

Mandates of the Special Rapporteur on extreme poverty and human rights and 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

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Excellency,

We have the honour to address you in our capacity as Special Rapporteur on extreme poverty and human rights and 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 pursuant to Human Rights Council resolutions 26/3 and 25/16.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **court orders secured against Argentina by NML Capital Limited, a subsidiary of the United States-based investment firm Elliot Capital Management, which may have the effect of limiting the ability of the Argentinian authorities to fully respect and ensure the enjoyment of human rights by the country's population.** In addition to this letter we sent separate communications related to this matter to the Government of the United States of America and to NML Capital Limited.

According to the information received:

NML Capital sued Argentina on the basis of debts arising from the country's defaulted bonds, which were the object of bond swaps in 2005 and 2010. Reportedly, about 93 per cent of the investors holding bonds participated in these debt swaps, but a few creditors refused to accept the conditions of the swaps. Creditors specializing in distressed debt, so called "vulture funds", purchase the defaulted debt at significant discounts, hold out for other creditors to cancel their debts and then aggressively pursue repayments that are vastly in excess of the amount that they paid for the debt. For example, NML Capital allegedly purchased the majority of their Argentinian bonds from June to November 2008, paying roughly 20 per cent of face value.

Reportedly, after failed legal efforts to seize Argentinian assets directly, the holdout bond holders took out lawsuits based on the *pari passu* or equal treatment clause in bond contracts, which would deny any future payments on restructured

bonds until payment in full to holdout bond holders took place. On 23 August 2013, the United States Second Circuit Court of Appeals upheld the District Court of New York's ruling in favor of NML Capital.¹ Argentina appealed the ruling to the United States Supreme Court. By denying *certiorari* in June 2014 and thereby refusing to take up the case, leaving the lower court rulings intact, the Supreme Court has affirmed a precedent which may result in exorbitant awards for holdout creditors and potentially penalize creditors who participated in a debt restructuring.²

We wish to express our concern that the reported decisions could represent a significant threat to the ability of Argentina to respect and fulfill its human rights obligations.

In this respect, we would like to note that Argentina successfully reduced its public debt from about 160 percent of Gross Domestic Product (GDP) by settling with the majority of creditors for a repayment of 30 percent of its sovereign debt, enabling the country to recover economically. The total public debt currently stands at around 40 percent of the country's GDP. Argentina reached an agreement with almost 93 per cent of its creditors, who have been paid in timely fashion since the agreement reached on the bond swap. The District Court of New York in its decision has ruled that a few hold out creditors not only have the right to get 100 per cent of their claim, but also the power to block the ongoing payments to the restructured bondholders. Under this ruling, all creditors are denied their repayments. This can trigger serious consequences to Argentina and pose difficulties for debt restructurings for other countries in the future.

Impeding Argentina from repaying its restructured bondholders and pushing the country into a debt crisis poses a risk for its population in terms of economic, social and cultural rights.. The recent report of the Independent Expert on foreign debt and human rights on his visit to Argentina (UN Document A/HRC/25/50/Add.3) describes the profound impact of Argentina's 2001 debt crisis. GDP shrank in the period from 1999 to 2002 by 25 per cent, official unemployment peaked at over 21.5 per cent in May 2002, savings and pensions were devaluated, and inflation of up to 41 per cent contributed to a drop in real wages by 23.2 per cent in 2002. According to the World Bank, 53 per cent of the population lived in poverty and 24.8 per cent faced extreme poverty. The crisis also severely affected the public health system, with hospitals suffering a serious shortage of basic supplies and prices of medicines soaring. In addition, the drastic drop in employment left roughly 60 per cent of the population outside the social health insurance system.

¹ *NML Capital Ltd. v. Republic of Argentina*, 727 F.3d 230 (2d Cir. 2013). See as well earlier decisions of the Court of Appeals, *NML Capital Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012) from 28 October 2012 and amended injunctions by the Southern District Court of New York, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (TPG), 2012 WL 5895786 (S.D.N.Y. Nov. 21, 2012).

² Opinion of the US Supreme Court, *Republic of Argentina v. NML Capital, Ltd.*, No. 12-842, from 16 June 2014, available at: http://www.supremecourt.gov/opinions/13pdf/12-842_5hdk.pdf

Argentina's debt restructurings and settlement of International Monetary Fund's obligations has enabled the Government to significantly increase its social spending, including on education, health and social security. Social spending for health, education, social security and housing in the national budget increased from 9.5 per cent of GDP in 2003 to 15.5 per cent of GDP in 2013. Overall social spending (by the national, provincial and municipal governments) rose to around 27.7 per cent of GDP by 2009. Data from the National Statistics and Census Institute show that the poverty and extreme poverty levels have constantly declined since 2003, from 47.8 and 20.5 per cent to about 4.7 and 1.4 per cent respectively in 2013.

NML Capital's litigation may prevent Argentina from using resources freed up by debt relief for its development and poverty reduction programmes, and therefore may diminish its capacity to create the conditions necessary for the realization of human rights for the people of Argentina. Thus money earmarked for poverty reduction and basic social services, such as health and education, may be diverted to settling the substantial claims from hold out financial companies and the financial liabilities they may additionally trigger. In short, the litigation threatens to erode the gains from debt relief and may lead to jeopardizing the fulfilment of human rights obligations.

Apart from undermining Argentina's obligations on economic, social and cultural rights, the burdens resulting from a debt crisis may pose major obstacles for achieving the Millennium Development Goals.³ The UNCTAD Trade & Development Reports highlight the need for social investments as a means for improving outcomes for economic security, access to healthcare and food and housing security.⁴).

