

Virtual Dialogues

with Latin America

FOREIGN DEBT AND HUMAN RIGHTS

Reframing Debates on Foreign Debt Regimes



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Foreign Debt and Human Rights: *Reframing Debates on Foreign Debt Regimes*

The **Center for Latin American Studies** at the University of Arizona, in collaboration with **Asuntos del Sur** with the generous support of the **Confluence Center for Creative Inquiry** presents *Foreign Debt and Human Rights: Reframing Debates on Foreign Debt Regimes* as part of the Virtual Dialogues series.

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Gastón Chillier
Executive Director of the Center for Legal and Social Studies of Argentina

Towards a Multilateral Approach to Sovereign Debts

by Matías Bianchi

If anything has been constant in the two centuries in Latin America since Independence, it has been the frequency of financial crises, especially crises of sovereign debt. It is striking that there is not a multilateral institutional architecture yet in place that can regulate these processes. The recent declaration of the G20 seems to be one step more in this direction, despite the resistance of core countries.

Sovereign debts in perspective

Sovereign debts are one of the most important channels of interaction between developed and developing countries. In the case of Latin America, they are a part of its history, as the practice of international borrowing is as old as the countries themselves, starting with the British financing of the newly independent republics in the 1820. Financial crises have been around for just as long, and most of these have been produced by crises of sovereign debts. A survey by ECLAC shows that out of the 940 financial crises registered in the history of the region, 576 were related to sovereign debt. These crises have occurred in cycles, with the last one following massive borrowing in the 1970s, and during which the foreign debts of countries in the region jumped from 22% to 45% of GDP. In 1979 the US Federal Reserve unilaterally decided to increase interest rates triggering the debt crisis of 1982. That episode sparked the so-called “lost decade” of the 1980s, when the region went from having an average of 121% of the global GDP per capita to 98%, and an average of 34% of the GDP per capita of OECD countries to 26%. The region still has the scars from that period.

“We still do not know the form that this framework will take—or even if it will happen—but it is clear that a profound debate must take place on several fronts: on the co-responsibility of creditor countries and institutions; on the mechanisms for debt restructuring; and on the need to consider the human impact of over-indebtedness.”

This “debt crisis” not only affected Latin America but also the rest of the developing world, a process that meant an enormous transfer of resources to developed countries. Between 1980 and 2006 developing countries paid back 12 times what they owed in capital and interests, and yet, they currently still owe five times more than at the beginning of the period. Eric LeCompte, executive director of Jubilee Network, says that “today, from every 10 dollars spent on foreign aid for poor countries, they spend 50 dollars in debt services”.

Sovereign crises have been a burden for developing countries throughout history. They have been crucial in defining North-South relations. What is striking is that no multilateral institutional devices have been created, be it at the regional or at the global level, to address these problems.

The case of Argentina versus the so-called “vulture funds” must be seen as one more chapter in this oppressive aspect of the history of emerging countries. As with other cases, the South American country finds itself now in an extremely delicate situation. Unlike in the past, however, the magnitude of this case has made it difficult for the international community to ignore. And now, for the first time, there is a call to build a system that will not leave developing countries at the mercy of creditors. Indeed, the Financial Times has called this “the case of the century”.

The recent G20 summit in Australia represents a step in the direction that others have taken toward this end, including the G77+China. Regional and global

multilateral organizations, such as the United Nations, the Organization of American States, MERCOSUR, ALBA and ECLAC, have all adopted diverse declarations and resolutions on this issue. Even the UN General Assembly—a pertinent forum for the discussion of these kinds of issues—recently voted on a resolution calling for the need to adopt a multilateral framework.

We still do not know the form that this framework will take—or even if it will happen—but it is clear that a profound debate must take place on several fronts: on the co-responsibility of creditor countries and institutions; on the mechanisms for debt restructuring; and on the need to consider the human impact of over-indebtedness.

Let's examine each front separately.

Debt restructuring mechanisms

If a company falls into bankruptcy, there are legal mechanisms to resolve any potential conflicts. If a country falls into default, on the other hand, there is no recourse. José Antonio Ocampo, former head of ECLAC, points out that the most important lesson learned in the debt management of the 1980s—a process that sunk Latin America into its worst economic crisis in history—was that the lack of mechanisms resulted in the creation of an effective creditors' cartel that was supported by industrialized countries and imposed conditions on countries that forced them to adopt recessive policies. A similar absence of debt-restructuring mechanisms has forced countries to face negotiations individually and from a position of fragility, leaving them at the will of creditors.

One objective of such mechanisms would be to avoid another fundamental aspect of debt restructuring: excessive litigation. Juan Pablo Bohoslavsky, an independent expert and UN adviser on this matter, notes that “vulture funds do not lend; they buy defaulted debt in order to start a litigation process. That is their business”. In the case of Argentina, these speculative funds, which

represent 1% of the country's debt, have managed to elicit a favorable sentence from a New York Judge who, upon interpreting the *pari passu* principle in an innovative way, has put at risk the country's decades-long restructuring process.

