



Towards a multilateral legal framework for debt restructuring: Six human rights benchmarks States should consider

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On 29 December 2014 the General Assembly of the United Nations decided to establish an ad-hoc committee, open to the participation of all Member States and observers of the United Nations, to elaborate through a process of intergovernmental negotiations, a multilateral legal framework for sovereign debt restructuring processes (GA resolution [69/247](#)). This initiative aims at increasing the efficiency, stability and predictability of the international financial system and achieving sustained, inclusive and equitable economic growth and sustainable development in accordance with national circumstances and priorities (GA resolution [68/304](#)).

My mandate as set out in Human Rights Council resolution [25/16](#), requests me to pay particular attention to the effects of foreign debt and the policies adopted to address them on the full enjoyment of all human rights, in particular, economic, social and cultural rights in developing countries. In this context I have as well been mandated to pay particular attention to new developments, actions and initiatives being taken by international financial institutions, other United Nations bodies and intergovernmental organizations.

I would like to thank Member States and the United Nations Conference on Trade and Development for their call published on 15 January 2015 to submit views and make contributions relating to a future legal framework on debt restructuring in accordance with General Assembly resolution [69/247](#).

Due to the sort period provided for submitting comments I would like to limit myself to spell out six human rights benchmarks that States should consider when discussing a multilateral legal framework for sovereign debt restructuring. I intend to submit more detailed views to the Ad Hoc Committee over the coming months once proposals by States and other stakeholders have become publicly available for discussion. My reflections on debt restructuring and human rights will furthermore culminate in my 2015 report to the General Assembly which I will devote to this topic this year.

In this context I would like to draw to the attention of the Ad-Hoc Committee that the Human Rights Council adopted on 26 September 2014, a resolution on foreign debt and human rights inviting States participating in the negotiations on a multilateral framework for debt restructuring to ensure that such framework will be compatible with existing international human rights obligations and standards (resolution [27/30](#), operative paragraph 3). It is my sincere hope

that this commitment made by the States which endorsed this resolution will be appropriately reflected in the final text of a future multilateral legal framework for debt restructuring that is likely to emerge this year in New York during the inter-governmental negotiations.

As I have mentioned in my [letter](#) to the Chair of G77 dated 5 September 2014 which was as well shared with all UN Member States, there are good reasons why the United Nations system is the right place to discuss how to fill the global legal void on sovereign debt restructuring - or at least to reduce the fundamental uncertainty as to how existing rules and principles of international law apply to the challenges in this field: the universal and equal basis of its membership, broad-based convening role, its technical capacity and the fact that it is not a financial actor in global markets. All these facts should contribute to build consensus around debt issues. The United Nations Charter (Arts. 1.3 and 55.2) confirms these specific competences as one of the purposes of the United Nations: to achieve international co-operation in solving international problems of an economic character while promoting solutions of international economic and related problems.

Sovereign debt substantially is meant to help to implement domestic economic and social policies in order to promote growth and development. However, it can also throw millions of people into poverty if not managed properly, in particular if it results in a debt crisis. Debt crises can generally have broad and deep global implications on financial stability, economic growth and the realization of economic, social and cultural rights.

Reports of my mandate have highlighted the negative human rights impacts debt crisis have had not only on developing countries, including middle income countries ([A/HRC/20/23/Add.2](#) and [A/HRC/25/50/Add.3](#)), but as well on advanced economies, such as Greece or Latvia ([A/HRC/23/37/Add.1](#) and [A/HRC/25/50/Add.1](#)). If no legal nor economic incentives are provided to lenders and borrowers for more responsible behaviour, crisis are longer and hit harder the most vulnerable and unprotected groups. Delays in debt restructuring owing to prolonged litigation have come at significant economic costs, aggravating negative impacts on the enjoyment of human rights, in particular social, economic and cultural rights, in countries already in debt distress.¹

During the last decades there have been several proposals for improving international rules or procedures relating to debt restructuring, they include proposals for:

