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Mandate 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

REFERENCE: SPB/SHD/GT/ff

5 September 2014

Excellency,

I would like to thank you for your correspondence on behalf of the Member States of the Group of G77 and China, dated 2 September 2014, inviting me to share my views about the draft resolution ([A/68/L.57/Rev.1](#)) entitled “Towards a multilateral convention to establish a legal regulatory framework for sovereign debt restructuring processes” in my capacity as 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.

My mandate as set out in Human Rights Council resolution [25/16](#), requests me to pay particular attention to the effects of foreign debt and the policies adopted to address them on the full enjoyment of all human rights, in particular, economic, social and cultural rights in developing countries. In this context I have as well been mandated to pay particular attention to new developments, actions and initiatives being taken by international financial institutions, other United Nations bodies and intergovernmental organizations. Therefore I welcome very much the opportunity to provide you with some comments on this initiative. In this context I would like to inform you that I have identified the issue of debt restructuring and human rights as one of my thematic priorities in my report to the 69th session of the General Assembly which I will present at the end of October 2014 to the Third Committee (The report should soon become publicly available as UN document [A/69/273](#)).

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

This explains why over the last years the United Nations have increasingly addressed global financial issues, as reflected by annual General Assembly resolutions [65/189](#), [66/189](#), [67/198](#) and [68/202](#) on debt sustainability and development. The issue of foreign debt, debt relief, debt restructuring, and excessive demands by so-called

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“vulture funds” have for many years been subject of resolutions of the Human Rights Council, including its most recent resolutions [20/10](#) and [23/11](#). In these resolutions the Human Rights Council regretted “the absence of mechanisms to find appropriate solutions to the unsustainable foreign debt burden of low- and middle-income heavily indebted countries, and that, to date, little headway has been made in redressing the unfairness of the current system of debt resolution” and affirmed that “from a human rights perspective, the settlement of excessive vulture funds [claims] has a direct negative effect on the capacity of Governments to fulfil their human rights obligations, especially with regard to economic, social and cultural rights”. I would therefore suggest including as well references to these resolutions of the Human Rights Council in the proposed text.

There are serious reasons suggesting that the United Nations system is the right place to discuss how to fill the global legal void on sovereign debt restructuring - or at least to reduce the fundamental uncertainty as to how existing rules and principles of international law apply to the challenges in this field: the universal and equal basis of its membership, broad-based convening role, its technical capacity and the fact that it is not a financial actor in global markets. All these facts should contribute to build consensus around debt issues. The United Nations Charter (Arts. 1.3 and 55.2) confirms these specific competences as one of the purposes of the United Nations: to achieve international co-operation in solving international problems of an economic character while promoting solutions of international economic and related problems.

While it is debatable what the best tools to prevent and deal with debt crises are, we are in a position to identify some factors that actually impair multilateral efforts to fight extreme poverty and exacerbate collective action problems related to global public goods involved in sovereign financing. One of these is factors is the so-called vulture funds litigation.

Vulture fund litigation not only prevents heavily indebted poor countries from using resources freed up by debt relief for their own development programs (see the 2010 report on this issue of my predecessor, Mr. Cephias Lumina, UN Document [A/HRC/14/21](#)) but also complicates debt restructurings as they create a fundamental moral hazard problem: those who do not accept a debt restructuring and litigate against the sovereign debtor will be fully repaid, while those creditors that made an effort and accepted the fact that the debt had to be reduced will be the only ones suffering from the haircut. Given that risk, creditors will probably be much more reluctant to conclude debt restructuring agreements with sovereign debtors, therefore, crises (and the ensuing negotiations) will be longer, more difficult to resolve, and with less predictable outcomes. Besides, if sovereign debtors are forced to grant a few private and highly speculative lenders preferential treatment at the expense of creditors that made sacrifices to let the country recover, the duty to perform a serious credit risk assessment will be the first victim. Financial markets need more prudence, not less.

Vulture funds’ disruptive litigation is only one – but probably the most prominent – evidence of the consequences of the global legal void on debt restructurings. The nature and our understanding of sovereign debt problems have changed over the last decade in ways that make a strong case for minimum but legally and economically healthy international rules on sovereign debt restructuring. There are a number of possible options and proposals to fill this void, which might work in a complementary

way: National legislation, collective action clauses, facility programs in multilateral institutions and soft law principles can play, to some extent, a certain role.

My mandate has for example over the past year advocated to the adoption of national legislation to protect poor countries against vulture fund lawsuits and to safeguard the gains from international debt relief efforts (see [A/HRC/14/21](#)) and praised some countries that have adopted legislation limiting the ability of such funds to litigate in their jurisdiction against heavily indebted poor countries, including Belgium, the United Kingdom of Great Britain and Northern Ireland and the Island of Jersey. While it has been the view of the Independent Expert that the scope of the legislation should cover a wider group of countries beyond heavily indebted poor countries, these laws should be seen as a step in the right direction.

