



Chapter 14

Business & Finance

Business & Finance

Chapter 14

- 348 Introduction – Kate Mitchell**
- 349 The Emergence of Business and Human Rights in the EU’s External Relations**
- 350 Vulture Funds: the Real Dimension of the Controversy from a Human Rights Perspective**
- 351 The ‘Vulture Funds’ Issue and the Bankruptcy Law Process for States in Economic Crisis**

Introduction

By Kate Mitchell

Human rights law has traditionally understood the primary actors to be States and individuals. In this dynamic, human rights law provides a means through which vulnerable individuals are protected from abuse by the more powerful machinery of the State. The rise of multinational corporations has changed this dynamic. On the one hand, corporations have the capacity to promote the social and economic wellbeing of individuals, bringing a form economic stability into countries that the political machinery of the State had been unable or unwilling to secure. On the other hand, the relationship between the governed, those who govern and the corporations promising benefits to both is not without tension or controversy, and concerns are often raised by lawyers and civil society about the potential for corporations to abuse their powerful position. The contributions to the Oxford Human Rights Hub Blog in 2014-2015 concerning Business, Finance and Human Rights highlight some of the complexities in this new area of human rights law.

There is a preliminary question about whether developments in business, finance and human rights can be regarded as contributions towards human rights law at all, at least in the area of international human rights law. As international law currently stands, and as the UN Framework and Guiding Principles on Business and Human Rights correctly observes, States are the primary duty-bearers under international law. For corporations, the language that is used is that of corporate social responsibility, rather than corporate duties or obligations. This language filters down to the regional level of the European Union, as explored in Gosia Pearson's contribution 'The Emergence of Business and Human Rights in the EU's External Relations' (p 349). Although, as Pearson explains, the division of competencies within the EU is such that the implementation of the UN Guiding Principles at a regional level raises many complexities, and at the end of the day, the legal regulation of corporations (as opposed to *corporate social responsibility* initiatives), and accountability mechanisms for corporations whose behaviour may fall short of human rights standards, falls to be regulated at the domestic level. There is increasing movement in this area, as Pearson highlights, with several Member States of the EU (including the UK in its adoption of its action plan on business and human rights entitled 'Good Business: Implementing the UN Guiding Principles on Business and Human Rights' in 2013) taking initiatives and introducing legislation that clarifies the expectations of companies in protecting human rights in a business environment.

While corporations are not, generally speaking, duty-bearers under international law, it is unquestionable that corporations are rights holders. This can raise tensions between the human rights obligations that States may owe to individuals and the contractual obligations States may owe to corporations. Maria Laura Farfan and Tomas Rubio explore this complex issue in their contribution on 'Vulture Funds: the Real Dimension of the Controversy from a Human Rights Perspective' (p 350). As Farfan and Rubio identify, when States are in the midst of economic and financial crisis, the risk of default of sovereign debt can raise several, often conflicting, challenges for States. Defaulting on sovereign debt can lead to costly and lengthy litigation with bondholders, as the litigation between NML Capital and the Argentine Republic explored in Farfan and Rubio's piece illustrates. Likewise, as Farfan and Rubio also identify, defaulting on debt can have catastrophic human rights consequences including increases in unemployment, poverty, and damage to fundamental social services. The *economic* impact of sovereign debt default on corporations is frequently litigated, in domestic litigation like that mentioned by Farfan and Rubio, but also before international arbitration panels convened under bilateral investment treaties. For human rights lawyers, the concern is that the simultaneous *human rights* impact of sovereign debt default will be underappreciated and undervalued.

Hector Jose Miguens raises similar concerns to Farfan and Rubio in his contribution 'Vulture Funds and Bankruptcy Law Processes for States in Economic Crisis' (p 351). Mindful of the challenges that economic crises present both to human rights and to business, Miguens explores various efforts that have been made to adopt legal frameworks for sovereign debt restructuring processes. As Miguens identifies, efficient, stable and predictable legal regimes create favourable environments for human rights and business. The initiatives within the United Nations noted by Miguens that provide assistance and guidance to developing countries in this area should therefore be welcomed.

While numerous complexities remain, the contributions to the Oxford Human Rights Hub in 2014-2015 highlight that the relationship between business and human rights is increasingly receiving the attention within human rights discourse that it deserves.

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Business & Finance

Chapter 14

The Emergence of Business and Human Rights in the EU's External Relations

Gosia Pearson | 3rd March 2015

Globalization has provided numerous opportunities for enterprises to contribute to the respect of human rights. At the same time, it also increases the risks of business involvement in human rights violations. The European Union sought to address these challenges in its internal policies and in relations with third countries and organisations.



The European Union (EU) played a key role in the development of the UN Framework and Guiding Principles on business and human rights. There were several factors that influenced the EU's active involvement in this process, including a growing pressure from the European Parliament and civil society, an opportunity to promote its own standards on Corporate Social Responsibility (CSR) developed in 2006, and a need to fulfil its traditional role in shaping the human rights agenda at the UN. At the same time, the UN Framework and Guiding Principles increased the prominence of business and human rights as part of a wider EU CSR agenda, as reflected in "A renewed EU strategy 2011-14 for Corporate Social Responsibility" and concrete actions that followed to implement it.

