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**Requests addressed to the Advisory Committee stemming
from Human Rights Council resolutions:
Activities of vulture funds and impact on human rights**

 Draft progress report on the activities of vulture funds and the impact on human rights

 Draft research-based report on the negative effects of the activities of ‘vulture funds’ on the enjoyment of human rights prepared by Jean Ziegler, Rapporteur of the drafting group on the activities of ‘vulture funds’ and the impact on human rights

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I. Introduction

1. This preliminary report is submitted in accordance with Human Rights Council (HRC) Resolution 27/30 of 26 September 2014, by which the Council requested the Advisory Committee to prepare a research-based report on the activities of ‘vulture funds’ and their impact on human rights.

2. According to the HRC, ‘vulture funds’ are ‘indicative of the unjust nature of the current financial system, which directly affects the enjoyment of human rights in debtor States’. The resolution calls on States ‘to consider implementing legal frameworks to curtail predatory funds activities within their jurisdictions’.

3. This research seeks to determine the extent to which the activities of ‘vulture funds’ may hinder the State’s capacity to fulfil its human rights obligations and what actions can be undertaken by States individually and collectively to tackle its negative effects.

4. In the preparation of this preliminary report, the Committee has sought the views and inputs of Member States, United Nations agencies, relevant international and regional organizations, the Office of the High Commissioner for Human Rights and relevant special procedures, 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.

5. The Advisory Committee would like to thank in particular Argentina, Cuba, El Salvador, Kuwait, Mauritius, Philippines, and the Bolivarian Republic of Venezuela, the Portuguese Ombudsman, the Greek National Commission for Human Rights, the Centre for Legal and Social Studies (CELS), the Centre Europe–Tiers Monde (CETIM), and the Asamblea Permanente por los Derechos Humanos (APDH) for the information provided in response to the questionnaire.

6. This report highlights the great and growing concerns posed by strategies employed by ‘vulture funds’. It analyses some of the most striking examples of ‘vulture funds’ litigation. It further considers national and international initiatives carried out in recent years to mitigate the negative impact of these activities particularly on the enjoyment of economic, social, and cultural rights and the right to development. States are recommended to undertake a number of measures – both individually and in a coordinated manner – in order to effectively control ‘vulture funds’ activities.

 II. What are ‘vulture funds’?

7. There is no international legal regime governing cases of state ‘insolvency’ or ‘bankruptcy’. Thus, as things stand, a state that defaults on its sovereign debts has to start on its own initiative a process to restructuring its foreign debt. This entails undertaking complex and protracted negotiations with a range of very different types of creditors, including private commercial creditors.[[1]](#footnote-2) Because participation in such processes is voluntary creditors (even a small percentage of them) may well decide for a variety of reasons, not to take part and to hold out for a higher level of repayment. It is at this point that ‘vulture funds’ come into play.

8. According to Cephas Lumina, the former 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 (hereafter former Independent Expert), ‘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 judgements, 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 (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 interests, penalties and legal fees”.[[2]](#footnote-3)

9. Thus, in the context of sovereign debt, a ‘vulture fund’ is a hedge fund that invests in debt considered to be weak or in danger of default.[[3]](#footnote-4) These funds are not lenders, but private funds that purchase the distressed debt on the secondary market at a discount, with a view to making a profit by suing the debtor for more than the price they paid to acquire the debt.[[4]](#footnote-5) To that end, they make the most of the existing failures in the regulation of the financial system: they buy or collect from other bond-holders the sovereign debt and systematically hold out in the restructuration processes with the sole aim of obtaining a high return.[[5]](#footnote-6)

10. These investment strategies are popularly called ‘vulture’[[6]](#footnote-7) because of their predatory *modus operandi* whereby they:

(a) Target sovereign states with distressed economies and generally with weak capacity for legal defence. The numbers of successful instances of litigation against poor developing countries outnumber by far those against any other group of countries.[[7]](#footnote-8) According to World Bank’s estimates, nearly one-third of countries that are eligible for debt relief and other poverty alleviation programmes are targeted by nearly 26 ‘vulture funds’.[[8]](#footnote-9) In March 2014, the International Monetary Fund (IMF) reported that in the group of the least developed countries one was in debt distress (Sudan) and nine were at a high risk of debt distress (Afghanistan, Burundi, Chad, Comoros, the Democratic Republic of the Congo, Djibouti, Haiti, Kiribati, and Sao Tome and Principe);[[9]](#footnote-10)

(b) Operate and benefit from the opacity and lack of control of the secondary market. When the indebted country is either close to default or has already defaulted on its debt ‘vulture funds’ acquire the sovereign bonds in the secondary market, benefiting from significant discounts. It is remarkable that in this context sovereign bonds may be are traded without the duty to inform the concerned debtor state.;[[10]](#footnote-11)

(c) Refuse to participate in any orderly and voluntary debt restructuring processes:

(i) Once a State starts to negotiate a restructuring with private bondholders ‘vulture funds’ exercise their right to hold out or rather collect and purchase the distressed bonds in the secondary market. They then take advantage of the weak position of a country close to default by putting it under additional pressure. Such pressure may easily end up in an agreement whereby the debtor state accepts a disadvantageous settlement as the only means to avoid a long and costly process against a particularly ‘aggressive’ litigator;[[11]](#footnote-12)

(ii) This was the case of Greece in 2012 when the Government decided to pay €436 million to settle a case with several holdouts on its debt restructuring. Strangely Dart Management, an investment fund based in the Cayman Islands, was accorded privilege in the payment, receiving 90 per cent of that amount. Greece seemingly yielded to pressure to avoid being sued by the ‘vulture funds’ in the midst of the particularly instable and sensitive political situation the country was going through.[[12]](#footnote-13)

(d) Sue the country claiming the reimbursement of the full value of the bond, plus interest and delay penalties:

(i) To ensure that the court’s decision is favourable to their interest ‘vulture funds’ choose ‘creditor-friendly jurisdictions’, usually the United States of America or the United Kingdom. However, increasingly they sue in the debtor countries themselves, where weaker legal systems are easily overwhelmed by the level of technical detail involved in adjudicating such cases;[[13]](#footnote-14)

(ii) Cases brought by ‘vulture funds’ are particularly protracted: the medium estimate for recovery is six years with annualized returns averaging from 50 to 333 per cent.[[14]](#footnote-15) Such proceedings are always burdensome and can complicate financial and reserve management.

(e) Chase the country to enforce the judgment:

(i) Once ‘vulture funds’ have obtained a favourable judgement they seek its enforcement before different local courts (forum shopping) until they secure the enforcement action they desire. They might resort not only to court proceedings but also to other pressure tactics, ranging from placing attachments and engaging in lobbying, to organizing press campaigns to discredit debtor States, all with a view to forcing governments to pay up.[[15]](#footnote-16) Figures show that in recent years attachment of the country’s assets abroad has become the most common enforcement strategy;[[16]](#footnote-17)

(ii) A 2005 ruling of the British High Court, for example, permitted the ‘vulture fund’ firm Kensington International Limited to intercept the proceeds of the Republic of Congo’s oil sales to recoup a US$39 million debt.[[17]](#footnote-18) The money raised through oil profits can be seized until a claim of $90 million is repaid.[[18]](#footnote-19)

(f) Obtain exorbitant profits. ‘Vulture funds’ have averaged recovery rates of about 3 to 20 times their investment, equivalent to returns of 300 to 2,000 per cent:[[19]](#footnote-20)

(i) In 1996, for example, Elliot Associates L.P. bought defaulted bank debt owed by Peru for US$11.4 million (with a face value of $20.7 million) and in 2000 successfully sued the country for $58 million. The IMF estimates that in some cases the claims by vulture funds constitute as much as 12 to 13 per cent of a country’s gross domestic product (GPD).[[20]](#footnote-21)

(g) Operate in jurisdictions where bank secrecy rules apply.[[21]](#footnote-22) It is not by chance that most ‘vulture funds’ companies are incorporated in ‘tax havens.’[[22]](#footnote-23) Such jurisdictions facilitate where there is no obligation of disclosing information on benefits or ownership they are likely to avoid or evade taxation by hiding their gains. Tax havens facilitate the secretive manner in which ‘vulture funds’ operate as well as the flight of much-needed capital, particularly from developing countries.[[23]](#footnote-24)

11. In a globalized world with high public burdens the enforcement of sovereign debt via courts is likely to become increasingly relevant.[[24]](#footnote-25) The likelihood of creditor litigation in cases of debt crisis has increased since the 1980s from 10 to more than 40 per cent.[[25]](#footnote-26) This does not include litigation originated by bilateral investment treaties or before international arbitration bodies that are increasingly used by ‘vulture funds’ to deploy its strategies. A recent study found that between 1976 and 2010 there were about 120 lawsuits by commercial creditors against 26 defaulting countries in the USA and the UK alone.[[26]](#footnote-27) Also according to the African Development Bank, the reported number of outstanding cases against debtor countries has doubled since 2004, with an average of eight new cases filed per year.[[27]](#footnote-28) The high success rate of past litigation (72 per cent of winning cases) has certainly contributed to this growing trend.[[28]](#footnote-29)

12. The current debt crisis in Greece shows that not only the least developed countries are at risk. Moreover, the recent outcome of the ‘vulture fund’ litigation against Argentina and the ensuing changes in legal doctrine regarding the ‘pari passu’ clause have opened the door to increasingly ‘disruptive’ lawsuits not only against least developed but also against middle income and highly developed countries.

13. There is no doubt that, as things stand, the existing financial system offers opportunities for ‘vulture funds’ to profiteer at the expense of poor developing countries as well of creditors that have made sacrifices to let the country recover. Such a ‘perverse’ outcome has led to an increasingly broad agreement on the need to reverse this situation.

14. It is against this backdrop that 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, Juan Pablo Bohoslavsky (hereafter, the Independent Expert) has undertaken a leading role. In a letter sent to the Chairman of the Group of G77 and China in 2014 he explained that:

“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 complementary way: National legislation, collective action clauses, facility programs in multilateral institutions and soft principles can play, to certain extent, a certain role”.[[29]](#footnote-30)

 III. Case studies

15. ‘Vulture funds’ have a long history of predatory practices against many developing countries including heavily indebted poor countries (the so-called HIPCs),[[30]](#footnote-31) mostly in Africa and the Americas.

16. Africa is by far the continent most harassed by ‘vulture funds’, with an average of eight suits filed every year.[[31]](#footnote-32) Without the capacity or the resources to face complex and protracted processes, African countries have been particularly harassed by ‘vulture fund’ litigation, losing the bulk of the suits. This state of affairs led the African Development Bank to establish in 2009 the African Legal Support Facility (ALSF), a special body providing these countries with specialized legal assistance.[[32]](#footnote-33)

17. Despite ‘vulture funds’ having operated in Africa since the 1990s, such actions went largely unnoticed among the general public until very recently. It has taken a high profile case, namely the dispute confronting the government of Argentina with one of the most well-known ‘vulture funds’ firms to prompt the international community to tackle the situation.