- a [Sovereign Debt Restructuring Mechanism \(SDRM\)](#) suggested by the International Monetary Fund in 2001;
- a Fair and Transparent Debt Arbitration Process ([Raffer 2005](#));
- a Sovereign Debt Tribunal ([Christoph Paulus and Steven T. Kragman 2008](#));
- an [International Debt Restructuring Court](#) (IDRC) suggested by a group of UN experts ([A/63/838](#));

¹ See as well Julian Schumacher, Christoph Trebisch, Henrik Enderlein, "Sovereign defaults in court", 6 May 2014, paper available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2189997

- a Fair and Transparent Debt-workout Mechanism ([EURODAD 2009](#));
- a Sovereign Debt Adjustment Facility suggested by the Committee on International Economic Policy and Reform ([Brookings Institute 2013](#));
- a Sovereign Debt Forum (SDF), (Richard Gitlin and Bret House, [Centre for International Governance Innovation 2014](#));
- improved Collective Action Clauses (CACs); and
- guidelines from the finance industry, such as the set of non-binding Principles for Stable Capital Flows and Fair Debt Restructuring ([Institute of International Finance 2004](#)).

The IMF has undertaken an own analysis of recent experiences with debt restructurings, informed by debt restructurings for Greece, Belize, Jamaica and ongoing litigation against Argentina ([IMF 2013](#)). On 29 August 2014 the International Capital Market Association (ICMA) released a [new set of model clauses](#) for foreign sovereign bond contracts to address some flaws related to the fact that a small group of creditors are able to extract preferential treatment in debt restructuring processes and cause serious disruptions.

While improving CACs may address some problems, there remains a legal void that needs to be addressed in the field of debt restructuring. Let us imagine a financial world ruled by improved CACs. Would this solve all the collective action problems associated to debt restructuring? What will happen if the debtor does not reach the contractually required threshold? We will be again facing a legal void.

The predecessor in my mandate, Cephias Lumina, suggested to States to consider the creation of an Independent Debt Dispute Resolution Mechanism (see for example [A/HRC/20/23](#), para 85-87) to restructure unsustainable debts and resolve disputes in a fair, transparent and efficient manner. The main aim of the mechanism is to ensure that debtor States can achieve economic viability and growth, and restore their capacity to service their external debts without compromising the fulfilment of their international human rights obligations. He underlined that such a mechanism should ensure that a debtor State, during and after the restructuring process, should be able to fulfil its international human rights obligations, implement its development programme and provide basic services to all persons living in its territory and under its jurisdiction.

The proposal was included in the Guiding Principles on Foreign Debt and Human Rights [A/HRC/20/23](#), endorsed by the Human Rights Council resolution [20/10](#) on 10 July 2012. It is one of the proposals that the Ad-Hoc Committee established to negotiate a new multilateral framework for debt restructuring may wish to consider.

This brings me to relevant human rights standards that States should take into consideration next to the core international human rights treaties², the universal declaration of human rights and the declaration on the right to development ([A/RES/41/128](#)). The Guiding

² Listed at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>

Principles on Foreign Debt and Human Rights ([A/HRC/20/23](#)) were designed to assist States and all relevant lenders including private and public, national and international financial institutions, bilateral lenders and organized groups of bondholders in their conduct relating to external debt and contain key human rights principles that should be considered when designing a new legal framework for debt restructuring, such as equity and non-discrimination, progressive realization and satisfaction of minimum essential levels of economic, social and cultural rights, non-retrogression, shared responsibility of debtors and creditors, transparency, participation and accountability.

The Guiding Principles on Business and Human Rights ([A/HRC/17/31](#)) endorsed by the Human Rights Council in 2011, include provisions on State obligations to ensure adequate regulation of business enterprises (Chapter I) and on the corporate responsibility to respect human rights (Chapter II) which means that business enterprises, including financial businesses, should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. The guiding principles on business and human rights furthermore require businesses to carry out human rights due diligence in order to identify, prevent, mitigate and account for such adverse human rights impacts.

