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INTERGOVERNMENTAL ORGANIZATIONS

UN ORGANS FOCUS ON PARALYZING DEBT CAUSED BY “VULTURE FUNDS”

The United Nations (UN) International Tribunal for the Law of the Sea ordered the release of the ARA Libertad, an Argentine naval ship, on December 15, 2012. A Ghanaian court impounded the ARA Libertad in October 2012 at the behest of the “vulture fund” NML Capital, a subsidiary of the U.S.-based investment firm Elliot Capital Management. NML Capital sought to hold the ship as leverage to secure partial payment of a debt that NML argues Argentina owes it following NML’s purchase of Argentinian debt, at a fraction of its face value, one year before Argentina’s \$100 billion (USD) default. Though a majority of Argentina’s creditors accepted repayment at a lower rate, NML Capital refused to accept the debt repayment deal offered by Argentina. Instead, NML Capital sued Argentina for the full face value of the debt. The actions of vulture funds, like NML Capital, have come under increased scrutiny by development and human rights advocates, leading, in the situation of the United Kingdom and the Channel Island of Jersey, to legislation preventing the vulture funds from seeking excessive claims against heavily indebted countries. These companies undermine debt relief efforts that, in turn, lead to the deprivation of human rights.

“Vulture funds” are companies that go after both private and sovereign debt during periods of crisis, when the debt is available at a fraction of its face value. Regarding sovereign debt, the African Development Bank found that, on average, vulture funds collect three to twenty times their investment. The companies purchase debt with the explicit goal of seeking repayment at face value and rebuff any attempt by the indebted state to renegotiate. Vulture funds often force repayment of sovereign debt by utilizing foreign courts to secure verdicts against the debtor state. For example, the U.S.-based FG Hemisphere paid \$3.3 million (USD) for a thirty-year-old debt owed by the former state of Zaire to the former state of Yugoslavia. FG Hemisphere then sued the Democratic Republic of Congo, Zaire’s successor state, in the courts of the

Channel Island of Jersey for \$100 million (USD). FG Hemisphere initially secured a judgment ordering Congo to pay the \$100 million (USD), but a higher court later overturned the judgment. According to the World Bank, the top 26 vulture funds have already collected \$1 billion (USD) from the world’s poorest states and the International Monetary Fund states that vulture funds are currently seeking another \$1.47 billion (USD).

Cephas Lumina, the United Nations Independent Expert on foreign debt and human rights, recently expressed concern about the negative impact of vulture funds on the realization of human rights. Lumina cautioned governments about allowing vulture funds to “paralyze debt relief for heavily indebted countries.” Pointing out the connection between debt and human rights, Lumina said that “reduced debt burdens and increased fiscal capacity contribute to the creation of the conditions necessary for the realization of all human rights, particularly economic, social and cultural rights.” Vulture funds have also come to the attention of the full Human Rights Council. In June 2012, the UN Human Rights Council (the Council) endorsed the UN Guiding Principles on Foreign Debt and Human Rights (the Principles). Vulture funds’ failure to negotiate debt with the debtor state contravenes two of these principles. First, the Principles state: “[L]oan agreements should impose clear restrictions on the sale or assignment of debts to third parties by creditors without the prior informed consent of the Borrower State concerned. Every effort must be directed towards achieving a negotiated settlement between the creditor and the debtor.” Second, the Principles state: “[C]reditors should not sell sovereign debt on the secondary market to creditors that have previously refused to participate in agreed debt restructuring.” In its resolution adopting the Principles, the Council stated that the obligation to protect individuals’ human rights from vulture funds extends beyond the duty of private actors to refrain from actions that undermine human rights. As the Council affirmed, “the activities of vulture funds highlight some of the

problems in the global financial system and are indicative of the unjust nature of the current system,” and it called on States to address the issue.

As the Human Rights Council made clear, states have an obligation to rein in a business model that is fundamentally at odds with efforts to reduce debt burdens and better ensure human rights. And, with vulture funds currently circling around another \$1.47 billion (USD), the realization of the UN Guiding Principles on Foreign Debt and Human Rights could provide a welcome reprieve to states in need of debt relief.

