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Towards a legal framework for restructuring sovereign debt

UN takes historic first step

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Editor's Note

MORE than anything else, it was the international debt crisis of the 1980s that exposed one of the major failings of the current global financial system. As indebted nations of the South struggled to repay debts which they had no hope of ever discharging in full, it became evident that there was a gaping lacuna in the international financial architecture.

The fact is that while an indebted individual or corporation can always seek legal relief from a cycle of unending debt payments, there is no comparable provision in the international financial system to offer a way out for indebted nations. Under municipal law, insolvency legislation provides a variety of mechanisms to enable an impecunious debtor to restructure his debts. In contrast, under international law, indebted nation states can seek no such legal relief simply because there is none.

Not for nothing are the 1980s known as 'the lost decade' as indebted nations, in desperation, turned to the International Monetary Fund (IMF) for loans only to suffer some of the worst economic downturns in their history – downturns from which some of them have never fully recovered.

Not surprisingly, it is one of the states that were victims of the 1980s crisis which is now in the vanguard of the international struggle to establish a sovereign debt restructuring mechanism. Argentina, which carried the economic wounds of 'the lost decade' well into the 1990s, had however the misfortune to suffer another crisis in 2001, as a result of ill-advised (by the IMF) policies pursued by previous President Carlos Menem. Consequently, the country's currency was devalued considerably and it was forced to default on its external debt to the tune of $100 billion.

It was left to a subsequent President, the late Nestor Kirchner, to pull Argentina out of its economic morass by pursuing a bold alternative course independent of the IMF. While initiating an economic recovery, he tackled the debt problem in a thoroughly audacious manner. In 2003, he defied the IMF by defaulting on a $3 billion loan payment to the Fund rather than utilise Argentina's scant foreign reserves to pay the debt. In 2005 and 2010, he offered the $100 billion creditors debt swaps which effectively reduced the debt by some 75%.

Most of these creditors (about 93% of them) accepted this restructuring, but a minuscule number held out. And it was after some of these holdouts sold their debts in 2008 to a couple of hedge funds – NML Capital (a subsidiary of Elliott Capital Management run by US billionaire Paul Singer) and Aurelius Capital Management – that Argentina became drawn into a renewed battle over its debt.

The fact is that both the above hedge funds have earned a notoriety as 'vulture funds', i.e., financial institutions which, in the words of a UN expert on foreign debt, make huge profits 'by acquiring defaulted sovereign debt at deeply discounted prices and then seeking repayment of the full value of the debt through litigation, seizure of assets or political pressure'. NML's prey before it swooped on Argentina have included poor countries such as the Democratic Republic of the Congo and Peru.

In its attempt to recover the debt in full (about $1.33 billion), in 2012 NML managed to secure an order from a New York District Court judge which, in effect, prevented Argentina from making any payment to holders of the restructured debt unless it also paid NML in full on the amount due to it. The rationale for this injunction by Judge Thomas Griesa was his bizarre interpretation of the doctrine of *pari passu*, which obliges a debtor in insolvency proceedings to place all his creditors on an 'equal footing'. He held that Argentina had breached this doctrine, designed to ensure equal treatment to all creditors, by paying the holders of the restructured debt without servicing the debt due in full to NML.

When all legal avenues to challenge and set aside this judgement failed and Argentina was forced into a technical default, its current President, Cristina Kirchner, moved to enact legislation to bring the debt within the purview of Argentine law and substitute an Argentine bank, Nacion Fideicomisos, in place of the New York bank which had hitherto been the financial intermediary through which payments could be made. This attempt to circumvent the injunction drew a fierce response from Judge Griesa, who ruled that Argentina was in contempt of court. Argentina has hit back by defiantly depositing with Nacion Fideicomisos $161 million in payments on the restructured debt, but it is not clear at this stage how this legal dispute will play out.

However, regardless of its outcome, the fact is that it is no longer simply an issue between Argentina and its creditors. Argentina has taken the battle to the United Nations and, with the support of the G77 developing-country bloc, mounted a bold move to effect a structural reform of the whole problem of international sovereign debt. On 9 September the UN General Assembly passed a landmark resolution that mandates the world body to create a 'multilateral legal framework for sovereign debt restructuring processes'.

The choice of the UN as the forum for tackling this issue is a wise one not only because it is the most inclusive institution but also because it was the UN which hosted the 1944 Bretton Woods Conference that gave birth to the current international financial architecture. A critical component was clearly left out from the architecture and Argentina's efforts are directed at repairing this deficiency.

Our cover story for this issue focuses on Argentina's battle with the vulture funds. A number of articles provide the background to this bitter dispute. Others report on and analyse the historic UN vote. We also include an article which considers how the goals behind this important international initiative can be brought to fruition.

– The Editors

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A recently adopted UN resolution championed by Argentina, which is involved in a legal dispute with 'vulture fund' creditors, seeks to set up a multilateral framework for restructuring sovereign debt. Picture shows an anti-vulture fund poster on a street in Buenos Aires. 9

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Mayan people's movement defeats 'Monsanto Law' in Guatemala

In Guatemala, a move to vest exclusivity on patented seeds to a handful of transnational companies such as Monsanto has been rebuffed by indigenous Mayan communities.

Christin Sandberg

Indigenous people protesting the so-called 'Monsanto Law' that would have threatened seed diversity.

ON 4 September, after 10 days of widespread street protests against the biotech giant Monsanto's expansion into Guatemalan territory, groups of indigenous people joined by social movements, trade unions and farmer and women's organisations won a victory when the country's Congress finally repealed legislation that had been approved in June.

The demonstrations were concentrated outside Congress and the Constitutional Court in Guatemala City, and coincided with several Mayan communities and organisations defending food sovereignty through court injunctions in order to stop Congress and the President, Otto Perez Molina, from letting the new law on protection of plant varieties, known as the 'Monsanto Law', take effect.

On 2 September, the Mayan communities of Sololá, a mountainous region 125 kilometres west from the capital, took to the streets and blocked several main roads. At this time a list of how individual congressmen had voted on the approval of the legislation in June was circulating.

When Congress convened on 4 September, Mayan people were waiting outside for a response in favour of their movement, demanding a complete cancellation of the law – something very rarely seen in Guatemala. But this time they proved not to have marched in vain. After some battles between the presidential Patriotic Party (PP) and the Renewed Democratic Liberty Party (LIDER), Congress finally decided not to review the legislation, but cancel it.

Lolita Chávez from the Mayan People's Council summarised the essence of what has been at stake: 'Corn taught us Mayan people about community life and its diversity, because when one cultivates corn one realises that there is a variety of crops such as herbs and medicinal plants depending on the corn plant as well. We see that in this coexistence the corn is not selfish, the corn shows us how to resist and how to relate with the surrounding world.'

Controversial law

The Monsanto Law would have given exclusivity on patented seeds to a handful of transnational companies. Mayan people and social organisations claimed that the new law violated the Constitution and the Mayan people's right to traditional cultivation of their land in their ancestral territories.

Antonio González from the National Network in Defence of Food Sovereignty and Biodiversity commented in a press conference 21 August: 'This law is an attack on a traditional Mayan cultivation system which is based on the corn plant but which also includes black beans and herbs; these foods are a substantial part of the staple diet of rural people.'

The new legislation would have opened up the market for genetically modified seeds, which would have threatened to displace natural seeds and end their diversity. It would have created an imbalance between transnational companies and local producers in Guatemala, where about 70% of the population depend on small-scale agricultural activities for their livelihood. That is a serious threat in a country where many people live below the poverty line and where children suffer from chronic malnutrition, with some starving to death.

The law was approved in June without prior discussion, information and participation from the most affected. It was a direct consequence of a free trade agreement with the US, ratified in 2005. However, recently the protests started to grow and peaked a couple of weeks ago with a lot of discussions, statements and demonstrations.

At first the government ignored the protests and appeared to be more interested in engaging in superficial forms of charity like provision of food aid while ignoring the wider and structural factors that cause and perpetuate poverty in Guatemala such as unequal land distribution, deep-rooted inequalities and racism, to name but a few.

But soon enough they decided to act. Even though politicians claimed not to act on social demands, it was without doubt a decision taken after enormous pressure from different social groups.

The Monsanto Law was seen as an attack on the traditional Mayan cultivation system based on the corn plant.

Criminalising the Mayan people – again

There was a great risk that the Monsanto Law would have made criminals of already repressed small farmers who are just trying to make ends meet and doing what they have done for generations – cultivating corn and black beans for their own consumption. The Monsanto Law meant that they would not have been able to grow and harvest anything that originates from natural seeds. Farmers would be breaking the law if these natural seeds had been mixed with patented seeds from other crops as a result of pollination or wind, unless they had a licence for the patented seed from a transnational corporation like Monsanto.

Another risk expressed by ecologists was the fear that the costs of the patented seeds would have caused an increase in prices and consequently a food crisis for those families who could not afford to buy a licence to sow.

Academics, together with the Mayan people, also feared that the law would have intensified already fierce social conflicts between local Mayan communities and transnational companies in a country historically and violently torn apart.

Mayan people and Mother Earth

Currently international companies are very interested in gaining control of the abundant natural assets that Guatemala possesses. There is just one problem: the Mayan people – indeed most people – in Guatemala do not agree with a policy of treating nature like a commodity to be sold off piece by piece, especially when they receive nothing in return. It is very difficult to argue that it is a rentable business for Guatemalan society as a whole, much less local communities, when it is a minority but powerful economic elite which benefits on behalf of the environment, nature and society.

So what happens when the people organise in defence of their territory? The international companies call the government and have them use whatever means necessary to remove those standing in their way so they can construct megaprojects like mines or hydroelectric dams or extend monocultures in any region they see fit without much concern for those who might be affected.

In August three men were killed when police used violent force to evict a community which had organised itself to protest against a hydroelectric megaproject in Alta Verapaz. Hundreds of police officers were sent to the area on orders from the Minister of Home Affairs, Mauricio López Bonilla. It was not an exceptional case by any means.

Ongoing conflict

As for the Monsanto Law, for a chilling reminder of where this was most likely headed, one need look no further than the US: according to information from Food Democracy Now, a grassroots community for a sustainable food system, Monsanto, the world's leading chemical and biotech seed company, admits to filing 150 lawsuits against America's family farmers, while settling another 700 out of court for undisclosed amounts. This has caused fear and resentment in rural America and driven dozens of farmers into bankruptcy.

It is impossible to predict how this controversy might unfold, but the reality in Guatemala today is one marked by an ongoing conflict between the government and the Mayan people, who constitute over half of the population.