The G20 summit, which took place this week, made note of some of these facts and included in the final document the need to have “ordered and predictable

sovereign debt restructuring processes.” Later, in the annex, the document referred to the dangers of “excessive litigation.”

Co-responsibility and legitimacy

A second aspect under debate is the co-responsibility of creditors. The strongest debt crises that Latin America experienced were led by a financial surplus in international markets. This financial surplus promoted, either through force or influence, the acquisition of debts by developing countries. See, for example, the British industrial revolution in the 1820s; the “dance of the millions” after World War I; the flush of petro-dollars in the 1970s; and globalization in the 1990s. These periods of global surplus are intimately connected to local crises: the famous loan of Rivadavia aimed at modernizing the port of Buenos Aires; the Great Depression; the Debt Crisis; and the most recent sequence of Tequila, Asian,



G77 Summit, Santa Cruz, Bolivia 2014



G20 Summit, Brisbane, Australia 2014 Credit: Pablo Martinez Monsivais

Caipirinha and Tango crises. They were all synchronized.

These debt crises are not the result of an excessive borrowing pathology on the part of leaders from developing countries. Instead, the tendency to excessive/irresponsible borrowing responds to economic processes in core countries and the close relationship of these with our local elites. In Latin America, the massive borrowing of the 1970s happened under illegitimate military dictatorships. For example, Argentina's foreign debt jumped from 8 to 45 billion dollars during the throes of the country's "Dirty War." Ten billion dollars of that money was used for purchasing weapons from developed countries. Another \$5 billion was used to nationalize the debts of large local enterprises. It is crucial to study and discern the legitimacy of these debts.

Human Rights

Another crucial dimension of this debate goes beyond the economic aspects to gauge the social impacts of over-borrowing. Bohoslavsky points out that "just as credits can help economic growth and social development, so too can they condemn millions to poverty." Africa, the poorest continent in the world, has paid in debt services over the last quarter century as much as the entire developing world owed in 1980. Yet, 300 million people live with less than a dollar a day, 30 million children under age five suffer malnutrition, and 43% of the population simply does not have access to fresh water. Where should their priorities lie?

Judge Griesa's ruling to force Argentina to fully pay the vulture funds at 1600% of profits creates an incentive for other investors to misbehave, putting at risk any future attempt to restructure debts. Therefore, the UN Human Rights Council declared on September 26 that the "excessive demands" of the vulture funds "have a direct negative effect on the capacity of Governments to fulfill their human rights obligations, especially with regard to economic, social and cultural rights."

This is the agenda that the G77 + China is pushing through at the UN, where the General Assembly managed to approve a declaration on the need for a multilateral mechanism. Such a mechanism would allow developing countries to have a voice—and a vote—in these processes, thus preventing them from remaining at the mercy of powerful actors. Among the eleven who



Hon. Thomas P. Griesa, U.S. District Judge Photo Credit: John Loomis, 2012

voted against the UN resolution are the United States, England, Germany, and Japan.

For many observers, this discussion is not relevant because Argentina represents an isolated instance. For the most part, sovereign debts are under control. The World Bank estimates that these debts represent 22% of GDP, which is the lowest level in three decades. Nevertheless, commodity prices are falling; developed countries are highly indebted; and incrementally peripheral countries like Spain, Portugal, Greece and Italy are in a very fragile situation. Each of these facts should alarm the international community. Collectively, they emphasize the need to pursue this agenda.

Argentina is currently paying a very high cost for pursuing this fight. Everything indicates that it will not benefit from any results that may emerge in the short term. That is, if a mechanism is adopted, its capacity to work with countries will not be retroactive. In all, this losing battle may be a legacy that Argentina will leave for the rest of the international community.

Matías Bianchi is Director of Asuntos del Sur.
@matiasbianchi
He moderated the Nov. 18th Discussion.

After Argentina vs NML Capital: *Global Consequences of Argentina's Legal Battle with Predatory Hedge Funds* by Eric LeCompte

Before jumping into the topic, let me share with you who my organization is and why Jubilee USA (www.jubileeusa.org) is involved in what was seen – just a few years ago - as an obscure legal case, a case between a country that caucuses with the G20 against a group of hedge funds. Why Jubilee USA, founded by groups like American Jewish World Service, the US Conference of Catholic Bishops, most of the big 10 mainline national churches, unions and others, would ultimately file with the Supreme Court urging the high court to take the case. For Jubilee USA, our involvement is defined by our history and our mission.

First, our mission: to end extreme poverty and address inequality. Around the world, 85 people own more wealth than 3.5 billion people – more wealth than half of the world's population. The International Monetary Fund (IMF) notes the root cause of inequality is global sovereign debt – the basis of our credit based global financial system. 1 out of 5 people live in extreme poverty, and we believe that's 1 out of 5 people too many.

We know that extreme poverty exists because of a failure of debt, tax and trade policies. Right now, for every 10 dollars in aid from the developed world to the developing world, 50 dollars is leaving in debt payments, and another 100 dollars is leaving because of corruption

and corporate tax avoidance. For every 10 dollars in aid, developing countries are losing 150 dollars in revenue, and these countries continue to take out new loans

and rack up unsustainable debt. We harness the voice of our national member organizations and 400 faith communities around the United States to change the policies that keep people poor.

