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Activities of vulture funds and their impact on human rights

Final report of the Human Rights Council Advisory Committee

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I. Introduction

1. The present report is submitted in accordance with Human Rights Council resolution 27/30, by which the Council requested the Human Rights Council Advisory Committee to prepare a research-based report on the activities of vulture funds and their impact on human rights.

2. In the resolution, the Council reaffirmed that the activities of vulture funds highlighted some of the problems in the global financial system and were indicative of the unjust nature of the current system, which directly affected the enjoyment of human rights in debtor States. It called upon States to consider implementing legal frameworks to curtail the activities of predatory funds within their jurisdictions.

3. In preparing the present report, the Advisory Committee sought the views and inputs of Member States, United Nations agencies, relevant international and regional organizations, the Office of the United Nations High Commissioner for Human Rights (OHCHR) and relevant special procedures mandate holders, including 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, as well as national human rights institutions, non-governmental organizations and eminent academics. The report was prepared by the Rapporteur of the drafting group on the activities of vulture funds and the impact on human rights, Jean Ziegler.[1]

4. The Advisory Committee would like to thank, in particular, the Governments of Argentina, Cuba, El Salvador, Kuwait, Mauritius, the Philippines and the Bolivarian Republic of Venezuela, the Ombudsman of Portugal, the National Commission for Human Rights of Greece, the Centre for Legal and Social Studies, the Centre Europe-Tiers Monde, the Committee for the Abolition of Illegitimate Debt and the Permanent Assembly for Human Rights (Asamblea Permanente por los Derechos Humanos) for the information provided in response to the questionnaires sent in March 2015 and February 2018.

5. In the report, the growing concerns raised by the strategies deployed by vulture funds are highlighted. It also includes an analysis of some of the most striking examples of the activities of vulture funds and national and international initiatives and efforts undertaken to face and mitigate the negative impact stemming from those activities on the enjoyment of economic, social and cultural rights and the right to development.

II. What are vulture funds?

6. There is no international legal regime governing cases of State insolvency or bankruptcy. When a State defaults on its sovereign debt, it must initiate a process for restructuring the debt in order to obtain a reduction in the debt or an extension of the repayment terms. That implies undertaking complex and protracted negotiations with a very diverse range of creditors.[2] Participation in such restructuring processes is voluntary and therefore even a small percentage of creditors may well decide to hold out with a view to obtaining a higher level of repayment in future. It is at this point that vulture funds come into play.

7. According to the former Independent Expert on foreign debt, vulture funds are "private commercial entities that acquire, either by purchase, assignment or some other form of transaction, defaulted or distressed debts, and sometimes actual court judgments, with the aim of achieving a high return. In the sovereign debt context, vulture funds (or 'distressed debt funds', as they often describe themselves) usually acquire the defaulted sovereign debt of poor countries (many of which are heavily indebted poor countries

[1] The Rapporteur would like to thank Milena Costas Trascasas for her support in the elaboration of the present report.

[2] They might be international financial institutions, bilateral or multilateral lenders, private financial institutions or bondholders.

(HIPCs), on the secondary market at a price far less than its face value and then attempt, through litigation, seizure of assets or political pressure, to seek repayment of the full face value of the debt together with interest, penalties and legal fees" (A/HRC/14/21, para. 8).

8. These commercial entities are not lenders, but private hedge funds that purchase on the secondary market (or collect from other bondholders) distressed debt at discounted prices and then sue the debtor for a much higher amount. They are popularly called "vultures" because of their modus operandi, whereby they:

(a) Target States with distressed economies and a weak capacity for legal defence. According to the African Development Bank, 20 of the 36 poorest developing countries have been threatened or targeted by aggressive litigation by vulture funds since 1999. The World Bank estimates that more than one third of the countries that qualified for its debt relief initiative have been targeted by lawsuits by at least 38 litigating creditors, with judgments totalling $1 billion in 26 of those cases;[3]

(b) Operate and take advantage of the lack of regulation of the secondary market. To obtain significant discounts, vulture funds acquire sovereign bonds when the indebted country is either close to default or has already defaulted on its debt. In the secondary market, they can operate with great secrecy in terms of both ownership and operations. Sovereign bonds are thus traded between investors without the debtor State concerned necessarily being aware or informed of such operations;[4]

(c) Refuse systematically to participate in orderly debt restructuring processes. Once the State starts negotiations with private bondholders to restructure the sovereign debt, vulture funds exercise their "right" to hold out and/or start collecting and purchasing sovereign distressed bonds; they then wait until the country's financial situation has improved to start negotiations for a better deal. In addition to difficulties in gaining access to the international capital markets again, the debtor State is under the threat of being subjected to a long and costly process with a particularly aggressive litigator. The additional pressure may easily prompt some Governments to accept highly disadvantageous deals;[5]

(d) Sue the country for reimbursement of the full value of the bond, plus interest and procedural costs. If the debtor State does not surrender to the claims of the vulture funds, then the next step in the strategy is to file legal claims seeking reimbursement of an amount much higher than the price they paid in the secondary market (usually the face value of the bonds), increased with interest, delay penalties and legal expenses. To ensure that they get a favourable court decision they make sure that "creditor-friendly" jurisdictions are involved in the resolution of the dispute.[6] The courts of debtor countries may increasingly become an option, as weaker legal systems are easily overwhelmed by the level of technical detail involved in this kind of litigation. Procedures are particularly protracted (on average six years), costly and burdensome (with annualized returns ranging

[3] See African Development Bank Group, "Vulture funds in the sovereign debt context", available from www.afdb.org/en/topics-and-sectors/initiatives-partnerships/african-legal-support-facility/vulture-funds-in-the-sovereign-debt-context/.

[4] Because big institutional investors do not like to sue sovereign States, they seek to obtain some return by selling their defaulted debt to vulture funds on the secondary market. See Devi Sookun, *Stop Vulture Fund Lawsuits: a Handbook* (London, Commonwealth Secretariat, 2010), p. 11.

[5] To force the targeted State to pay, vulture funds resort to lobbying and other pressure tactics, such as filing actions to attach assets and organizing press campaigns to discredit debtor States. See Romina Kupelian and María Sol Rivas, "*Vulture Funds: the Lawsuit Against Argentina and the Challenge They Pose to the World Economy*" (Centro de Economía y Finanzas para el Desarrollo de la Argentina, working paper No. 49, February 2014), p. 7.

[6] New York and London are the primary locations for external sovereign borrowing and related legal disputes. Over 70 per cent of international bonds are issued under New York State law, while most of the remainder are issued under English law. See Julian Schumacher, Christoph Trebesch and Henrik Enderlein, "Sovereign defaults in court", CESifo working papers (February 2018), p. 1.

from 50 per cent to 333 per cent).[7] As a consequence, the financial and reserve management capacities of the debtor State remain compromised for a long period.

