

Theissen

Dear Chair,

Dear Members of the Advisory Committee,

Dear Delegates,

I would like to thank the Human Rights Council Advisory Committee for having invited the Independent Expert on foreign debt and human rights, Mr. Juan Pablo Bohoslavsky to this session focussing on two reports developed by the Committee 1) a report on vulture funds and human rights and 2) a report on non-repatriation of illicit funds and its impact on human rights to be submitted to the next session of the HRC (A/HRC/36/52).

Mr. Bohoslavsky sends his kind regards. As he is currently in Argentina he regrets that he cannot be with you today, but has kindly asked me to take part in this session.

*Assisting him in his work*

I have prepared short introductory remarks on both subjects.

Let me first turn to the issue of vulture funds and human rights.

So-called vulture funds, often also called distressed debt funds <sup>by</sup> debt that cannot be fully be served at huge discounts from creditors ~~usually with the aim to hold on their debt~~. Instead of cooperating and agreeing to a debt restructuring they hold out and wait until the debtor has regained its ability to serve its debt obligations to demand full repayment of the face value of the debt, usually through litigation in foreign courts.

Such non-cooperative creditors exploit the difficulties of States that cannot serve anymore their debt. They postpone efforts to reduce the debt burden of over-indebted States to sustainable levels through debt restructuring and thus can cause additional economic and financial harm, preventing a timely fair and transparent restructuring of public debt. Vulture funds cause with their behaviour as well harm to the enjoyment of human rights in debtor states, as they prolong debt crises and further reduce the fiscal space of debtor States to provide essential public services, such as health care, education, water and sanitation or social security to their population that are usually already underfunded often subject to austerity policies.

The Human Rights Council has passed in September 2014 a resolution 27/30 on this topic condemning the activities of vulture funds highlighting their negative impact on the enjoyment of human rights in debtor States and calling upon States to consider implementing legal frameworks to curtail predatory vulture fund activities in their jurisdiction, which was adopted by a vote.

The same resolution has provided a mandate to the Advisory Committee to draft a research based report on the activities of vulture funds on the enjoyment of human rights, which resulted in an interim report and has more recently been asked by the Human Rights Council to submit its Final report to it in September 2018.

I am grateful that that the Advisory Committee has continued to work on this subject, that was first brought to the attention of the Human Rights Council by a thematic report of the Independent Expert on foreign debt and human rights in 2010 (A/HRC/14/21).

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

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

The Independent Expert has raised in communications and public statements the issue in recent years. Including the litigation between NML Capital and other vulture funds against Argentina in US courts and expressed his concerns about the subsequent settlement reached. While the settlement has allowed Argentina to regain access to international financial markets, it is ambivalent as it encourages non-cooperation of minority creditors in the future, affecting not only Argentina. In addition the settlement and the subsequent lending on financial markets has again increased the public debt of Argentina while economic growth has remained low, reaching only about 1 per cent in the first quarter of 2017. It can therefore be predicted that there will be in the future challenging to serve the public debt or at least significant pressure on the Government to implement austerity policies resulting in a roll-back of public services for the realisation of economic, social and cultural rights in the country.

Dear members and delegates,

Vulture funds play as well an important role in Ireland in relation to non-performing private loans. As a recent report of the Debt and Development coalition of Ireland has highlighted, the international financial crisis has contributed to accumulation of immense distressed debt and many non-performing loans in Ireland. The two main Irish banks that hold the non-performing loans have created a feeding frenzy for foreign vulture funds when selling off their distressed debt. **€36 billion** of distressed real estate assets were sold by them in 2013 and 2014, this is 37% of the total amount of distressed estate assets sold throughout Europe during the same period. **60%** of all assets sold by one of these banks were bought by a single vulture fund, the Texas-based *Lone Star Capital*.