Our mission compels us to look at how the legal precedent in this case will hurt some of the poorest economies

in the world. We continue to move the G20, United Nations, US Government and the International Monetary Fund to change the policies that keep people poor. In fact, this past week, we won a commitment from the US



Paul Singer, founder and CEO of hedge fund Elliott Management Corporation, which currently holds a case against Argentina. Source: Copyright by World Economic Forum. swiss-image.ch/ Photo Remy Steinegger

government to move the G20 and the IMF to secure 100 million dollars in debt relief for the three impoverished Ebola-stricken countries of Sierra Leone, Guinea and Liberia. Guinea spends more on debt than on public health and these monies will become a long-term investment in infrastructure.

These continuous gains from our mission defines our history.

Jubilee USA's history counts over 130 billion dollars in debt relief. By international laws that we've won, proceeds from debt relief benefit must build social infrastructure in the developing countries that benefit from debt relief. These policies include the Heavily Indebted Poor Countries Initiative (HIPC) and the Multilateral Debt relief

initiative (MDRI). The last initiative was implemented by President George W. Bush. Bush's debt relief initiative, along with the funding his Administration organized to deal with the global AIDS crisis, is seen as among the



Eric LeCompte speaking at DOHA talks 2012.



The message on the streets of Argentina: "No to the debt payment."(Reuters/Marcos Brindicci)

most important aspects of his legacy. Congressional Quarterly cites our efforts as the last bipartisan efforts on Capitol Hill because our organizing moves Republican and Democrats to work together. These bipartisan policies created more accountability and transparency in the financial system and more protections for poor countries. Much of the historical debt relief we won addresses debts that propped up some of the world's worst dictators or rooted in corruption.

So, as we won billions in debt relief and social investment for the countries that need it most, we were devastated to see that groups known as "vulture funds" were targeting and actually collecting the aid monies we were winning for the poorest countries in the world.

In 2008, a vulture fund known as Donegal and Associates collected millions in debt relief money that Zambia had qualified for to build schools. They were targeting and collecting the very monies we were winning to help the poorest people in the world. As an aside, these predatory hedge funds were collecting debt relief aid monies funded by US tax payer dollars but avoided paying US taxes themselves by being domiciled in tax havens.

"If allowed to stand, the decision in this case...has the potential to generate systemic risks in the international system."

Jubilee USA was compelled to be involved in this case because these so called "vulture funds" were targeting

the aid monies we won for the world's poorest economies.

They were targeting our very history.

Further, our coalitions mission to protect the poor became front and center in this particular court case

because the case's precedent could exploit poor countries, making it more difficult for them to restructure debts and lead to defaults.

This brings us to the question: what is a "vulture fund" or predatory hedge fund? What happened to Argentina and why

does the case precedent matter?

A "vulture fund" is a type of hedge fund that buys debt for pennies on the dollar of a poor country or an economy in financial distress, as in the case of Argentina after its 2001 default. The hedge fund then uses the laws of the financial jurisdiction where the debt contracts were signed to force full payment. These types of funds often make an upwards of a 1400 percent profit. The business practice originally developed from these funds buying up distressed companies and then selling off pieces for profits. The name comes from these companies naming

their own business practice as scavengers.

However, the current practice developed into the more predatory taking advantage of economies facing distress or targeting and collecting aid monies the poorest countries in the world receive.

In Argentina's case, after their 2001 default, they restructured their debt and settled with more than 92 percent of the groups and individuals who held Argentine debt in deals in 2005 and 2010. Two "vulture funds" who had bought the debt cheaply became "hold outs" and refused to participate in the debt restructuring. Instead, these funds litigated Argentina for full payment in New York Courts because the contracts were signed under New York law.

These predatory hedge funds refused to take the deals offered in 2005, 2010 and after. If they had, these hedge funds would have made a profit 157 times their initial purchase – but they seek to make a profit of more than 1200 times and set a precedent that forces the poorest countries in the world into submission. The precedent could prevent these countries from restructuring their debt and dealing with inequality.

That's where this case has a global impact.

Because much of the world's sovereign debt is contracted in the world's chief financial jurisdiction, New York State, any court decision within this system could set a powerful precedent in favor of the hedge funds and against the world's poorest economies. Only a country with the resources of Argentina or a G20 country would have the wherewithal to spend an estimated 400 million dollars litigating this case over the last decade.

Countries like Grenada or the Democratic Republic of Congo, who we've determined could be impacted by this case precedent, don't have these resources (let alone the budget) to resist the predators. Now "vulture funds" have a powerful precedent in their tool box that could make it even more difficult for the world's poorest economies to oppose their will.

Part of the problem in this case is that the ruling out of New York interprets a parity, or *pari passu* clause, in favor of the predators and against how every country, most financial institutions and the majority of investors interpret the clause. The court's opinion is opposed by the International Monetary Fund, US government and the United Nations General Assembly.