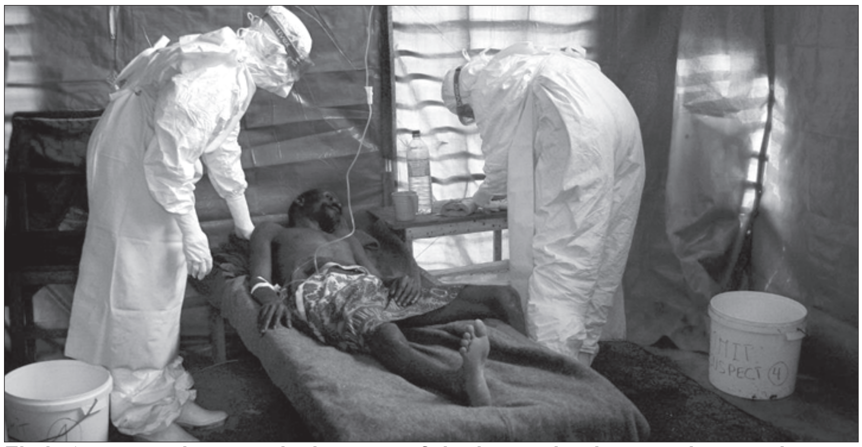
Nim Sanik, a Mayan people's representative from Chimaltenango, comments on the victory over the Monsanto Law: 'The fight to preserve collective property of Mayan communities such as seeds, which historically have served as a source of development and survival for the Mayan civilisation, is a way to confront the doors that the neoliberal governments have opened wide to national and transnational corporations that genetically modify and commercialise the feeding of humankind. We have just taken the first step on a long journey in our struggle to defend the sovereignty of the people in Guatemala.'◆

Christin Sandberg is a Swedish journalist based in Guatemala who has followed human rights and indigenous grassroots movements in Central America for seven years. This article is reproduced from the Upside Down World website (upsidedownworld.org).

Battling Ebola: Is human activity to blame?

As West Africa grapples with its deadliest-ever Ebola outbreak, few commentators have drawn attention to the fact that it is the human impact on the environment that has largely contributed to its spread. The following interview with Professor James C McCann of Boston University throws some light on the role that deforestation and human activity may have played in the current outbreak.

Amy Laskowski



Ebola 'seems to be spread... because of the interaction between human changes and landscape'.

HUMAN impact on the environment may be partially to blame for the deadliest-ever Ebola outbreak spreading through West Africa, researchers say. Global warming, logging and road construction have put humans in closer contact with infected bats and gorillas. In a 2012 study in the *Onderstepoort Journal of Veterinary Research*, researchers wrote that 'the increase in Ebola outbreaks since 1994 is frequently associated with drastic changes in forest ecosystems in tropical Africa,' and went on to note that 'extensive deforestation and human activities in the depth of the forest may have promoted direct or indirect contact between humans and a natural reservoir of the virus.'

For historical context on the virus and the role that deforestation and human activity may have played in the current outbreak, *BU Today*, the news and information website of Boston University in the US, spoke with James C McCann, a scholar on the history of the food, ecology and agriculture of Africa. He is a faculty fellow for the Frederick S Pardee Center for the Study of the Longer-Range Future, associate director of the African Studies Center, chair of archaeology, and a professor of history at Boston University. He is also a Guggenheim and Fulbright Fellow. His numerous books include *Green Land, Brown Land, Black Land: An Environmental History of Africa, 1800-1900*; *Stirring the Pot: The Tastes and Textures of African Cookery*; and *Maize and Grace: Africa's Encounter with a New World Crop, 1500-2000*, which won the 2006 George Perkins Marsh Prize as the best book on environmental history from the American Society for Environmental History.

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***BU Today*: How is human activity in Africa spreading the Ebola virus?**

McCann: With the Ebola outbreak in the Congo in 1995, tropical medical specialists were associating it with monkeys and forest-based activities, and now in this outbreak they have shifted to bats as a key link to transmission. This is a situation that is quite fluid because they understand the disease and what it looks like when there is an outbreak. The question is, how do you treat it, how do you avoid transmission?

If you look at earlier examples of not just forest change, but ecological change brought on by human activities, this bears some resemblance to the 1918 Spanish flu. That was a communicable disease with no vector involved; in other words there was not an insect vector that would explain the transmission, as with mosquito vectors and malaria. It's a haemorrhagic fever that comes with contact with bodily fluids, even if exchanged by touching or by breathing.

If you follow the Spanish flu's movement, it moved according to lines of transportation and communication. So people who got the disease, you could follow railway tracks. It came to Africa via a ship, ironically to Sierra Leone, one of the current areas affected by Ebola.

If we look at this [Ebola outbreak] ecologically, there are two different forest systems in play. In the 1995 outbreak in the Congo, it was one outbreak, people died at a very high mortality rate, but it seemed to have died out. That outbreak occurred in the Congolian forest. Now Ebola has found its way into the Upper

Guinea forest, which is a different forest system. But it seems to be spread, just in terms of a hypothesis, because of the interaction between human changes and landscape. The presence of bats and other forest-dwelling mammals seems to be a key factor. The forest, which is in transition from either deforestation or other kinds of interaction between the forest and settled areas, seems to be the factor why Ebola is suddenly popping up again.

Is deforestation a major issue in western Africa?

The area where the recent Ebola outbreak is taking place is actually going through a process of reforestation, or rather forest change. A lot of the area, which is inhabited, is regenerating forest. With that being the case, it's a transitional zone where people are coming into closer contact with the forest ecology. Just like I have raccoons and skunks near my suburban house, that kind of local landscape transition promotes new kinds of habitat and the new kinds of interactions between humans and the natural world that have been taking place in the West African forest ecology. So I wouldn't say it's deforestation, I would say it's landscape change. Deforestation is too simplistic a term.

Our reaction, understandably, is to respond to Ebola as a biomedical crisis, and to some degree it is, and the solution may come from the immediate treatment of patients. But the larger issue is the transition in ecological terms of human-natural interactions. I think that's where the longer-term solution will come from – understanding what happens when you begin to transform human ecology.

In your book *Green Land, Brown Land, Black Land*, you discuss the dangers of forest change, changing climate and rising ocean temperatures. What other human ecological issues is Africa dealing with?

There are massive changes that have to do with population growth and movement, urbanisation, which is not simply the removal of everything. It's the increased interaction between the natural world, which includes factories of disease, and human settlement. When you have an area of forest that is either preserved or interacts more directly with humans, that's where we see Ebola, both in the 1995 outbreak and now.

These areas have also just been through political crises to a large degree. Guinea has serious economic problems that accompany political unrest; Liberia went through civil war and a dislocation of all of the practices of health care. With those things going through a transformation, I think that's why Ebola suddenly emerges. It happens to be a very deadly virus with a high mortality rate, so it really captures the world's attention. It's especially capturing people's attention because doctors are coming down with the disease, which was also true with influenza earlier in the 20th century.

What are some of the lessons learned from previous outbreaks and how are those informing how we deal with this current crisis?

We've learned more about it and [are] identifying the transition from the human links to its setting in nature. In this case it's either bats or the eating of forest materials, proteins that may have promoted it. But simply the changing context of the ecology brings about disease. Malaria, after all, came out of the beginning of the movement of the forest very early on. For malaria, it was early contact between the people who were coming out of a forest and had natural immunity and people who didn't have the immunity. It has to do with the human ecology interface. Ebola is one version of that, but there are many others.

The lesson is that ecology really matters for health. It's as much ecology as it is biomedicine. That, I think, is the lesson. Sure there's a biomedical understanding of malaria, but it doesn't help us suppress or understand the disease. Ebola may well be a similar situation. The historical analogy will be valuable to keep in mind.

Does West Africa have the infrastructure in place to fight this outbreak?

It's very limited, partially because the infrastructure for health care delivery is not there. When you have an outbreak, there are people who don't have access to health care, or their health care is very limited. That's a connection to politics. And the role of local belief systems about disease may be at play here, too. On the news we are seeing many mission health centres, but not well-supplied clinics, in Guinea and Liberia. The delivery of primary health care is an issue. The first doctors who have contracted Ebola are missionaries, who often are the first to treat patients in affected areas.

The setting is the forest ecology. The Upper Guinea forest is separate from the Congolian forest, and there are different characteristics, but nonetheless, people are moving out, clearing land for settlements and small towns. It creates a whole new mix of things, out of which comes disease, like Ebola.

This week, the Liberian government has started to insist that Ebola victims be cremated. Does this fall in line with West African beliefs?

You're finding that cremation is suggested by the medical folks as a way of trying to stop transmission. Cremation is not a usual practice; in cities, it's becoming a little more common, but it's not a practice in most African societies. That would be a Christian burial. The burial practices vary from society to society. If you're Roman Catholic or Muslim and you live in rural Guinea, you're likely to be less receptive to the idea of cremation than people in other areas. Culture will play a role in treatment and response. There is a great variety of practices in Africa. In general, it's fair to say that cremation is not a universally applicable way of dealing with the dead. ◆

Amy Laskowski is a staff writer with BU Today *(www.bu.edu/today), the news and information website of Boston University, from which this article is reproduced.*

ECONOMICS

Banking with a difference

The establishment of the New Development Bank by the BRICS countries is a significant development which could have some impact on multilateral lending for infrastructure in the countries of the South. But if the new bank is to make a difference, it has to act in ways that differentiate it from the currently dominant global institutions in terms of funding patterns, rules and terms.

CP Chandrasekhar

THE world has one more multilateral development bank, the New Development Bank (NDB) that was established on 15 July 2014. With authorised capital of $100 billion and initial subscribed capital of $50 billion, the bank's founding partners are the countries in the BRICS grouping (Brazil, Russia, India, China and South Africa). These five countries, which share equally the paid-up capital in the form of actual equity ($10 billion) and guarantees ($40 billion), will remain dominant in perpetuity with their aggregate shareholding never falling below 55%. Organisationally too the BRICS bank seeks to be even-handed: India gets the first chair of a rotating presidentship, China gets to host the bank's headquarters in Shanghai, South Africa gets to host the first regional office, the first chair of the board of governors is from Russia and the first chair of the board of directors from Brazil.

In itself, the creation of a new multilateral development bank should not be considered out of the ordinary. A 2009 study from the Association of Development Financing Institutions in Asia and the Pacific estimated that there were over 550 development banks worldwide, of which 32 were in the nature of international, regional or subregional (as opposed to national) development banks. The news that one more has been added to the list should not elicit much excitement.