 A. Donegal International v. Zambia

18. In 1979, the Zambian government bought agricultural equipment from Romania. By 1984, the government had difficulty servicing the debt, which amounted to about US$30 million, interest included.

19. In early 1997, Debt Advisory International (which later incorporated Donegal International) started putting forward proposals to acquire the Zambian debt from Romania. In a memorandum sent to Romania, the company stated that:

“Under the HIPC initiative, Zambia will receive additional debt reduction from its bilateral creditors (…) In particular, bilateral creditors may need to write off up to 90 per cent of their Zambian claims and reschedule the remaining 10 per cent over 23 years or more. It is the practice of the Paris Club to require African Governments to agree a minute to the effect that they will not afford any other sovereign creditor better rescheduling terms that they have afforded the Paris Club. Consequently, we believe that there is very little chance that Romania can expect more in net present value terms that we are presently offering.”[[33]](#footnote-34)

20. In 1999, just as Zambia was about to reach the decision point under the HIPC’s initiative for comprehensive debt relief, Romania sold the debt to Donegal International(based in the British Virgin Islands) for about $3 million, equating to 11 per cent of the debt’s face value. In 2003, in controversial circumstances involving allegations of corruption and bribing of public officials, Zambia signed a settlement agreement with Donegal International in which it agreed to waive sovereign immunity from litigation and pay around $15 million of the then $44 million face value. It also agreed to penal rates of interests in the event of default and to have any disputes determined under English law. Zambia paid a total of $3.4 million in three instalments and thereafter stopped paying, arguing that the agreement was tainted with corruption and had been signed without the requisite authority.[[34]](#footnote-35)

21. The company waited until 2006 when, months before Zambia was due to receive debt cancellation under the HIPC initiative, it initiated litigation in the UK courts seeking US$55 million. In February 2007, the English High Court ruled in favour of Donegal, but accepted one of Zambia’s defences that the stipulated interest rate under the settlement agreement was an illegal penalty. The end result was a reduction of Donegal’s claim to US$15.4 million.[[35]](#footnote-36) However, this was still nearly 17 times the amount the company paid, constituting a 370 per cent return on its ‘investment’ and equated to 65 per cent of the country’s savings in debt relief that year.[[36]](#footnote-37) Reportedly, the government of Zambia recognized the judgment and allocated the funds originally earmarked for health programmes to service the debt.[[37]](#footnote-38)

22. The impact of the ‘vulture funds’ claim on Zambia is striking bearing in mind that about 65 per cent of the amount it received in debt relief was intended to assist in development projects. The total expenditure of the central government on social benefits according to the IMF was around US$140 million, thus the ‘vulture fund’ took away almost 15 per cent of total government social welfare expenditure. Money that could have been channelled to education, health care, and poverty alleviation thus had to be used to pay the ‘victorious’ vulture fund.[[38]](#footnote-39)

23. This case study shows that ‘vulture funds’ do not hesitate to interfere with debt rescheduling programmes set up for the poorest developing countries.[[39]](#footnote-40) They take over the benefits of such programmes, seizing on the opportunity presented by resources newly freed up or about to be released by debt relief.

 B. FG Hemisphere v. Democratic Republic of Congo

24. In 1980, DR Congo entered into a credit agreement with a company based in the former Yugoslavia, Energoinvest, for the construction of a high-voltage electric power transmission facility. By the late 1980s the country had defaulted on its repayment obligations.

25. In 2003, the International Chamber of Commerce (ICC) made two arbitral awards in favour of Energoinvest, and in 2004 the US District Court for the District of Columbia confirmed the amounts of US$18.43 million and $11.725 million, plus 9 per cent interest and the costs of arbitration. Energoinvest then transferred its rights to recover the claim to FG Hemisphere (now FG Capital Management), a ‘vulture funds’ firm based in the state of Delaware, a tax haven in the USA.[[40]](#footnote-41) The debt was reportedly purchased for $37 million.[[41]](#footnote-42)

26. From that moment on, FG Hemisphere pursued its claim on the DR Congo’s debt, attempting to seize its assets all across the world. In 2005, it obtained a court order compelling the State to furnish detailed information about the location of any items worth more than US$10,000; any documents that identified aeroplanes, boats, trucks and cars worth more than US$10,000; and any gold, precious metals, works of art or jewellery.[[42]](#footnote-43) The State failed to comply with the order, arguing that it imposed a virtually impossible burden.

27. In 2008, FG Hemisphere filed a motion in the US District Court for the District of Columbia to hold the DR Congo in contempt. In 2009, the court fined the State the sum of $5,000 per week and rising every four weeks to a maximum of 80,000 per week, for failing to comply with the order.[[43]](#footnote-44)

28. To enforce the 2003 ICC rulings, FG Capital Management has frozen hundreds of millions of dollars owed to Congo through court cases around the world. In November 2008, a South African court effectively halted sales of electricity from Congo to South Africa by ruling that FG Hemisphere could seize any payments for Congolese power sold to the country. In February, Hong Kong’s Court of Appeal froze about $100 million from a signing bonus for Congo’s $6 billion minerals-for-infrastructure deal with China until the ICC claim is resolved.[[44]](#footnote-45) In 2011, the Court of Appeal of the Hong Kong Special Administrative Region ruled that in accordance with the prevalent doctrine of state of immunity the DR Congo had no immunity in commercial proceedings. The agreement included the payment of $221 million in mining entry fees to the Congolese government.[[45]](#footnote-46)

29. This course of action is an unfortunate event for a country that needs money for development. The DR Congo is rich in natural resources, including gold, copper, cobalt and diamonds. However, the country is recovering from more than four decades of dictatorship and war that destroyed its infrastructure. The DR Congo has a Human Development Index Ranking of 176.[[46]](#footnote-47) Approximately four-fifths of its nearly 66 million population lives on less than $2 per day. Government expenditure on health is estimated at 7.2% of GDP. As the former Independent Expert has observed ‘vulture funds’ litigation threatens the country’s potential gains from international relief efforts and its capacity to create the conditions for fulfilling its human rights obligations. He concluded that “the Democratic Republic of the Congo cannot service its external debt obligations without harming its poverty-reduction and economic development prospects”.[[47]](#footnote-48)

30. The African Legal Support Facility (ALSF) provided some $500,000 to the RD Congo in 2010 and has assisted successfully the country in its legal defence against FG Hemisphere.[[48]](#footnote-49)

 C. NML Capital Ltd v. Argentina

31. A recent decision of a New York court in litigation between vulture funds and Argentina has highlighted both, the need to find better legal solutions for sovereign debt restructurings and the potential negative consequences of vulture funds activities on the enjoyment of human rights.

32. It is well documented how the deteriorating economic, financial, and social situation led Argentina to a catastrophic collapse in 2001. Soon after defaulting, the Government recognized the need to restructure the debt (roughly US$81 billion). In two successive exchange offers in 2005 and 2010 Argentina made an agreement with more than 92 per cent of their creditors, getting them to take an approximately 70 per cent ‘haircut’ on their bond holdings. This was a quite successful outcome.

33. A group of bondholders led by NML Capital Limited rejected the restructuring and sued Argentina for the full amount in the New York State courts. ‘Vulture funds’ had bought up part of the defaulted bonds on the secondary market just before the collapse in 2001, but most were purchased, at bargain prices, after the default and some even after the exchanges. It is claimed that the ‘vulture funds’ paid around $48.7 million for more than $220 million in defaulted bonds.[[49]](#footnote-50)

34. ‘Vulture funds’ constitute a minor part of the bondholders, only 1.6 per cent. NML Capital Ltd. is a hedge fund company based in the Cayman Islands and owned by Mr Paul Singer.[[50]](#footnote-51) With this case, they managed to win three major battles: getting the US judge to change the legal doctrine on the ‘pari passu’ clause; a Second Circuit confirmation on that ruling; and a refusal by the Supreme Court to take the case, meaning it stood by the lower courts’ decisions.[[51]](#footnote-52)

35. The US court’s holding represents a major departure from the traditional market understanding of the ‘pari passu’ clause.[[52]](#footnote-53) According to the ruling, the ‘pari passu’ clause, instead of providing for contractual protection against the risk of legal subordination in favour of another creditor holder of unsubordinated and unprotected debt, it should be interpreted as providing factual preference to holdout creditors with regard to all other creditors.[[53]](#footnote-54) Argentina is consequently requested to fully pay the ‘vulture funds’ before any of the restructured bondholders get paid.

36. It is not surprising that this decision had been widely challenged, including by the US Government itself.[[54]](#footnote-55) Moreover, implementing the ruling would be very damaging for Argentina in practice since it could face demands from other holdouts and holders of restructured bonds for repayment on equal terms.[[55]](#footnote-56)

37. In November 2012, an US District Judge ordered Argentina to pay NML Capital and other hold-outs in full (roughly $1.33 billion); an amount that represents an exorbitant profit of about 1,600 per cent.[[56]](#footnote-57) The Court ruled that Argentina could not pay any of the creditors who accepted Argentina’s exchange offers until had paid the hold-out creditors. The Supreme Court, on June 2014, denied Argentina’s petition to review such order.[[57]](#footnote-58) On 30 June 2014, when Argentina attempted to pay its restructured bondholders, the US District judge ordered the deposited money to be frozen.

38. On August 31, 2015, the U.S. Court of Appeals for the Second Circuit ruled in favour of Argentina’s Central Bank in one of the many proceedings initiated by Argentina’s unpaid bondholders.[[58]](#footnote-59) This decision reinforces the statutory presumption in favour of States’ instrumentalities sovereign immunity, and sets a very high threshold to rebut it.

39. The US rulings represent a setback for debt restructuring, damaging as well the current negotiations for the establishment of an international mechanism for sovereign debt restructuring.[[59]](#footnote-60) The US rulings not only represent a resounding victory for the hedge funds that did not participate in Argentine debt swaps but are also a setback for orderly sovereign debt restructuring ‘with consequences well beyond the borders of the United States and Argentina’.[[60]](#footnote-61) The UN Secretary General, Ban Ki-moon, has recognized that:

“…international ad hoc arrangements for debt crisis resolution have created incoherence and unpredictability. Different courts have very different interpretations of the same contractual clause and can impose a wide array of rulings. Politics and interest groups can impact on the outcome of the rulings and debt restructuring, compromising consistency and fairness. The Republic of Argentina v. NML Capital Ltd. rulings have made future debt restructuring more difficult as debtors are left with only moral suasion and foreign relations as incentives to encourage creditor coordination”.[[61]](#footnote-62)

40. In fact, the US rulings have effectively created a dangerous precedent by rewarding hold-out creditors while penalizing creditors who participated in a debt restructuring:

“The ruling provides a status of increased credibility to vulture funds – a dangerous development given their opportunistic and profiteering function in the global debt system. The failure of influential governments to intervene paves the way for financial traders to use their war-chest to define policy in an area that affects the lives of millions of people around the world”.[[62]](#footnote-63)

41. In relation to the potential negative economic and social consequences of the activities of ‘vulture funds’ on the capacity of the Government to realize all human rights, particularly economic, social, and cultural rights, and the right to development, the Independent Expert has expressly recognized that the restructuring of the debt provided the Government with ‘larger fiscal space for social investment’.[[63]](#footnote-64) Notably, the country significantly increased the social spending for health, education, social security, and housing from 9.5 per cent of GDP in 2003 to 15.5 per cent in 2015 in the national budget.[[64]](#footnote-65) As the former Independent Expert has recalled, the country’s ability to address ongoing concerns related to the realization of these rights should not be compromised, and, therefore, Argentina should not ‘yield to unreasonable demands of ‘vulture funds’.[[65]](#footnote-66)

42. The US court’s ruling has created a negative precedent but at the same time has triggered wide-ranging and solid support to the position Argentina has taken against the ‘vulture funds’. This can be considered a positive and unexpected outcome.