Because Argentina is paying more than 92 percent of its bondholders at a restructured rate, the New York Court interpreted this to mean that the predatory funds and the hold-outs (those refusing to participate in the settlement) should also be paid – but instead of being

paid the same restructured rate – as most of the world believes Argentina should pay – the court decided these funds should be paid in full.

The US 2nd Circuit Court ruling hurt poor economies and essentially ruled that there is no risk in extremely risky speculative behavior. Let me repeat that – the ruling says to these predatory actors, "Your high risk cheap debt buying is a guaranteed investment."

As a result, these types of hedge funds are quickly buying up debt across Eastern Europe, Africa and Caribbean and in the poorest countries of the world.

The precedent encourages all investors to "hold-out" during any country's debt restructuring because the ruling offers a guarantee to be paid in full. After the 2nd Circuit Court ruling was made, the final appeal on this case was set in motion and Jubilee USA filed to the Supreme Court and urged them to take the case this past spring. We organized 80 religious and relief groups to sign onto our filing.

Our filing was joined by banks, investors and numerous countries who sided with us, noting that this case could change global debt restructuring and impact the poorest countries on the world. During this legal battle the US government, majority investor groups and the International Monetary Fund weighed in on the side of Argentina because of the global repercussions of the case.

In spite of the global consensus, the Supreme Court refused to hear the case and, while hearing a related case, ultimately upheld the lower court's ruling.

What does this court precedent mean for poor countries? It means trouble restructuring their debts and the targeting of their aid monies.

Jubilee USA's researched has determined that there are two other countries in the New York system who could be affected.

1.) The Caribbean Island of Grenada, where a copycat case is in effect around the interpretation of parity or *pari passu* clause. According to the most recent US Central Intelligence Agency statistics, nearly 40 percent of the population lives in poverty. A hold-out, the Taiwan Export Import Bank, is demanding full payment.

2.) The Democratic Republic of Congo, which the United Nations ranks 2nd to last in Global development. The DRC just lost a case to two vulture funds that now in the course of appeals will face the "parity" clauses. This is a judgment that goes back to the corrupt Mobutu

regime when the country was still called Zaire. On 18 million dollars in principle, the so called “vulture funds” were awarded 68 million dollars.

At this point, the United Nations, world governments, investor associations, big banks and the International Monetary Fund all agree with Jubilee that predatory and hold-out behavior must be stopped.

There is clear global consensus to stop the behavior and mutual support of several solutions – but there is division about how far we should go.

The following solutions are proposed and in various stages of action:

1.) Contracts/Market Changes – After the crisis in Greece, US Treasury convened one of the largest groups of investors and banks, the International Capital Markets Association, to discuss contract changes that would ensure the parity clause would force hold-outs and “vulture funds” to participate when countries restructure their debts. In recent weeks, Mexico, Kazakhstan and Vietnam have added these to new bond contracts. The International Monetary Fund and the G20 generally support similar proposals. These proposals, while important and supported by Jubilee USA, are not comprehensive enough to deal with the various types of debts that can be bought beyond sovereign bonds. Further, the contract clauses don’t deal with 900 billion in existing debt stock governed under New York law. This leads us to the need for statutory or law changes to the laws that govern the various financial jurisdictions.

2.) Statutory/Law Changes in Financial Jurisdictions – In the IMF’s October paper where they demonstrated support for changes in bond clauses, they also noted that if the precedent in this case impacts other countries, there should be changes to New York law. In particular, the IMF noted that changes to the Foreign Sovereign Immunities Act could prevent this type of behavior. Jubilee USA has previously introduced bipartisan legislation in the US Congress that would make the behavior less profitable. There’s also laws that could be introduced that would force hold-outs to sit at the table. Laws that deter predatory hedge funds have been passed in several financial jurisdictions in Europe like the United Kingdom and Belgium. We believe that every country in the world – whether they are a primary financial jurisdiction or not, should pass these kinds of laws. In addition to these statutory changes, there also needs to be shifts to the global financial system.

This brings us to the final solution which also enjoys significant global support.

3.) Bankruptcy Process for Countries – In September we won a vote at the UN General Assembly to begin a process to create a legal framework for bankruptcy for countries. Only 11 countries voted against this resolution and in the next few weeks the next step of the process begins. A bankruptcy process, similar to US Chapter 11 could force all debt holders to sit at the table during a debt restructuring. However, we need to understand that the global support for this process is derived from more than just wanting to stop the vulture funds. What the overwhelming support of the process shows, especially from poor countries and what are considered to be “middle income” countries, is that there is concern over the entire financial system. A global bankruptcy process, similar to what Adam Smith, the father of modern economics argued for, could do much more than stop predatory behavior. The process could prevent countries from defaulting in the first place and limit regional and global financial crisis. Yes, this process is important for preventing the next global financial crisis and increasing stability and predictability in the market. The International Monetary Fund, through a series of papers over the last year and a half, explored aspects of global bankruptcy.

