds until payment in full to holdout bond holders took place. On 23 August 2013, the United States Second Circuit Court of Appeals upheld the District Court of New York's ruling in favor of NML Capital.[1] Argentina appealed the ruling to the United States Supreme Court. By denying *certiorari* in June 2014 and thereby refusing to take up the case, leaving the lower court rulings intact, the Supreme Court has affirmed a precedent which may result in exorbitant awards for holdout creditors and potentially penalize creditors who participated in a debt restructuring.[2]

Fully appreciating the important principle of judicial independence, itself a human rights obligation, we wish to express our concern that the reported decisions could represent a significant threat to the ability of States to respect and fulfill their human rights obligations.

In this respect, we would like to note that Argentina successfully reduced its public debt from about 160 percent of Gross Domestic Product (GDP) by settling with the majority of creditors for a repayment of 30 percent of its sovereign debt, enabling the country to recover economically. The total public debt currently stands at around 40 percent of the country's GDP. Argentina reached an agreement with almost 93 per cent of its creditors, who were in the process of being paid in timely fashion since the agreement reached on the bond swap. The District Court of New York in its decision has ruled that a few hold out creditors not only have the right to get 100 per cent of their claim, but also the power to block the ongoing payments to the restructured bondholders. Under this ruling, all creditors are denied their repayments. This can trigger serious consequences for Argentina and pose difficulties for debt restructurings for other countries in the future.

Impeding Argentina from repaying its restructured bondholders and pushing the country into a debt crisis poses risks for the enjoyment of economic, social and cultural rights by its population. The recent report of the Independent Expert on foreign debt and human rights on his visit to Argentina (UN Document A/HRC/25/50/Add.3) describes the profound impact of Argentina's 2001 debt crisis. GDP shrank in the period from 1999 to 2002 by 25 per cent, official unemployment peaked at over 21.5 per cent in May 2002, savings and pensions were devaluated, and inflation of up to 41 per cent contributed to a drop in real wages by 23.2 per cent in 2002. According to the World Bank, 53 per cent of the population lived in poverty and 24.8 per cent faced extreme poverty. The crisis also severely affected the public health system, with hospitals suffering a serious shortage of basic supplies and prices of medicines soaring. In addition, the drastic drop in employment left roughly 60 per cent of the population outside the social health insurance system.

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[1] *NML Capital Ltd. v. Republic of Argentina*, 727 F.3d 230 (2d Cir. 2013). See as well earlier decisions of the Court of Appeals, *NML Capital Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012) from 28 October 2012 and amended injunctions by the Southern District Court of New York, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (TPG), 2012 WL 5895786 (S.D.N.Y. Nov. 21, 2012).

[2] Opinion of the US Supreme Court, *Republic of Argentina v. NML Capital, Ltd.*, No. 12-842, from 16 June 2014, available at: http://www.supremecourt.gov/opinions/13pdf/12-842_5hdk.pdf

Argentina's debt restructurings and settlement of International Monetary Fund obligations has enabled the Government to significantly increase its social spending, including on education, health and social security. Social spending for health, education, social security and housing in the national budget increased from 9.5 per cent of GDP in 2003 to 15.5 per cent of GDP in 2013. Overall social spending (by the national, provincial and municipal governments) rose to around 27.7 per cent of GDP by 2009. Data from the National Statistics and Census Institute show that the poverty and extreme poverty levels have constantly declined since 2003, from 47.8 and 20.5 per cent to about 4.7 and 1.4 per cent respectively in 2013.

This kind of litigation by hold-out creditors (so called "vulture funds") prevents heavily indebted countries from using resources freed up by debt relief for their development and poverty reduction programmes, and therefore diminishes the capacity of these countries to create the conditions necessary for the realization of human rights for their people. Thus money that is earmarked for poverty reduction and basic social services, such as health and education, may be diverted to settling the substantial claims of hold-out financial companies and the financial liabilities they can additionally trigger. In short, vulture funds threats eroding the gains from debt relief for poor countries and may jeopardize the fulfilment of these countries' human rights obligations.