Yet the news that the NDB had been created was received in some circles with much enthusiasm, in others with disappointment and in yet others with a degree of discomfort. The reason is that it is owned and controlled by the BRICS, an unusual grouping of 'emerging' countries that started life as a mental construct of an investment banking analyst, Jim O'Neill, and then became a reality as the countries concerned bought into the idea. Four of their leaders first met in New York in 2006 and then constituted a formal group at a summit of four of the current five members in Yekaterinburg in 2009. South Africa joined the group in 2010.

Consisting of large countries, considered by some to be characterised by substantial potential for rapid growth, they are seen to be among the possible future giants that would challenge the currently dominant economies in the Organisation for Economic Co-operation and Development (OECD). With two-fifths of the world's population and a fifth of the world's gross domestic product (GDP), the BRICS are indeed a formidable grouping. That makes the NDB different because most existing development banks are, in terms of shareholding, voting rights and management, dominated by one developed country or another, especially from among a set defined by the United States, Germany, France and Japan. Other countries have long been arguing for a reshaping of these shareholding and control structures to account for the changes in the relative economic and political importance of individual countries in the global order, but progress with such restructuring has been slow and marginal. The creation of the NDB is seen as being a response to the intransigence of countries that dominate the existing multilateral development banking infrastructure, especially the US, and a declaration of the exasperation of emerging nations with the current global financial architecture. Its founding membership also gives it a much greater chance of success than past attempts, like that with the Banco del Sur (Bank of the South), at establishing a successful competitor to the currently dominant multilateral development banks.

Would it make a difference?

While these factors make the creation of the NDB a matter of significance, would it make a difference? There are development banks from the South such as the China Development Bank and Brazil's Brazilian Development Bank (BNDES) that are large and have been expanding their international lending operations, especially in other developing countries, in recent years. But this is an instance of multilateral cooperation among a set of so-called 'Southern countries' in the governance of a development bank, which infuses checks and balances into its operations. Moreover, along with the creation of the NDB, the BRICS summit at Fortaleza, Brazil, in July this year also established a BRICS-controlled Contingent Reserve Arrangement (CRA) with committed resources of $100 billion, defined as 'a framework for the provision of support through liquidity and precautionary instruments in response to actual or potential short-term balance of payments pressures'. Since that involves entering an area now dominated by the International Monetary Fund (IMF), controlled again by the developed countries led by the US, the perception that the NDB would shift power relations in the multilateral development banking infrastructure seems corroborated.

It could, for three reasons. First, in a world characterised by substantially enhanced possibilities of mobilising private resources in debt and equity markets, poorer developing countries are discriminated against and kept out of such markets. Since the NDB is owned and backed by governments in a set of 'emerging economies', it is likely to be able to mobilise substantial resources at reasonable cost from private markets and channel them to needy countries. Second, inasmuch as the allocation of these resources would be determined by the representatives of governments from the five BRICS countries, it could direct resources to projects that are more in keeping with the requirements of the Southern countries.

Third, with control in the hands of the BRICS governments that are subject to the influence of local democratic forces, the terms on which the institution lends could in time reflect 'Southern' requirements and sensitivities. For example, there has been developing-country recognition that the kind of policy conditionalities attached to lending by the North-dominated Bretton Woods institutions limits national policy space in ways that favour the dominant nations and discriminates against the development interests of poorer countries and the disadvantaged sections of the populations in them. If, therefore, NDB lending occurs on terms that are more sensitive to the requirements of developing countries, the impact can only be positive. In fact, conditionalities could be so set as to distribute a part of the benefits to the poor among developing-country populations.

This is particularly important because of the role that development banks play. Unlike conventional banks, they focus on long-term financing and provide credit to more capital-intensive projects, especially of an infrastructural kind. Since such lending involves higher-than-normal debt-to-equity ratios, development banks to safeguard their resources closely monitor the activities of the firms they lend to, resulting in a special form of 'relationship banking', with far greater lending influence on the technology and on operations. The expectation is that such influence would be more Southern-oriented in the case of the NDB than, say, the World Bank.

State-capitalist development

But this point should not be pushed too far. In the final analysis development banks are instruments of state-capitalist development. Such specialised institutions are needed because of the shortfalls in the availability of long-term finance for capital-intensive projects in market economies, resulting from the maturity and liquidity mismatches involved. In non-market economies, allocations for such investments can be made through the budget and financed with taxes or the surpluses generated by state-owned enterprises. If the instruments are state-capitalist, they are unlikely to serve non- or anti-capitalist objectives that sacrifice private profit to deliver social benefit. So the best that can be expected of the NDB is that it would serve better the interests of capitalist development in the less-developed countries (with some concern for sustainability and inclusiveness) than would multilateral banks that are dominated by and serve as instruments of the developed countries.

Whether even this difference would be material depends on three factors. The first is the degree to which the emergence of the NDB alters the global financial architecture and perhaps, therefore, the behaviour of the institutions currently populating it. The second is the degree to which the BRICS bank can differ in its lending practices from the institutions that currently dominate the global development banking infrastructure. And, the third is the degree to which a development bank set up as a tool of state-guided development by governments in countries pursuing capitalist and even neoliberal development trajectories can indeed contribute to furthering goals of more equitable and sustainable development.

As noted earlier, the establishment of the NDB does make a difference to the global financial architecture. More so because of the relatively large authorised capital base of $100 billion and the paid-up capital commitment of $50 billion. Though established as far back as 1944, the capital base of the International Bank for Reconstruction and Development (IBRD) (the core lending arm of the World Bank) is only $190 billion, of which only $36.7 billion is available as actual equity, the rest being 'callable capital' that countries have committed to provide when called upon to do so. So even at inception the NDB seems significant in size compared to rivals still controlled by the developed industrial countries.

Regarding operational practices, there are clear signals that the NDB's lending is to be focused on large infrastructural projects that are seen as central to the development effort. Both cash-strapped developing-country governments and the private sector are unable or unwilling to fully fund the lumpy investments involved in these long-gestation projects, making the role of development financing institutions crucial to development. An infrastructural focus has therefore been a characteristic feature of many of the currently existing multilateral development finance institutions as well. So if the NDB is to be different from the World Bank or regional development banks like the Asian Development Bank, the difference would have to be reflected in the choice of projects within the infrastructural space, in the terms on which large loans are provided, and in the concern it shows for keeping development sustainable and inclusive. Inasmuch as the institution has been established by a set of emerging nations that do not exercise hegemonic power in the international economy, it is possible that lending behaviour could reflect such differences, which possibly accounts for the discomfort of the currently dominant institutions.

However, the NDB is fundamentally not detached from the global financial system. Being a bank, even if a specialised one, it must ensure its own commercial viability. And it must do so when a large part of the resources it lends would be mobilised from the market. While guarantees from the governments of its shareholding countries would improve the institution's rating and reduce its borrowing costs, those costs will have to be borne. So any form of socially concerned lending that does not yield a return adequate to cover costs and deliver at least a nominal profit will be ruled out. There is only so much an institution whose activities are constrained by market realities can do.

In addition, the procedures finally adopted would be influenced by the nature of the governments that control the new institution, and paths of development pursued in countries that associate with the bank either as providers of finance or borrowers. The NDB does not decide on the projects that come up for lending. It would only choose among projects that apply for lending support. In that choice, the norms that shareholding governments apply in their own contexts would play a role. Moreover, wanting to be seen as respectful of the sovereign interests of borrowing countries, the NDB would be careful not to frame its lending rules in ways that threaten the policy sovereignty of borrowing countries. If the countries that approach the institution are pursuing neoliberal strategies, there may be clear limits in terms of what the NDB itself can achieve.

Mirroring Bretton Woods?

There are other reasons why the NDB may not live up to the expectations it has generated in some circles. To start with, the NDB not only keeps membership open to any United Nations member, but provides for a category called non-borrowing members, which can as a group acquire, with the consent of the board, shares that give them voting power of up to 20% of the total. This gives developed countries entry into the bank's decision-making apparatus. Along with the declared possibility that the international financial institutions would be granted the status of observers in the meetings of the board of governors, a presence and voice for the developed countries in the NDB seems likely. They could exploit that presence and differences in the degree of developed-country dependence among the BRICS to reduce the effectiveness of the NDB as an 'alternative' institution.

The NDB is fundamentally not detached from the global financial system. There is only so much an institution whose activities are constrained by market realities can do.

This possibility is signalled by features of Article 5 in the treaty establishing the CRA, which specifies the maximum borrowing limits and the terms of borrowing by members of the arrangement. The article specifies a maximum borrowing limit for each member, which is a multiple of the financial commitment made by the member. Access to 30% of this maximum (the delinked portion) is available to a member based only on the agreement of the 'Providing Parties'. The remaining 70% (the IMF-linked portion) can be accessed in part or full only if, in addition to the agreement of the Providing Parties, the Requesting Party can provide evidence of an on-track arrangement between the IMF and the Requesting Party that involves a commitment of the IMF to provide financing to the Requesting Party based on conditionality, and the compliance of the Requesting Party with the terms and conditions of the arrangement.

This substantially dilutes the role that the CRA can play as an alternative to the IMF in offering balance-of-payments support to a distressed economy. If the CRA is being made a mere extension of the IMF, the possibility that the NDB can imitate the World Bank is also real.

It may be too much to expect the NDB (as some non-governmental organisations do) to adhere to sustainable development norms that its financing pattern does not permit and the governments backing the organisation do not respect. But, as noted, there are indications that the NDB and the CRA may not be too different from and completely independent of the World Bank and the IMF. Formally these institutions introduce more plurality into the international financial and monetary landscape. But in practice their presence does not guarantee significant difference. The decision of the BRICS to set up mini-versions of the World Bank and the IMF seems to be more a symbolic declaration of resentment at the failure of the US and its European allies to give emerging countries a greater say in the operations of the Bretton Woods institutions. It may also reflect an effort by each member of the BRICS grouping to leverage this show of strength to extract as much benefit as it individually can from any changes in the international system. The desire to redress the obvious inequities in the global financial system seems far less important.

So a first effort of democratic forces in the BRICS countries and elsewhere should be to pressure the governments involved to act in ways that differentiate the NDB and CRA from the currently dominant global institutions in terms of funding patterns, rules and terms. If in the process the NDB is forced to show greater respect for norms of sustainable and inclusive development than the Bretton Woods institutions do, it would be a major advance. ◆

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Battle hots up to curb 'vulture funds'

The issue of sovereign debt has once again come to the fore as Argentina battles a couple of hedge funds which bought up some of its debts and seek to extract their pound of flesh. *Martin Khor* explains how this fight has now culminated in an historic UN resolution designed to obviate such crises by moving towards the establishment of an international debt restructuring mechanism.

EXTERNAL debt is rearing its ugly head again. Many developing countries are facing reduced export earnings and foreign reserves.