It’s exciting that there is consensus to stop the predatory behavior and incredibly exciting that consensus is growing to actually change how the financial system operates.

In closing my comments on the global consequences of Argentina vs NML Capital, I’d like to share a selection of our Supreme Court filing that is available along with other legal documents on the case on our website.

http://jubileeusa.org/fileadmin/13-990__-991_Amici_Brief_filed_3-24-14.pdf

Eric Lecompte is the Director of the Jubilee USA Network.

@Eric_LeCompte

He participated as a discussant at the Nov. 18th Virtual Dialogue.

Summary and Excerpts of August 2014 Report to United Nations on Effects of Foreign Debt on Human Rights

by Juan Pablo Bohoslavsky

The following excerpts are from Juan Pablo Bohoslavsky's report 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 delivered to the UN General Assembly on August 7th, 2014. The report is publicly available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/69/273

I. Introduction

1. The present report sets out the preliminary workplan of 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, for the period from 2014 to 2017. On 8 May 2014, Juan Pablo Bohoslavsky was appointed by the Human Rights Council as the new Independent Expert on the effects of foreign debt; he assumed office on 2 June 2014. His report is submitted pursuant to Council resolution 25/16, in which the Council requested him to report regularly to the Council and the General Assembly.

2. The report is structured as follows: first, it provides a short background on the history of the mandate followed by a brief overview of the informal consultations that the Independent Expert held in New York and Washington, D.C., from 7 to 11 July 2014. It then outlines six thematic priorities that the Independent Expert would like to study further during his first three years. They include: (a) preventive aspects of debt policy and debt management to avoid potential negative human rights

implications of borrowing; (b) international human rights law in the context of debt restructuring and debt relief; (c) good practices to avoid negative human rights implications in the context of debt crisis and economic adjustment programmes; (d) human rights and debt arbitration in the context of bilateral investment treaties; (e) lending to States involved in gross human rights violations and transitional justice; and (f) impact of illicit financial flows on human rights.

3. The last section outlines the methodological approach that the new Independent Expert will follow while implementing his mandate. This includes

“The idea is not to wait until a debt crisis erupts, with potential negative impacts on the realization of economic, social and cultural rights, but to increase awareness that such impacts can frequently be avoided by improved fiscal policies and debt management.”

participation in international debates on debt relief, debt restructuring, financing for development, and illicit financial flows. In this context, he intends to attend key events, in particular those related to the further development and implementation of the United Nations post-2015 development

agenda. He would like to enhance dialogue and engagement with States, international financial institutions, United Nations agencies and other international organizations, the private sector, civil society and academia. Country visits will be essential to identifying good practices, assisting Governments in implementing internationally agreed (sustainable) development goals, learning from national and local experiences and identifying human rights challenges that States face while pursuing debt or adjustment policies. The Independent Expert will need to provide advice, undertake advocacy and raise concerns through established working methods of special procedures,

including communications and public statements, and continue to pay attention to the particular impact of debt and structural adjustment policies at the international, national and local levels on women, children, persons with disabilities, indigenous people, migrants, minorities and other groups. He will base his advice and policy recommendations on the obligations and policy guidance that international human rights law provides. His intention is not only to remind States and other stakeholders about their human rights obligations or responsibilities but also to provide advice to them when they are required to take difficult decisions in challenging circumstances. His research and advice will therefore focus on good practice and solid empirical evidence.

IV. Thematic priorities for 2014 to 2017

11. While the six substantive themes are separated for the purposes of the present document, it is stressed that the mandate holder will highlight the linkages among them. As not all stakeholders may have found time to provide feedback during the few weeks since the Independent Expert assumed office, he is open to receiving further comments and suggestions. The workplan outlined below may therefore be further adjusted. In addition, some flexibility in implementing the workplan should remain, to ensure that the mandate holder can respond adequately to new developments that will require his attention. Finally, the full realization of the work programme may depend on whether the mandate holder receives support in addition to the core funding provided through the regular budget of the United Nations.

A. Preventive aspects of fiscal policies and debt management

12. Sovereign debt and human rights discourse may have preventive aspects in the context of debt crises which have remained largely unexplored by the academic, civil society, governmental and international

communities. Debt policies and debt management strategies designed and implemented by Governments and monitored by international financial institutions rarely take into consideration the human rights implications of debt portfolios. The idea is not to wait until a debt crisis erupts, with potential negative impacts on the realization of economic, social and cultural rights, but to increase awareness that such impacts can frequently be avoided by improved fiscal policies and debt management. Contributing to the enhancement of this preventive dimension of human

rights law in sovereign financing constitutes a goal in itself. While ensuring the enjoyment of human rights sometimes requires resources, international human rights standards should inform the facilitation of responsible, effective and sustainable fiscal policies and management strategies. This includes the study of contemporary and prominent sovereign financing instruments, such as bond and derivative trading.

