



Mandate of the Independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights

Vulture funds and human rights

Remarks by Juan Pablo Bohoslavsky
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14th session of the Human Rights Council Advisory Committee
25 February 2015, Room XX

Dear Chair,

I would like to thank the members of the Advisory Committee for inviting me to this session, discussing the request of the Human Rights Council to prepare research-based report on the activities of vulture funds and the impact on human rights ([A/HRC/RES/27/30](#)). I welcome this opportunity to share some of my views.

The mandate of the Independent Expert on foreign debt and human rights started to look into issue of vulture fund litigation when it emerged that several poor countries that had been provided with debt relief under international debt relief initiatives were targeted with legal claims by vulture funds. In June 2010 my predecessor, Cephias Lumina, submitted a thematic report on vulture funds and human rights to the Human Rights Council ([A/HRC/14/21](#)). As far as I know this was the first thematic report on the issue from a human rights mechanism, and provides a starting point for further work on the issue.

Mr. Lumina's report includes a definition of what should be understood as a "vulture fund", and it included a limited number of case studies relating to vulture fund litigation affecting Liberia, the Democratic Republic of Congo and Zambia, illustrating how vulture fund activities had undermined in those countries the right to development and the realization of economic, social and cultural rights. Basically, the report argued, vulture funds eroded the gains from debt relief for poor countries and jeopardized the fulfilment of these countries' human rights obligations ([A/HRC/14/21](#), para 33).

Since 2010, when my predecessor wrote this thematic report, human rights standards have further evolved. I would like to mention here in particular the Guiding Principles on Foreign Debt and Human Rights ([A/HRC/20/23](#)), endorsed by Human Rights Council resolution 20/10 and the Guiding Principles on Business and Human Rights ([A/HRC/17/31](#)), endorsed one year earlier. Both sets of guidelines provide clues on why, from a human right perspective, abusive lenders should not be rewarded.

For example, the Guiding Principles on Business and Human Rights oblige States to ensure adequate regulation of business enterprises operating within their jurisdiction to ensure respect for human rights. In my view, this also implies the need for adequate regulation of private commercial entities in the financial sector, such as vulture funds, that may through their behaviour or activities cause negative human rights impacts, irrespectively of where such impacts take place. If vulture fund litigation in one country may impede another country to repay its restructured bond holders or trigger a debt crisis in another country, there are certainly extraterritorial effects on the enjoyment of economic, social and cultural rights that need to be

considered. In addition the Guiding Principles on Business and Human Rights set out certain human rights responsibilities of corporate actors themselves, including due diligence, measures to prevent and mitigate against adverse human rights impacts or consultation with affected stakeholders. I may therefore suggest to the Advisory Committee to reflect in more detail what these recent human rights principles require or recommend to States and so-called distressed debt funds.

While the effects of vulture funds litigation are of particular concern to heavily indebted poor countries, I would like to stress that such litigation has become increasingly a worldwide concern. Not only least developed countries, but middle income and highly developed countries have been targeted more and more by vulture funds.

Hold-out litigation has dramatically increased during the last years. A recent study by Schumacher, Trebesch and Enderlein found that between 1976 and 2010 there have been about 120 lawsuits by commercial creditors against 26 defaulting Governments in the United States and the United Kingdom alone, the two jurisdictions where most sovereign bonds are issued. While in the 1980s only about 5 per cent of debt restructurings were accompanied by legal disputes, this figure has gone up to almost 50 per cent and the total volume of principal under litigation reached USD 3 billion by 2010. About 34 out of 120 lawsuits were targeting Heavily Indebted Poor Countries and such litigation has resulted in delays for debt restructuring agreements.¹

Any delays in solving debt crisis come with significant costs, as financial and economic crisis become harsher and, as a consequence, can have more severe impacts on the enjoyment of human rights. Amongst experts there is consensus that debt restructurings are frequently “too little, too late” meaning inadequate debt relief not allowing the concerned country to exit the debt trap. The results have been negative both for debtors States and for their creditors.

Dear members of the Advisory Committee,

The litigation between NML Capital and Argentina before New York courts has set a problematic legal precedent. There are reasonable fears that the ruling will make future debt restructurings more difficult and provide additional incentives to hold-outs not to agree to debt restructuring agreements. The ruling has further removed financial incentives for creditors to participate in orderly debt workouts. Future debt restructuring will be more difficult, in particular for outstanding bonds without or weak Collective Actions Clauses (CACs).