As far as international law standards are concerned, and in light of the 2013 General Assembly ([68/202](#)) call “for the intensification of efforts to prevent and mitigate the prevalence and cost of debt crises by enhancing international financial mechanisms for crisis prevention and resolution”, I would like to draw to the Members of the Group of G77 and China the attention to the Guiding Principles on Foreign Debt and Human Rights ([A/HRC/20/23](#)) and the Guiding Principles on Business and Human Rights ([A/HRC/17/31](#)) endorsed by Human Rights Council resolutions [20/10](#) and [17/4](#) respectively. It is my view that the proposed resolution should include an explicit reference to those two sets of human rights principles to ensure that obligations emanating from international human rights law are adequately considered in the context of negotiating a legal regulatory framework for sovereign debt restructuring.

For example principle 6, of the Guiding Principles on Foreign Debt and Human Rights states that all States should ensure that any and all of their activities concerning their decisions on lending and borrowing decisions, the negotiation and implementation of loan agreements or other debt instruments, the utilization of loan funds, debt repayments, and the renegotiation and restructuring of external debt do not derogate from the obligation to respect, protect and fulfil human rights. Sovereign borrowers, as lenders, should be responsible in their financial transactions and the good faith principle is particularly relevant once debt crises erupt. From a human rights perspective insolvent states should not procrastinate but seek a fair debt restructuring in order to prevent bad situations from turning worse.

Furthermore principle 18 and 53 affirm that human rights obligations and in particular minimum essential levels of satisfaction of each economic, social and cultural right should be respected, including in the context of debt restructuring. Principle 63 also asserts that “if the debtor State has been granted debt relief through an international debt relief mechanism, the amount of debt recoverable by the litigating creditor should not exceed that recovered by other creditors.” The Guiding Principles have also called on States to consider the establishment of an international debt workout mechanism to restructure unsustainable debts and resolve debt disputes in a fair, transparent, efficient and timely manner (principles 84-86).

It should be noted that financial business enterprises, including hedge funds or so-called “vulture funds” have to respect human rights and should exercise human rights due diligence to identify, prevent, mitigate and account for adverse human rights impacts as outlined by the Guiding Principles on Business and Human Rights (see in particular principles, 11, 12, 13, 15, 17). I am not aware that financial business enterprises active on the secondary debt market, or Courts called upon to find fair

solutions to debt disputes, have already fully considered the implications of the Guiding Principles on Business and Human Rights for their transactions or in their jurisprudence.

At the same time the Guiding Principles on Business and Human Rights affirm the duty of States to protect human rights through ensuring adequate laws and policies governing business enterprises. These same Principles furthermore specify that States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.

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

Despite these standards and principles there remains however a global legal void that needs to be addressed in the field of debt restructuring specifically. (Collective actions clauses, even when designed and interpreted correctly – which cannot be taken for granted –, do not fully address the typical coordination problems that debt restructurings pose).

Filling the legal void at global level through an international regulatory framework resulting from an equal, participatory and transparent process should be considered as a legitimate and complementary approach in addition to addressing the matter through national legislation or contractual options. As suggested by the General Assembly resolution on external debt sustainability and development adopted on 20 December 2013 ([68/202](#)), national efforts (like national laws) to promote more responsible lending and borrowing should be complemented by global strategies and policies.

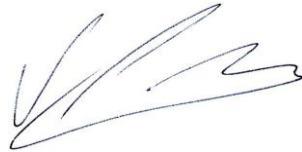
Building broad international consensus around this initiative is crucial in every possible way and should include all relevant stakeholders, sovereigns, multilateral lenders and donors, private financial business and civil society organizations. This is a step forward to promote a more responsible culture in the world of sovereign financing which has been much neglected in the years leading to the global financial crisis.

Identifying and systematizing existing human rights standards, and general and emerging international principles to be applied to sovereign debt restructurings would consolidate a normative body based on largely tested and well rooted rules, which would minimize the negative externalities of debt crises. While establishing consensus for an international convention will require a significant investment of effort, it would probably be balanced with the systemic benefits of more responsible financial behaviours and more orderly, timely and speedy debt restructurings. In addition, a regulatory framework might trigger both financial and non-financial benefits for affected countries and individuals. As the spread of norms and ideas potentially has the ability to shape what societies perceive as legitimate, an international instrument setting minimum standards on debt restructurings based on human rights arguments would help

to reinforce the idea that co-responsibility should be, from every point of view, the cornerstone of financial markets.

While the text, at any event, will emerge as a result of a negotiation process, I would like to remark that international human rights law should be considered as applicable law in the context of debt restructurings and inform discussions about a multilateral convention from its inception. As I have indicated in my above mentioned work plan, the role of human rights law in debt restructurings is one of the thematic priorities for my mandate. Therefore I would be more than pleased to contribute more substantially to such a norm building process.

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



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