B. Human rights in the context of debt restructuring and debt relief

13. International law applicable to sovereign debt restructuring is still in its infant stage. Some international rules and principles are emerging and are being consolidated. As sovereign insolvency has obvious implications for the enjoyment of economic, social and cultural rights by debtors' populations and of their right to development, international human rights law should be considered when defining and identifying the rules governing debt restructurings. Standstill agreements, seniority, the distribution of financial losses between debtors and creditors and among creditors, the legitimacy of decision-making processes, holdout creditors' rights, and the procedural and substantive aspects of vulture funds litigation are concrete examples of problems and challenges posed by every debt restructuring, the rules relating to which should also be informed by international human rights law. Research will be encouraged in this realm, and the Independent Expert will undertake, when suitable, advocacy for a human rights-based approach to debt restructuring and debt relief.



Juan Pablo Bohoslavsky; C. Chappat / UN Library, Geneva

C. Good practices in dealing with debt crisis

14. The mandate holder will continue to monitor how debt burdens and adjustment programmes affect the enjoyment of human rights. Such monitoring will be complemented with the exploration of more sophisticated tools informed by human rights law to give Governments and those severely affected by such programmes more effective means to prevent negative human rights impacts that may result from such policies, and, if required, receive compensation for them. Such tools may operate at both the domestic and international levels. In the same vein, it is necessary to identify best practices for decision-making in situations in which retrogressive measures cannot be avoided owing to necessity. Who is affected by policy reforms, how much and for how long? How can adjustment policies be implemented in a manner that human rights, including those of vulnerable or marginalized groups (including, but not limited to, children and women), are respected and that essential levels of economic, social and cultural rights remain guaranteed? These are all delicate questions that Governments have been seeking to answer with varying degrees of success from the human rights viewpoint. Lessons can be learned from these experiences.

15. The identification of applicable rights and appropriate remedies in the debt context will ensure that the claims of adversely affected groups can be considered alongside those of creditors and other stakeholders in formulating any debt restructuring or adjustment programme.

D. Debt disputes and bilateral investment treaties

16. International investment arbitration is increasingly used to solve disputes between sovereign debtors and their creditors despite the legal gaps and inconsistencies in foreign investment law and institutional weaknesses in the international arbitration system. Nevertheless, given that its application to debt disputes is ultimately a policy choice of the parties to the treaties, and as cases are actually proceeding, it would be useful to explore whether international human rights law has, and should have, a role in this area when dealing with sovereign debt disputes while monitoring the evolution of those arbitration cases. Creditors' property rights, States' responsibilities and the fundamental rights of debtors' populations need to be fairly balanced

in every debt dispute forum while adequately dealing with the collective action problems that debt distress brings.

E. Lending to States and non-State actors engaged in gross human rights violations

17. While acknowledging the seminal work on sovereign debt and human rights carried out in 1978 by Antonio Cassese for the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights (E/CN.4/Sub.2/412 (vols. I-IV) and Corr.1), the Independent Expert is of the view that more work is needed to better understand whether, and how, to prevent and minimize the risk that private and official financial assistance may be provided to Governments and non-State actors committing gross human rights violations. This work could include quantitative and qualitative academic research on the link between debt and human rights violations, and country studies and recommendations on the use of financial instruments to prevent, halt or minimize gross human rights violations, as well as access to justice in this regard.

18. Transition to peace poses a great political, legal, economic and institutional challenge in terms of holding State and non-State actors accountable for their roles during conflict periods. In those cases in which lenders and other economic actors may have financially contributed to the success of Governments that grossly violated human rights, transitional justice mechanisms may be adopted and/or adapted to incorporate those financial actors into the quest for truth, justice, memory, reparation and non-repetition. In addition, as there are bound to be arguments for a clean slate after internal conflicts, it is worth tracking and useful to identify best practices or emerging custom in this respect. Contributing to both conceptual discussions and advice to countries going through transitional periods is among the challenges for this mandate.

19. As a better understanding of the links between gross human rights violations and sovereign financing is linked not only to the right to the truth but also to the prevention of abuses, intellectual exchanges with international financial institutions, private lenders, United Nations organs and civil society actors working on those issues will be encouraged.

F. Impact of illicit financial flows on the enjoyment of human rights

VI. Conclusions

20. The Independent Expert was requested by the Human Rights Council in its resolution 25/9 to undertake an additional study on the effects of illicit financial flows in the context of the post-2015 development agenda of the United Nations. This follows an earlier request made by the Council to the previous mandate holder to submit an in-depth study on the impact of non-repatriation of funds of illicit origin on the enjoyment of human rights to the Council (see resolutions 19/38 and 22/12 and documents A/HRC/22/42 and Corr.1 and A/HRC/25/52).

21. In order to carry out the study, illicit financial flows need to be further defined and their volume, origins and destinations studied. In addition, as systematic approaches to address the problem will be needed, it is not sufficient to look at success on a case-by-case basis only; it is important to focus on the identification and systematization of human rights effects of non-repatriation of illicit funds, which reduce developing countries' resources and capacities to fulfil the civil, political, economic and social rights of citizens, and feed global poverty and inequalities. It is also necessary to pay attention to the causes and structural roots that facilitate and promote illicit financial flows in countries of origin and countries of destination of such flows. As a general principle, more transparency in financial markets, including more and better information and access to information, seems to be needed in order to design effective and/or improved instruments to prevent illicit financial flows and their negative human rights spillover effects. Related analytical work and the formulation of advice will be carried out by the Independent Expert.