No country would like to have to seek the help of the International Monetary Fund (IMF) to avoid default. That could lead to years of austerity and high unemployment, and at the end of it, the debt stock might even get worse. Low growth, recession, and social and political turmoil are probable. This has been experienced by many African and Latin American countries in the past, and by several European countries presently.

When no solution is found, some countries then restructure their debts. Since there is no international system for an orderly debt workout, the country would have to take its own initiative. The results are usually messy, as it faces a loss of market reputation and the creditors' anger. But the country swallows the pill rather than have more turmoil at home.

Posters put up at the entrance to the Argentina Economy Ministry building read 'Together we will fight against the loan shark vultures'. The activities of vulture funds threaten to obstruct efforts by any country to restructure its debts.

Such was the experience of Argentina, whose public debt reached 166% of GDP in 2002. After many years of decline and political instability, Argentina defaulted in 2001. Argentina then arranged for two debt swaps in 2005 and 2010, thus restructuring its debt with 93% of its creditors, who agreed to receive about a third of the original debt value.

But 7% of creditors, known as 'holdouts', did not agree to the restructuring. A few influential hedge funds (comprising only 1% of creditors) which had bought some of the debt very cheaply on the secondary market sought a court order in New York (where the original loans had been contracted) to be paid in full.

There are several such funds, now popularly termed 'vulture funds', that specialise in buying distressed debt at low prices (say, 10% of the original loan value) and then insisting through the courts on being paid in full with interest. Like vultures, they circle overhead and swoop to make a meal of the dead or dying bodies. Only in this case the 'bodies' are countries and they are asked to squeeze their shrivelled economies further to pay the vulture funds.

The US judiciary, after a long process that went to the Supreme Court, decided a few months ago that the holdout hedge funds that took up the case concerning the Argentine debt should indeed be paid in full and with interest.

Further, it decreed that the 93% of creditors who had already agreed to be paid at a big discount are now not allowed to be paid, unless the vulture funds are paid in full at the same time. The New York judge used the principle of *pari passu* (that all creditors should be treated the same) in reaching the decision.

Argentina had already arranged with a bank in New York to pay out interest to the 93% a few weeks ago, but the bank refused to do so, due to the court order.

The vulture funds want their pound of flesh. The main fund, NML Capital, would make an estimated 1,600% profit.

Argentina's President Cristina Kirchner refused to bow to these

A few influential hedge funds which had not taken part in a restructuring process involving Argentine sovereign debt eventually obtained a US court order for full repayment of their debt. Picture shows a placard with a picture of Thomas Griesa, the judge who gave the order, being held up during a protest in Buenos Aires.

funds. If she did, the country might have to also repay all the creditors the full value, which is $120 billion, and that is impossible to do.

This incredible turn of events has caused outrage among many public interest groups and anger among developing countries' governments. The South Summit of the G77 developing-country grouping in May in Bolivia criticised the vulture funds and called for a proper global debt restructuring mechanism.

Finance ministries of developed countries have been concerned as well as many are also affected. Greece went through debt restructuring, in which private creditors agreed to take a loss, a few years ago.

Accepting the US court decision as the new template would make it quite impossible for any country to restructure its debts, since the now emboldened vulture funds would pounce and block it.

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 the real vultures perform a valuable task!

At the end of August, the Swiss-based International Capital Market Association, a group of bankers and investors, issued new standards aimed at reducing the ability of holdout investors to undermine debt restructuring.

On 9 September, the G77 succeeded in promoting a resolution at the United Nations General Assembly which recognised that a state's efforts to restructure debt should not be impeded by hedge funds that seek to profit from distressed debt.

The General Assembly, by a vote of 124 in favour, 11 against and 41 abstentions, also decided to set up a multilateral legal framework for sovereign debt restructuring by the end of its 69th session (around September 2015), to increase the stability of the international financial system.

An international debt restructuring mechanism will be a systemic solution, since countries with debt crises can have recourse to an international court or system and need not do a messy debt restructuring on its own.

There will now be an uphill battle to get the resolution implemented, since the United States, Germany and the United Kingdom (all key countries in global finance) were among those which objected.

Another resolution, initiated by Argentina, was adopted by the UN Human Rights Council on 26 September, aimed at setting up legal frameworks to curtail vulture funds' activities and for sovereign debt restructuring.

One good thing is that the UN, which is a universal body in which developing countries have a greater say in decision-making, is now at the centre of the debt discussion.

The negotiations ahead will be tough but well worth it since preventing and managing a debt crisis is now a priority for a growing number of countries. ◆

The South Summit of the G77 developing-country grouping in May in Bolivia *(pic)* criticised vulture funds and called for a proper global debt restructuring mechanism.

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Why the world needs to stand with Argentina

Argentina's problems with 'vulture funds' have far-reaching implications for the stability of the system of cross-border debt, says *Jayati Ghosh*.

ALMOST everyone now knows that the world of international finance is not a particularly robust one, nor is it particularly just or fair. But it has got even weirder and more fragile, if this can be imagined. The June ruling of the US Supreme Court, refusing to hear an appeal by the government of Argentina against a decision of a lower court on a case relating to its debt restructuring agreement with creditors around a decade ago, was not just a blow against the state and people of Argentina. It has the potential to undermine the entire system of cross-border debt that underlies global capitalism today.

The case has its origins in the 1990s, when the government of Carlos Menem fixed the Argentine peso at the value of one US dollar, through a currency board arrangement that restricted base money supply to the amount of external reserves and sought to increase its spending through the build-up of external debt. This was obviously an unsustainable strategy, which exploded in a financial crisis in 2001, bringing on a major devaluation of the currency and a default on around $100 billion of external debt.

In 2005, the government of Nestor Kirchner, which had then managed to revive the economy to some extent, offered its creditors debt swaps that significantly restructured the debts. Since Argentine bonds were anyway trading at a fraction of their face value in the secondary market, this deal, which reduced the value of the debt by nearly 75%, was acceptable to most of the multinational banks and other creditors. (Since unpaid interest is added on to the principal and compounded, the actual face value of the debt in such cases is typically much more than the amount originally borrowed or lent out.) Indeed, creditors holding 93% of government bonds participated in the debt swaps of 2005 and 2010.

However, a tiny minority of creditors held out and refused to accept the negotiated settlement. These then sold their holdings to hedge funds. The particular funds that take on distressed assets in the hope of recouping a higher value from them are also known as 'vulture funds'. But it has been pointed out that this gives vultures a bad name, since real vultures actually contribute to their ecosystem rather than destroy it!

One of the most prominent of these funds in the Argentine case is NML Capital, a subsidiary of Elliott Capital Management, which is run by US billionaire and major Republican Party donor Paul Singer. This fund has a history of using aggressive tactics to force struggling sovereign debtors to pay the full value of debts that have already been deeply discounted by the market. In the past, it has successfully sued the governments of Peru and the Democratic Republic of the Congo.

Ever since it bought Argentine bonds at around 20% of the face value in 2008, it has been pursuing the case both legally and physically. In 2012, it hired mercenaries to detain and try to seize an Argentine ship where it was docked off the coast of Ghana; at another time it even attempted to grab the Argentina Presidential plane from an airport – as 'collateral' for its supposed holding of debt. Legally, NML Capital and another vulture fund, Aurelius Capital Management LP, have been pursuing a case in a New York district court demanding full payment on their debt, of the value of around $1.5 billion. It has been estimated by the Argentine government that this could amount to a return of more than 1,600% on the initial investment made by these vulture funds.

Devastating decision

In 2012, US District Judge in New York Thomas Griesa ruled in favour of the hedge funds, which was both extraordinary in law and devastating in its potential implications not just for Argentina but for finance in general. The Argentine government appealed against it, but this appeal has now been dismissed by the US Supreme Court.

Consider just some elements of this US court decision. First, it is based on a peculiar and unprecedented interpretation of the *pari passu* (equal treatment) clause, which holds that all bondholders must be treated alike. The courts have interpreted this to mean that a sovereign debtor must make full payment on a defaulted claim if it makes any payments on restructured bonds. So if the bondholders who agreed to restructure 93% of the Argentine debt are being paid according to their agreement, then the other, resisting bondholders must also be paid the full value of their debts!

The immediate effect of this would be to disable Argentina from repaying $832 million of debt to other bondholders (who have already received around 90% of their debt) unless it also pays the holdouts in full, thereby forcing the country into technical default. Economy Minister Axel Kicillof noted in a speech to the United Nations that this contradicts Argentina's own laws and its clear agreements with creditors in the restructuring process that it would not treat other creditors differently. An official statement from the Argentine government called this judgement 'senseless and unheard of', and pointed out that by attempting to block the payment, the judge 'has abused his power and gone outside of his jurisdiction because the holders of restructured bonds are not the object of this litigation'.

This is effectively leaving the country no choice but default on its other legal obligations. 'Not paying while having the resources and forcing a voluntary default is something that is not contemplated in Argentine law. It would be a clear violation of the debt prospects,' Kicillof has said.

Systemic implications

This absurd interpretation of the *pari passu* clause does indeed have systemic implications. It effectively makes a mockery of all debt renegotiation agreements, since there would be no incentive for any creditor to accept less than full value of the debt if some other creditor will be paid in full. It is therefore also in contradiction to the United States' own bankruptcy laws under Chapter 9 and Chapter 11. Indeed, bankruptcy laws are in place in most market economies precisely to ensure that there can be an orderly workout when debts cannot be repaid in full.

There is a reason for this. No credit system can function or has ever functioned with zero default. This possibility of default is embedded into credit contracts through the interest rate, with interest rate spreads operating as the market estimate of the probability of a default. So those who are seen as less likely to be able to repay are forced to pay higher interest rates, in both formal and informal credit transactions. A creditor who has been demanding and receiving a higher interest rate based on this probability cannot then demand full repayment as a right, since the contract reflected that very likelihood. So the ruling actually negates the basic principles upon which all credit markets function. This is one reason why even columnist Martin Wolf of the *Financial Times* described this case as 'extortion backed by the US judiciary' (*Financial Times*, 24 June 2014).

The US court rulings go further, saying that any third party – including banks facilitating such transactions – that attempts to pay these bondholders would be held in contempt of court. Judge Griesa even ruled that a payment by Argentina to holders of a euro-denominated restructured bond was also illegal, even though that particular bond is denominated under English law and not under US jurisdiction.