The [UNCTAD Principles on Responsible Sovereign Lending and Borrowing](#), endorsed by 13 countries during and after the UNCTAD Doha Conference in 2012³, acknowledge that “sovereign lending and borrowing are intrinsically linked to the feasibility of the Millennium Development Goals” and establish that “in circumstances where a sovereign is manifestly unable to service its debts, all lenders have a duty to behave in good faith and with cooperative spirit to reach a consensual rearrangement of those obligations. Creditors should seek a speedy and orderly resolution to the problem” (principle 7) and “if a restructuring of sovereign debt obligations becomes unavoidable, it should be under taken promptly, efficiently and fairly” (principle 15). The work that is carried out by the UNCTAD Working Group on Debt Workout Mechanism shows how well legally rooted those important principles are as well as how relevant their implications are.

Based on existing international human rights law and the above mentioned principles I would like to propose the following six human rights benchmarks as a contribution to the inter-governmental discussions on a future legal framework for sovereign debt restructuring:

³ <http://www.unctad.info/en/Debt-Portal/Project-Promoting-Responsible-Sovereign-Lending-and-Borrowing/About-the-Project/Principles-on-Responsible-Sovereign-Lending-and-Borrowing/Endorsements/>

Six human rights benchmarks for a multilateral legal framework for debt restructuring

1. The new legal framework should include an explicit reference that debt restructuring must be compatible with existing human rights obligations and standards.

I propose that the following elements be reflected in a future legal framework on debt restructuring:

a) Debt restructuring should be compatible with the human rights obligations of the debtor State and lending State(s), including when acting collectively through international organisations.

b) The debt restructuring should also ensure respect for human rights by private lenders as outlined in the Guiding principles on business and human rights and other human rights standards applicable to non- State actors.

The proposed ideas are based on Human Rights Council resolution 27/30 inviting States to ensure that the new multilateral framework on debt restructuring is compatible with existing international human rights obligations and standards. It may sound self-evident that States are bound by the human rights treaties signed or ratified by them. However, so far national courts, international arbitration bodies or negotiations between debtors and lenders have largely ignored human rights obligations and standards or hardly assessed potential human rights impacts in their deliberations, decisions or proposed agreements.

While human rights primarily impose obligations on States, international financial institutions and private lenders have to respect as well human rights as outlined by the Guiding Principles on Business and Human Rights. Even non-State actors that are not business enterprises, for example individual bond holders, have certain responsibilities under international human rights law (see for example GP on Foreign Debt and Human Rights, Principles 6, 9, 55 and the Guiding Principles on Business and Human Rights, Principles 11-15).

2. Risk assessments and debt sustainability analysis carried out prior to a debt restructuring need to include human rights impact assessments

I propose inclusion of the following element in the new legal framework:

Risk assessments and debt sustainability analysis carried out prior to a debt restructuring should include human rights impact assessment. Due diligence in risk assessment before granting or renewing a loan should include the capacity of the debtor State to fulfil its human rights obligations towards its own population under a given financial situation.

The Guiding Principles on business and human rights provide several due diligence provisions (principles 17-21) that can as well be expected by State or State owned or controlled enterprises or institutions involved in lending or borrowing.

3. The future multilateral framework on debt restructuring should address adequately negative human rights impacts caused by hold outs

Disruptive litigation by hold outs is one – but probably the most prominent – example of the consequences of the legal void at the international level in relation to debt restructuring. Particularly in litigation by vulture funds, the interpretation of the contractual and procedural rights should take into consideration potential human rights impacts on the debtor’s population and on other lenders. National legislation should complement international rules by limiting within their jurisdictions the ability of so-called vulture or distressed sovereign debt funds to litigate for excessive demands which may undermine the ability of States, in particular developing States, to realise progressively economic, social and cultural rights.