UN WORKING GROUP URGES A BINDING ACCOUNTABILITY MECHANISM FOR PRIVATE MILITARY AND SECURITY COMPANIES

Recent comments by a UN Working Group focused on private military and security companies (PMSCs) highlight the continuing need for an international convention to ensure that PMSCs respect international human rights and humanitarian law. PMSCs are a force and a control tool used by both state and non-state actors. Though PMSCs appear to be the modern mercenary, they do not necessarily fall under the narrow definition of mercenary articulated in Article 47 of Protocol I of the Geneva Conventions and Article 1 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (which also criminalizes them). PMSCs operate in a variety of capacities formally viewed as the exclusive role of government, including combat, domestic policing, drug eradication, and post-conflict reconstruction. Private actors, such as multinational corporations, also utilize the services of PMSCs.

Though existing prior to the September 11, 2001, attack in the United States, PMSCs have greatly benefited from the United States’s “global war on terror,” with the industry now taking in an estimated \$100 billion (USD) annually. Human rights concerns over this growing phenomenon led the UN Commission on Human Rights, in July 2005, to create the

Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination (Working Group). In July 2010, the Working Group submitted a draft international convention on PMSCs for consideration by the Human Rights Council. The convention would reaffirm that States Parties are responsible and should have a monopoly of the legitimate use of force, would identify certain government functions that cannot be outsourced to PMSCs, and would require States Parties to take measures to ensure that PMSCs are held accountable for violations of international human rights and humanitarian law. In addition to States Parties, this convention would also apply to intergovernmental organizations. The Working Group's latest country visit to Somalia in December 2012 highlights the need for this binding convention.

Faiza Patel, the Chairperson of the Working Group, called on the Somali government to "ensure that private security forces are properly regulated and do not become a substitute for competent and accountable police." Specifically, the Working Group noted concerns over the use of armed security on board vessels off the coast of Somalia. Though put in place to combat "piracy," Patel found that "[t]he lack of regulations for armed

security on ships and the absence of robust reporting for incidents at sea create[s] risks for human rights" violations. Concerns over the use of private security forces in Somalia followed on the heels of an alarming statement issued by the Working Group one year earlier. In a press release, the Working Group noted that PMSCs "undertake an ever-larger range of activities in an increasing number of countries around the world." In addition to the increased prevalence of PMSCs, the Working Group noted how the lack of a clear delineation between mercenaries and PMSCs can negatively impact the realization of human rights. Specifically, the Working Group referenced the report from its 2011 mission to Equatorial Guinea that found the Equatorial Guinea "coup attempt of March 2004 . . . clearly involve[d] mercenaries, some of whom were employees or former employees of private military and security companies from several other countries. . . . [T]he attempt illustrates the possible close and disturbing links between mercenaries and some private military and security companies, making the monitoring of such links all the more necessary." Furthermore, the Working Group raised concerns over the use of PMSCs to provide security for oil infrastructures, as it may negatively impact the state's control over its natural resources and hence further

weaken its ability to control its borders and ensure its security. In addition to the *coup* attempt in Equatorial Guinea, the past decade was rife with examples of human rights abuses carried out by PMSCs, including the infamous Nisour Square massacre where employees of the private PMSC Blackwater (now known as Academi) fatally shot seventeen Iraqi civilians. As such, PMSCs, according to the Working Group, must no longer operate unless measures are put in place to ensure accountability.

As the Working Group found, PMSC employees have repeatedly committed "grave" human rights violations. By partially or fully ceding their monopoly on the use of force to PMSCs, states undermine their ability and obligation to respect, protect, and fulfill human rights. But, instead of calling for an outright ban on PMSCs, the Working Group seeks the creation of binding minimal international standards that regulate the actions of PMSCs and ensure states comply with their obligations under international human rights and humanitarian law.

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