Business and human rights also emerged as a topic of the EU's external policy on human rights.

It became part of the EU Strategic Framework on Human Rights and Democracy. The Action Plan, annexed to the document, foresaw three actions for completion by the end of 2014, namely: 1) to ensure implementation to the Commission Communication on CSR, in particular by developing and disseminating human rights guidance for three business sectors and for small and medium-sized enterprises; 2) to publish a report on EU priorities for the implementation of the UN Guiding Principles; and 3) to develop national plans for EU Member States on implementation of the UN Guiding Principles. These commitments have been only partially implemented.

The guidance for three sectors (information and communication technologies, oil and gas, as well as employment and recruitment agencies) and for medium and small enterprises were published in 2013 and 2012, respectively. While the two sets of guides are important developments as they offer vital support to enterprises, there was no specific dissemination campaign among companies either within the EU or in relations with third countries. Instead they were promoted at events, such as the Business and Human Rights Forum, or in human rights dialogues with third countries. It is difficult to measure the concrete impact of the guides due to lack of information on whether companies use them in formulating their own CSR policies and operations. However, an assessment is possible based on a survey carried out with 200 randomly selected large companies, among which just five referred to the UN Guiding Principles. Size and country of origin of companies were the most important contributing factors in this respect.

The report on the EU priorities for the implementation of the UN Guiding Principles has been delayed several times and has not

Business & Finance

Chapter 14

yet been published. It will not establish EU priorities but will instead present the state of play of the implementation of the UN Guiding Principles, and what should be done next. Due to the division of competences within the EU, the report will only cover EU institutions, omitting an assessment of Member States' efforts.

Only four Member States finalized their national plans on business and human rights: UK, Netherlands, Italy and Denmark. Spain and Finland prepared drafts. Belgium, France, Germany, Portugal and Sweden signalled they would develop such plans, and the Czech Republic and Malta plan to include business and human rights in their national plans on CSR. According to a recently published European Commission compendium on Member States' CSR policies, different inter-related factors determined development of national action plans, such as: the structure and level of development of national economies, the involvement of stakeholders in policy design, and division of labour among ministries on CSR.

The EU's external policy on business and human rights is still emerging. If there is a second Action Plan on Human Rights and Democracy, the activities in this field should be more concrete and forward looking. While ensuring coherence among EU internal and external policies is important and should be maintained, the European External Action Service could become more proactive in stepping up the international dimension of internal policies, for example, through more systematic inclusion of human rights dialogue and the funding of projects.

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Vulture Funds: the Real Dimension of the Controversy from a Human Rights Perspective

Maria Laura Farfan and Tomas Rubio | 1st September 2014

While a lot of perspectives (economic, political, legal and even diplomatic) have been brought to the table regarding the possible effects of New York Judge Thomas Griesa's verdict in the litigation between NML Capital, LTD (Plaintiff) and the Argentine Republic (Defendant), there has been no voice for a human rights perspective.



After the Republic of Argentina defaulted on its external debt in 2001, 92.4% of the bondholders agreed to negotiate with Argentina a reduction in its amount. NML Capital, Ltd. (NML) – one of Argentina's bondholders – did not agree to restructure the debt and brought a suit in the United States courts to collect what it was owed. NML prevailed in 11 debt-collection actions brought against Argentina in the Southern District of New York.

Human rights issues creep into this debate: because of a US court decision, Argentina is facing a delicate economic and financial situation (including the risk of a new default), with the consequent human rights violations that it may entail. Figures don't lie: the default that Argentina faced in 2001 led to an abrupt growth in unemployment levels, a drastic rise in poverty, and serious damage to education and health systems, among other effects. In fact dozens of human rights organizations from all over the world signed a joint statement warning against this kind of problematic judicial intervention.

Obviously this is a result that neither Argentines, nor the rest of the world, wants to see. For the relevance of the case extends beyond the situation in Argentina. It sets a judicial precedent with effects for countries around the world since creditors will no longer have an incentive to accept any debt restructuring in the future. If there is a court decision that establishes the principle that bondholders should receive the whole amount, developing countries, which lack the means to pay large debts in one go, will be severely affected. This could establish a dangerous international jurisprudence, whereby the validity of fundamental human rights is put into question.

Does this mean that international obligations assumed by States should be ignored? Of course not: States' debts and obligations must be honored. However, one important point emerges from this case: rules of the international financial systems require a deep social sensitivity, in addition to economic and legal knowledge, in order to solve complex problems. The current international paradigm must be reconsidered. The international community has to decide if, as appears to be the consequence of Griesa's ruling, creditors will be allowed to put themselves above the most essential needs of individuals, or whether vulnerable countries are to have the possibility of a reasonable negotiation, which could produce favorable solutions for both. Whatever the answer may be, it has to be in consonance with human rights law, which the international community has a duty to promote and guarantee.