Another extraordinary feature of the court judgement is the requirement that banks involved in handling the payments made to Argentine bondholders must turn over information to holdout bondholders on all the assets that the Argentine government holds worldwide. This is a major violation of banking secrecy laws everywhere, including in the United States. Even Justice Ruth Bader Ginsburg, a member in the Supreme Court's group of justices deciding the case, was constrained to ask: 'By what authorisation does a court in the United States become a "clearinghouse for information" about any and all property held by Argentina abroad?' A press release from UN development body UNCTAD noted that this also severely erodes sovereign immunity, which can even have adverse effects on the US and may be illegal under other US laws.

It is no surprise that even the International Monetary Fund (IMF) has expressed concern over the systemic implications of this on the operation of financial markets. The ripple effects of this judgment are likely to be felt for some time, affecting new (and inevitable) cases of restructuring of sovereign debt. There are unknown but probably vast amounts of sovereign debt that is not governed by collective action clauses, and even such clauses cannot function if 25% of creditors choose to hold out. Inability to enforce orderly restructuring is a recipe for the seizure or inaction of credit markets. Certainly it is an outcome that the already fragile global financial system can ill afford.

The obvious requirement is to move towards some internationally recognised system of debt restructuring, possibly along the lines of Chapter 9 bankruptcy laws in the US that govern municipalities, or similar arrangements that recognise and give primacy to the rights of citizens rather than only creditors. This is also recognised by the private financial sector. The International Capital Market Association – an association of banks, investors and debt issuers – has suggested guidelines that would bind all investors to decisions agreed by the majority and a more equitable interpretation of the *pari passu* clause.

In this context, a recent resolution of the UN General Assembly to work 'towards the establishment of a multilateral legal framework for sovereign debt restructuring processes' is an important first step that is greatly to be welcomed. It is to be hoped that this would concentrate the minds of those involved in governing global economic and financial relations, to make such processes more secure and viable.

But the vote on the resolution exposed unfortunate rifts across countries as well as the continuing power of finance in shaping the policies of governments in the developed world. At one level the mandate was clear, as the vote was overwhelmingly supportive of the resolution: 124 countries voted in favour compared to 11 against and 41 abstentions. But it was essentially approved with the votes of developing countries, while the 'no' votes included the US, Japan, Germany and the UK – the centres of global finance that are home to both major transnational banks and vulture hedge funds. The remaining European Union members abstained – even though several have already themselves benefited from a more pragmatic and flexible system to write down the value of their outstanding sovereign debt. It is time that such governments realised that it is contrary to their own self-interest to keep promoting the interests of a few rapacious financiers at the expense of financial stability. ◆

Jayati Ghosh is an economics professor at Jawaharlal Nehru University in New Delhi.

Argentina takes on pirates and vultures

Dan Beeton says that in the current battle between Argentina and the vulture funds, the world waits to see whether the ruthless world of Wall Street piracy or sanity will prevail.

THE sailors drew their weapons as the men in uniform approached the ship. The vessel, an Argentine warship named the *Libertad*, would not be allowed to leave the Ghanaian port where it had docked, the men – Ghanaian authorities – warned; the ship itself was being claimed as collateral by a foreign power across the sea. As the news reached Argentina, it was met with shock and outrage. The foreign power – a man named Paul Singer – demanded $20 million from Argentina for the ship's release.

Was this an act of international piracy? Argentina's economy minister and some commentators alluded to it as such. It was 2 October 2012, and it was the latest manoeuvre by billionaire hedge fund manager Singer and his NML Capital fund to seize assets held by the Argentine government. It would be two-and-a-half months before the fate of the *Libertad* would be resolved and the United Nations' International Tribunal for the Law of the Sea ordered that it be released.

The Argentine naval vessel *Libertad* being held in a Ghanaian port in October 2012 as part of an effort by a hedge fund to seize assets held by the Argentine government. The ship was eventually released.

When the *Libertad* returned home, a defiant Cristina Kirchner, the Argentine president, proclaimed, 'These "vulture" funds [hedge funds] that tried to take our *Libertad* ship, this is the 28th extortion they've attempted. They're the product of this global crisis that can be defined as "anarchist capitalism" where there are no global rules and only the lobby of the most powerful is in the right.'

A year-and-a-half later, it appears that Kirchner was correct: might makes right in the financial world, and billionaires can potentially wield more power than countries. This is the opinion of many, if not most, analysts and commentators following the 2012 ruling by a US District Court judge in favour of NML Capital and other holdout investors, which was subsequently upheld in June this year when the US Supreme Court declined to hear Argentina's appeal.

Argentina's long battle with these 'vulture funds' tracks the history of the country's emergence from an economic depression and ruin into a dynamic economy with growth and poverty reduction that was among the most successful in the hemisphere over the past 12 years.

For years in the 1990s Argentina was the poster-child for 'Washington Consensus' neoliberal economic policies. It had tamed inflation and pegged its currency to the US dollar in what the Toronto *Globe and Mail* noted was 'widely viewed as a masterstroke'. In 1997, International Monetary Fund (IMF) Managing Director Michel Camdessus praised Argentina for 'reducing state intervention in the economy', and implementing policies that would allow 'high-quality growth of the kind that will be genuinely sustainable over the long term'. It seemed to be a model for other middle- and lower-income countries to consider emulating.

Then it all collapsed. The currency's peg to the US dollar became unsustainable, and a recession that began in mid-1998 turned into a depression. In December of 2001 there were riotous protests in the streets as Argentina was forced to default on its debt. The following month it would break its currency peg to the dollar, and the Argentine peso plummeted in value. Poverty spiked to almost 50% and unemployment passed 20%. Stories appeared in the press of desperately hungry people hunting down cats, dogs, horses and rats for food.

Argentina was forced to default on $100 billion of debt owed to private creditors. The government threatened to default to the IMF as well (and even briefly did, in 2003), and announced it would pursue alternative policies to the ones that the Fund was pressing on it. Venezuela would later loan billions to Argentina, and offered more so that Argentina could escape dependence on the Fund. But in 2002, the IMF, the business press and much of the economics profession predicted that Argentina's troubles were just beginning. They would turn out to be wrong.

Even though its access to international financial markets was now limited, Argentina was unrestrained by 'Washington Consensus' policy dictates and was free to pursue remedies that would result in robust economic recovery. The economy began to grow, ending the depression just three months after the default. Argentina was able to reach its pre-recession level of GDP within three years, and led South America in economic growth over most of the next decade. And by breaking with the IMF, Argentina broke the power of the IMF; Argentina showed that it could stand up to the Fund and get away with it.

'The fact that Argentina's break with the IMF and its policies was key to the country's economic success also has implications for other countries,' Mark Weisbrot, the Co-Director of the Center for Economic and Policy Research (CEPR), has noted. In the years following, Bolivia, Brazil, Venezuela and others would also end their obligations to the Fund and forgo IMF agreements. By 2007, before the global recession hit, the IMF's total loan portfolio was down to just $20 billion from $96 billion three years before, and most of that $20 billion was loaned to Turkey and Pakistan.

Argentina's success story resulted from policy choices, not from a commodities boom, as has often been described by the press. As the Center for Economic and Policy Research described in a 2011 report, after Argentina broke with the Fund, social spending tripled in real (inflation-adjusted) terms. Employment as a percentage of the labour force rose to a record high 55.7% by 2010. Real wages increased by over 40% in five years. Poverty was reduced by over two-thirds, and inequality declined significantly.

In order to do all this, however, default was necessary. Argentina could not both service its debt and address urgent social needs in the wake of the recession and financial crisis. After years of negotiation, the government struck a deal with the great majority – about three-fourths – of its creditors in 2005; by 2010 more than 92% of creditors had reached an agreement for debt restructuring. But Paul Singer and NML Capital, who bought up shares of debt in 2008, apparently never intended to reach any deal. Whereas the great majority of bondholders had lost money, Singer seeks to get a 1,600% return on his bonds.

Judge Thomas Griesa of the US District Court of the Southern District of New York handed Singer a victory by ruling that Argentina must pay NML Capital and other holdouts at the same time as the majority of creditors with whom it had previously worked out an agreement. The *New York Times* reported that Griesa appears not to have understood the complexities of the case, including that some of the debt is denominated in foreign currencies. This time, commentary overwhelmingly supported Argentina. The IMF, France, Brazil and Mexico filed briefs in support of Argentina's appeal to the US Supreme Court (the US government did not, but did so at the previous appellate court). On 31 July, over 120 economists including Nobel laureate Robert Solow, Dani Rodrik and Branko Milanovic sent a letter to the US Congress warning of the ruling's implications not only for Argentina but for the international financial system and the US as a centre of global finance. Countries like Belgium and the UK have laws that would prevent the kind of claims the vultures have made on Argentina; the economists noted that countries may choose to issue their debt on those financial markets in the future, rather than the United States.

Nobel Prize-winning economist Joseph Stiglitz cautioned that 'The vultures have imposed enormous harm on global sovereign debt markets and on those countries whose well-being depends on them, especially in the emerging markets and developing countries.'

But in the end, the US government – which opted not to file in favour of Argentina before the Supreme Court, and apparently prevented the IMF from doing so either – seems to have backed Singer, even over its own interests. For the vultures, the precedent that Griesa's ruling sets could be a big win. As the economic justice network Jubilee USA points out, countries such as Grenada and the Democratic Republic of the Congo may be imperilled more immediately, as they also seek to fend off vulture funds.

The Kirchner administration in Buenos Aires may ultimately also emerge a political victor. The fight has inflamed national sentiments and rallied the public. Axel Kicillof, the telegenic economy minister famous for his Elvis-style sideburns, has emerged on the international stage as a heroic figure championing the Argentine people. Kicillof is perhaps reminiscent of another bold, young economy minister in a different South American country: Ecuador's Rafael Correa, whose public sparring with the World Bank in 2005 helped to launch his political career; he was elected president a year later.