(e) "Chase" the country to enforce the judgment: once vulture funds have obtained a favourable judgment, they seek its enforcement before different courts through "forum shopping" practices, until they secure the enforcement action they desire. Figures show that attachment of a country's assets abroad has become a particularly common legal strategy in past years.[8] Despite many unsuccessful attempts, such pressures have often helped vulture funds to achieve a favourable out-of-court settlement. Such outcomes reinforce the legal strategy pursued by vulture funds of chasing States before courts worldwide in the hope of eroding State immunity, which shields certain State properties and assets from seizure;[9]

(f) Obtain exorbitant profits: vulture funds have achieved, on average, recovery rates of some 3 to 20 times their investment, equivalent to returns of 300–2,000 per cent. In some cases, the claims of vulture funds constitute a significant portion (12–13 per cent) of a country's gross domestic product (GDP);[10]

(g) Operate in jurisdictions where bank secrecy rules apply: most vulture funds are incorporated in tax havens, where there is no obligation to disclose information on benefits or ownership and it is feasible to hide gains to avoid or evade taxation.[11] Such jurisdictions facilitate the secretive manner in which vulture funds operate and the flight of much-needed capital, particularly from developing countries (A/HRC/14/21, paras. 13–14).

III. Case studies

9. The predatory practices of vulture funds in relation to developing countries, particularly heavily indebted poor countries, have a long history. The countries most commonly targeted have unsustainable debt burdens and lack both the capacity and the resources needed to face such complex and protracted judicial processes. In recent years, vulture funds have aimed their profit expectations at middle-income countries, particularly Argentina. With more than 50 lawsuits filed by commercial investors after the default of 2001, the country accounts for a third of the total number of lawsuits brought by vulture funds.[12] The analysis of the following examples will provide a clearer understanding of the human rights impact deriving from the activities of vulture funds.

A. *Donegal International Ltd. v. Zambia*

10. By 1984, the Government of Zambia was unable to service a $30 million debt owed to Romania for the acquisition of agricultural equipment. In early 1997, the firm Debt Advisory International (which later incorporated Donegal International Ltd.) began to put

[7] See African Development Bank Group, "Vulture funds in the sovereign debt context".

[8] For example, a ruling of the High Court of the United Kingdom of Great Britain and Northern Ireland in 2005 allowed Kensington International Ltd. to intercept the proceeds of oil sales of the Republic of the Congo to recoup a $39 million debt. The profits realized by the Congo from the sale of oil can be seized until a claim of $90 million is repaid.

[9] See Schumacher, Trebesch and Enderlein, "Sovereign defaults in court", pp. 5–9.

[10] For example, in Liberia in the 2000s, lawsuits amounted to an extraordinary 41.6 per cent of GDP, ibid., p. 15. See also African Development Bank Group, "Vulture funds in the sovereign debt context".

[11] For example, Donegal International Ltd. is based in the British Virgin Islands, Kensington International Ltd. in the Cayman Islands and FG Hemisphere in Delaware, United States of America. The particularities of such jurisdictions are well known: opacity (bank secrecy or other mechanism such as trusts); low taxation or exemption from taxation for non-residents; regulations favourable to the establishment of front companies without real activity on the territory; lack of cooperation with the tax, customs and/or judicial authorities of other countries; and weak or non-existent financial regulation. See Renaud Vivien, "FG Hemisphere vulture fund's latest victory against the Democratic Republic of Congo. What is Belgium doing?", Committee for the Abolition of Illegitimate Debt, 2 January 2011.

[12] See Schumacher, Trebesch and Enderlein, "Sovereign defaults in court" p. 11.

forward proposals for acquiring the debt. In 1999, just as Zambia was about to reach the decision point for comprehensive debt relief under the Heavily Indebted Poor Countries Initiative, Romania sold the debt to Donegal International for about $3 million, 11 per cent of the face value.

11. In 2003, in controversial circumstances involving allegations of corruption and the bribing of public officials, Zambia signed a settlement agreement with Donegal International by which it agreed to waive sovereign immunity from litigation and to pay approximately $15 million of the then $44 million face value of the debt. The agreement also included penal rates of interest in the event of default and the application of United Kingdom law to any future dispute arising from it. After paying off a total of $3.4 million, the Government of Zambia stopped fulfilling the terms of the agreement, arguing that it was tainted with corruption (A/HRC/14/21, para. 24).

12. In 2006, only months before Zambia was due to receive debt cancellation under the Heavily Indebted Poor Countries Initiative, Donegal International sued the country in the United Kingdom courts for a total of $55 million, nearly 17 times the amount the company paid for the debt. It finally received a favourable ruling, obtaining US$ 15.4 million.

13. The Government of Zambia reportedly recognized the judgment and allocated about 65 per cent of the amount received, already earmarked for health programmes, to service the debt (ibid., para. 25).[13] As a result of the litigation, vulture funds removed from the country almost 15 per cent of its total social welfare expenditure, funds that could have been channelled instead towards education, health care and poverty alleviation.[14]

B. *FG Hemisphere v. Democratic Republic of the Congo*

14. In 1980, the Democratic Republic of the Congo entered into a credit agreement with Energoinvest, a company based in Sarajevo, for the construction of a high-voltage electric power transmission facility. The country soon defaulted on its repayment obligations.

15. In 2003, the International Chamber of Commerce made two arbitral awards in favour of the company. In 2004, a District Court in the United States of America confirmed the amounts to be paid: $18.43 million and $11.725 million, plus 9 per cent interest and the costs of the arbitration. At that point, the company decided to transfer the right to recover the claim to FG Hemisphere, a company based in the State of Delaware (a tax haven in the United States).[15] It reportedly purchased the debt for $37 million.[16]

16. FG Hemisphere then pursued its claim on the debt by attempting to seize the country's assets worldwide. In 2005, the Government's failure to provide the courts in the United States with detailed information about the location of any assets worth more than $10,000 led to a weekly fine of $5,000, to increase periodically to a maximum of $80,000.[17]

17. To enforce the 2003 rulings, FG Capital Management (formerly FG Hemisphere) managed to freeze hundreds of millions of dollars owed to the Democratic Republic of the Congo and obtained enforcement judgments from a number of courts around the world. In November 2008, a South African court effectively halted sales of electricity from the country by ruling that FG Hemisphere could seize any payments for services sold by the

[13] See also See Romina Kupelian and María Sol Rivas, "*Vulture Funds: the Lawsuit Against Argentina and the Challenge They Pose to the World Economy*", p. 9 and Thomas Laryea, "Donegal v. Zambia and the persistent debt problems of low-income countries", *Law and Contemporary Problems*, vol. 73, No. 4 (Fall 2010).

[14] See Lydia Polgreen, "Unlikely ally against Congo Republic graft", *New York Times* (10 December 2007).

[15] The sale was approved by the former Prime Minister of Bosnia and Herzegovina, who was investigated on corruption charges relating to his tenure at Energoinvest. See "Vulture funds–the key players", *The Guardian*, 15 March 2011.

[16] See Michael J. Kavanagh, "Congo, U.S.-controlled venture lose $100 million vulture claim", Bloomberg (3 November 2010).

[17] See Devi Sookun, *Stop Vulture Fund Lawsuits: a Handbook*, p. 45.