 IV. National legislation

43. As of today, only two countries have enacted legislation to prevent ‘vulture funds’ from pursuing excessive claims against indebted countries before their national courts, namely, Belgium and the UK. Unsuccessful attempts were made in France and the USA to adopt legislation to prevent ‘vulture funds’ from pursuing excessive claims against indebted countries before their national courts.[[66]](#footnote-67)

43. Belgium was the first country to pass such national legislation. In 2007, a considerable number of lawsuits were lodged in its domestic courts seeking to seize development funding granted to the Republic of Congo and the DR Congo.[[67]](#footnote-68) ‘Vulture funds’ were seeking the enforcement of favourable judgements that they had obtained before foreign courts. Only one year later the country passed a law aimed at safeguarding ‘Belgium funds disbursed towards development co-operation and debt relief from the actions taken by vulture funds’.[[68]](#footnote-69) Such legislation sets an important precedent since it automatically outlawed any ‘vulture fund’ from pursuing any Belgian funding or companies investing in the sovereign debtor country to obtain repayment.

45. In 2015, a new law ‘on the fight against “vulture funds”’ set out a more detailed legal framework aiming to curtail the ability of hold-out creditors to obtaining ‘illegitimate advantages.’[[69]](#footnote-70) The aim is to help the judiciary to identify ‘vulture funds’ and with this aim targets the acquisition of distressed sovereign debt The law provides that ‘if a creditor pursues an illegitimate interest through the repurchase of a loan or a claim owed by a State, its rights towards that State will be limited to the price to repurchase such a loan or claim.’ It further provides that an ‘illegitimate advantage’ is deemed pursued by a creditor if (i) a ‘manifest disproportion’ exists between the repurchase price and the amounts which it seeks to recover from the State; and (ii) at least one of the following criteria is met:

(a) The debtor was insolvent (or a payment default was imminent) at the time of the debt buyback;

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

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

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

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

(f) The reimbursement would have a measurable adverse impact on the public finances of the State and would reasonably likely compromise the socio-economic development of its population.

46. So, according to the new legislation the judiciary should adequately consider the important public interest that is at stake by taking into account the adverse impact the repayment of the debt may have on the socio-economic situation of the debtor state and the well-being of its population.[[70]](#footnote-71) The Belgium law constitutes an excellent example of how states can disincentive ‘vulture funds’ from starting litigation.[[71]](#footnote-72)

47. A very similar legislative path was followed by the UK, another of the preferred jurisdictions for ‘vulture funds’ litigation. In a consultation paper published in October 2009 the UK explained that:

“The government is determined that these actions do not prevent poor countries from using the resources freed up by debt relief for development and poverty reduction. And we firmly believe it is the right to act to prevent this from happening at the expense of debt relief funded by the UK taxpayer”.[[72]](#footnote-73)

48. In 2009, an initial law was passed limiting the ‘maximum recoverable amount’ to that initially paid for the debt, plus interest or charges with the aim ‘to regulate the recovery of the defaulted sovereign debt of developing countries’.[[73]](#footnote-74) The law established a clear threshold to the profit “equal to any amounts recovered from other actions related to the same defaulted sovereign debt”, as well as to the interest’s rate and their calculation.[[74]](#footnote-75) It further introduced the requirement of seeking ‘consent’ from national authorities before recovering defaulted sovereign debt, which essentially implied that the ‘vulture funds’, before seeking a judgment or the enforcement of a judgment, should make a request. The ‘consent application’ must include all the relevant information, i.e., the name of those who will receive a financial benefit; a copy of the company’s incorporation documents, total amount paid for acquiring the right to the financial benefit, and a declaration of anything of value given to the debtor country’s Government in connection with the acquisition or collection of the defaulted sovereign debt.[[75]](#footnote-76)

49. In 2010, supplementary legislation was enacted specifically targeting the HIPC countries i.e., those of countries that have been designated as unsustainable external debts by commercial creditors.[[76]](#footnote-77) The law establishes limits the amount recoverable in respect of claims for ‘qualifying debts’ and applies to any judgment given by UK courts, foreign judgements enforceable in the UK, as well as to arbitral awards. In 2013, the Act was replicated in the UK overseas territories and dependences of Jersey, Guernsey, and the Isle of Man, also preferred jurisdictions for initiating ‘vulture funds’ suits.[[77]](#footnote-78)

50. These national laws may certainly have played an important deterrent role in stopping ‘vulture funds’ lawsuits against the most vulnerable developing countries. However, it is clear that more national laws are needed in order to effectively address this situation, as the Independent Expert has recognized on several occasions.[[78]](#footnote-79) In fact, the efficiency and impact of national measures might be easily reduced by the tactic of ‘forum shopping’, which is an integral part of the ‘vulture funds’ strategy.

51. ‘Vulture funds’ litigation is mainly sought before US courts and concerns firms that are registered under US domestic law. This is not by chance. Over recent decades, US legislation and its courts have been particularly permissive and favourable to ‘vulture funds’ actions and interests. For this reason, that this country enacts legislation to ‘stop vulture funds’ seems to be an essential step towards effectively avoiding this disruptive litigation.[[79]](#footnote-80)

 V. International initiatives

52. Over recent decades a growing consensus has emerged on the need to curb ‘vulture funds’ activities. Social organizations have been calling for years for concrete action to address the ‘perversity’, ‘immorality’, and ‘outrageous outcomes’ of these predatory investments.[[80]](#footnote-81) Increasingly, States both from developing and developed countries, have expressed the need for a robust legal regulatory framework to restructure sovereign debt as a way of addressing the root-causes of ‘vulture funds’.

53. In a G8 meeting hold in May 2007, Finance Ministers and Central Bank Governors claimed to “remain concerned about the problem of aggressive litigating against HIPC countries”. They welcomed “the steps already taken by the Paris Club to address this problem, and urge all sovereign creditors not to sell on claims on HIPCs, and assured that they were ‘examining additional steps that might be taken”.[[81]](#footnote-82) Very similar concerns were expressed and actions and proposed by the State signatories to the 2008 UN Declaration Financing for Development. The Doha Declaration welcomed “steps taken to prevent aggressive litigation against HIPC-eligible countries, including through the enhancement of debt buy-back mechanisms and the provision of technical assistance and legal support” and called “on creditors not to sell claims on HIPC countries to creditors that do not participate adequately in the debt relief efforts”.[[82]](#footnote-83)

54. In the same vein, in a Declaration adopted in 2014, by the Ministers for Foreign Affairs of the Member States of the Group of 77 (G-77) and China, it was stated that ‘vulture funds’ actions “pose a risk to all future debt restructuring processes, for both developing and developed countries”. Moreover, “they stressed the importance of not allowing vulture funds to paralyse the debt restructuring efforts of developing countries and stressed that these funds should not supersede a State’s right to protect its people under international law”.

55. International and regional organizations have joined the cause against speculative investments. In 2009, the Council of Europe’s Parliamentary Assembly adopted a recommendation whereby it strongly condemned ‘vulture funds’ action that, according this body, “have no compunction in taking advantage of the 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”.[[83]](#footnote-84)

56. In 2008, Member States of the European Union committed themselves to not sell HIPC’s debt on the secondary market to creditors that refused to take part in debt relief initiatives.[[84]](#footnote-85) A similar decision had been publicly proclaimed by members of the Paris Club in a statement delivered one year before.[[85]](#footnote-86) Financial institutions such as the IMF,[[86]](#footnote-87) the African Bank for the Development,[[87]](#footnote-88) and the Inter-American Development Bank[[88]](#footnote-89) have been tracking the economic and financial effects of speculative practices on debtor countries.

57. The ability of ‘vulture funds’ to jeopardize the objectives of the IMF and World Bank Initiative on HIPC’s countries makes clear that the implications of ‘vulture funds’ activities are not exclusively financial or economic; and more importantly, that the adverse impact of these activities cannot be effectively addressed in an isolated or partial manner.

58. The certainty that ‘vulture funds’ are not the problem per se but rather the result of the failures of the financial system, as well as of the lack of coherence of the different sectorial policies carried out at the international level, opened the way to two parallel but interconnected proposals that are now being pursued by the UN General Assembly and the Human Rights Council.

59. On 9 September 2014, the UN General Assembly responded to the increasing demand to take action with a landmark resolution entitled “Toward the establishment of a multilateral legal framework for sovereign debt restructuring processes”. Proposed under the initiative of the G-77 and China the resolution was backed by a large majority of UN member states, with 124 voting in favour.[[89]](#footnote-90) The General Assembly recognizes “the need to create a legal framework that facilitates the orderly restructuring of sovereign debts, allows the re-establishment of viability and growth without creating incentives that inadvertently increase the risk of non-compliance and acts as deterrent to disruptive litigation that creditors could engage in during negotiations to restructure sovereign debts”, emphasizing ‘the special importance of timely, effective, comprehensive and durable solutions to the debt problems of developing countries in order to promote their inclusive economic growth and development.’ Resolution 68/304 further puts the focus on ‘vulture funds’ by highlighting that such activities “benefit from litigation initiated against indebted countries, which are forced to divert many of their resources to handle such litigation, thereby undermining the purpose of the debt restructuring processes”. The General Assembly further supported all initiatives taking by financial organizations to prevent ‘vulture funds’ activities. Strangely, human rights concerns were not expressly mentioned in the text.

60. In the explanation of the vote the Argentinian Minister of Foreign Affairs, Mr. Timerman, stated that:

“Billions of dollars are going into the pockets of the owners of vulture funds because of that legal vacuum. The vacuum’s existence is not mere coincidence. Those who are involved in such trade, which is scandalously profitable, invest a percentage of their profits in campaigns and lobbyists to ensure that the situation does not change. The lack of a legal regulatory framework to restructure sovereign debt has a direct correlation with poverty, disease and the insecurity suffered by countries who have been historically crushed by external debt – countries where none of the owners of such funds, or their lobbyist or lawyers, live”.[[90]](#footnote-91)

61. The USA was among the 11 countries that voted against this Resolution. For this State, experience in the debate on sovereign debt shows that the creation of such a mechanism “would have highly uncertain results” and that “work on this technical complex issue is ongoing in other forums”, including the IMF and the International Capital Market Association. In the explanation of its vote, the Deputy US Representative, Mrs. Robl, stated that:

“The United States cannot support the creation of a sovereign debt restructuring mechanism, as envisioned in this resolution. The establishment of a statutory mechanism for debt restructuring could create uncertainty in financial markets. If lenders face higher uncertainty regarding repayment, they may be less likely to provide financing and will likely charge higher risks premiums, potentially stifling financing to developing countries”.[[91]](#footnote-92)

62. None of the European Union Member States supported the resolution (6 voted against and 19 abstained), due to the lack of a collective clear position and “serious concerns about its substance and significant objections about the process of its adoption, especially with respect of the rush with which that complex proposal was launched and to the predetermined outcome it prescribes”.[[92]](#footnote-93) However, Italian’s Ambassador, Mr Lambertini, speaking on behalf of the EU, stated that Member States recognize the importance of sovereign debt restructuring “which is not pertinent only to certain countries”.