Argentina, the press has reported, is in default following the failure to reach agreement with the vulture funds by a 30 July deadline. But the Argentine government rejects this characterisation: 'Preventing someone from paying is not default,' Kirchner said in a televised address, referring to Argentina's efforts to repay the great majority of bondholders. Meanwhile, the world waits to see whether a single billionaire – empowered by an extremist judge – can hold a country of 41 million people hostage, or whether sanity will prevail. The former would uphold the ruthless world of Wall Street piracy, like a nightmare version of the finance pirates in Monty Python's *The Meaning of Life*. ◆

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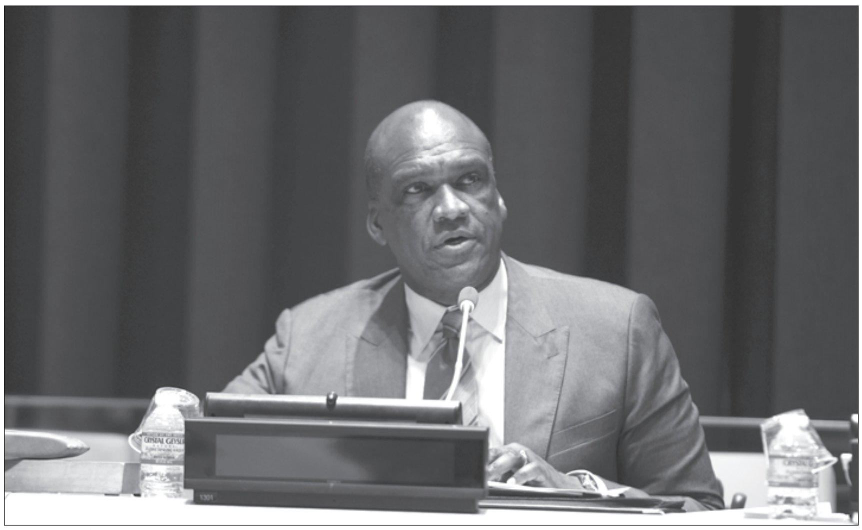
Historic UN vote on a multilateral sovereign debt mechanism

Bhumika Muchhala provides a detailed analysis of the landmark United Nations vote on the establishment of a legal framework for sovereign debt restructuring and highlights the active role played by civil society groups campaigning for such a reform.

THE United Nations General Assembly on 9 September adopted by vote the crucial draft resolution of the Group of 77 and China, 'Towards the establishment of a multilateral legal framework for sovereign debt restructuring processes'.

A majority of 124 countries voted for the resolution, 11 countries voted against it, while 41 countries abstained from a vote. A total of 176 countries out of the UN membership of 193 were present.

The central action of the draft resolution is to: 'Decide to elaborate and adopt through a process of intergovernmental negotiations, as a matter of priority during [the General Assembly's] 69th Session, a multilateral legal framework for sovereign debt restructuring processes with a view to, inter alia, increasing efficiency, stability and predictability of the international financial system as well as achieving sustained, inclusive and equitable economic growth and sustainable development, in accordance with national circumstances and priorities.'



UN Photo/Loey Felipe

The UN General Assembly has adopted a landmark resolution which seeks to establish a multilateral sovereign debt restructuring framework. Picture shows General Assembly President John Ashe announcing the results of the vote on the resolution on 9 September.

The adoption of this resolution is historic due to several key reasons. Firstly, a majority of member states in the General Assembly have voted in the affirmative on one of the most fundamental and longstanding gaps in the international financial architecture, that of a sovereign debt workout framework that is multilateral and that has legal force. The text of the resolution may be read as a proposal that the General Assembly adopt a set of legal principles that should govern all sovereign debt workouts.

The resolution commits the General Assembly to agree on modalities, or the terms and logistics, for commencing open, intergovernmental negotiations on a sovereign debt restructuring framework by the end of 2014.

Subsequently, the resolution commits governments to adopt an outcome on a 'multilateral legal framework for sovereign debt restructuring processes' by the end of the 69th session of the General Assembly (by about September 2015).

The resolution was spearheaded by Argentina in the wake of the now well-known litigation launched by 'vulture fund' holdout creditors which had bought Argentina's debt at a significant discount during the nation's debt restructuring almost a decade ago and are now demanding the full value and interest of the bonds acquired by them.

Vulture fund litigation not only threatens to sabotage the entire sovereign debt restructuring process, but also prevents indebted countries from using precious foreign exchange resources freed up by debt relief for domestic development needs.

As UN human rights expert on foreign debt Juan Pablo Bohoslavsky stated, 'Those who do not participate in a debt restructuring and litigate against the sovereign debtor might get fully repaid, while creditors who accept a "haircut" will see the value of their bonds significantly reduced. Creditors will thus probably be much more reluctant to conclude debt restructuring agreements with sovereign debtors, meaning that debt crises will last longer and become more difficult to resolve, with less predictable outcomes.'

Secondly, the European Union (EU), which usually votes as a bloc, voted on this occasion as separate member states and in sharp division. As had been expected, the United Kingdom and Germany voted against the resolution, as did Ireland, Finland, Hungary and the Czech Republic.

The vast majority of EU member states abstained from voting, which leaves the door open in terms of their national decision to participate in negotiations and discussions with regard to both process and substance. The European countries that abstained were: Italy, France, Sweden, Switzerland, the Netherlands, Spain, Greece, Norway, Portugal, Denmark, Austria, Bosnia and Herzegovina, Bulgaria, Cyprus, Latvia, Lithuania, Luxembourg, Malta, Monaco, Montenegro, Serbia, Slovakia, Slovenia and Ukraine.

Such an explicit division within the EU vote is a unique and significant occurrence, revealing a more complex and fissured political portrait than that presented by the EU in other development finance and global institutions or within the European media itself.

Thirdly, the country grouping JUSCANZ (Japan, the United States, Canada, Australia and New Zealand), which is led by the United States, was also divided. New Zealand abstained from a vote while all the other countries voted against the draft resolution. (Incidentally, New Zealand is running for a seat on the UN Security Council.)

The United States is the only country in the group that explicitly rejected the very prospect of negotiating for a multilateral legal framework. Even Canada and the other states did not explicitly reject intergovernmental negotiations. This reality isolates the United States as the most serious obstacle to ensuring the minimum political space that would allow for intergovernmental discussions to actually take place within the UN.

Almost all developing countries, including the Africa Group countries and the Small Island Developing States (SIDS), voted in favour of the resolution. Countries that were not present included: Ghana, Somalia, Mali, Cameroon, Liberia, Lesotho, Central African Republic, Cambodia, Republic of Macedonia, Micronesia, Marshall Islands, Nauru, Tuvalu and Timor-Leste.

Russia and Azerbaijan voted 'yes' on the resolution.

Out of 193 countries in the UN, 176 showed up and 17 were absent. Several absences, particularly in the case of the SIDS, were due to the SIDS conference in Samoa having concluded just the day before on 8 September.

The strong majority vote implies that a very large number of member states at the UN have agreed to embark on a more ambitious track towards sovereign debt workouts than has previously been taken on by the UN. The very optimal scenario is that the General Assembly will eventually adopt a set of legal principles that should govern any and all sovereign debt workouts.

While a General Assembly resolution is not binding, it is a normative statement to which governments ascribe political priority. The theme of debt restructuring stretches back to the Monterrey Consensus, produced in 2002, which called for exactly such a resolution.

Twelve years later, although wheels are finally in motion in the UN on this significant topic of sovereign debt workouts, the primary challenge will be to ensure that negotiations actually take place to establish a multilateral legal framework.

Debate over UN mandate and procedure

There were two key lines of argument by countries that either voted against the resolution or abstained from the vote.

Firstly, they argued that the very subject of sovereign debt restructuring and sustainability is not within the expertise and purview of the United Nations system. Secondly, a procedural argument, or rather complaint, arose regarding the lack of preparatory and discussion time (and the overall 'mistiming') surrounding the proposal of the draft resolution by Argentina and the Group of 77 chair (Bolivia).

With regard to the first line of offence that the UN is not the appropriate forum for discussions pertaining to the international financial architecture, and that the International Monetary Fund (IMF) or the Group of 20 (G20) bodies are much better suited, this has been the knee-jerk position taken by most developed countries across various discussions in the UN, including that of the General Assembly Second Committee on macro-policy issues as well as within the sustainable development and post-2015 development agenda contexts.

It reflects developed countries' preference for a course of passive discussion and operational inaction in the UN by handing over all authority and mandate to the IMF-World Bank and G20 nexus.

The EU in particular said that its member states have serious concerns on whether a legally binding convention for debt resolution is the best way to deal with the problem. The EU also reasserted its view that the UN General Assembly is not the best forum for dealing with such a 'complicated matter, taking into account, for example, the ongoing work of the IMF, to which the EU is actively contributing'.

However, the Group of 77 and China as a whole, Argentina, Brazil, India, China, Egypt, Indonesia, Jamaica and several other countries in the Africa Group and SIDS group made powerful statements defending the legitimacy and mandate of the UN to act on structural and systemic issues.

These countries stressed that the UN's very charter mandates the institution to discuss and act on all issues pertinent to international cooperation, which include finance and trade.

Furthermore, it is the UN that has the balanced and representative, deliberative body that can advance from broad principles on sovereign debt workouts to a proposed mechanism or process.

Financial system issues such as financial regulation, the international monetary system and, in particular, sovereign debt are at the very centre of various UN conferences, such as the 2002 International Conference on Financing for Development which adopted the Monterrey Consensus, the Doha Conference on the follow-up to the Financing for Development agenda in 2008, and the Conference on the World Financial and Economic Crisis and Its Impact on Development in 2009, to name a few.

The General Assembly's Second Committee negotiates a resolution on debt sustainability which is adopted by the Assembly every year; and the UN Economic and Social Council (ECOSOC) holds an annual conference with the Bretton Woods institutions (viz., the IMF and World Bank) in which sovereign debt is prioritised through the HIPC and MDRI debt relief initiatives.

Various UN documents, such as the Rio+20 outcome document 'The Future We Want' as well as the recently produced outcome on the Sustainable Development Goals, explicitly mention debt restructuring.

The UN has also produced several proposals for effective and fair debt workout mechanisms, most notably in the UN Conference on Trade and Development (UNCTAD) expert group which has been working on principles for a debt workout mechanism (such as legitimacy and impartiality) as well as guidelines for responsible sovereign lending and borrowing.

In addition to UNCTAD, the UN Commission on International Trade Law (UNCITRAL) also has expertise in international insolvency. While it does not currently deal with sovereign insolvencies, it could do so if requested by the General Assembly. UNCITRAL could also make concrete recommendations to the General Assembly, which could be debated in the context of the imminent Financing for Development discussions, at which all relevant stakeholders would be represented and at which governments could be jointly represented by their finance and foreign ministries.

The UN indeed has the expertise, agencies and mandate; it only requires the political will to set the wheels in motion for the formulation and operationalisation of a set of legal principles that could govern all sovereign debt workouts.

On the procedural issue, the narrative of developed countries was that the timeframe for the draft resolution was 'artificial' and 'rushed', with 'not enough time to discuss'.

Norway, which abstained from a vote, said that despite their support for UNCTAD on the work towards a debt restructuring mechanism, the lack of consensus on this resolution ascribed limited value to it.

However, this narrative should be countered by that of the vast majority of countries in the General Assembly, which point out that five informal discussions were held on the draft resolution, during which most developed countries refused to contribute to the talks in a substantive manner.