Owing to its emblematic nature the Special Rapporteur on extreme poverty and human rights, Philip Alston, and myself have jointly raised our concerns with the United States of America, Argentina and the main litigating vulture fund, NML Capital Limited in three letters. The text of our communications and the responses received from the concerned countries can be accessed in the joint communications report of special procedures submitted to the 28th session of the Human Rights Council.² In addition, we voiced our concerns in a public statement that was

¹ Schumacher, Julian and Trebesch, Christoph and Enderlein, Henrik, Sovereign Defaults in Court (6 May 2014). Available at SSRN: <http://ssrn.com/abstract=2189997> or <http://dx.doi.org/10.2139/ssrn.2189997>

² ARG 2/2014, USA 15/2014 and OTH 10/2014 from 20 August 2014, reported in [A/HRC/28/85](http://www.hrcr.org/docs/A/HRC/28/85).

issued on 27 November 2014. We regret that NML Capital Limited has to date not send a formal reply to our letter.³

The outcome of the litigation between NML Capital and Argentina underscored the need to improve the predictability and fairness of debt restructuring. It triggered not only the Human Rights Council resolution with the request for the study of the Advisory Committee – but also set in motion a parallel process within the United Nations General Assembly, where an intergovernmental Ad-hoc Committee was established to negotiate a multilateral legal framework for debt restructuring.⁴ I have endorsed the need for improving international rules related to sovereign debt restructuring that should as well address the problem of hold-out and vulture fund litigation. My views can be found in a letter sent to the General Assembly Member States in September 2014.⁵ Furthermore, I highlighted to the Ad hoc Committee six human rights benchmarks that States should consider when elaborating a multilateral legal framework for sovereign debt restructuring processes like, for example, risk assessments and debt sustainability analysis carried out prior to a debt restructuring need to include human rights impact assessments; and international and regional human rights protection mechanisms, national human rights institutions and civil society organisations should be able to play a role in the decision making process of debt restructurings.⁶

It is my view that the collective action problem that vulture funds pose in debt restructurings needs to be addressed. There is a need for incentives that abusive creditors do not enjoy better treatment than those that are willing to compromise on their claims and allow a country to recover. To the contrary some form of financial disadvantages or punishment may be necessary to make creditors acting in bad faith willing to compromise, such as total or partial subordination of their debts, depending on how serious the bad faith was. In order to assess the good or bad faith of lenders there are objective standards, as the UNCTAD Expert Group designing a Workout Mechanism currently shows us.

It is notable that vulture funds are often secretive, both in terms of their ownership and operations, and many of them are incorporated in offshore financial centres and banking secrecy jurisdictions, commonly referred to as ‘tax havens’. Some are owned by large financial institutions such as hedge funds and in other cases their ownership is obscure. This suggests that owners of vulture funds are frequently not only trying to accumulate wealth through speculative means to the detriment of indebted countries and their populations, but that they are likely to avoid or evade taxation by hiding their gains in secrecy jurisdictions. In doing so, they are impairing so to speak twice the ability of States to mobilize necessary resources for public spending and the realisation of economic, social and cultural rights. In fact, there are links to illicit financial flows, taxation and human rights, topics that both the Special Rapporteur on extreme poverty and human rights and I have covered in recent thematic reports ([A/HRC/26/28](#), [A/HRC/28/60](#)).

³ “Human Rights Impact must be addressed in vulture fund litigation – UN experts”, 27 November 2014, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15354&LangID=E>.

⁴ For more background, working documents and submissions, see <http://www.unctad.info/en/Debt-Portal/Events/Our-events/GAG77-events-on-Legal-Framework-for-Debt-Restructuring-Processes/>

⁵ http://www.ohchr.org/Documents/Issues/IEDebt/letter_Chairman_of_the_Group_G77.pdf

⁶ My submission is available at:

<http://www.ohchr.org/Documents/Issues/Development/IEDebt/DebtRestructuring.pdf>

Distinguished members of the Advisory Committee,

Let me close with some suggestions in relation to the requested research report for your consideration:

1. It may be fruitful to undertake a more comprehensive empirical analysis about litigation by vulture funds and their impact on human rights covering not only heavily indebted poor countries. The research question could address a broader angle, for instance, the extent of delays caused by vulture funds litigation in debt restructurings; and the economic costs of vulture fund litigation. In this context, it could address to what extent vulture fund litigation has undermined the right to development and the ability of States to realise economic, social and cultural rights, the realisation of MDGs or the sustainable development goals to be adopted in the coming months.
2. The Advisory Committee may wish to undertake a more comprehensive legal analysis from the perspective of international human rights law, taking into consideration the evolving nature of international human rights law, including the Guiding Principles on Foreign Debt and Human Rights and the Guiding Principles on Business and Human Rights. In addition, principles of international law and human rights law, such as impartiality, stay on litigation, procedural fairness, transparency, co-responsibility and participation could be considered in more detail in relation to debt disputes including litigation by vulture funds.
3. The Advisory Committee could elaborate suggestions for States to consider regulative, legislative or other measures within their jurisdictions in order to limit disruptive effects of vulture fund litigation. A few countries, like Belgium, and the United Kingdom including some of its crown jurisdictions, have adopted for example national laws limiting either the possibilities of vulture funds to seize development cooperation funds or limiting their ability to litigate against highly indebted poor countries subject to international debt relief. The scope of these laws has been rather limited, but they could be evaluated. In addition certain measures could be proposed to enhance the transparency of such funds, prohibit commercial or public entities invests in vulture funds and ensure that their owners and their shareholders are disclosed and subjected to appropriate taxation.

I would like to stop here and am looking forward to the discussion. Thank you.