63. The Ambassador of Algeria, Mr. Boukadoum, explaining that Algeria had faced a terrible financial crisis in the 1990s being forced to confront the “terrible process of debt restructuring”, said: “we can accept reasonable profits, of course, but the goal is also to effectively promote poverty eradication, job creation, production an strong inclusive and sustainable economic growth”. And he added:

“We cannot contemplate financial institutions and the latest crisis always being on our minds. We cannot countenance having invisible groups behind the scenes deciding on the stability and fate of peoples, countries and citizens without their knowledge. This is not a technical issue; it is a hard-wired political one. Those people, groups and institutions cannot act as if they were – our elected leaders, working against our basic interests and the stability of our countries”.[[93]](#footnote-94)

64. Only a few days later, on 26 September 2014, the Human Rights Council addressed the lack of explicit mention of human rights concerns and obligations in the General Assembly resolution by passing another landmark resolution on the “Effects of foreign debt and other related financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights: the activities of vulture funds”. Resolution 23/70 was supported by the large majority of the Member States of the Human Rights Council. It condemned the “direct negative effect that the repayment to those funds, under predatory conditions, has on the capacity of Governments to fulfil their human rights obligations”.[[94]](#footnote-95) As the Argentinian Ambassador, Pedro Alberto D’Alotto points out, these initiatives evidence:

“The will of the international community to breach the existing gap in a multilateral effort, where sovereign states decide not to be hostage by the market nor their sovereign debt restructuring left to the discretionary will of speculators”.[[95]](#footnote-96)

65. Social organizations and more broadly civil society have been denouncing the damaging consequences of ‘vulture funds’ activities. In July 2014, 100 organizations worldwide supported the establishment of an international mechanism for the restructuring of sovereign debt ‘based on the obligations of states to respect, protect and enforce human rights, both in their territory and extraterritorially’.[[96]](#footnote-97) The focus is not yet on the development and economic growth of a country in macroeconomic terms, but rather on the more practical repercussions of such activities on the well-being and daily life of their populations.

66. Non-governmental organizations have thus brought to the debate a new perspective relating to the ability of ‘vulture funds’ to hinder the state’s duty to fulfil its human rights obligations, which may endanger the living conditions and well-being of its population and thereby the enjoyment of certain rights, particularly socio-economic rights and the right to development. ‘Vulture funds’ have also made evident the need for a more coherent approach to measures aimed at implementing the development goals as well as the need to give more concrete expression to the principle of international cooperation enshrined in the United Nations Charter.[[97]](#footnote-98)

67. As a result of this process, on 10 September 2015, the General Assembly adopted Resolution 69/319 endorsing the Basic Principles on Sovereign Debt Restructuring Processes.[[98]](#footnote-99) This resolution reaffirms the need of systematically integrating human rights concerns in the context of the review of the international financial and economic architecture that is taking place at the General Assembly. More specifically, the principle of sustainability requires that sovereign debt restructuring workouts lead to stable debt situations by ‘minimizing economic and social costs, warranting the stability of the international financial system and respecting human rights.’ Therefore, a balance must be struck between the protection of the private interest of the outset creditor’s rights and the public interest of protecting and promoting a sustained and inclusive economic growth and sustainable development. By its general character, the principle of sustainability has become instrumental for the promotion and protection of economic development, growth and human rights in times of debt crisis.[[99]](#footnote-100)

 VI. Human rights impact of ‘vulture funds’

68. A number of national and international human rights bodies have contributed to the articulation of the linkage between ‘vulture funds’ and the state’s duty to fulfil its human rights obligations, including the right to development. The thematic report submitted in 2010 by the former Independent Expert has notably set the basis for the development of a coherent strategy aimed at curtailing the disruptive action of ‘vulture funds’ activities. According to Cephas Lumina:

“From a human rights perspective, the settlement of excessive vulture fund claims by poor countries with unsustainable debt levels has a direct negative effect on the capacity of the Governments of these countries to fulfil their human rights obligations, especially with regard to economic, social and cultural rights, such as the rights to water and sanitation, food, health, adequate housing and education”.[[100]](#footnote-101)

69. It is a fact that ‘vulture funds’ activities have the ability to hinder and even jeopardize a state’s capacity to fulfil its human rights commitments, particularly those linked with economic and social progress, the elimination of poverty, and development.[[101]](#footnote-102) While debts held by these private investment firms may represent a small fraction of poor countries’ debt, awards in ‘vulture fund’ litigation undeniably represent a substantial burden on the budgets of already poor countries. Harmful conditions of loans or high and abusive interest rates may make the repayment of debt extremely difficult and may place the state in a situation of having to repay far more than the amount originally borrowed. As Cephas Lumina explains:

“Vulture fund activity not only dilutes the gains from debt relief, it also complicates the debt relief processes and undermines other creditors by forcing debtor countries to grant vulture funds preferential treatment at the expense of responsible creditors who may be involved in debt restructuring with debtor countries. Unlike vulture funds, responsible secondary debt participants do not acquire sovereign debt for the sole purpose of enforcing payment of usurious interest rates from impoverished countries”.[[102]](#footnote-103)

70. Thus, it is basically in the interest of ‘vulture funds’ hampering and delaying debt restructuring. Significantly, their expectation of obtaining profits increases in proportion to the economic and financial distress of the country. That will certainly increase their profits but also economic and human suffering.

71. The negative impact of ‘vulture funds’ actions on the state’s ability to fulfil its human rights obligations will increase as a financial and economic crisis becomes hasher. So they may also contribute to exacerbate the adverse impact of the debt burden and may lead to harsh austerity measures involving cuts on public spending that may ultimately impact on the economic growth and development of the country and thereby on the enjoyment of economic, social, and cultural rights.[[103]](#footnote-104)

72. As a result, money earmarked for poverty reduction and basic social services, such as health and education, is diverted to settling the substantial claims of ‘vulture funds’. Particularly in the case of HIPC countries, it has been demonstrated how resources freed up for development and poverty reduction programmes were used to service the debt with ‘vulture funds’:

“By forcing HIPCs, through litigation and other means, to divert financial resources saved from debt cancellation, vulture funds diminish the impact of, or dilute the potential gains from, debt relief for these countries, thereby undermining the core objectives of internationally agreed debt relief measures. Vulture funds profiteer at the expense of both the citizens of HIPCs and the taxpayers of countries that have supported international debt relief efforts”.[[104]](#footnote-105)

73. The case of Malawi constitutes a good example of how debt repayments may impact negatively on the enjoyment of certain rights. In 2002, following a poor harvest, seven million from a population of eleven million were left facing a serious food shortage because the Government was forced to sell the maize from its National Food Reserve Agency to raise funds to repay loans.[[105]](#footnote-106) This example shows that ‘vulture funds’ action ultimately may diminish the capacity of the country to create the conditions necessary for the realization of the rights of the people, in this case, the right to food.

74. More generally, it has been empirically demonstrated that in many of the poorest 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. Debt servicing and harmful conditions linked to loans and debt relief often limit investments in and undermine the provision of accessible public services.[[106]](#footnote-107) The Millennium Development Goals Gap Task Force reported in 2008 that, despite the increase in social expenditures as a result of debt relief, a large number of countries were still spending more on debt servicing than on public education or health. In 2006, for example, 10 developing countries spent more on debt service than on public education, and in 52 countries debt servicing amounted to more than the public health budget.[[107]](#footnote-108)

75. The burden of high external debt repayments significantly reduces the available resources for social investment. This has been made evident in relation to several countries by the Committee on Economic, Social and Cultural Rights. In the case of Ecuador, for example it stated that the high percentage of the annual national budget (around 40 per cent) allocated for foreign debt servicing seriously limited the resources available for the achievement of effective enjoyment of economic, social and cultural rights.[[108]](#footnote-109) Also in relation to Madagascar, the Committee on the Rights of the Child said that the external debt, the structural adjustment programme and the limited availability of financial and skilled human resources impacted in a negative manner on social welfare and on the situation of children and impeded the full implementation of the Convention’.[[109]](#footnote-110)

76. On the contrary, studies demonstrate how reduction in debt service and debt cancellation has effectively contributed to the creation of the conditions necessary for the realization of social rights. In this regard, it has been stated that:

“In circumstances where debt has been cancelled, countries have been able to invest more in public services such as health care, education, water and sanitation and to abolish user fees for some of these services (such as fees for health care and primary education previously introduced as part of austerity measures imposed by the international financial institutions), thereby enhancing the enjoyment of the rights to health care, education, water and sanitation”.[[110]](#footnote-111)

77. Governments should not be placed in a position where they are unable to ensure the realization of basic human rights because of excessive debt repayments. The State’s responsibility to ensure the enjoyment of basic human rights may take priority over their debt service obligations, particularly when such payments further limit the country’s ability to fulfil its human rights obligations. It has been recommended in this regard that 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, including the right to development.[[111]](#footnote-112) Thus, such assessments on debt sustainability should take due account of the potential adverse human rights implications of debt service.