In the five informal negotiation sessions (that took place in August 2014), several ambassadors from Group of 77 member states made presentations on the resolution, explaining the purpose and objective of their resolution. The developed countries responded with complete silence, explaining only that they did not have a mandate or directions from their capitals to participate in the discussions.

According to some observers, perhaps the developed countries thought that the Group of 77 was bluffing, just 'making noise' as a political move.

At the very last session, the US said that they did not believe in a statutory approach to sovereign debt restructuring, only a market-led approach. The US elaborated that there was no need for regulation on a statutory level, because collective action clauses and a contractual approach to debt disputes settled in the courts of the country whose laws govern the contract, were enough.

However, it is to be noted that there is no explicit wording for a statutory approach in the resolution.

The said lack of consensus can be countered by the fact that the vast majority of countries, 124 countries out of a total of 193 in the General Assembly, voted for the resolution. While this admittedly does not constitute a consensus, and while countries such as the US, Germany and Japan that voted against the resolution are a significant obstacle, there is some bearing given to the fact that in terms of one nation, one vote, the resolution passed.

Indeed, the fact that only the US explicitly rejected an intergovernmental negotiation on the draft resolution bears repeating, as even the other 10 countries that voted against the resolution seem willing to engage in some type of intergovernmental process going forward.

UN member states speak out

At the General Assembly, the Group of 77 and China delivered a strong statement that asserted full support for their draft resolution, which they said demonstrated their true commitment to build an international financial system where the rules are fair and pro-development, as well as a genuine global partnership to enable developing countries to achieve sustainable development.

They stressed that the lack of a structured mechanism is a major failure of the current international financial architecture, which leads, among others, to long delays in debt restructuring, unfair outcomes and loss of value for both debtors and creditors.

The G77 said that today it is Argentina that is suffering from protracted holdout bondholder litigations, but many developing and developed countries have suffered before from the exact same predatory behaviour, and others will follow if there is no action.

The G77 reminded the General Assembly that for the last decade the Group has been calling for and presenting proposals towards establishing a legal framework for sovereign debt restructuring processes.

The G77 also reinforced, in alignment with their official stance across all UN processes, that the United Nations is the organisation with the central role and legitimacy to deal with development and related issues, including economic and financial affairs, and to decide on the best follow-up and alternatives to meet the needs and challenges of the 21st century.

Brazil, along with several other

developing countries, also stressed that development and finance issues have never been taboo for the General Assembly. The resolution adopted builds on the treatment given to debt issues in annual resolutions within the Second Committee and at the ECOSOC meetings with the Bretton Woods institutions and UNCTAD.

Brazil stressed that as the world's first universal development agenda is being launched, the linkage between debt sustainability and sustainable development becomes increasingly clear. This is precisely why sovereign debt sustainability and restructuring has played a critical role in the means of implementation of the outcome document on Sustainable Development Goals produced by the Open Working Group (and adopted by the General Assembly on 10 September 2014).

Brazil further said that the report of the intergovernmental committee of experts on sustainable development financing also refers to debt restructuring, and stresses the fact that collective action clauses are perceived by many in the international community as insufficient to deal with all sovereign debt restructuring cases.

This process, Brazil highlighted, will hopefully address this gap, with timely support and technical expertise from all organisations within the UN system, especially the IMF, UNCTAD and the UN Department of Economic and Social Affairs (DESA).

Brazil also stressed that they would have liked for this resolution to be adopted by consensus and made a reference to the lack of constructive engagement on the part of the member states that voted against the resolution. In closing, Brazil urged these member states to reconsider their positions during the next General Assembly year.

Academics call for action

Ahead of the General Assembly vote, a letter sent on 25 August by several noted economists, including Nobel laureates Joseph Stiglitz and Robert Solow, to UN Secretary-General Ban Ki-moon encouraged him to support the convening of a meeting to launch a process within the United Nations in order to draft a convention among nations for the restructuring of sovereign debt.

The letter stressed that sovereign debt crises can disrupt development processes in significant ways, and it is widely recognised that there has to be an orderly way of restructuring debts. The letter elaborated that within virtually all countries, mechanisms have been developed for doing this for private debts through bankruptcy laws, which are now seen as a vital part of a market economy. But unfortunately, there is no comparable mechanism for the debts of sovereigns.

Its absence has, for instance, led to the emergence of destabilising speculative behaviour in international debt markets, said the economists in their letter. The consequence is that the ability of countries in distress to resolve debt problems in a timely manner has been seriously compromised.

According to the letter, the importance of this lacuna, with its serious repercussions, has repeatedly been recognised, for instance, by the IMF and by the International Commission of Experts on Reforms of the International Monetary and Financial System appointed by the President of the UN General Assembly. The 2009 report of that Commission (in particular Chapter 4), which was endorsed by the UN Conference on the World Financial and Economic Crisis and Its Impact on Development, called upon states to 'explore enhanced approaches to the restructuring of sovereign debt ...'.

The report was also taken up by Resolution 65/143 adopted by the 65th session of the General Assembly on 20 December 2010. The resolution recognised the 'urgent need to enhance the coherence, governance and consistency of the international monetary and financial systems' and reaffirmed 'that the United Nations is well positioned to participate in various reform processes aimed at improving and strengthening the effective functioning of the international financial system and architecture'.

Another letter from a wider coalition of progressive economists and academics called for the creation of a sovereign debt workout mechanism.

The letter, sent to EU policymakers, stated that proposals for a sovereign debt workout mechanism have been around for more than a century, with renewed emphasis since the beginning of the 'third world debt crisis' in 1982.

Throughout this history, the letter said, governments have repeated that it is not the right moment for a reform. However, it has become clear that cyclical debt crises will continue, for which the world will pay a high price in terms of deepening social and economic polarisation through adjustment matters and unnecessarily high losses to investors, which are the unavoidable consequence of a delayed insolvency filing.

The academics made an explicit call for decision-makers to create a reliable, rule-of-law-based mechanism for sovereign insolvency under the auspices of an institution that is neither debtor nor creditor. They also offered their support in the design of such a mechanism.

Civil society mobilises pressure and UN rights expert weighs in

In the run-up to the General Assembly vote, the civil society organisations of the European Network on Debt and Development (Eurodad) sent a joint letter to the EU missions to the UN in New York as well as to each member state's ministries of finance and foreign affairs.

The letter stated that European civil society expected European governments to contribute constructively to promoting the necessary reforms and vote in favour of the draft UN resolution on debt restructuring. With several decades of experience in promoting just solutions for debt crises, European civil society also stood ready to continue a dialogue with governments and international organisations, and contribute constructively to the modelling of a convention on sovereign debt restructuring.

Eurodad's letter further elaborated that when endorsing the Monterrey Consensus more than 10 years ago, all European nations committed 'to consider an international debt workout mechanism ... to restructure unsustainable debts in a timely and efficient manner'. The failure to implement this commitment had caused or aggravated many avoidable debt crises over the past decade and led to unnecessary economic costs, welfare losses and human suffering. In the wake of the recent financial and economic crisis of 2007, European nations had also borne these costs of debt crises. 'Implementation is overdue. It is time for the international community to move from rhetoric to reality.'

On 4 September, the Jubilee USA network on sovereign debt issues also sent a letter to the US Ambassador to the United Nations, Samantha Power, urging the US to vote in favour of the resolution.

The letter noted that the draft resolution was supported by a number of countries that traditionally failed to caucus in debt negotiations or utilise transparent lending and borrowing practices. With passage of the resolution, the intergovernmental process in the UN had the ability to bring these countries to the table to discuss responsible lending and borrowing.

The Jubilee USA network expressed awareness of the concerns of the US as to which forum such a process should operate within, and believed the favourable vote and active participation of the US would serve to help resolve these concerns.

Meanwhile, UN human rights expert on foreign debt, Juan Pablo Bohoslavsky, has said that international human rights law should inform discussions about a multilateral legal framework on sovereign debt restructuring from its inception.

Bohoslavsky was appointed by the UN Human Rights Council in May as 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.

He stated that an international legal framework should be seen as complementary to existing UN Guiding Principles on Foreign Debt and Human Rights and on Business and Human Rights, to national legislation limiting vulture fund litigation, and to collective action clauses in sovereign bonds. It would promote more responsible financial behaviour and more orderly, timely and speedy debt restructuring processes.

Bohoslavsky underlined that building broad international consensus around this initiative is crucial and should include all relevant stakeholders, sovereign debtors, multilateral lenders, private financial business and civil society organisations.

Argentina passes important new law

Meanwhile, Argentina continues to persist onward in the now landmark lawsuit against it by the vulture funds, the outcome of which has profound systemic implications for the international financial system.

The US Supreme Court issued a ruling in June declining to hear Argentina's appeal – which was supported by global financial institutions, the UN, various sovereign states and the US Executive itself – and ordering instead that Argentina pay the suing hedge funds $1.33 billion (constituting principal plus interest for holdout bonds).

This was followed by another Supreme Court decision to order the relevant financial institutions, primarily banks, in the US to turn over information to these hedge funds about assets that Argentina holds worldwide, including accounts held by entities of the Government of Argentina and by individual officials.

These rulings resonate well beyond the borders of Argentina and the US. They are in effect a resounding victory for hedge funds to encroach on indebted countries and deepen their financial distress to breaking point. Most critically, the rulings set legal precedents that explicitly favour the predatory and destructive behaviour of vulture funds.

However, on 11 September, the Argentine media reported that the country's lower house of Congress passed a new law that allows for a change in the payment jurisdiction for the nation's bondholders (a majority 93%) who had agreed to the debt swaps of 2005 and 2010, and creates a separate account where payment will be deposited for the 7% of bondholders who did not agree to the swaps. The law also creates a parliamentary commission to investigate and audit the origins of Argentina's foreign debt.

The law, which was passed with 134 votes for, 99 against and 5 abstentions, is explained by the nation's economic experts as an alternative mechanism to open new channels of payment. It is also a response to the situation in which Argentina has found itself, where its agreed-upon debt restructuring was disrupted by the US court ruling, which has prevented the nation from processing the repayments to creditors that it is obliged to undertake and is fiscally able to undertake as well.

With broad support from both government representatives and allies in Buenos Aires, this new law appears to have the potential to improve the rather dire state of affairs in the nation's sovereign debt saga. Furthermore, sovereign debt audits have the potential to identify illegitimate and odious debt, as opposed to legitimate debt.

As for the next steps forward within the United Nations, the real work will start when the intergovernmental negotiations begin. The constructive and active participation of the developed countries, specifically those 11 countries that voted against the resolution, in particular the United States, will be the ultimate challenge. ◆

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A small step, but a step nonetheless, towards international sovereign debt reform

Barry Herman cautions that while the UN resolution is a step forward in the fight for an international debt restructuring mechanism, realisation of the goal will still face resistance from member states opposed to it. He suggests how despite this, a positive outcome can be achieved.