Democratic Republic of the Congo to South Africa. In February 2010, the Court of Appeal in Hong Kong froze about $100 million of a signing bonus for a $6 billion minerals-for-infrastructure agreement between the Democratic Republic of the Congo and China until the International Chamber of Commerce awards had been resolved.[18] The agreement included a payment of $221 million in mining entry fees to the Government, which FG Hemisphere sought to receive towards payment of the arbitral award. The Government claimed State immunity, but the Court of Appeal ruled that the country had no immunity in commercial proceedings.[19]

18. That is an unfortunate event for a country that needs money for development. The Democratic Republic of the Congo is rich in natural resources but is recovering from more than four decades of dictatorship and war that have destroyed its infrastructure. In fact, it is difficult to see how a country with one of the lowest Human Development Index rankings (176) can service its external debt obligations without at the same time harming its poverty reduction and economic development prospects (A/HRC/14/21, para. 20). The negative impact of vulture funds on the capacity of the State to create the conditions necessary to fulfil its human rights obligations is therefore evident.

C. *NML Capital Ltd. v. Argentina*

19. The deteriorating economic, financial and social situation that led Argentina to a catastrophic collapse in 2001 has been well documented (see, for example, A/HRC/25/50/Add.3). Soon after defaulting, the Government recognized the need to restructure roughly $81 billion of debt. In two successive exchanges of offers, in 2005 and 2010, Argentina succeeded in reaching an agreement with more than 92 per cent of its creditors, which agreed to take an approximately 70 per cent "haircut" on their bond holdings.

20. A group representing 1.6 per cent of bondholders, led by NML Capital Ltd. (a hedge fund based in the Cayman Islands), refused to restructure and decided to sue the country in the New York State courts for the full amount.[20] Some of the defaulted bonds had been bought on the secondary market just before the country's default in 2001, but most were purchased afterwards, at bargain prices. The vulture funds allegedly paid about $48.7 million for more than $220 million in defaulted bonds soon after the default; others were purchased even after the bond exchanges of 2005 and 2010 (ibid., para. 32).

21. In November 2012, a New York district court judge ordered Argentina to pay NML Capital and other "hold-outs" in full (about $1.3 billion), an amount that may represent a profit of about 1,600 per cent.[21] The court ruling was first confirmed by a decision of the United States Court of Appeals for the Second Circuit and subsequently endorsed by the Supreme Court, which stated that the country could not pay the creditors that had accepted the exchange offers until the "hold-out" creditors had been paid in full.

22. Those rulings represented a major departure from the traditional market or legal understanding of the *pari passu* clause, a common component of bond contracts.[22] NML

[18] See Michael J. Kavanagh, "Congo, U.S.-controlled venture lose $100 million vulture claim".

[19] Kathryn Crossley, "Case analysis: *Democratic Republic of the Congo and Ors v. Hemisphere Associates LLC*", Asian Legal Business (17 June 2011).

[20] Elliott Management investment fund controls NML Capital and has brought actions against Argentina and many other countries. The chief executive officer, Paul Singer, is one of the main financial backers of the Republican Party in the United States, which gives him enormous lobbying power, as well as substantial political and legal support for carrying out these operations. See Romina Kupelian and María Sol Rivas, "*Vulture Funds: the Lawsuit Against Argentina and the Challenge They Pose to the World Economy*", p. 10.

[21] See letter dated 9 July from Axel Kicillof, Minister of Economy and Public Finance of Argentina, to the *Financial Times*.

[22] "By equal step or without preference": the international financial markets have long understood that this clause protects a lender against the risk of legal subordination in favour of another creditor. See Lee C. Buchheit and Jeremiah S. Pam, "The pari passu clause in sovereign debt instruments", *Emory Law Journal*, vol. 53 (special edition, 2004).

Capital contended that the country was not granting the same treatment to the creditors that did not participate in the exchange because it had agreed only to pay its debt to the exchange bondholders.[23]

23. In February 2016, with a newly elected Government in office in Argentina, the United States court set a number of conditions for effectively lifting the injunction and allowing Argentina to service its restructured debts. Events accelerated from then on and in April 2016, ceding to massive financial pressure, Argentina abruptly reversed its previous policy regarding the claims and agreed in an out-of-court settlement to pay $6.5 billion dollars to the "hold-outs".

24. That settlement represented a further setback in the process aimed at setting up an international sovereign debt restructuring mechanism based on the equal treatment of creditors. Paying vulture funds much more than was paid to cooperative creditors in previous debt restructuring is a disturbing outcome. Rewarding those who refuse to participate in debt restructuring efforts sends the wrong message.[24]

25. From a human rights perspective, that kind of settlement raises important concerns. In the short term, putting an end to more than a decade of judicial disputes contributes to restoring a country's credibility, opening its access to financial markets. However, in order to pay the "hold-outs", the Government was forced to increase its debt burden, a fact that, in the long run, may hinder the ability of the State to comply with its commitments in the area of economic and social rights, exacerbating inequality and financial instability.

26. In any event, the long judicial dispute highlights the pressing need to regulate speculative investment practices in order to bring them into line with human rights approaches and requirements. Furthermore, it has prompted a process aimed at establishing a multilateral mechanism with a mandate to resolve sovereign debt litigation in an independent and impartial manner.

27. Although the legal consequences of this case should not be underestimated, its final outcome must be read in the light of the particular circumstances that surrounded the dispute and the evident political implications involved. There is no doubt, however, that the United States rulings will certainly incentivize vulture funds to pursue such strategies in the future.[25]

IV. Disruptive litigation: a growing trend

28. The case of Argentina is not an exception, but forms part of a more general trend. Increasingly, non-cooperative creditors are reaping extraordinary profits owing to settlements reached or judgments obtained after disruptive litigation. Not only do investors' expectations of obtaining high returns by suing countries asphyxiated by onerous financial terms benefit from the lack of a global mechanism on debt restructuring, but they may also be at the origin of this state of affairs.

29. In fact, statistics show that lawsuits and attempted attachments are increasingly becoming a common way of solving sovereign debt disputes, entailing costly and protracted judicial processes for the defaulting State.[26] In the period from 1976 to 2010, there were about 158 lawsuits against 34 defaulting countries in the United States and the United

[23] Instead, the clause is broadly interpreted as providing factual preference to "hold-out" creditors over those acting in good faith. See John Muse-Fisher, "Starving the vultures: *NML Capital v. Republic of Argentina* and solutions to the problem of distressed-debt funds", *California Law Review*, vol. 102, No. 6 (2014).

[24] See www.ohchr.org/_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/Issues/IntOrder/Info_Note_Argentinian_VultureFunds_EN.pdf&action=default&DefaultItemOpen=1.

[25] Debt and Development Coalition Ireland, "Stop debt vultures: implications of the vulture attack on Argentina" (1 September 2014), p. 4.

[26] See Schumacher, Trebesch and Enderlein, "Sovereign defaults in court", p. 12.