78. In a 2010 Recommendation on “The need for constant respect of human rights during the implementation of the fiscal and social exit strategy from the debt crisis”, the Greek National Commission for Human Rights expressed “its strong belief that the State’s obligation to respect fundamental human rights while exercising its powers to exit from the external debt crisis is imperatively imposed by the State’s undertaken obligations under national and international law”. The human rights national institution also recalled “the urgent need to adopt measures to safeguard and shield fundamental rights during the financial crisis” and “the common demand for due respect of all individual and social rights”.[[112]](#footnote-113)

79. From this perspective, there is no doubt that the irruption of ‘vulture funds’ litigation in a debt crisis is certainly disruptive since it may bring the state to the verge of economic and social collapse. As the Special Advisor on Economics and Development Finance of South Centre, Professor Yuefen Li, has observed, a debt crisis is a kind of ‘financial tsunami’ that may bring a great deal of economic destruction and economic reversal along with sacrifice in human rights terms. A country can lose 5–15% of its GDP.[[113]](#footnote-114) Delays in solving debt crisis come with significant costs as financial and economic crisis become harsher and, as consequence, can have more severe impacts on the enjoyment of human rights.[[114]](#footnote-115)

80. When a country defaults on its international debt, its ability to provide the population with the most basic social services is greatly hindered. Countries are often left with no choice but to repay the debt thus diverting the financial resources that could have been saved by debt cancellation and which could have been injected into national budgets. There is no doubt that in this context, ‘vulture fund’ litigation may only be harmful since it diverts much needed resources and attention from pressing development, social, and human rights issues to lengthy and costly litigation.[[115]](#footnote-116)

81. It is open to criticism the fact that the existing legal framework generally ignores the primary human rights obligations of states to provide for the basic social needs of their people. The criteria for assessing sustainability must take into account the country’s ability to provide basic services and balance human-rights consideration with the ability of debtor countries to repay their debts. The Independent Expert has stated on the occasion of the analysis of Ecuador’s periodical report that:

“A State’s obligations to respect, protect and promote the human rights of all people subject to its jurisdiction must take precedence over obligations to spend budgetary resources on debt servicing, in cases where the two are competing for funds. In this regard, the independent expert considers that States are justified in querying the repayment of debt that has been incurred in questionable circumstances”.[[116]](#footnote-117)

82. The question of whether a state might be under an obligation not to repay its debt to ‘vulture funds’ if it can only do so at the expense of neglecting the basic social needs of its people is highly controversial. It requires making a choice between contractual obligations toward creditors and social rights obligations towards the people of the country. But in the absence of a multilateral independent mechanism capable of solving disputes over the repayment of sovereign debt, debtor states have little choice but to prioritize their contractual obligations.[[117]](#footnote-118) In fact, practice shows that the normal approach to this dilemma is not often that of prioritizing poverty reduction and other social policies over servicing the country’s obligations toward its creditors. Interestingly, it has been observed that:

“The debt burden adversely affects the protection of economic and social rights not only because of the diversion of money from social purposes to debt servicing. Rather, the dependency in which it puts the debtor countries 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”.[[118]](#footnote-119)

83. It is 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, particularly economic and social rights, including the right to development.[[119]](#footnote-120) Particularly in the case of immoral, disproportionate, and speculative claims deriving from debts that have been settled under abusive terms it is required to take a more human-rights centred approach. Consequently, the impact of debt repayment on the overall budget and on the availability of funds for the protection of at least the minimum core of economic and social rights should be carefully assessed.

 VII. Applicable legal framework to ‘vulture funds’

84. Over the past years, the Human Rights Council has endorsed a set of guiding principles in the context of sovereign debt and business-related issues. The Human Rights Council endorsed in 2012 the Guiding Principles on Foreign Debt and Human Rights, and in 2011, the Guiding Principles on Business and Human Rights.[[120]](#footnote-121)

85. The purpose of such documents is to guide states and other relevant stakeholders in the task of bringing into line their policies and activities in line with human rights commitments. According to the Guiding Principles on Foreign Debt and Human Rights, they seek to assist “States and all relevant actors including … organized groups of bondholders in the conduct of their respective activities and pursuit of their respective interests relative to external debt”. To that end, they provide a number of operational principles drawn from the practice of states and human rights bodies that may contribute to guide the state’s action with regard to ‘vulture funds’ activities.

86. On June 2014, the Human Rights Council adopted Resolution 29/9 on the ‘Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights’, a process that will certainly impact the activities of ‘vulture funds’, that benefit of their unprecedented economic financial and political power and rely on their transnational character, economic and legal flexibility and complex structures to evade national and international laws and regulations.

 A. Relevant principles applicable to states

87. There are a number of positive actions that states could undertake in order to mitigate the negative effects of ‘vulture fund’ activities.

 1. Duty of international cooperation

88. States should cooperate to create an international enabling environment conductive to the universal fulfilment of economic, social and cultural rights, taking into account the potentially negative impact on the enjoyment of human rights of external debt servicing and the adoption of related economic reform policies.[[121]](#footnote-122) According to this general principle, states must ensure that their activities and those of their residents and corporations, do not violate the human rights of people abroad and that States, individually or through membership of international institutions, do not adopt or engage in policies that undermine the enjoyment of human rights or engender disparities between and within states.[[122]](#footnote-123)

 2. Obligation of ensure adequate regulation of ‘vulture funds’

89. As a consequence, states have a general obligation of ensuring adequate regulation of business enterprises. This implies, first, enforcing laws that aim to persuade ‘vulture funds’ to respect human rights. National legislation should set out clearly the expectation that ‘vulture funds’ domiciled in their territory and/or jurisdiction respect human rights thorough their operations.[[123]](#footnote-124) States should also provide guidance on how the funds can respect human rights while operating.[[124]](#footnote-125)

 3. Encourage compliance and require ‘due diligence’

90. States should also through national regulations encourage compliance by and require due diligence from ‘vulture funds.’[[125]](#footnote-126) So the legislation should be supported by regulations and procedures that, for example, aim at excluding the likelihood of vulture funds seizing certain type of funds, such as development cooperation funds, or litigating against states that are affected by a distressed economy. Limits on the amount that can be claimed and also on the interest rates should be established.

 4. Human Rights primacy

91. Particularly in the context of debt restructuring the value of a human rights-oriented approach must be reaffirmed. The debtor state bears a particular responsibility in the design of foreign debt strategies coherent with its human rights commitments. Such strategies should not hamper the improvement of conditions guaranteeing the enjoyment of human rights and must be directed to guarantee the achievement of adequate level of growth to meet their socio-economic needs and development requirements.[[126]](#footnote-127)

 5. Minimum core

92. Restructuring processes should aim at reaching an agreement that enables the debtor state to service its external debts without compromising its capacity to fulfil its human rights obligations. States should ensure that particularly the obligation to repay external debt, do not derogate from their minimum core obligations with respect to economic and social rights.[[127]](#footnote-128)

 6. Debt unsustainability

93. ‘Vulture funds’ should conduct due diligence to ensure that the conditions of the loan will not increase the debt of the state to an unsustainable level as to impede the creation of conditions for the realization of human rights.[[128]](#footnote-129) This is a shared responsibility, since also debtor states should ensure that their level of debt servicing is not as excessive or disproportionate as to amount to a diversion of their resources away from the provision of social services.[[129]](#footnote-130)

 7. Debt sustainability assessment

94. Debt sustainability assessments should be undertaken by the debtor State or the relevant international bodies. It must not be limited to economic considerations, such as the debtor state’s economic growth prospects and ability to service their debt obligations, but must also take into consideration the impact of debt burdens on a country’s ability to achieve the Millennium Developing Goals and to create the conditions for the realization of all human rights.[[130]](#footnote-131)

 8. Restrictions on the selling of debt on the secondary market

95. Loan agreements should impose clear restrictions on the sale or assignment of debt to third parties by creditors without the prior informed consent of the borrower state. Efforts should be directed towards achieving a negotiated settlement between the creditor and the debtor.[[131]](#footnote-132)

 9. Principle of ‘bona fide’

96. States and ‘vulture funds’ should be responsible in their financial transactions. The good faith principle is particularly relevant once a debt crisis erupts. Under such circumstances, creditors have a duty to behave in good faith and in a cooperative spirit to reach a consensual rearrangement.[[132]](#footnote-133) This might imply more specifically that abusive creditors do not enjoy better treatment than those that are acting in good faith.[[133]](#footnote-134) In practical terms, it should be guaranteed that the amount of debt recoverable by the ‘vulture funds’ should not exceed that recovered by other creditors.[[134]](#footnote-135) States are also called upon to comply with this obligation particularly in the process to create an international mechanism designed to resolve disputes concerning the restructuring of sovereign debt.[[135]](#footnote-136)

 B. Relevant principles applicable to ‘vulture funds’

97. ‘Vulture funds’ are commercial entities in the financial sector and, therefore, are required to conform while performing their activities to the Guiding Principles on Business and Human Rights.[[136]](#footnote-137)

 1. Duty to respect human rights

98. ‘Vulture funds’ have to respect human rights and should exercise human rights due diligence. They “should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved”.[[137]](#footnote-138)

 2. Avoid causing or contributing to adverse human rights impacts

99. ‘Vulture funds’ activities do not conform with Guiding principle no. 13 specifically providing that business enterprises must avoid causing or contributing to adverse human rights impacts through their own activities, and should prevent or mitigate adverse human rights impacts that are directly linked to their operations.

 3. Assessments of actual and potential human rights impacts

100. It should almost go without saying that it is not part of ‘vulture funds’ practice to comply with Guiding Principle no. 17 requiring for assessments of actual and potential human rights impacts. Aggressive litigation against HIPCs demonstrates the absence of any policies or other mechanisms aimed at evaluating the impact of ‘vulture funds’ actions on the human rights of the population of the targeted state.[[138]](#footnote-139)

 VIII. Conclusions and recommendations

101. ‘Vulture funds’ activities are inherently exploitative since they seek to obtain disproportionate and exorbitant gains at the expense of the realization of the human rights and the sustainable development of states. Seeking the repayment in full of a sovereign debt from a defaulted state -or close to it- is far more than a plain investment opportunity: it is an illegitimate outcome. In a debt crisis not only financial obligations are at stake. The duty to observe due diligence to prevent violations of economic, social and cultural rights applies to all states and stakeholders, including the ‘vulture funds’ management.

102. ‘Vulture funds’ profits are made at the expense of the sustainable development of states and ignoring the human rights situation of their populations. This course of action undermines human rights obligations and general principles of international law. In order to avoid human rights violations, all relevant stakeholders must systematically undertake at all levels assessments on the impact of ‘vulture fund’ activities on the implementation of the economic, social and cultural rights. Illegitimate ‘vulture funds’ activities must be identified and curtailed. To that end, states are recommended:

**(i) To enact, as a matter of urgency, legislation aimed at curtailing predatory ‘vulture funds’ activities within their jurisdiction. Domestic laws should not be limited to HIPCs but cover a broader group of poor countries and should apply to commercial creditors that refuse to negotiate any restructuring of the debt. The UK and Belgium laws provide a valuable guidance for states to limit ‘vulture funds’ practices. Regulations aimed at curtailing potential extraterritorial negative impact of ‘vulture funds’ activities should also be enacted.**

**(ii) To adopt the necessary measures aimed at preventing any judicial action from ‘vulture funds’ in their jurisdiction and to prohibit commercial or public entities to invest in ‘vulture funds’. National courts or judges should not give effect to foreign judgments nor conduct judgement enforcement procedures in favour of ‘vulture funds’. It is a good practice limiting the value of ‘vulture funds’ claims to the discounted price paid for the bonds. The 2015 Belgium law includes very valuable criteria to identify illegitimate interest that seek to obtain manifestly disproportionate profits through abusive investment strategies.**

**(iii) To enhance and promote transparency by ensuring that ‘vulture funds’ owners and their shareholders are disclosed and subject to appropriate taxation. Courts and other relevant national authorities must have access to all relevant documents and information on the amounts and creditors’ identity. Transparency in relation to claims dealing with sovereign debt purchased in the secondary market must be also ensured.**