This influx of vulture funds has in particular a visible impact in relation to the housing market in Ireland and affects the right to housing. The most immediate risk posed by vulture funds is that homeowners lose their homes as they cannot afford paying back their debt. There are approximately **100,000 mortgages in serious arrears in Ireland**, and according to some estimates, we will see between **20,000 and 30,000 home repossessions** in the coming years. Vulture funds also affect the housing market through the acquisition of development property preventing the land being used for purposes that serve the interests of the community, such as parks, schools, hospitals, or social housing. Secondly, vulture funds tend to focus on the construction of commercial office buildings, and where they do build housing, it is typically luxury housing, and unaffordable to most

local people. Finally, the purchase of land and the lack of available property has driven up Irish rents and property costs, making housing unaffordable to low-income households.

I want to highlight this example as well to underline that the activities of vulture funds should not only a concern to developing countries that have been so far mostly affected by their activities. I am looking forward to read the final report of the Advisory Committee. Thank you.

### **Illicit financial flows**

Let me turn to the issue of illicit financial flows.

Illicit financial flows raise several human rights issues. As the report of the advisory committee clarifies, such flows can stem from criminal illegal conduct, such as illegal weapon smuggling, drug trafficking, trafficking of human beings and corruption involving often stakeholders in several jurisdictions, in the case of corruption usually as well national and multinational business enterprises. Not all illicit financial flows related to criminal activities under national law. They include as well abusive practices such as transfer mispricing or complex tax avoidance schemes that break the spirit of the law, while they may be difficult to be proven as contravening national regulations. From a financial point of view the majority of such flows have are tax related, including tax evasion by high net worth individuals making use financial service providers assisting them to hide financial assets in banking secrecy jurisdictions worldwide.

The mandate of the Independent Expert was strengthened earlier this year, by including the effects of illicit financial flows on the enjoyment of human rights as one of the issues that the Independent Expert should consider in his work. This year the Independent Expert has looked at the issue mainly in the context of his country visits to Tunisia and Panama. It will be as well on his agenda in the context of the forthcoming visit to Switzerland. Visiting these countries will allow to gain a more holistic view on the issue and underline the international character of the problem, that has been increasingly recognized by the international community in recent years. We are for example that all states have made a commitment to reduce substantially illicit financial flows by 2030 in one of the targets of the SDGs

The Panama Paper paper scandal, has further highlighted the global nature of tax evasion, showing how politically exposed persons, high net worth individuals – a modern synonym for the very rich – and transnational corporations use complex schemes to hide their wealth and sometimes as well proceeds of corruption with the aim of tax minimization. Usually they have been assisted in this by commercial banks, financial service providers and law firms specialised in setting up trusts and other vehicles to hide the actual beneficial owners operating in many countries.

The human rights impact of illicit financial flows is manifold:

1. National Treasuries, in particular as well developing countries lose billions of revenues that are missing for the realization of the right to development and the realization of economic, social and cultural rights, including the realization of the Sustainable Development Goals.

Illicit financial flows undermine the obligation of States to ensure that maximum available resources are used for the realization of economic, social and cultural rights. They also undermine the functioning of public institutions that are very important for the protection of human rights, such as police, courts and other bodies.