Kingdom alone.[27] The high success rate (72 per cent) certainly encourages this worrying tendency. Since the 1990s, the percentage of debt crises involving litigation has grown from 10 per cent to almost 50 per cent.[28]

30. Africa has been by far the most harassed region, with an average of eight cases filed every year. Not for nothing African countries have the lowest rate of winning cases and have disbursed more than 70 per cent of the nearly $1 billion awarded to vulture funds as a result of lawsuits.[29] It is against that backdrop that some specific initiatives to protect States receiving funds from the International Monetary Fund (IMF) and the World Bank have developed.[30]

31. Remarkably, the African Legal Support Facility, established by the African Development Bank in 2008, provides legal support and technical advice to States facing lawsuits launched by vulture funds.[31] In 2006, the Commonwealth secretariat set up an "HIPC legal clinic" to assist States in the negotiation and renegotiation of foreign debt. Despite the fact that information on the implementation of those programmes is not available, the evidence is that vulture funds are progressively changing their business focus from heavily indebted poor countries to middle-income countries and territories, such as Greece, Puerto Rico and the Bolivarian Republic of Venezuela.[32]

32. In other countries particularly hit by the financial crisis, such as Ireland or Spain, vulture funds are developing speculative strategies in relation to non-performing private loans.[33] In that context, their strategy is quite similar: they acquire distressed real estate assets, taking advantage of the difficulties people are having to repay their loans to the banks and wait until the mortgage is in default. In such a way, vulture funds progressively get a dominant position in the housing market that ends by allowing them to influence rents and house prices. Speculation drives up property costs and makes housing unaffordable for low-income households. In a letter sent to Blackstone Group L.P., the world's largest private equity firm, United Nations human rights experts expressed concerns about the grave impact that the "financialization" of housing was having on the enjoyment of the right to adequate housing for millions of people across the world.[34]

V. National legislation

33. At present, only three countries, Belgium, France and the United Kingdom, have enacted some sort of legal framework to discourage disruptive litigation initiated by vulture funds. Attempts to enact similar initiatives in the United States have failed so far.

[27] This number does not include litigation resulting from bilateral investment treaties or before international arbitration bodies, which are increasingly being used by vulture funds to deploy their strategies.

[28] See Schumacher, Trebesch and Enderlein, "Sovereign defaults in court", p. 2.

[29] African Legal Support Facility, "Medium term strategy 2013–2017", p. 10.

[30] Currently, 36 States are classified as heavily indebted poor countries, i.e., countries with high poverty levels that are eligible for financial assistance from IMF and the World Bank. In 2017, seven African States among them were facing commercial litigation, IMF factsheet, "Heavily Indebted Poor Countries (HIPC) Initiative and Multilateral Debt Relief Initiative (MDRI). Statistical Update" September 2017, p. 45.

[31] As of January 2016, the facility consists of 52 States, African States and others (Belgium, Brazil, France, the Netherlands and the United Kingdom) and 7 international organizations. In 2010, the Management Board approved support for the first case involving vulture fund litigation against the Democratic Republic of the Congo.

[32] See Committee for the Abolition of Illegitimate Debt, "*Fonds Vautours. Les Ailes de la Dévastation* (2017).

[33] See, for example, Michael Byrne, "From Puerto Rico to the Dublin docklands; vulture funds and the global South", Debt and Development Coalition Ireland (2016) and Luis Doncel, "Los fondos buitre reinan en España", *El Pais* (21 April 2018). In Ireland, 60 per cent of all assets sold by one of the banks have been acquired by Texas-based Lone Star Capital.

[34] See OHCHR, "States and real estate private equity firms questioned for compliance with human rights" (26 March 2019).

34. While these national laws have played an important deterrent role, it is evident that concerns raised by the activities of vulture funds can only be effectively tackled if more countries pass national laws to limit their claims. To avoid "forum shopping" strategies, regulation is particularly needed in those jurisdictions preferred by vulture funds for starting litigation or enforcing attachments.

35. National legislators may resort to useful guidelines deriving from existing domestic laws and experience of implementation, namely: (a) protection should be extended to any debt-distressed country and not only to heavily indebted poor countries; (b) procedures should allow for the identification of debts that are protected from the claims of vulture funds, on the basis of objective criteria; (c) concerns about the socioeconomic situation of the debtor State and the well-being of its population should be adequately incorporated and addressed by the legislator; and (d) issues regarding the lack of transparency in the secondary debt market and the operation of vulture funds in tax havens should be also tackled.

Belgium

36. Belgium was the first country to enact national legislation against the activities of vulture funds.[35] In 2008, a first law responded to the numerous lawsuits lodged by vulture funds before national courts aimed at seizing official funds allocated by Belgium to official development aid to certain countries.[36]

37. In 2015, a new law set out a more detailed framework, fixing limits to the amount that vulture funds could legitimately claim.[37] A threshold (the price paid to repurchase the loan or debt) was established for those cases where it could be demonstrated that the creditor's repurchase pursued an "illegitimate advantage".

38. There is such "illegitimate advantage" when:

(a) There is a "manifest disproportion" between the repurchase prices of the loan or debt and the face value of the amounts that the creditor seeks to recover from the State;

(b) One or more of the following criteria is met:

(i) The debtor State was insolvent (or a default was imminent) at the time of the debt buy-back;

(ii) The creditor is based in a tax haven or similar jurisdiction;

(iii) The creditor systematically uses legal proceedings to obtain repayment;

(iv) The creditor refused to take part in debt restructuring efforts;

(v) The creditor abused the weakness of the State to negotiate a repayment which is manifestly unbalanced;

(vi) The total reimbursement of the amounts demanded by the creditor would have a measurably adverse impact on the public finances of the State and would be likely to compromise the socioeconomic development of its population.

39. The law is not limited to heavily indebted poor countries and provides comprehensive protection against litigation by vulture funds. It integrates human rights concerns, while taking due account of the important public interests at stake when dealing with sovereign debt.[38] Requiring the judges to make an assessment of the impact that the repayment of the debt might have on the socioeconomic situation of the debtor State and on the well-being of its population is certainly an innovative element and one of the most prominent aspects of this legislation.

[35] Law aimed at preventing the seizure or transfer of public funds allocated to development aid, particularly by the strategies of vulture funds, 6 April 2008.

[36] Ten lawsuits were lodged against the Democratic Republic of the Congo in 2007 alone.

[37] Law relating to the fight against the activities of vulture funds, 12 July 2015.

[38] Chamber of Representatives of Belgium, Draft law relating to the fight against the activities of vulture funds, doc. 54 0394/001, 7 October 2014.

40. In May 2018, the Belgian Constitutional Court declared inadmissible the recourse filed by NML Capital to challenge this legislation.[39] In a landmark decision, the Court refused all arguments put forward by the vulture funds, in particular that the application of the law would lead to a violation of the creditor's rights to property and to a fair trial, as provided by the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocol No. 1.