 **(iv) To ensure that adjudication bodies, including the ICSID and the Permanent Court of Arbitration, integrate in their practices the duty of arbitrators to assess at a preliminary stage the bona fide of ‘vulture fund’s’ claims as well as the standing of the claimant, by requiring the disclosure of details of the debt. Claims that are manifestly disproportionate to the amount initially paid to purchase the debt should not be considered. Arbitrators should take into account the impact the final award may have on the enjoyment of economic, social and cultural rights as well as for the durable and sustained development of the debtor’s state. Relevant bodies should integrate these principles in the code of conduct or ethics for arbitrators.**

**(v) To ensure that the principle of ‘bona fide’ is adequately enhanced in national legislation and applied by domestic courts in relation to sovereign debt restructuring processes litigation by providing that abusive creditors do not enjoy better treatment than those that are acting in good faith, as required by GA Resolution 69/319.**

**(vi) To explore further ways of mainstreaming and operationalizing the pre-eminence of human rights concerns and implications, including the achievement of the Sustainable Development Goals, in the process of setting-up a multilateral legal framework for debt restructuring, and to cooperate in good faith towards that end.**

1. They might be: international financial institutions, bilateral or multilateral lenders, private financial institutions, or bondholders. A/HRC/20/23, 10 April 2011, para. 4. [↑](#footnote-ref-2)
2. A/HRC/14/21, 29 April 2010, para. 8. [↑](#footnote-ref-3)
3. Distressed assets are assets of companies or government entities that are experiencing financial or operational distress, default, and/or under bankruptcy. Purchasing or holding such distressed-debt creates significant risk due to the possibility that bankruptcy may render such securities worthless. [↑](#footnote-ref-4)
4. While potentially lucrative, these investment strategies require significant levels of resources and expertise to analyse each instrument and assess the likelihood of ultimate recovery. Distressed securities tend to trade at substantial discounts to their intrinsic or par value. See: M. Mailoc López de Prado and C. Rodrigo Illera, Invertir en Hedge Funds. Análisis de su estructura, estrategias y eficiencia, Madrid, 2014. [↑](#footnote-ref-5)
5. In order to avoid this situation, it has become the practice to include a ‘collective clause’, allowing the restructuring of a country’s debt as long as the majority of creditors approve. They bind all other creditors and therefore, eliminate the basis on which a ‘vulture fund’ creditor can hold out for more. [↑](#footnote-ref-6)
6. Influential Financial Times commentator Martin Wolf has supported Argentina in its battle with the vulture funds, even saying that it is unfair to the real vultures to name the holdouts as such since at least real vultures perform a valuable task! See: M. Khor, Battle hots up to curb ‘vulture funds’, South Bulletin No. 83, 12 February 2015, p. 2, at: http://www.southcentre.int/question/battle-hots-up-to-curb-vulture-funds/. [↑](#footnote-ref-7)
7. Of 36 Heavily Indebted Poor Countries (HIPC) going through debt relief, at least 20 have been threatened with or subjected to legal actions by commercial creditors since 1999, including Angola, Burkina Faso, Cameroon, the Republic of Congo, Côte d’Ivoire, Democratic Republic of Congo, Ethiopia, Liberia, Madagascar, Mozambique, Niger, Sao Tome and Principe, Sierra Leone, Tanzania, and Uganda. African Development Bank, “Vulture Funds in the Sovereign Debt Context”; http://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/african-legal-support-facility/vulture-funds-in-the-sovereign-debt-context/. [↑](#footnote-ref-8)
8. African Development Bank, “Vulture Funds in the Sovereign Debt Context”; http://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/african-legal-support-facility/vulture-funds-in-the-sovereign-debt-context/. [↑](#footnote-ref-9)
9. IMF list of low-income countries’ debt sustainability analysis for Poverty Reduction and Growth Trust-eligible countries as at 4 April 2013; www.imf.org. [↑](#footnote-ref-10)
10. The idea of sovereign debt being traded in such conditions is remarkable. One of the reasons advanced for its occurrence is that: “big institutional investors do not like suing sovereign countries and therefore can obtain some return by selling their defaulted debt to vulture funds.” D. Sookum, Stop Vulture Fund Lawsuits. A Handbook. Commonwealth Secretariat, 2010, p. 11. [↑](#footnote-ref-11)
11. The threat of losing further reputation in the markets and difficulties in re-accessing to international capital markets may contribute to such a state of affairs. [↑](#footnote-ref-12)
12. H. Meyerson, “In Greek crisis, Germany should learn from its fiscal past”, The Washington Post, 28 January 2015. http://www.washingtonpost.com/opinions/harold-meyerson-in-greek-crisis-germany-should-learn-from-its-fiscal-past/2015/01/28/2d25bbd4-a721-11e4-a7c2-03d37af98440\_story.html; T. Landon, “Bet on Greek Bonds Paid Off for Vulture Fund”, The New York Times, 15 May 2012, at: http://www.nytimes.com/2012/05/16/business/global/bet-on-greek-bonds-paid-off-for-vulture-fund.html?\_r=0. [↑](#footnote-ref-13)
13. “Vulture Funds and Poor Country Debt: Recent Developments and Policy Responses”, Jubilee USA Network, Briefing Note No. 4, April 2008, p. 3. [↑](#footnote-ref-14)
14. African Development Bank, “Vulture Funds in the Sovereign Debt Context”, at: http://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/african-legal-support-facility/vulture-funds-in-the-sovereign-debt-context/. [↑](#footnote-ref-15)
15. R. Kupelian and M.S. Rivas, “Vulture Funds. The lawsuit against Argentina and the challenge they pose to the world economy”, Working Paper No. 49, CEFID-AR, February 2014, p. 7, at: http://www.mecon.gov.ar/DESENDEUDAR/en/doc/opinion-Kupelian-Rivas-en.pdfT. [↑](#footnote-ref-16)
16. J. Schumacher, C. Trebesch, and H. Enderlein, “Sovereign Defaults in Court: The rise of Creditor Litigation”, p. 32, at: http://www.scu.edu/business/economics/upload/SovereignDefaultsinCourt.pdf. [↑](#footnote-ref-17)
17. [2005] EWHC 2684 (Comm). [↑](#footnote-ref-18)
18. Y. LI, Special Advisor on Economics and Development Finance, South Centre, 25 February 2015, Presentation to the HRC Advisory Committee; “Unlikely Ally Against Congo Republic Graft”, The New York Times, 10 December 2007, at: http://www.nytimes.com/2007/12/10/world/africa/10congo.html?pagewanted=all&\_r=1&. [↑](#footnote-ref-19)
19. Ibid. [↑](#footnote-ref-20)
20. African Development Bank, “Vulture Funds in the Sovereign Debt Context”, at: http://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/african-legal-support-facility/vulture-funds-in-the-sovereign-debt-context/. [↑](#footnote-ref-21)
21. As examples, Donegal International Ltd. is based in the Virgin Islands; Kensington International Ltd. in the Cayman Islands, and FG Hemisphere in the state of Delaware, in the USA. [↑](#footnote-ref-22)
22. These are territories characterized by: opacity (via bank secrecy or another mechanism such as trusts); low taxes or no taxes at all for non-residents; easy regulations permitting the creation of front companies and no necessity for these companies to have a real activity on the territory; lack of cooperation with the inland revenue, customs and/or judicial departments of other countries; and weak or non-existent financial regulation. See: R. Vivien, ‘FG Hemisphere vulture fund’s latest victory against the Democratic Republic of Congo. What is Belgium doing?’, CADTM, 2 January 2011, at: http://cadtm.org/FG-Hemisphere-vulture-fund-s. [↑](#footnote-ref-23)
23. A/HRC/14/21, 29 April 2010, para. 14. [↑](#footnote-ref-24)
24. J. Schumacher, C. Trebecsch, and H. Enderlein, “Sovereign Defaults in Court: The rise of Creditor Litigation”, 23 June 2013, p. 1. [↑](#footnote-ref-25)
25. Changes in sovereign debt markets also seem to have contributed to the surge in legal disputes, in particular the increase in average “haircuts” and the increasing number and heterogeneity of creditors. [↑](#footnote-ref-26)
26. J. Schumacher, C. Trebesch, and H. Enderlein, “Sovereign Defaults in Court: The rise of Creditor Litigation”, 23 June 2013, p. 4. [↑](#footnote-ref-27)
27. Ibid. [↑](#footnote-ref-28)
28. However, according to the IMF the number of litigation cases against HIPCs has been declining in recent years but flattened over the past few years. At: https://www.imf.org/external/np/exr/facts/hipc.htm. [↑](#footnote-ref-29)
29. Views by the Independent Expert, Juan Pablo Bohoslavsky, on the initiative of the Group of G77 and China to establish a multilateral legal framework to regulate debt restructuring processes, in letter of 5 September 2014, at: http://www.ohchr.org/Documents/Issues/IEDebt/letter\_Chairman\_of\_the\_Group\_G77.pdf. [↑](#footnote-ref-30)
30. These are a group of countries with high poverty levels which are eligible for financial assistance from the IMF and the World Bank. The list is made and updated by those organizations jointly with other non-governmental organizations. Currently 39 states are classified as HIPCs. [↑](#footnote-ref-31)
31. Countries threatened with or subjected to legal actions include: Angola, Burkina Faso, Cameroon, the Republic of Congo, Côte d’Ivoire, the Democratic Republic of the Congo, Ethiopia, Liberia, Madagascar, Mozambique, Niger, Sao Tome and Principe, Sierra Leone, Tanzania, and Uganda. [↑](#footnote-ref-32)
32. According to the African Development Bank, in recent decades at least twenty countries have been threatened with or subjected to legal actions by commercial creditors and ‘vulture funds’; http://www.afdb.org/en/news-and-events/article/african-legal-support-facility-management-board-holds-key-meeting-in-abidjan-13810/. [↑](#footnote-ref-33)
33. Donegal International Ltd v. Republic of Zambia & Another. Queen's Bench Division (Commercial Court) [2007] EWHC 197 (Comm), 15 February 2007, para. 75. [↑](#footnote-ref-34)
34. A/HRC/14/21, 20 April 2010, para. 24. [↑](#footnote-ref-35)
35. IDA and IMF, “Heavily Indebted Poor Countries (HIPC) Initiative and Multilateral Debt Relief Initiative (MDRI)—Status of Implementation”, 28 August 2007, p. 34, at: http://www.imf.org/external/np/pp/2007/eng/082807.pdf. [↑](#footnote-ref-36)
36. Ibid., para. 25. [↑](#footnote-ref-37)