2. In the case of corruption often public funds for development are deviated for the enrichment of some few powerful individuals, further entrenching excessive economic inequalities between individuals, within and amongst nations which threatening the enjoyment of all human rights for all. The principle of non-discrimination is a core principle of all human rights treaties, but we know that in practice individuals have non-discriminatory access to the right to health education, water and sanitation, neither at national level and even less at global level.
3. Illicit financial flows and corruption undermine the rule of law, trust in State and democratic institutions, increase the risk of state capture by kleptocratic elites undermining, social development, economic, social, civil and political rights.
4. Illicit financial flows, if not stopped may encourage other severe human rights violations: As long as it is possible and profitable to trade weapons illegally, finance terrorism, traffic drugs and human beings, States and Non-State actors are fuelling physical violence, armed conflict acts and the exploitation of migrants and refugees causing serious harm to the right to physical integrity and various other human rights.
5. As the Study of the advisory committee rightly highlights: The non-repatriation of stolen assets sends the wrong message that case of grand corruption will remain unpunished. Impunity must be avoided particularly where national resources and public funds have been systematically plundered, by those in power.
6. Human rights are as well too often under threat when citizens unveil illicit financial flows, corruption and tax evasion or abuse. States need to strengthen the protection of whistleblowers exposing such damaging behaviour. In many countries being a journalist exposing misappropriation of public funds is extreme risky. The persons that exposed for example the so-called sweet heart deals in Luxemburg which allowed legally multinational corporations to reduce their tax burden to a minimum received praise from the European parliament, but were still be sentenced for stealing data and leaking confidential business information
7. Finally we cannot forget core human rights provisions that require due process in the fight against corruption and illicit financial flows. Those accused of corruption and misappropriation of public funds need to receive a fair trial. Sufficient safeguards need to be established to ensure that the fight against illicit financial flows and corruption is not turned into a tool to criminalize people that have become dissidents, and as a tool to suppress their voices and remove them arbitrarily from their posts.

The report of the Advisory Committee adds important information to the discussion and earlier reports by the High Commissioner and the Independent Expert on the effects of foreign debt, by including a discussion on best practices in the return of illicit funds. It discusses national legislation passed in Switzerland such as the 2015 Foreign Illicit Assets Act, the compliance of Swiss Banks with anti-money legislation, and includes case studies relating to the return of stolen assets to Nigeria, Tunisia and Malaysia.

The report shows that asset recovery is not an easy task, that even with good will by government authorities in countries of origin and destination, often it is only possible to repatriate only a small amount of all illicit financial funds that left the country.

In my view the report points at various deficits in states of origin and destination of funds of illicit origin. It argues as well that there are powerful domestic interest groups that may have an interest to keep banking secrecy, such as local financial service providers or construction and property related industries. Indeed there are tensions. If one reads for example policy documents by the Government of Switzerland relating to the Swiss financial market or on corporate tax reform, it is apparent that on one hand one wants to clean-up and promote a "white money" strategy for its financial market, on the other hand protect the local financial industry and remain a hub for multinational business enterprises, that provide employment and tax revenue. And indeed as money can easily be transferred, if there are no common international standards applicable to all jurisdictions the risk is strong that money and other financial assets will just be transferred to other jurisdictions offering better benefits to investors.

The same political economy analysis could however as well be extended to countries of origin of illicit financial flows. Why is it sometimes so difficult to strengthen good governance and transparency in these countries and make it difficult for reducing illicit financial outflows, curb corruption and end harmful tax competition and other practices that undermine human rights. The concern about asset recovery should not be our only concern. It is equally important to strengthen the legal and institutional frameworks aimed at curbing illicit financial flows money laundering and tax evasions to reduce the amount of illicit financial transactions leaving countries of origin.

While the amounts that have been sometimes frozen are large, the amounts that have been returned repatriated are in purely economic terms marginal. The symbolic value of returning stolen assets is often higher than the monetary impact their return would have for the national treasury.

There are as well contradictions in transitional countries. In February this year I visited together with the Independent Expert Tunisia. We witnessed many efforts to strengthen the legal and institutional framework to fight for example corruption. As disrespect for human rights under the past Ben Ali regime was strongly linked with nepotism and corruption the Truth and Dignity Commission was given a broad mandate to unveil as well past economic crimes. However times have partly changed some years after 2011: A controversial economic reconciliation law was proposed by the President of the country providing amnesty for certain economic crimes for business people and officials in the public administrations. While misappropriated public funds would require to be restituted, the economic reconciliation law does not require individual public disclosure by amnesty applicants of their misconduct and this undermines the earlier established transitional justice process of the Truth and Dignity Commission. Public protests have so far resulted that the Parliament excluded business people from the scope of the economic reconciliation law. It would if passed by Parliament however still provide impunity to persons in the public administration and is therefore strongly contested.