41. The Court found that the limitations to the creditor's rights to property introduced by the 2015 law were both justified by the public interest and proportionate to the aim pursued. In precise terms, the legislation seeks to protect the most vulnerable countries by preventing the activities of vulture funds from contributing to making the situation worse. It provides national judges with objective criteria to identify creditors that pursue an "illegitimate advantage" in light of the "manifest disproportion" existing between the repurchase price and the face value of the amounts the creditor claims.

42. The law does not exclude entirely the creditor's right to claim before the Belgian courts, but limits the repayment to the actual price of the sovereign debt, since the right to claim up to that amount remains untouched. According to the Constitutional Court, the difference between the treatment of creditors that pursue an illegitimate aim and others is reasonably justified to achieve the aims of the law.

United Kingdom of Great Britain and Northern Ireland

43. Following discussions on a draft bill to limit the maximum recoverable amount of the defaulted sovereign debts of developing countries, in 2010 Parliament passed a law limiting the amount recoverable of claims related to "qualifying debts".[40] The regulation applies to any national and foreign judgments enforceable in the United Kingdom, as well as to arbitral awards. However, its scope is limited to heavily indebted poor countries.

44. Section 3 (2) of the law refers to the debts of countries that have reached decision point under the Heavily Indebted Poor Countries Initiative, defining the relevant proportion by referring to the reduction as applied under the Initiative when a country reaches the decision point. The percentage reduction calculated by IMF and the World Bank is required from all creditors holding debts included in the Initiative, in order to reduce the country's indebtedness to a sustainable level.[41]

45. The aim of the law is to ensure that courts in the United Kingdom neither render nor enforce a judgment that allows recovery of covered debts of those countries in excess of the amount calculated as sustainable debt under the Initiative. The creditor may not recover more than the existing debt, even in cases of renegotiation or new agreements. While there is no provision for cancellation of a debt, enforcement is limited to the recoverable amount under the existing debt, irrespective of the law applicable to the debt or claim.[42]

France

46. In 2016, an amendment to the law on the fight against corruption introduced rules aimed at protecting foreign States that are beneficiaries of French official development assistance facing sovereign default from speculation by abusive creditors.[43] The new regulation prohibits the seizing of goods or properties of a foreign State if (a) the debtor State was the recipient of ODA at the time the debt was issued; (b) it was in default or close to it at the time the creditor acquired the debt; (c) the situation of default (or close to it) with respect to the specific claim dates back less than four years (or six years in cases of

[39] Decision No. 61/2018, Action for annulment of the law of 12 July 2015 relating to the fight against the activities of vulture funds, introduced by NML Capital Ltd. incorporated in the Cayman Islands.

[40] Debt Relief (Developing Countries) Act 2010.

[41] See explanatory notes to the law, para. 22, and Francis D. Chukwu, "Refocusing on the objectives: a critique of the U.K.'s Debt Relief (Developing Countries) Act, 2010" (1 May 2011).

[42] See Michael Waibel, "Debt relief to poor countries: rules v. discretion", *Journal of International Banking and Financial Law* (May 2010).

[43] Law No. 2016 1691 of 9 December 2016 relating to transparency, the fight against corruption and the modernizations of economic life, JORF No. 0287 of 10 December 2016, art. 60.

manifestly abusive behaviour); or (d) a restructuring proposal has been accepted by two thirds of the creditors. Seizures are allowed, but only up to the amount obtained by good-faith creditors, namely those that participated in debt restructuring negotiations and accepted their results.[44]

47. Given that the French law is a positive step against the activities of vulture funds, it is regrettable that it will not apply to debts acquired before its entry into force. That leaves out of its scope the great majority of "unprotected" sovereign bonds.[45]

Comparison of laws on vulture funds by country	*Applies to all countries*	*Applies to old debts*	*Applies to new debts*	*Applies to all companies*	*Prevents suing for more than paid for debt*	*Prevents suing for more than other creditors have accepted*
Belgium (2015)	√	√	√	/X	√	X
France (2016)	X	X	√	√	X	√
UK (2010)	X	√	X	√	X	√

Source: Jubilee Campaign.

VI. Forging an international consensus

48. A growing consensus on the need to curb the activities of vulture funds has emerged over the past 10 years. A number of States have expressed in several forums their support for undertaking common actions aimed at protecting heavily indebted poor countries from vulture funds and, more generally, at the establishment of an international mechanism for orderly debt restructuring.

49. At a meeting of the Group of Eight, held in May 2007, finance ministers and governors of central banks expressed their concern about the problem of aggressive litigation against heavily indebted poor countries and urged all sovereign creditors not to sell claims on those countries.

50. The same year, Commonwealth finance ministers emphasized the need for concerted international action to address vulture funds litigation and urged Governments to introduce legal protection to ensure that debt relief was provided, as a minimum, on terms equivalent to the heavily indebted poor countries framework.

51. In 2008, the member States of the European Union committed not to sell claims on heavily indebted poor countries to creditors unwilling to provide debt relief. A year earlier, the Paris Club had endorsed a similar position.

52. The signatories of the 2008 Doha Declaration on Financing for Development expressed identical concerns.[46] The declaration welcomed steps taken to prevent aggressive litigation against "HIPC-eligible countries" and called on creditors not to sell claims on such countries to those refusing to participate adequately in debt relief efforts.[47]

53. In 2009, a recommendation of the Parliamentary Assembly of the Council of Europe strongly condemned the activities of vulture funds, which "have no compunction in taking

[44] See Fanny Galois, "*Fonds vautours. La France réagit aussi*" (10 April 2018), available from www.cadtm.org.

[45] According to the IMF, the 70 per cent of the bonds that do not contain enhanced clauses to protect good-faith bondholders will expire in the next 10 years. In 2014, its Executive Board endorsed the inclusion of enhanced clauses (*pari passu* provisions and collective action clauses) in all new international sovereign bonds. See IMF, "Third progress report on inclusion of enhanced contractual provisions in international sovereign bond contracts" (December 2017).

[46] See General Assembly resolution 63/239, annex.

[47] Ibid., para. 60. In the Addis Ababa Action Agenda, signatories reiterated their concern at non-cooperative creditors who had demonstrated their ability to disrupt timely completion of debt restructuring (para. 98).

advantage of opportunities arising from debt waivers granted by creditor countries, particularly European, or blocking worldwide the assets of the countries concerned and threatening them with bankruptcy".[48]

54. In 2014 and 2015, the Ministers for Foreign Affairs of the member States of the Group of 77 and China recognized that the speculative activities of vulture funds posed a risk to all future debt-restructuring processes, for both developing and developed countries. They further stressed the importance of not allowing vulture funds to paralyse the debt-restructuring efforts of developing countries and affirmed that those funds should not supersede the right of a State to protect its people under international law (A/69/423, annex, para. 29, and A/70/410, annex, para. 33).