22. In this context, the United Nations Convention against Corruption, as well as the development of international human rights law (including the debate about extraterritorial obligations) applicable to corporations, will be highly relevant to efforts to minimize illicit financial outflows. Collaboration with domestic and international organizations and entities working on these issues, including the Working Group on business and human rights, will be a priority.

23. For countries in transition, the repatriation of stolen assets poses an even greater challenge. Rectifying instances of corruption, embezzlement and cronyism can be crucial for the achievement of broad goals of transitional justice.

37. The workplan of the Independent Expert on the effects of foreign debt and human rights will focus on several issues that, despite their great importance, have received limited international attention from a human rights perspective. These include preventive measures to avoid debt crisis and associated negative human rights impacts; good practices in dealing with debt crisis to avoid retrogressive measures in the realization of economic and social rights; the role of human rights in debt restructurings; debt disputes in the context of bilateral investment treaties; lending to States and non-State actors involved in gross human rights violations; and the impact of illicit financial flows on the enjoyment of human rights.

38. The Independent Expert will promote human rights accountability and monitoring, including through guidance on human rights impact assessments to protect against and provide remedies for any negative human rights impacts of finance and investment policies, and promote and support the participation of rights holders in the design and monitoring of public policies, budgets and development projects, including austerity measures.

39. Part of his human rights mainstreaming activities will be devoted to helping to integrate human rights in relevant United Nations policies and programmes in the context of the post-2015 agenda framework currently under discussion.

40. He is convinced that putting human rights at the heart of development and financial policies not only is the right thing to do from a normative perspective but will also lead to much better and more sustainable results for economic, social and human development.

Juan Pablo Bohoslavsky participated as a discussant on the Nov. 18th dialogue.

His appointment as an independent expert at the United Nations began officially on June 2nd, 2014.

The Human Rights Impact of Sovereign Debt

by Gastón Chillier



“Enough vultures.”(Reuters/Enrique Marcarian)

Sovereign debt may be used to foster economic growth and help poorer countries achieve their development goals. But it is a double-edged sword because ballooning debt burdens can spark economic and social crises, dragging millions of people into poverty. In those cases, human rights—including people’s right to housing, health care and education—are often violated.

Argentina’s legal dispute with vulture funds has similar human rights ramifications. The country defaulted on roughly \$100 billion in sovereign debt in 2001-2002, during a traumatic financial and political crisis. Nearly 93 percent of creditors agreed to swap their defaulted debt for restructured bonds in 2005 and 2010, but “holdout” creditors—led by vulture funds such as NML Capital—sued to recover the full value of the defaulted bonds, even though they’d bought them for pennies on the dollar.

Earlier this year, the US Supreme Court denied

a petition filed by Argentina in a case initiated by NML and Aurelius Capital Management. As a result, Argentina was ordered to pay its debt to these vulture funds, even though this violated the country’s own laws and the terms of the restructured bonds. Argentina refused to pay the vulture funds and a US federal court blocked its payment on restructured bonds in July. Effectively, the US judicial system and the vulture funds are holding hostage the creditors who accepted the restructurings. The legal deadlock continues until today.

The Argentine case is not unique. In 2010 more than fifty claims of this sort had been filed against highly indebted countries, and many of them are still pending. Globally, there is a fundamental conflict between the handful of bondholders who use predatory practices furnished by the financial system to profit exorbitantly and States that must reach agreements with the majority of their bondholders and guarantee the economic, social and cultural rights of their people.

States do have an obligation to honor their financial commitments, but they also have international obligations that not only govern their actions within the international community but also require that they respect and protect the human rights of each person in their jurisdiction.

In reaction to the US Supreme Court decision, CELS put out a statement that was co-signed by more than 100 social organizations worldwide. We argued that the court ruling violated international law principles and threatened Argentina's ability to fulfill its basic human rights obligations. We believe this case exposes a global dilemma regarding sovereign debt and human rights because it gives creditors no incentive to participate in restructurings since—according to the court's erroneous interpretation—vulture funds can swoop in at any time and demand full repayment on defaulted debt. That means sovereign debt crises will be more difficult to resolve across the globe. The US Treasury Department opposed the ruling on the same basis.

To address these grave deficiencies in the global financial system that benefit the vultures, the UN General Assembly approved a resolution in September to devise a multilateral legal framework for sovereign debt restructurings. The General Assembly resolution (A/RES/68/304) recognized that a State's right to restructure its debt should not be frustrated by any other State, and it expressed concern that existing external debt problems in some low- and middle-income countries could hamper their sustainable development.

In our statement, we stressed the urgent need to take collective action so that all States enact laws restricting the predatory activities of creditors; debtor States establish safeguards to limit the ability of foreign jurisdictions to harm the full enjoyment of human rights; and a global mechanism compatible with human rights obligations and standards is created to resolve sovereign debt disputes in an orderly and timely fashion. States must ensure that their foreign debt obligations do not prompt spending cuts that will ultimately hinder the advancement of human rights.