In this context, I would like to refer the Ad-Hoc Committee also to a thematic report of my predecessor on vulture funds and human rights ([A/HRC/14/21](#)), to the joint statement on vulture funds litigation issued together with the Special Rapporteur on extreme poverty and human rights on 27 November 2014⁴, and Human Rights Council resolution [27/30](#) reaffirming in its operative paragraph 2 “that the activities of vulture funds highlight some of the problems in the global financial system and are indicative of the unjust nature of the current system, which directly affects the enjoyment of human rights in debtor States, and calls upon States to consider implementing legal frameworks to curtail predatory vulture fund activities within their jurisdictions” . (See as well Guiding Principles on Foreign Debt and Human Rights, Principles 52-54 and 59-62).

4. Debt restructuring should ensure that minimum essential levels of the enjoyment of economic, social and cultural rights can be satisfied even in contexts of financial crisis and retrogressive measures affecting the enjoyment of these rights should be avoided.

Article 2 of the International Covenant on Social, Economic and Cultural Rights obliges State parties to undertake steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of economic, social and cultural rights. As the Committee on the International Covenant on Social, Economic and Cultural Right has underlined in its [General Comment No. 3](#), State Parties have the minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of economic, social and cultural rights and retrogressive measures should be avoided and would need to be fully justified by reference to the totality of the rights provided for in the Covenant.

Even in a context of necessity, such as a financial crisis, retrogressive measures may only be implemented in a manner compatible with international human rights law: Measures that could impede the progressive realization of economic, social and cultural rights must (a) be temporary and restricted to the period of crisis; (b) strictly necessary and proportionate; (c) not be discriminatory and take into account all possible alternatives, including fiscal measures, to ensure the necessary measures to mitigate inequalities that may arise in times of

⁴ Available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15354&LangID=E>

crisis; and (d) identify the minimum core content of the rights enshrined in the Covenant, or a social protection floor, as developed by the International Labour Organization (ILO), and ensure the protection of this core content at all times (see [E/2013/82](#) and [A/HRC/25/50/Add.1](#), para 8-11). Such legal requirements should be taken into account when negotiating and deciding the terms of any debt restructuring and adjustment program.

States should as well ensure adequate protection of small scale bond holders through adequate banking regulations and consumer protection to avoid that they can incur losses that may endanger their enjoyment of core essential minimum levels of economic, social and cultural rights.

Consequently human rights law should have a role when deciding how to distribute financial losses. (see as well Guiding Principles of Foreign Debt and Human Rights, principles 17-18).

5. The human rights principles of impartiality, transparency, participation and accountability should be reflected in a new legal framework for debt restructuring

Should an international or national body be established or entrusted to arbitrate or adjudicate on debt claims, such a body must be appointed in and work in a transparent manner and ensure impartiality and independence from parties involved in a debt dispute. According to human rights law judicial or semi-judicial bodies should ensure a fair and public hearing by a competent independent and impartial tribunal established by law when making decisions affecting citizens (see Universal Declaration on Human Rights, article 10, Guiding Principles on Foreign Debt and Human Rights, principle 86). This principle is as well relevant for international bodies, making decisions that affect borrowing and lending States, international financial institutions, commercial bondholders and citizens.

Civil society organisations representing rights holders that may be affected by debt restructuring decisions should be able to participate in decisions affecting the enjoyment of their rights (see Guiding Principles on Foreign Debt and Human Rights, principles 28-32). This includes both individuals in debtor countries whose enjoyment of economic, social, rights might be affected and individual bond holders in other States.

6. International and regional human rights protection mechanisms and national human rights institutions and civil society organisations should be able to play a role in the decision making process of debt restructurings.

Such institutions and organisations should be able to provide expert briefs, contribute to the impact assessments and to the identification of applicable law, and be allowed to make submissions to decision making bodies dealing with debt disputes and debt restructuring when affecting the enjoyment of their rights.

Annex:

- Letter of the Independent Expert on foreign debt and human rights, 5 September 2014
- Human Rights Council resolution [27/30](#)
- Guiding Principles on Foreign Debt and Human Rights ([A/HRC/20/23](#))