55. In 2018, the European Parliament passed a resolution in which it acknowledged that "vulture funds targeting distressed debtors and interfering with the debt-restructuring process should not receive legal or judicial support for their pernicious activities". It also called on European Union member States to adopt, on the initiative of the European Commission, a regulation based on the Belgian law on combating debt speculation by vulture funds.[49]

VII. Towards a multilateral framework on debt restructuring

56. Responding to the increasing demand for international action, in September 2014 the General Assembly adopted its landmark resolution 68/304 entitled "Towards the establishment of a multilateral legal framework for sovereign debt restructuring processes", in which it called for a legal framework aimed at facilitating the orderly restructuring of sovereign debts and capable of deterring creditors from disruptive litigation. The Assembly expressly emphasized that the activities of vulture funds undermined the purpose of debt restructuring processes by forcing indebted countries to divert many of their resources to handling such litigation. One year later, the Assembly endorsed a set of principles that should guide the establishment of an international orderly sovereign debt-restructuring workout.[50]

57. The principle of sustainability entails promoting sustained and inclusive economic growth and development that leads to stable debt situations. That means that debt sustainability is only achieved when debt service does not result in violations of human rights and human dignity, and does not prevent the attainment of international development goals (see A/HRC/40/57, paras. 12.2 and 12.3).

58. It is in that context that in its resolution 27/30, the Human Rights Council called upon States to curtail the activities of vulture funds by implementing national frameworks and expressly recognized the negative impact the repayment of debts under predatory conditions caused to the capacity of a State to fulfil its human rights obligations. Some months before, 100 civil society organizations worldwide had supported the establishment of an international mechanism for the restructuring of sovereign debt "based on the obligation of States to respect, protect and enforce human rights, both in their territory and extraterritorially".[51]

59. In view of the efforts and the progress made over the past years, it is difficult to understand the reasons behind the current political deadlock in the process aimed at setting up a debt-workout institution, building on General Assembly resolution 69/319 on Basic Principles on Sovereign Debt Restructuring Processes. In April 2018, the European Parliament insisted on the need to set up an international debt-workout mechanism capable

[48] See recommendation 1870 (2009), available from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17748&lang=en.

[49] See resolution of 17 April 2018 on enhancing developing countries' debt sustainability (2016/2241(INI)), paras. 32 and 37.

[50] See resolution 69/319.

[51] See "The conflict between Argentina, the vulture funds and the judicial branch of the United States exposes a global problem that impacts on human rights".

of solving debt crises in a fair, speedy and sustainable manner.[52] According to the resolution adopted by the Parliament, the road map on sovereign debt workout developed by the United Nations Conference on Trade and Development (UNCTAD) and the proposal to establish an international debt-restructuring court should be at the heart of the new mechanism.[53]

60. Meanwhile, vulture funds make the most of the absence of an international regulatory framework by exploring new ways to enforce the terms of their sovereign bonds, particularly through the international investment arbitration system. Despite the fact that the system is not designed to hear disputes over financial assets, it seems that arbitrators have opened the door to speculative claims (A/72/153, para. 60).

61. Furthermore, the mechanism appears to be manifestly inadequate to solve complex sovereign debt-restructuring disputes, as investment tribunals too often tend to ground their decisions in purely economic terms while ignoring the broader human rights implications of such situations.

62. The impact of such a worrying trend on the process towards orderly negotiated settlements should not be underestimated. Upholding the rights of investors without taking due account of the broad human rights implications of debt crises incentivizes vulture funds to continue their disruptive strategies. Increased power for hold-out creditors and vulture funds would lead to increased liability for debtor States and a higher risk that human rights obligations are undermined, as economic recovery is impaired and funding for public services giving effect to human rights reduced (ibid., paras. 54 and 59).

VIII. Impact of the activities of vulture funds on human rights

63. Human rights monitoring bodies have underscored the negative impact deriving from the activities of vulture funds on the capacity of the State to fulfil its human rights obligations (see, in particular, A/HRC/14/21).[54] The Independent Expert on foreign debt has observed that the settlement of excessive claims by vulture funds against poor countries with unsustainable debt levels has a direct, negative effect on the capacity of Governments to fulfil their human rights obligations. Economic, social and cultural rights, particularly the rights to health, water and sanitation, food, housing and education, are among the most affected. Empirical research supports the finding of negative economic and financial consequences deriving from protracted aggressive litigation against debt-distressed and poor States.[55]

64. Through lengthy and costly litigation, vulture funds contribute to diverting State resources from other, more pressing developmental, social and human rights issues (A/HRC/14/21, para. 35). Protracted litigation may cause important delays in resolving the debt crisis and limit the capacity of a State to commit the resources and efforts necessary to bring the country out of its debt crisis. It may worsen the already significant economic and financial consequences attached to the crisis and lead to policies that have a severe impact on the enjoyment of human rights (A/72/153, para. 6).[56] Some of the most prominent negative impacts deriving from the activities of vulture funds are described below.

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[52] See resolution 2016/2241(INI), para. 32.

[53] See UNCTAD, "Sovereign debt workouts: going forward. Roadmap and guide" (April 2015); Martin Guzman and Joseph E. Stiglitz, "Creating a framework for sovereign debt restructuring that works" in *Too Little, Too Late*, Martin Guzman, José Antonio Ocampo and Joseph E. Stiglitz, eds. (New York, Columbia University Press, 2016); and "A soft law mechanism for sovereign debt restructuring", Developing Economics (13 November 2017).

[54] The duty to fulfil imposes on the State an obligation to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of economic, social and cultural rights.

[55] The effects of disruptive litigation on the debt sustainability of heavily indebted poor countries have been tracked on an annual basis by the Millennium Development Goals Task Force and the IMF.

[56] A debt crisis may entail a great deal of economic destruction and economic reversal along with sacrifice in human rights terms. A country can lose 5–15 per cent of its GDP.

Activities of vulture funds hinder the capacity of a State to fulfil economic, social and cultural rights

65. Litigation by vulture funds represents a substantial burden on the budgets of already poor countries. Harmful conditions of loans or high and abusive interest rates may make repayment extremely difficult. The State having to repay far more than the amount originally borrowed may be obliged to redirect resources into debt service that had been previously allocated to essential public services or even worse, to introduce long-term austerity policies (ibid., para. 59). Such a course of action hinders the capacity of a State to fulfil economic, social and cultural rights (namely to adopt appropriate measures towards their full realization) and, ultimately, has an impact on the economic growth and development of the country.[57]

66. Human rights monitoring bodies have analysed how an excessive burden of high external debt repayments can significantly reduce the resources available for social investment. In fact, it has been demonstrated that in many countries, debt repayment is often carried out at the expense of basic human rights, including the rights to food, health, education, adequate housing and work. In the case of Ecuador, for example, the Committee on Economic, Social and Cultural Rights noted that the high percentage of the annual national budget (about 40 per cent) allocated for foreign debt servicing seriously limited the resources available for the effective enjoyment of economic, social and cultural rights (E/C.12/1/Add.100, para. 9).

67. The case of Malawi may be extreme, but it shows how debt repayment affected the country's capacity to create the necessary conditions for the realization of economic and social rights. In 2002, the Government had to sell the maize from its national food reserve agency to raise the funds needed to repay loans. Unfortunately, a poor harvest that year, left 7 million people, out of a population of 11 million, facing serious food shortages (A/HRC/11/10, para. 30).