In terms of legal arguments, Argentina and many experts on the issue dispute the US court's novel interpretation of the "pari passu" (or equal treatment) clause found in the defaulted bonds held by vulture funds. The court says this clause forbids Argentina from making payments on its restructured debt if it does not simultaneously pay the bondholders who rejected the terms of the restructuring, regardless of whether these creditors hold the same bonds or not. Argentina sustains that it is

must give equal treatment only to those investors who own the same bond.

Other precedents that support the Argentine position are the Principles on Promoting Responsible Sovereign Lending and Borrowing, unveiled in 2012 and cited by the General Assembly in its September resolution. One of the principles establishes that it is abusive for creditors to acquire the debt instruments of a sovereign country in financial distress with the intention of forcing a preferential settlement outside of a consensual workout process. The principles also aim to help countries maintain steady economic growth and achieve the UN's Millennium Development Goals.

In addition, the general principles of law recognized in the Rules of the International Court of Justice guide the behavior of States and include the principle of good faith and non-abusive use of the law.

In terms of human rights norms, the adverse impact of debt burdens and fiscal adjustment measures on the realization of economic, social and cultural rights has been flagged as a concern since the early 1990s by the Committee on Economic, Social and Cultural Rights (CESCR), a UN body of independent experts monitoring implementation of an international covenant on this matter.

In addition, the Guiding Principles of Sovereign Debt and Human Rights were endorsed by UN Human Rights Council in 2012. They state that financial commitments and loan agreements do not derogate States' human rights obligations, and that any external debt strategy must be designed to guarantee the full enjoyment of human rights.

Finally, Cephas Luminas, a former UN Independent Expert on the effects of foreign debt and other financial obligations of States, urged all countries to enact legislation to limit the ability of investors to pursue immoral profits at the expense of the poor and most vulnerable through protracted litigation.

We couldn't agree more.

Gastón Chillier is the Executive Director of the Center for Legal and Social Studies (CELS) of Argentina.

@gchillier

He participated as a discussant at the Nov. 18th Virtual Dialogue.

Contributor Bios

Matías Bianchi

Matías Bianchi is the director of Asuntos del Sur and lectures at the University of Arizona. He is a political scientist and his areas of interest include federalism, subnational democratization processes and issues of governance in natural resource-exporting countries. He has worked for the Latin American Program of the Woodrow Wilson Center, the UNDP, the Government of Argentina, the Development Center of the OECD and led the Federal Institute of Government. He has recently published the book “Democracy in the margins of democracy: activism in Latin America in the digital age”.

Eric LeCompte

Eric LeCompte is the Executive Director of Jubilee USA Network and represents a civil society coalition of 75 US member organizations, 400 faith communities and 50 Jubilee global partners. Jubilee USA Network has won critical global financial reforms and more than \$130 billion in debt relief to benefit the world’s poorest people.

Juan Pablo Bohoslavsky

Juan Pablo Bohoslavsky was appointed as an 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 for the United Nations in June of 2014. Prior to his appointment he worked as a law firm partner litigating in Argentina on behalf of corporations and non-governmental organizations and served as a legal consultant for the Argentiniana state to arbitration cases relating to interntional investments.

Gastón Chillier

Gastón Chillier is Executive Director of the Center for Legal and Social Studies (CELS) of Argentina. He is a lawyer graduated from the University of Buenos Aires (UBA) and holds a Master in International Law and Human Rights from the University of Notre Dame, in the United States. He has worked as an associate in Human Rights and Security, with the Washington Office on Latin America (WOLA), and as program director for Latin America at Global Rights.

About

Virtual Dialogues with Latin America is a series of events organized by the Center for Latin American Studies at the University of Arizona with support from the Confluence Center for Creative Thinking and Asuntos del Sur think tank. The goal is to provide an expository medium by which leading experts in Latin America can interact with students and faculty, not just at the University of Arizona, but world-wide as the events are streamed live. Using social media the participants around the world can chime in and communicate with the discussants. The dialogues address pertinent issues that affect Latin America today. Just as we rely on institutional support from the aforementioned organizations and institutions, we also work with and rely on partners throughout Latin America. Thank you to the Confluence Center for Creative Inquiry at the University of Arizona for being a major supporter as well as to Dr. Linda Green for her considerable time and resources in this project.

Directors of the Virtual Dialogues Series: Dr. Linda Green and Dr. Matías Bianchi

Center for Latin American Studies at the University of Arizona

Address: 845 N Park Ave., Suite 280, Tucson, AZ 85721

www.las.arizona.edu

Tel: (520) 626-7242

Fax: (520) 626-7248

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Center for Latin American Studies
University of Arizona
Address: 845 N Park Ave., Suite 280
Tucson, AZ 85721
www.las.arizona.edu
Tel: (520) 626-7242
Fax: (520) 626-7248
Administrative Assistant Robert James
rbjames@email.arizona.edu