37. R. Kupelian and M. S. Rivas, “Vulture Funds. The lawsuit against Argentina and the challenge they pose to the world economy”. Working Paper No. 49, CEFID-AR, February 2014, p. 9; Laryea, “Donegal v. Zambia and the persistent debt problems of low-income countries”, 2010. [↑](#footnote-ref-38)
38. Y. LI, Special Advisor on Economics and Development Finance, South Centre, 25 February 2015, Presentation to the HRC Advisory Committee; “Unlikely Ally Against Congo Republic Graft”, The New York Times, 10 December 2007. [↑](#footnote-ref-39)
39. The HIPC Initiative was launched in 1996 by the IMF and The World Bank, with the aim of ensuring that no poor country faces a debt burden it cannot manage. In 1999, a comprehensive review of the Initiative allowed the IMF to provide faster, deeper, and broader debt relief and strengthened the links between debt relief, poverty reduction, and social policies. In 2005, to help accelerate progress toward the Millennium Development Goals (MDGs), the HIPC Initiative was supplemented by the Multilateral Debt Relief Initiative (MDRI). The MDRI allows for 100 per cent relief on eligible debts by three multilateral institutions— the IMF, The World Bank, and the African Development Fund (AfDF) — for countries completing the HIPC Initiative process. In 2007, the Inter-American Development Bank (IADB) also decided to provide additional (“beyond HIPC”) debt relief to the five HIPCs in the Western Hemisphere. At: https://www.imf.org/external/np/exr/facts/hipc.htm. [↑](#footnote-ref-40)
40. The sale was signed off by the former Bosnian Prime Minister, Nedzad Brankovic, who has been investigated on corruption charges relating to his tenure at Energoinvest. Vulture funds – the key players, The Guardian, 15 March 2011, at: http://www.theguardian.com/global-development/2011/nov/15/vulture-funds-key-players. [↑](#footnote-ref-41)
41. http://www.bloomberg.com/news/articles/2010-11-03/congo-u-s-controlled-venture-lose-100-million-vulture-fund-debt-claim. [↑](#footnote-ref-42)
42. D. Sookum, Stop Vulture Fund Lawsuits. A Handbook. Commonwealth Secretariat, 2010, p. 45. [↑](#footnote-ref-43)
43. A/HCR/14/21, 29 April 2010, para. 19. [↑](#footnote-ref-44)
44. M. Kanavagh, “Congo, U.S.-– Controlled Venture Lose $100 Million Vulture Claim”, Bloomberg Business, 3 November 2010, at: http://www.bloomberg.com/news/articles/2010-11-03/congo-u-s-controlled-venture-lose-100-million-vulture-fund-debt-claim. [↑](#footnote-ref-45)
45. K. Crossley, “Case analysis: Democratic Republic of the Congo and Ors V. Hemisphere Associates LLC”, Asian Legal Business, 17 June 2011, at: http://www.legalbusinessonline.com/news-analysis/case-analysis-democratic-republic-congo-and-ors-v-fg-hemisphere-associates-llc/64049. [↑](#footnote-ref-46)
46. http://hdr.undp.org/sites/default/files/Country-Profiles/COD.pdf. [↑](#footnote-ref-47)
47. A/HCR/14/21, 29 April 2010, para. 20. [↑](#footnote-ref-48)
48. It has, however, lost another case, notably against Themis Capital and Des Moines Investments Ltd. for some US$18 million of Congolese debt acquired in 2008 from Citibank and various other creditors. In February 2009, Themis and Des Moines filed a lawsuit against the DR Congo for the principal $18 million plus decades of interest. The debt dates back to the corrupt regime of former dictator Mobutu in the early 1980s. At: http://www.afdb.org/en/news-and-events/article/african-legal-support-facility-management-board-holds-key-meeting-in-abidjan-13810. [↑](#footnote-ref-49)
49. A/HRC/25/50/Add.3, 2 April 2014, para. 32. [↑](#footnote-ref-50)
50. Singer is the founder and chief executive officer of the Elliott Management investment fund, which controls NML Capital, the ‘vulture fund’ that brought the highest number of actions against Argentina. In addition, it filed lawsuits against Côte d'Ivoire, the Democratic Republic of the Congo, Ecuador, Peru, Panama, Poland, and Vietnam. He is one of the main financier of the Republican Party of the USA; for example, he was the largest contributor to the presidential campaigns of George W. Bush and Mitt Romney. These contributions are said to grant him enormous lobbying power as well as a substantial ability to obtain political and legal cooperation in order to carry out his operations. “Vulture funds – the key players”, The Guardian, 15 November 2011, at: http://www.theguardian.com/global-development/2011/nov/15/vulture-funds-key-players; R. Kupelian and M. S. Rivas, “Vulture Funds. The lawsuit against Argentina and the challenge they pose to the world economy”. [↑](#footnote-ref-51)
51. “Argentina In Default As Battle Against Billionaire Paul Singer's Elliott Drags On”, Forbes, 30 July 2014; http://www.forbes.com/sites/afontevecchia/2014/07/30/final-round-for-argentina-vs-billionaire-paul-singers-elliott-as-default-is-hours-away/. [↑](#footnote-ref-52)
52. The ‘pari passu’ clause is Latin locution meaning ‘by equal step’ or ‘without preference’. It is a boilerplate provision found in both private and sovereign cross-border debt instruments that represents a borrower’s promise to rank the debt subject to the clause equally in right of payment with all of the borrower’s other unsubordinated obligations. The international financial markets have long understood the ‘pari passu’ clause to protect 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,’ 53 Emory L.J.869, 870 (2004). [↑](#footnote-ref-53)
53. The legal ‘manoeuvre’ consists in contending that Argentina has violated this clause since it has not granted NML the same treatment as that granted to the holders of bonds who accepted the 2005 and 2010 restructuring offers, since Argentina only paid its debt to exchange bondholders and did not pay the debt to those that did not participate in the exchange. [↑](#footnote-ref-54)
54. The USA has publicly stated that an erroneous interpretation of this clause could have adverse consequences for future voluntary restructuring of debts and the stability of the international financial system. [↑](#footnote-ref-55)
55. The hedge fund would receive $832 million but Argentina could face the demands of up to $140 billion from other holdouts and holders of restructured bonds who potentially could demand repayment on equal terms. “Human rights impact must be addressed by vulture fund litigation, say United Nations Experts”, 27 November 2014, at: http://www.unog.ch/80256EDD006B9C2E/%28httpNewsByYear\_en%29/02179B903BBE1A27C1257D9D00525E1A?OpenDocument. [↑](#footnote-ref-56)
56. A. Kicillof, Minister of Economy and Public Finance of Argentina, “Vulture funds are showing their true colours”, 9 July 2014, at: http://www.ft.com/intl/cms/s/0/bf78b33a-0779-11e4-b1b0-00144feab7de.html#axzz3g0YRD3Lx. [↑](#footnote-ref-57)
57. NML Capital tried to have the judicial decisions enforced in France, Luxembourg, and the UK. In Belgium, France, and Switzerland they requested attachment orders to freeze bank accounts and confiscate assets of the Argentine embassies, Aerolíneas Argentinas, the airline property in France, BCRA reserves at BIS Switzerland, and taxes owed to the country and to the Argentine provinces by French Corporations. See ICJ, Argentina v. United States of America, Application instituting proceedings filed in the Registry of the Court on 7 August 2014, para. 48. [↑](#footnote-ref-58)
58. EM Ltd. and NML Capital Ltd v. Banco Central De La Republica Argentina, F.3d —- (2015), 2015 WL 5090694; http://www.ca2.uscourts.gov/decisions/isysquery/65f6af2f-ff5c-4ed6-9f08-33be4cded8c4/6/doc/13-3819\_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/65f6af2f-ff5c-4ed6-9f08-33be4cded8c4/6/hilite/. [↑](#footnote-ref-59)
59. UNCTAD, “Argentina’s “vulture fund” crisis threatens profound consequences for international financial system”, 24 June 2014, at: http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=783. [↑](#footnote-ref-60)
60. “External debt sustainability and development. Report of the Secretary-General”, A/69/167, 22 July 2014, para. 43. [↑](#footnote-ref-61)
61. Ibid., para. 57. [↑](#footnote-ref-62)
62. Debt and Development Coalition Ireland, “Stop Debt Vultures: Implications of the Vulture Attack on Argentina”, 1 September 2014, at: http://debtireland.org/download/pdf/20140901165539.pdf [↑](#footnote-ref-63)
63. A/HRC/25/50/Add.3, 2 April 2014, para. 49. [↑](#footnote-ref-64)
64. Ibid., para. 21. [↑](#footnote-ref-65)
65. Ibid., para. 34. [↑](#footnote-ref-66)
66. To the contrary, in 2004, the New York state legislature amended N.Y. Judiciary Law 489 to effectively eliminate the defence of champerty –an English common-law doctrine that precluded as an abuse of process the purchase of debt with the intent and purpose of bringing a lawsuit –as to any debt purchases or assignments having a value of more than $500,000. ‘Vulture funds’ apparently lobbied the New York state legislature to amend the law. See Memorandum in Support, New York State Assembly, Bill Number : A7244C. [↑](#footnote-ref-67)
67. In 2007, ten lawsuits were lodged against DR Congo in Belgian courts. D. Sookun, Stop Vulture Funds Lawsuits: A Handbook, Commonwealth Secretariat, 2010, pp. 90-91. [↑](#footnote-ref-68)
68. Loi visant à empêcher la saisie ou la cession des fonds publics destinés à la coopération internationale, notamment par la technique des fonds vautours, 6 April 2008. In fact, this law was clearly an attempt to avoid a repetition of the case of Kensington International Ltd. against the Republic of Congo, in which this vulture fund managed to seize a Belgian cooperation fund intended for Congo. [↑](#footnote-ref-69)
69. « Loi relative à la lutte contre les activités des fonds vautours », 1 July 2015, at: https://www.dekamer.be/flwb/pdf/54/1057/54K1057001.pdf . [↑](#footnote-ref-70)
70. Doc. 54 0394/001, Chambre des Représentants de Belgique, « Proposition de Loi ‘concernant la lutte contre les activités des fonds vautours », 7 octobre 2014: https://www.dekamer.be/flwb/pdf/54/0394/54K0394001.pdf. [↑](#footnote-ref-71)
71. J. Van de Poel, “New anti-vulture fund legislation in Belgium: an example for Europe and rest of the world”, at: http://cadtm.org/New-anti-vulture-fund-legislation. [↑](#footnote-ref-72)
72. Foreword, ‘Consultation Paper on Vulture Funds’, July 2009, p. 3. [↑](#footnote-ref-73)
73. “Developing Country Debt (Restriction of Recovery (2008-2009)”, at: http://www.publications.parliament.uk/pa/cm200809/cmbills/091/2009091.pdf. [↑](#footnote-ref-74)
74. Cf. Section 3. [↑](#footnote-ref-75)
75. Cf. Section 6. [↑](#footnote-ref-76)
76. “Debt Relief (Developing Countries) Act”, See in particular, Section 1, at: http://www.legislation.gov.uk/ukpga/2010/22/contents. [↑](#footnote-ref-77)