Activities of vulture funds jeopardize international poverty reduction initiatives

68. The ability of vulture funds to jeopardize the objectives of the IMF and World Bank Heavily Indebted Poor Countries Initiative is striking, particularly bearing in mind that it aims to ensure the debt sustainability of poor countries.[58] In a number of cases, it has been clearly demonstrated that resources freed up for development and poverty reduction programmes were used to service debt owed to vulture funds. That situation has led human rights monitoring bodies to urge the States concerned to reallocate international development aid and other resources to priority sectors and to ensure that international development aid is used for the progressive realization of the rights to an adequate standard of living (see, for example, E/C.12/COD/CO/4, para. 29).

69. A good example is the case of the Democratic Republic of the Congo. In 2014, a district court in the United States ruled that the country had to pay nearly $70 million to a vulture fund for an $18 million debt acquired in 2008, dating back to the regime of former dictator Mobutu Sese Seko in the 1980s.[59] On the basis of the improved fiscal situation resulting from international debt reduction programmes, the country was ordered to pay the claims of the vulture funds. This example shows how domestic rulings can clearly

[57] The obligation of a State to fulfil requires positive measures when other measures have not succeeded in ensuring the full realization of such rights and can entail issues such as public expenditure, governmental regulation of the economy, the provision of basic public services and infrastructure, taxation and other redistributive economic measures. See OHCHR, *Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions* (United Nations publication, Sales No. E.04.XIV.8), p. 18.

[58] The scheme was first launched in 1996 and was supplemented in 2005 by the Multilateral Debt Relief Initiative.

[59] See *Themis Capital, LLC and Des Moines Investments Ltd. v. Democratic Republic of Congo and Central Bank of the Democratic Republic of the Congo*, 14 July 2014.

undermine the intent of the Heavily Indebted Poor Countries Initiative, which is often not taken into account by national courts.[60]

70. This is not an isolated case, however. In 2013, the World Bank and IMF reported that commercial litigation was ongoing against eight heavily indebted poor countries. The authors of the report stressed that such legal struggles not only had adverse financial consequences for the poorest countries, but also took up considerable amounts of the time and resources of debtor government authorities.[61]

71. Thus, under present circumstances, funds obtained by the poorest countries from debt relief may easily be channelled to repay an outstanding loan pursuant to court rulings. As a result of aggressive, disruptive litigation, a debtor State may be forced to divert money earmarked for poverty reduction and basic social services, such as health and education, to settling the substantial claims of vulture funds.[62]

Activities of vulture funds contribute to increased debt service

72. Debt burden adversely affects the protection of economic and social rights, not only because of the diversion of funds from social purposes to debt servicing, but also because of the situation of dependency in which it puts the debtor States.[63] It has been observed that such dependency "might result in a factual loss of sovereignty over their economic and social policies and in the imposition of policies with potentially negative consequences for the protection of social rights".[64]

73. Against that background, a reduction in debt service and/or debt cancellation can effectively create the conditions necessary for the realization of economic, social and cultural rights. The evidence is that such measures have allowed many countries to invest more in public services such as health care, education and water and sanitation, and to abolish user fees for some of those services, which had previously been introduced as part of austerity measures imposed by the international financial institutions.[65] However, it remains a controversial issue as to whether a State might be under an obligation not to repay its debt to vulture funds if it can do so only at the expense of neglecting the basic social needs of its people.

74. Under present circumstances, debtor States often have little choice but to prioritize their contractual debt obligations, contrary to what human rights law would require. That suggests that a more human rights-centred approach is needed. The obligation of a State to ensure the enjoyment of at least the minimum core of economic and social rights should take priority over its debt service obligations, particularly when such payments further limit the country's ability to fulfil its human rights obligations (see, for example, E/C.12/GRC/CO/2, para. 8). That is particularly the case when increased debt service is derived from harmful conditions linked to speculative claims that further limit the country's ability to fulfil its human rights obligations.

75. It is then a logical consequence of the evolution of human rights law that a State cannot decide to service debt at the expense of meeting its human rights obligations (see

[60] See *Taking Stock of the Global Partnership for Development: Millennium Development Goals Gap Task Force Report 2015* (United Nations publication, Sales No. E.15.I.5), footnote 16.

[61] See *The State of the Global Partnership for Development: Millennium Development Goals Gap Task Force Report 2014* (United Nations publication, Sales No. E.14.I.7), p. 41.

[62] As has been observed, they "profiteer at the expense of both the citizens of HIPCs and the taxpayers of countries that have supported international debt relief efforts" (A/HRC/14/21, para. 69).

[63] In 2006, for example, 10 developing countries spent more on debt service than on public education, while in 52 countries debt service amounted to more than the public health budget. See *Delivering on the Global Partnership for Achieving the Millennium Development Goals: Millennium Development Goals Gap Task Force Report 2008* (United Nations publication, Sales No. E.08.I.17), p. x.

[64] See Sabine Michalowski, "Sovereign debt and social rights – legal reflections on a difficult relationship", *Human Rights Law Review*, vol. 8, No. 1 (January 2008).

[65] See Cephas Lumina, "Sovereign debt and human rights", in *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (United Nations publication, Sales No. E.12.XIV.1), pp. 289 and 294.

A/70/275). Sovereign debt workouts must not lead to violations of economic or social rights or prevent the attainment of internationally agreed development goals. UNCTAD has observed in this regard that "full debt sustainability is only achieved when debt service does not entail intolerable sacrifices for the well-being of society".[66]

Activities of vulture funds undermine the realization of the Sustainable Development Goals

76. Lawsuits brought by vulture funds may slow down the progress made by both developed and developing countries in realizing the Sustainable Development Goals. Successful implementation of Goal 17 to strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development requires strengthening domestic resource mobilization and assisting States in attaining long-term debt sustainability. That implies "coordinated policies aimed at fostering debt financing, debt relief and debt restructuring, as appropriate, and addressing the external debt of highly indebted poor countries to reduce debt distress" (target 17.4).

IX. Strengthening a human rights-based approach

77. Vulture funds take advantage of the lack of adequate regulation of a financial system that has traditionally been based on purely commercial interests and foreign to human rights-based approaches and concerns. Although relevant actions have been undertaken in previous years and human rights monitoring bodies have provided some valuable guidance in striking a better balance between the different interests at stake, human rights should be further mainstreamed in debt crisis contexts.

78. The international community should work to provide the basis for shaping a more coherent framework, where both commercial interests and human rights concerns are accommodated. Human rights law sets out a number of standards that are applicable in such contexts and provides guidance to States, both individually and at the international level, on how to tackle the negative impact of the activities of vulture funds. Recent developments also require that the linkages between an enhanced capacity of States to fulfil economic, social and cultural rights and sustainable development be strengthened.[67]

International level

79. The adverse impact of the activities of vulture funds on human rights cannot be tackled effectively in an isolated or partial manner. States are expected to cooperate in good faith in the process leading to the establishment of an international mechanism for sovereign debt restructuring. In that context, they should ensure that the obligation to service their debts does not lead to derogating from the minimum core obligations relating to economic and social rights. The process of restructuring should aim to reach an agreement that enables States to service their debts without compromising their capacity to fulfil their human rights obligations (A/HRC/20/23 and Corr.1, annex, principle 18).