Argentina's human rights obligations, including the obligation contained in article 2 of the International Covenant on Economic, Social and Cultural Rights require Argentina to realize economic, social and cultural rights progressively, using its maximum available resources. At the very least, Argentina must ensure the satisfaction of minimum essential levels of each economic, social and cultural right. While compliance with the principle of 'progressive realization' depends on the availability of resources in each State Party, article 2 also imposes obligations that have the same content for all States Parties regardless of their level of development.

Moreover, article 2.1 imposes severe limitations on the taking of deliberately retrogressive measures as stated by the Committee on Economic, Social and Cultural Rights in General Comment No. 3 para. 9. The Committee noted that 'any deliberately retrogressive measures [...] would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.' As explained by the Committee, an example of a 'deliberately retrogressive measure' would be a general

³ See Consolidation of findings of the high-level task force on the implementation of the right to development, A/HRC/15/WG.2/TF/2/Add.1 and Corr.1, para. 54, from 25 March 2010.

⁴ See as well the report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System, 1 September 2009, available at: <http://www.un.org/ga/president/63/PDFs/reportofexperts.pdf>.

decline in living conditions, “directly attributable to policy and legislative decisions by States Parties, and in the absence of accompanying compensatory measures” (General Comment No. 4 para. 11). According to the Committee there is a strong presumption that deliberately retrogressive measures that affect the level of enjoyment of economic, social and cultural rights are in violation of human rights standards (General Comments No. 3, para. 9 and No. 4, para. 11).

In adopting retrogressive measures, States must demonstrate that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the ICESCR, in the context of the full use of the maximum available resources (General Comments No. 3, para. 9, No. 13, para. 45, No. 14, para. 32, No. 15, para. 19, No. 17, para. 27, No. 18, para. 34, No. 19, para. 42 and No. 21, para. 65.). The Committee has further specified that any retrogressive measures: (i) should be temporary by nature and in effect and limited to the duration of the crisis; (ii) should be necessary and proportionate; (and alternative measures comprehensively examined); (iii) should be reasonable; (iv) should not be directly or indirectly discriminatory; (v) should accord particular attention to the rights of disadvantaged and marginalized individuals and groups and ensure that they are not disproportionately affected; (vi) should identify the minimum core content of right and ensure the protection of this core content at all times; (vii) should have involved genuine participation of affected groups in examining the proposed measures and alternatives; and (viii) should be subject to meaningful review procedures at the national level.⁵

We would also like to refer to the United Nations Guidelines on foreign debt and human rights, endorsed by the Human Rights Council in June 2012 (A/HCR/20/23, Annex). The Guidelines call inter alia upon States to analyze their policies and programmes, including those relating to external debt, macroeconomic stability, structural reform and investment, with respect to their impact on poverty and inequality, social development and the enjoyment of human rights, as well as their gender implications, and adjust them as appropriate, to promote a more equitable and non-discriminatory distribution of the benefits of growth and services (para 12).

The Guidelines also underscore that the principles of transparency, participation and accountability should be observed in the lending and borrowing decisions by States (para 28) which include the full disclosure of all relevant information regarding loan agreements, debt repayments, debt management, outcomes of public debt audits and other related matters and require the effective and meaningful input from all stakeholders (including project beneficiaries) in loan policy and resource utilization decisions. The Guidelines underscore as well the need for oversight by relevant representative bodies and civil society organizations (para 32).

⁵ See letter dated 16 May 2012 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, available from http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fSUS%2f6395&Lang=en.

The 2010 report of the previous Independent Expert on the effects of foreign debt to the Human Rights Council (UN Document A/HRC/14/21) provides case studies on the impact of such “vulture funds” on debt relief and human rights. The report provides recommendations on how the problem of “vulture funds” could be tackled through multilateral initiatives or at the national level, including through enacting national legislation designed to protect highly indebted countries from the excessive claims of “vulture funds”.

It is our responsibility under the mandates provided to us by the Human Rights Council to seek to clarify all cases brought to our attention. Since we are expected to report on these cases to the Human Rights Council, we would be grateful for your cooperation and your observations on the following matters:

1. Are the facts summarized above accurate?
2. What steps has your Excellency’s Government taken to implement the United Nations Guiding Principles on Business and Human Rights and the Guiding Principles on Foreign Debt and Human Rights, in relation to debt restructurings that may impact upon the enjoyment of human rights?
3. Has your Excellency’s Government taken steps to ensure that any policies resulting in a decline in living conditions or other deliberately retrogressive measures are introduced “after the most careful consideration of all alternatives” and are duly justified by reference to the totality of the rights provided for in the International Covenant on Economic, Social and Cultural Rights in the context of the use of the maximum available resources?
4. What steps has your Excellency’s Government taken to ensure that Para 12 of the United Nations Guidelines on foreign debt is effectively implemented and that the impacts of a possible debt crisis do not have a discriminatory impact on the people most vulnerable to poverty?
5. What steps has your Excellency’s Government taken to incorporate a human rights perspective, specifically in regard to human rights impact assessments, requirements for transparency in decision making, effective oversight and successful incorporation of input from stakeholders in debt issues?
6. What contractual, legal or institutional steps is your Excellency’s Government taking in order to prevent future holdout litigation from negatively affecting human rights?

We would appreciate a response within 60 days.

While awaiting with interest the detailed response to the above questions, we would like to inform your Excellency’s Government that of our intention to issue a news release in the near future as we are of the view that the information upon which the press

release is going to be based is sufficiently reliable to indicate a matter warranting immediate attention.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

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

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