Apart from undermining the ability of States to meet their obligations on economic, social and cultural rights, excessive debt burdens pose major obstacles for a number of countries in achieving the Millennium Development Goals.[3] The United Nations Conference on Trade & Development (UNCTAD) Reports highlight the need for social investments as a means for improving outcomes for economic security, access to healthcare and food and housing security.[4]

The 2010 report of the Independent Expert on the effects of foreign debt to the Human Rights Council[5]provides case studies on the impact of such "vulture funds" on debt relief and human rights. The report provides recommendations on how the problem of vulture funds could be tackled through multilateral initiatives or at the national level, including through enacting national legislation designed to protect highly indebted countries from the excessive claims of vulture funds.

In this context we are aware that in July 2009, Representative Maxine Waters introduced the Stop Very Unscrupulous Loan Transfers from Underprivileged Countries to Rich, Exploitive Funds Act, or the Stop VULTURE Funds Act (H.R.2932), in the United States House of Representatives. This legislation is designed to protect low-income developing countries from the predatory practices of vulture funds by preventing "speculation and profiteering in the defaulted debt of certain poor countries." Other States and territories, such as the United Kingdom of Great Britain and Northern Ireland and the

[3] See Consolidation of findings of the high-level task force on the implementation of the right to development, A/HRC/15/WG.2/TF/2/Add.1 and Corr.1, para. 54 from 25 March 2010.
[4] See the Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System, 1 September 2009, available at: http://www.un.org/ga/president/63/PDFs/reportofexpters.pdf.
[5] See UN Document A/HRC/14/21

Island of Jersey have passed legislation reducing the ability of "vulture funds" to litigate against highly indebted poor countries in their jurisdictions, thus reducing the risk of negative human rights impacts by such litigations.[6]

If the approach created by the recent court rulings continues to prevail in the United States of America, or is adopted in other international financial contexts, collective action problems of future sovereign debt restructurings will be indeed exacerbated. Hold-out creditor litigation and the freezing of assets of debtor countries in the course of such litigation jeopardize the servicing of debt obligations by the affected countries. Thus vulture fund litigation may not only dilute the gains from debt relief, it also complicate the debt restructuring process and undermines other creditors by forcing debtor countries to grant hold out creditors preferential treatment at the expense of more responsible creditors. Unlike so called vulture funds, responsible secondary debt participants do not acquire sovereign debt from impoverished countries for the sole purpose of obtaining payment on terms that reflect usurious interest rates.

Sovereign debtors have binding international human rights obligations that may also apply to bilateral and multilateral lenders. Private lenders, like any other corporate actors, also have human rights responsibilities, as set out by the Guiding Principles on Business and Human Rights (UN document A/HRC/17/31) and the Guiding Principles onf Foreign Debt and Human Rights (UN document A/HRC/20/23). Insisting that human rights be respected in such contexts does not amount to denying the validity of contractual commitments, but suggests that some contract clauses or their interpretation should be seen as unconscionable. Such an approach would make debt workouts fairer and more effective, and would prevent cases of excessive hardship that result in the denial or violation of human rights.

It is our responsibility under the mandates provided to us by the Human Rights Council to seek to clarify all cases brought to our attention. Since we are also expected to report on these cases to the Human Rights Council, we would be grateful for your cooperation and your observations on the following matters:

1. Are the facts summarized above accurate?

2. Does the Government bring international human rights law and its operational implications to the attention of its courts when the latter are dealing with debt restructurings?

3. What is the Government's position in relation to the draft legislation proposed by Representative Maxine Waters to the United States House of Congress designed to protect low-income developing countries from predatory practices of vulture funds? Or alternative, please provide details about proposals by your Government on similar legislative initiatives that would restrict the ability of these funds to sue low and medium income countries in the United States of America.

[6] See United Kingdom, Debt Relief (Developing Countries) Act 2010, Jersey, Debt relief (Developing Countries) Law, 2012.

4. What steps has your Excellency's Government taken to implement the United Nations Guiding Principles on Business and Human Rights and the Guiding Principles on Foreign Debt and Human Rights, in relation to debt restructurings that may impact upon the enjoyment of human rights?

5. What steps has your Excellency's Government taken to incorporate a human rights perspective, specifically human rights impact assessments, into multilateral and international discussions on collective action clauses and debt restructuring mechanisms?

We would appreciate a response within 60 days.

While awaiting with interest a detailed response to the above questions, we would like to inform you of our intention to issue a news release in the near future as we are of the view that the information upon which the press release is going to be based is sufficiently reliable to indicate a matter warranting immediate attention.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

Philip Alston
Special Rapporteur on extreme poverty and human rights

Juan Pablo Bohoslavsky
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