77. See: Debt Relief (Developing Countries) (Jersey) Law 2013, at: https://www.jerseylaw.je/Law/display.aspx?url=lawsinforce%2Fconsolidated%2F17%2F17.200\_DebtRelief%28DevelopingCountries%29Law2013\_RevisedEdition\_1January2014.htm. [↑](#footnote-ref-78)
78. Both the former and the current Independent Experts have call upon the states to enact, as a matter of priority, legislation to limit the ability of ‘vulture funds’ at national level. They have recommended that legislative frameworks include measures to promote transparency in the secondary debt market and tackle tax havens. In addition, the legislation should not be limited to HIPCs but should extend to all developing countries. See: A/HRC/14/21, 29 April 2010, paras. 52 and 53; United Nations 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, Dr Cephas Lumina Mission to Argentina, 18-29 November 2013, at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14040&LangID=E#sthash.OXqLVZY8.dpuf. [↑](#footnote-ref-79)
79. In June 2009, draft legislation was also introduced in the United States Congress targeting ‘vulture funds.’ See: “Stop Very Unscrupulous Loan Transfers from Underprivileged countries to Rich, Exploitive Funds Act”, at: https://www.govtrack.us/congress/bills/110/hr6796/text. [↑](#footnote-ref-80)
80. The Speech of Gordon Brown before the UN is frequently quoted: ‘We particularly condemn the perversity where vulture funds purchase debt at a reduced price and make a profit from suing the debtor country to recover the full amount owed ‐a morally outrageous outcome.’ (Gordon Brown, then Chancellor of the Exchequer of the UK Government, speech at the UN General Assembly Special Session on Children on 10 May 2002 – ‘Financing A World Fit for Children’). [↑](#footnote-ref-81)
81. “Statement of G7 Finance Ministers and Central Bank Governors”, Washington, 19 October 2007, at: http://www.g8.utoronto.ca/finance/fm071019.htm. [↑](#footnote-ref-82)
82. Adopted at the Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus, Doha, Qatar, 29 November – 2 December 2008, para. 60, at: http://www.un.org/esa/ffd/doha/documents/Doha\_Declaration\_FFD.pdf. [↑](#footnote-ref-83)
83. “Protecting financial aid granted by Council of Europe member states to poor countries against financial funds known as “vulture funds”, CM/AS(2009)Rec1870 final 12 June 2009, para. 3. [↑](#footnote-ref-84)
84. Council of Europe, “Council conclusions: speeding up progress towards the Millennium Development Goals (MDGs)”, 280th External Relations Council Meeting, Brussels 26 and 27 May 2008, para. 41, at: http://eu-un.europa.eu/articles/fr/article\_7909\_fr.htm. [↑](#footnote-ref-85)
85. Paris Club, “Press Release on the threats posed by some litigating creditors to heavily indebted poor countries”, 22 May 2007, at: http://www.clubdeparis.org/sections/communication/archives-2007/communique-presse-du/switchLanguage/en. [↑](#footnote-ref-86)
86. “Debt Relief Under the Heavily Indebted Poor Countries (HIPC) Initiative”, Fact Sheet, May 2015, at: https://www.imf.org/external/np/exr/facts/hipc.htm. [↑](#footnote-ref-87)
87. http://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/african-legal-support-facility/vulture-funds-in-the-sovereign-debt-context/. [↑](#footnote-ref-88)
88. http://www.iadb.org/res/publications/pubfiles/pubWP-577.pdf. [↑](#footnote-ref-89)
89. A/RES/68/304; Adopted by 124 votes in favour, with 41 abstentions and 11 votes against (Australia, Canada, the Czech Republic, Finland, Germany, Hungary, Ireland, Israel, Japan, the UK, and the USA); http://www.un.org/en/ga/68/resolutions.shtml. [↑](#footnote-ref-90)
90. 107th Plenary meeting, Tuesday, 9 September 2014, A/68/PV.107, p. 6. [↑](#footnote-ref-91)
91. Ibid., p. 5. [↑](#footnote-ref-92)
92. Ibid., p. 7. [↑](#footnote-ref-93)
93. Ibid., p. 20. [↑](#footnote-ref-94)
94. A/HRC/RES/27/30, 26 September 2014. Adopted by 33 votes in favour (Algeria, Argentina, Benin, Botswana, Brazil, Burkina Faso, Chile, China, Congo, Costa Rica, Côte d’Ivoire, Cuba, Ethiopia, Gabon, India, Indonesia, Kazakhstan, Kenya, Kuwait, Maldives, Mexico, Morocco, Namibia, Pakistan, Peru, Philippines, Russian Federation, Saudi Arabia, Sierra Leone, South Africa, United Arab Emirates, Venezuela (Bolivarian Republic of), Viet Nam), 5 against (Czech Republic, Germany, Japan, UK, USA), and 9 abstentions (Austria, Estonia, France, Ireland, Italy, Montenegro, Republic of Korea, Romania, the former Yugoslav Republic of Macedonia). It was co-sponsored by 79 additional states. [↑](#footnote-ref-95)
95. Alberto Pedro D’Alotto,”Why we need to counter the threat from vulture funds”, South Bulletin No. 83, 12 February 2015, p. 13, at: http://www.southcentre.int/question/battle-hots-up-to-curb-vulture-funds/. [↑](#footnote-ref-96)
96. “The conflict between Argentina, the vulture funds and the judicial branch of the United States exposes a global problem that impacts on human rights. One hundred Human Rights organizations from all over the world call attention to the impact on human rights of the US Court decision on Argentina ́s sovereign debt and demand the reform of the global financial system”, 29 July 2014, at: http://www.cels.org.ar/common/documentos/Deuda%20Externa%20y%20DDHH%20-%20CELS%20+ENG.pdf. [↑](#footnote-ref-97)
97. See, for example, Jubilee Debt Campaign, (<http://jubileedebt.org.uk/>); Centre Europe–Tiers Monde (CETIM), at: http://www.cetim.ch/en/index.php?currentyear=&pid=. [↑](#footnote-ref-98)
98. Adopted by 136 votes in favour, 6 against and 41 abstentions. The principles were adopted on July 2015 by the Ad Hoc Committee on Sovereign Debt Restructuring Processes, in its third working session. [↑](#footnote-ref-99)
99. Restructuring of sovereign debt: UN Expert stresses GA principles are binding; http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=16408&LangID=E#sthash.jSOPwGUo.dpuf. [↑](#footnote-ref-100)
100. A/HRC/20/23, 10 April 2011, para. 70. [↑](#footnote-ref-101)
101. The duty to fulfil imposes on the state an obligation to take appropriate legislative, administrative, budgetary, judicial and other measures toward the full realization of economic, social and cultural rights. [↑](#footnote-ref-102)
102. A/HRC/14/21, 29 April 2010, para. 57. [↑](#footnote-ref-103)
103. See: “Letter dated 16 May 2012 addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights”, at: http://www2.ohchr.org/english/bodies/cescr/docs/LetterCESCRtoSP16.05.12.pdf. [↑](#footnote-ref-104)
104. Ibid., para. 69. [↑](#footnote-ref-105)
105. A/HRC/11/10, 3 April 2009. [↑](#footnote-ref-106)
106. C. Lumina, “Sovereign debt and human rights”, in: Realizing the right to development, p. 289. [↑](#footnote-ref-107)
107. UN, “Millennium Development Goal 8 – Delivering on the Global Partnership for Achieving the Millennium Development Goals: MDG Gap Task Force Report 2008”, p. 30. [↑](#footnote-ref-108)
108. E/C.12/1/Add.100, para. 9. [↑](#footnote-ref-109)
109. CRC/C/15/Add.218, para. 4. [↑](#footnote-ref-110)
110. C. Lumina, op. cit., p. 294. [↑](#footnote-ref-111)
111. C. Lumina, op. cit., p. 299. [↑](#footnote-ref-112)
112. 7 June 2010. Information provided in response to the Questionnaire, at: http://nhri.ohchr.org/EN/Regional/Europe/Documents/2010\_Crisisen.pdf. [↑](#footnote-ref-113)
113. After the default of Argentina in 2001, for example, the number of people living in poverty reached a record of 53 per cent. “Human rights impact must be addressed by vulture fund litigation, say United Nations Experts” 27 November 2014, at: http://www.unog.ch/80256EDD006B9C2E/%28httpNewsByYear\_en%29/02179B903BBE1A27C1257D9D00525E1A?OpenDocument. [↑](#footnote-ref-114)
114. Y. LI, Special Advisor on Economics and Development Finance, South Centre, 25 February 2015, Presentation to the HRC Advisory Committee; “Unlikely Ally Against Congo Republic Graft”, The New York Times, 10 December 2007. [↑](#footnote-ref-115)
115. A/HRC/14/21, 29 April 2010, para. 35. [↑](#footnote-ref-116)
116. A/HRC/14/21/Add.1, para. 75. [↑](#footnote-ref-117)
117. Ibid., p. 68. [↑](#footnote-ref-118)
118. S. Michalowski, “Sovereign debt and social rights-legal reflections on a difficult relationship”, Human Rights Law Review, 2008, p. 39. [↑](#footnote-ref-119)
119. This idea has been endorsed by certain countries at Constitutional level. [↑](#footnote-ref-120)
120. HRC/RES/20/10 and HRC/RES/17/4 respectively. [↑](#footnote-ref-121)
121. Guiding Principles on Foreign Debt and Human Rights, Principle no. 7. [↑](#footnote-ref-122)
122. Ibid., Principle no. 22. [↑](#footnote-ref-123)
123. Guiding Principles on Foreign Debt and Human Rights, Principle no. 38. [↑](#footnote-ref-124)
124. Guiding Principles on Business and Human Rights, Principle no. 3. [↑](#footnote-ref-125)
125. Guiding Principles on Business and Human Rights, Principle no. 4. [↑](#footnote-ref-126)
126. Guiding Principles on Foreign Debt and Human Rights, Principle no. 8. [↑](#footnote-ref-127)
127. Ibid., Principles nos. 18 and 53. [↑](#footnote-ref-128)
128. Ibid., Principle no. 39. [↑](#footnote-ref-129)
129. Ibid., Principle no. 48. [↑](#footnote-ref-130)
130. Ibid., Principle no. 65 [↑](#footnote-ref-131)
131. Ibid., Principle no. 59. [↑](#footnote-ref-132)
132. UNCTAD Principles on Responsible Sovereign Lending and Borrowing. [↑](#footnote-ref-133)
133. According to the UNCTAD Expert Group designing a Workout Mechanism “good faith is a principle which encompasses basic requirements of fairness, honesty and trustworthiness”. UNCTAD, Sovereign Debt Workouts: Going Forward Roadmap and Guide, April 2015, p. 22. [↑](#footnote-ref-134)
134. Guiding Principles on Foreign Debt and Human Rights, Principle no. 63. [↑](#footnote-ref-135)
135. The Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises annexed the Guiding Principles to his final report to the Human Rights Council (A/HRC/17/31). The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011. [↑](#footnote-ref-136)
136. http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\_EN.pdf. [↑](#footnote-ref-137)
137. Guiding principles on business and human rights, Principle no. 4. [↑](#footnote-ref-138)
138. In this sense the Independent Expert has said: “I am not aware that financial business enterprises active in the secondary debt market, or Courts called upon to find fair solutions o debt disputes, have already fully considered the implications of the Guiding Principles on Business and Human Rights for their transactions or in their jurisprudence”. Views by the Independent Expert on foreign debt and human rights, Juan Pablo Bohoslavsky, on the initiative of the Group of G-77 and China to establish a multilateral legal framework to regulate debt restructuring processes Letter, 5 September 2014. [↑](#footnote-ref-139)