National level

80. States should undertake concrete steps aimed at regulating the disruptive litigation of vulture funds concerning sovereign debt. National laws should thus expressly exclude the possibility of seizing development cooperation funds and of undertaking litigation against States in debt distress. It is a good practice to limit the value of the claim to the discounted price originally paid by the creditor. In addition, States should ensure that vulture funds domiciled in their territory or operating in their jurisdiction respect human rights throughout their operations (A/HRC/17/31, annex, principle 3).[68] Domestic regulations

[66] UNCTAD, "Sovereign debt workouts: going forward. Roadmap and guide", p. 24.

[67] See, Tahmina, Karimova, *Human Rights and Development in International Law* (Routledge, 2016).

[68] See also Human Rights Council resolution 26/9.

should also recognize the extraterritorial obligation of States to fulfil economic, social and cultural rights.[69]

81. National law should provide the basis for regulating the behaviour of abusive non-cooperative creditors in restructuring processes by providing that they cannot enjoy better treatment than those that are acting in good faith.[70] Guarantees should be provided that the amount of debt recoverable by a vulture fund cannot exceed that recovered by cooperative creditors (A/HRC/20/23 and Corr.1, annex, principle 61).

82. Steps should be taken to regulate the trading of sovereign debt on the secondary market and guarantee transparency. In the absence of an international restructuring mechanism, all efforts must be directed towards achieving a negotiated settlement (ibid., principle 59).

83. Finally, States should assess whether servicing debt owed to vulture funds would result in derogation from their minimum core obligations with respect to economic, social and cultural rights. Debt sustainability analysis should include an evaluation of the level of debt a country can carry without undermining its capacity to fulfil its human rights obligations and the realization of the right to development (ibid., principles 8, 48 and 65).

Management of vulture funds

84. Under the Guiding Principles on Business and Human Rights, vulture funds have a responsibility to respect human rights (ibid., principles 11 and 17).[71] That responsibility includes the obligation to assess whether adverse human rights impacts are expected from their activities (A/HRC/17/31, annex, principles 13 (a) and 15). The management of vulture funds must thus refrain from any predatory or obstructive behaviour that could compel States to act in contravention of their human rights obligations in order to repay debts, or that could directly impact the capacity of States to meet those obligations (see A/HRC/40/57, principle 16.3 in relation to principle 15.2).

85. Despite the fact that the general framework is fully applicable to vulture funds, it is not expected that they will adjust their behaviour accordingly, which underscores the need for appropriate national and international regulation.

X. Conclusions and recommendations

86. **Vulture funds are inherently exploitative. They deploy predatory financial strategies to obtain disproportionate and exorbitant gains at the expense of the realization of human rights, particularly economic, social and cultural rights, and the right to development. Seeking the repayment in full of a sovereign debt from a State that has defaulted, or is close to default, is an illegitimate purpose. In a debt crisis, more than financial obligations are at stake.**

87. **Excessive claims awarded to vulture funds have allowed them to reap profits at the expense of the welfare and sustainable development of the poorest countries, without taking due account of the negative consequences of such actions on the capacity of a State to fulfil its human rights obligations.**

88. **The duty to observe due diligence to prevent a negative impact on and potential violations of economic, social and cultural rights applies to all States and stakeholders, including the management of vulture funds. The impact of their activities on the**

[69] See "Maastricht principles on extraterritorial obligations of States in the area of economic, social and cultural rights" (2013), principle 32.

[70] This encompasses the basic requirements of fairness, honesty and trustworthiness. See UNCTAD, "Sovereign debt workouts: going forward. Roadmap and guide", p. 22. See also UNCTAD, "Principles on promoting responsible sovereign lending and borrowing" (January 2012).

[71] A direct link of causality between the activities of vulture funds and their negative human rights impact is not generally required. See also www.ohchr.org/Documents/Issues/Business/LetterOECD.pdf.

enjoyment of economic, social and cultural rights should therefore be systematically assessed.

89. **The Advisory Committee recommends that the Human Rights Council:**

(a) **Maintain the issue of vulture funds and human rights on its agenda in order to assess the impact of their activities on economic, social and cultural rights and the right to development, and support further initiatives aimed at identifying and curtailing illegitimate activities by vulture funds;**

(b) **Explore further ways of mainstreaming human rights in the context of debt-restructuring workouts and of operationalizing processes aimed at assessing and monitoring the negative impact of the activities of vulture funds on the full enjoyment of economic, social and cultural rights and on the realization of the Sustainable Development Goals;**

(c) **Commend the work of the African Legal Support Facility, and call upon States to support the expansion of this mechanism so as to assist developing countries in their disputes with vulture funds and other similar speculative ways of manoeuvring on financial markets;**

(d) **Adopt a new resolution, following the examination of the present report, entrusting the Advisory Committee with the follow-up to this issue, with a view to making concrete recommendations to States and relevant stakeholders. A further study reviewing relevant national legislation and case law, as well as good practices, would help States in the process of establishing an adequate legal framework.**

90. **The Advisory Committee recommends that Member States:**

(a) **Enact legislation aimed at curtailing the predatory activities of vulture funds within their jurisdictions. Domestic laws should not be limited to heavily indebted poor countries but should cover a broader group of countries and apply to commercial creditors that refuse to negotiate any restructuring of a debt. Claims that are manifestly disproportionate to the amount initially paid to purchase a sovereign debt should not be considered. The laws in Belgium and the United Kingdom provide valuable examples for other States in drafting national laws aimed at limiting the practices of vulture funds;**

(b) **Adopt measures aimed at limiting disruptive litigation by vulture funds in their jurisdictions. National courts or judges should not give effect to foreign judgments or conduct enforcement procedures in favour of vulture funds that are pursuing a disproportionate profit. It is a good practice to limit the value of the claims of vulture funds to the discounted price originally paid for the bonds;**

(c) **Enhance and promote transparency by ensuring that the owners and shareholders of vulture funds are disclosed and made subject to appropriate taxation. Transparency on sovereign debt in the secondary market should be particularly ensured and courts and other relevant national authorities must have access to all relevant documents and information on the amounts concerned and the identity of creditors;**

(d) **Ensure that adjudication bodies, including the International Centre for Settlement of Investment Disputes and the Permanent Court of Arbitration, integrate into their practices the duty of arbitrators to assess at a preliminary stage the bona fides of vulture fund claims, as well as the standing of the claimant, by requiring that the details of the debt be disclosed;**

(e) **Ensure that the principle of bona fides is adequately reflected in national legislation and applied by the domestic courts in relation to litigation concerning sovereign debt restructuring processes by ensuring that abusive creditors do not enjoy better treatment than cooperative creditors acting in good faith.**