Acting otherwise could mean a regrettable backlash and would certainly fail to fulfill numerous international human rights agreements (which are of course as binding as economic commitments). Those duties are established in the Charter of the United Nations when it lays down International Economic and Social Co-operation principles (Chapter IX); the American Convention on Human Rights, which states the requirement of international co-operation to allow the progressive development of economic, social and cultural rights (Chapter III); the International Covenant on Economic, Social and Cultural Rights (e.g. Article 2, paragraph 1); and generally, the Millennium Development Goals, which must be pursued. In addition, any State and international organization also must have in mind the Guiding principles on foreign debt and human rights endorsed by the United Nations Human Rights Council in 2012, where the importance of human rights in the context of this kind of controversy has been established.

Here is where the issue appears most pressing. This decision must be analyzed not only in terms of the economic damage it may cause. It is much more important to note the detriment that will be caused to the most vulnerable people, those susceptible to the greatest effects of a crisis. They are the real victims of the current system and its loopholes.

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The 'Vulture Funds' Issue and the Bankruptcy Law Process for States in Economic Crisis

Hector Jose Miguens | 3rd February 2015

A recent book edited by Juan Pablo Bohoslavsky and Jernej Letnar Čerňič *Making Sovereign Financing and Human Rights Work* (Hart, 2014) notes that poor public resource management, the global financial crisis curbing fundamental fiscal space, millions thrown into poverty, and authoritarian regimes running successful criminal campaigns with the help of financial institutions are all phenomena that raise questions around finance, economic issues and human rights. They argue that there is urgent need for more systematic, robust legal and economic thinking about sovereign finance and human rights.

UN General Resolution 68/304 emphasized the importance of a timely, effective, and durable solution to the debt problems of developing countries to promote their inclusive economic growth and development. It also advocated the intensification of efforts to prevent debt crises, by enhancing international financial mechanisms for crisis prevention and resolution in cooperation with the private sector. Finally, it decided to adopt a multilateral legal framework for sovereign debt restructuring processes, with a view to increasing the efficiency, stability and predictability of the international financial system.

As Juan Pablo Bohoslavsky noted, there are a number of ways to meet this aim, many of which are complementary: national legislation, collective action clauses, facility programs in multilateral institutions and soft law principles can play, to some extent, a role. In addition to economic and political efforts, other legal solutions may be appropriate, such as drafting bills for collective procedures for States.

Filling the legal void at the global level through an international regulatory framework resulting from an equal, participatory and transparent process would be a legitimate and complementary approach to national legislation or contractual efforts. As suggested by the UN General Assembly Resolution on external debt sustainability and development adopted on 20 December 2013 (68/202), national efforts to promote more responsible lending and borrowing should be complemented by global strategies and policies.

There is a need to reinforce coherence and coordination in order to avoid the duplication of efforts in the financing of development processes. Private creditors of sovereign debt are increasingly numerous, anonymous, and difficult to coordinate, and there are

Business & Finance

Chapter 14

a variety of debt instruments and a wide range of jurisdictions in which debt is issued, which complicates the restructuring of sovereign debt. Moreover, the international financial system does not have a sound legal framework for the orderly restructuring of sovereign debt, which further increases the cost of non-compliance.

Therefore, implementing a collective procedure to restructure sovereign debts and adopting a codification of international law are necessary in order to fulfill the purposes and principles of the Charter of the United Nations and to give greater importance to its role in the relations among States regarding the human rights in the economic and social field.

Chapter Eleven of the United States Bankruptcy Code provides a useful example of insolvency legislation that could be implemented. As suggested some years ago in different international documents and forums –notably this report by Anne Krueger– both creditors and the debtor are in need of practical institutions of bankruptcy proceedings applicable to States and foreign creditors.

This is true, especially pertaining to the following legal matters: out-of-court proceedings, an international bankruptcy jurisdiction, the automatic stay, the first day orders, a sort of “bankruptcy estate”, property of the “bankruptcy estate”, creditors’ claims against the “bankruptcy estate”, discovery, regulated insolvency professionals (such as creditors’ and equity committees, mediators, examiners, trustees, etc.), a system of debtor-in-possession financing, the selling of certain assets, voidable preferences, fraudulent conveyances, shielding debtor assets, injunctions, equitable subordination of certain creditors, priorities, economic reorganization plan of the debtor, negotiation of the plan, plan process, fiduciary duties of government officials, post-petition debt securities, and, finally, discharge and payments to creditors before and after de confirmation of the plan.

Apart from the comparative Bankruptcy Codes available it could be prudent to follow the regime of the Legislative Guide on Insolvency Law of the United Nations Commission on International Trade Law, adopted in 2004, also by analogy and, when suitable, the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009).

Any sort of bankruptcy regime for indebted States would be useful to protect human rights, especially the social and economic rights of those in the State. The lack of a collective procedure causes chaos in the relationship between the creditors and the State debtor – and delays in the negotiation of a solution of the crisis with the creditors, as well as lengthy procedural struggles among the parties in different jurisdictions – all of which impact negatively in the human rights of the population in that country, and the capacity of that State in providing for them.

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