THE United Nations General Assembly adopted a resolution on 9 September aimed at reforming the process for sovereign debt 'workouts', which the international community applies after countries trip (or are tripped) and fall into debt crises. Many commentators see that resolution as path-breaking. Unfortunately, it is only just a delicate opportunity for real reform, but it is an opportunity nevertheless. The resolution had and presumably still has enemies among governments at the UN that can prevent it from leading to actual policy change. However, it may be possible to win those governments to the side of discussing reform or at least expressing neutrality rather than full-blown opposition. This requires a bit of explaining.

'There seems to be sufficient dissatisfaction around the world with how sovereign debt crises are handled that an international reform initiative might gain enough support to lift off the ground.'

General Assembly resolution 68/304

The resolution, titled 'Towards the establishment of a multilateral legal framework for sovereign debt restructuring processes', has two operative paragraphs at its end that embody the new commitment:

'The General Assembly…

'5. Decides to elaborate and adopt through a process of intergovernmental negotiations, as a matter of priority during its sixty-ninth session, a multilateral legal framework for sovereign debt restructuring processes with a view, inter alia, to increasing the efficiency, stability and predictability of the international financial system and achieving sustained, inclusive and equitable economic growth and sustainable development, in accordance with national circumstances and priorities;

'6. Also decides to define the modalities for the intergovernmental negotiations and the adoption of the text of the multilateral legal framework at the main part of its sixty-ninth session, before the end of 2014.'

In other words, the General Assembly agrees to negotiate and adopt a 'legal framework' that could be applied to the processes (note the word is plural in the resolution) that govern – or should govern – how sovereign debt crises are resolved. This work is to be carried out during the Assembly's 69th session, which runs from mid-September 2014 to mid-September 2015. Before the end of 2014, however, the Assembly should define how it intends to carry out this task, i.e., it should 'define the modalities for the intergovernmental negotiations and the adoption of the text'.

By September 2015, according to the resolution, the Assembly should have agreed on a text for a legal framework. The Assembly usually adopts a text by agreeing to it as a resolution. An Assembly resolution is not legally binding but rather a normative statement to which governments give more or less political standing, depending on its content and degree of political support underlying the formal wording of the text.

A more consequential outcome would be to agree to transfer the discussion to a treaty negotiation process wherein the framework would be adopted as the main part of a 'convention', which would also specify how it would come into force. On completion of the negotiations, senior representatives of member states intending to adopt the convention sign it but it then has to be ratified by each of the governments. It only comes into force when the requisite number of countries specified in the convention has completed ratification. Notably, the first draft of what became resolution 68/304 would have had the Assembly 'express its determination to adopt a multilateral convention establishing a legal regulatory framework for sovereign debt restructuring processes'. The resolution that was finally adopted has a more modest goal. The Assembly could return to the idea of formulating a convention, but that appears unlikely for the time being.

Nevertheless, a consensus resolution on a debt crisis resolution framework could be accorded a high political standing, as it would *ipso facto* represent the shared view of the global community. The member states of the Group of 77 (G77) and China, the developing-country caucus at the UN, have enough votes to adopt any resolution. However, a voted resolution would be understood to reflect only the views of the Group. Resolution 68/304 was a case in point, as it was adopted by a vote of 124 in favour, 11 opposed and 41 abstentions. On the other hand, developed countries did not vote 'no' as a block, as witnessed by the numbers abstaining. In other words, there is a group of countries outside the G77 that might be willing to pursue the initiative after further discussion and it remains to be seen how firm the opposition is among the 'no' votes. Building to a consensus is the central challenge facing proponents of the resolution.

It is also important to note that the resolution does not call for establishment of an international 'mechanism' for sovereign debt workouts. In particular, it does not call for a 'statutory regime' to replace the current largely market-based regime for restructuring debts owed to private creditors, although this is how the representative of the United States (Terri Robl) read the text of the resolution (as per UN Department of Public Information, meetings coverage release, GA/11542, 9 September 2014). The resolution does not call for a court for insolvent sovereigns or an arbitration panel or even a mediation service. It just calls for a legal framework. That would be an intermediate step towards a different way to resolve sovereign debt crises. For that reason, perhaps it is an attainable step.

The resolution does not specify what is meant by a 'legal framework'. It acknowledges that a 'sound' one does not currently exist and is needed to facilitate the 'orderly restructuring of sovereign debts' so as to allow 'the re-establishment of viability and growth'. It should not 'inadvertently increase the risk of non-compliance' of creditors with the terms of a debt restructuring and it should deter 'disruptive litigation that creditors could engage in during negotiations to restructure sovereign debts'.

There is a reflection here of the recent Argentine difficulties with non-compliant bondholders who have pursued disruptive litigation against Argentina. In fact, an approach exists today to reduce the risk of non-compliance by holders of sovereign bonds that was not commonly in use when Argentina issued the bonds that are at the centre of its current conflict with a group of speculative hedge funds. The new approach is embedded in the 'small print' or 'boilerplate' terms of the bond contract. It specifies what majority of bondholders is needed to approve a change in the bond's financial terms. When that majority (typically 75%) agrees, the minority is legally required to accept the proposed change. Moreover, in addition to such 'collective action clauses' (CACs) in individual bond issues, it is now conventional to specify in a bond contract that if a specified majority of all the holders summed over all outstanding different issues of similar bonds approves a change, then the rejecting bondholders are forced to accept the change even if they own a majority of one or more issues and could otherwise reject the change on an individual issue basis. This is called an 'aggregation clause'.

Over time, the specifications of standard CACs and aggregation clauses have been revised to strengthen them so as to more effectively deter speculative efforts to undermine bond restructurings. However, CACs and aggregation clauses are not all that is at stake. Firstly, this approach applies only to bond restructuring and not to arrangements with official and other private creditors besides bondholders, whose repayment schedules may also need to be adjusted. Secondly, it pertains to only one aspect of a bond workout, namely getting the bondholders to agree to a restructuring of their bonds, usually meaning accepting the necessity to take a loss (a 'haircut' in the jargon of Wall Street). Thus, adoption of an internationally agreed legal framework that applies across all types of creditors and that takes into account the imperative to 're-establish viability and growth' would certainly be a global policy advance.

Argentina's leadership

The Argentine government took the initiative to formulate and win adoption of resolution 68/304. Indeed, Argentina's Foreign Minister, Héctor Timerman, was present when the Assembly voted to adopt it. It is fair to ask: why this? Why now? One good hypothesis is that it was a response to a series of adverse decisions in US courts that overturned certain accepted legal principles under which the sovereign bonds of Argentina and other countries have been restructured for decades.

To understand this, one needs to note that, even though sovereign governments have special immunities in the courts of foreign countries, they can be sued in those courts in a restricted range of cases. Within that range, private creditors of a foreign government can sue for repayment on the grounds that the terms of a loan contract had been violated. As many of Argentina's bonds on which it had to default at the end of 2001 had been issued under New York law, bondholders could sue Argentina in the US courts.

In fact, most bondholders do not sue as it is costly in terms of legal expenses and uncertain outcomes.

They accept that the insolvent government will seek to 'cure' its default as it is a prerequisite to returning to the market to borrow again, which it ultimately will want to do, if for no other reason than to roll over maturing debt instead of just paying it off. The bondholders also appreciate that, by definition, an insolvent government cannot honour all its payment obligations. As with all other creditors of an insolvent government, the bondholders will seek the best deal they can get, accepting that they may have to take less than what they are owed.

And so it was with Argentina. By 2010, 93% of its bondholders had swapped their defaulted bonds for new ones of lower value but with greater confidence that Argentina would make all payments on a timely basis, which it has done. Nevertheless, a few investors took another approach. After a default (or even before, if default is anticipated), bonds trade on financial markets at a small fraction of their face value. Many bondholders do not want to wait for the debt workout and are willing to sell them for a small percentage of their face value to be free to use those funds in other investments. The buyers are speculative investors. Most expect that when a new bond is offered in exchange for the defaulted bond, its face value will be higher than the price they paid for the defaulted bond and they then accept the swap. A few of the investors follow a different strategy. They try to collect the full face value of the original bonds through the courts; indeed, the speculators know that country will be better able to fully honour those old bonds once the majority of bondholders have accepted much-reduced claims on the sovereign government. This is what happened with some of Argentina's defaulted bonds.

In fact, the US courts have been quite sympathetic to the claims of bondholders and other creditors. They usually decide that the defaulting government should pay the speculators the face value of the bonds and all past due interest. However, getting a judgment against a government is not the same as collecting the money. The court will not allow the speculators to attach property that is part of the official functioning of the foreign government in the country, such as an embassy. However, if the government engages in 'commercial' activity, the creditors can seize commercial property when it is within the jurisdiction of the court or a friendly third country; e.g., if the government owns an airline, the speculators can attach it when it lands in their country. Argentina had privatised most of its commercial activities in the 1990s and so this route was not available for collecting what the court approved.

Giving the speculators a way to collect on judgments in their favour is where the US courts made their surprising reinterpretation of contract law. A standard clause in sovereign bond contracts is *pari passu*, which means 'equal footing' and is interpreted to mean that all the bondholders would be treated equally. It has long been understood that all the bondholders would thus have equal standing or equal priority in receiving payments from the borrower. NML Capital, the lead protagonist against Argentina, argued that *pari passu* meant that Argentina was obligated to pay all its current obligations to all its bondholders equally. The US court had said Argentina needed to pay the full face value and accumulated interest on the old bonds owned by NML Capital. The firm thus argued that the next time Argentina made its regular interest payment to its current bondholders (an unprotected commercial activity as interpreted by the courts), it would also have to fully pay NML.

This was a new interpretation of *pari passu* and the huge surprise was that the District Court accepted it, as did the Court of Appeals and as did the US Supreme Court, at least implicitly, as it declined to put Argentina's appeal on its docket. Argentina dutifully transferred the funds for its regular interest payment ($539 million) to Bank of New York Mellon to forward to each of its current bondholders; however, the District Court judge refused to allow that payment to be made without also paying the speculators. Argentina refused. As the interest due was thus not paid, Argentina was forced into a formal condition of default on its bonds at the end of July.

This reinterpretation of *pari passu* was so ludicrous that every sane legal authority knows it cannot be allowed to stand as a precedent and should not have been enforced on Argentina. Even the US government wrote an amicus curiae brief for Argentina, albeit at the appeals court stage. Several governments wrote amicus briefs at the Supreme Court stage, including France and Brazil. And the International Capital Market Association responded in August when it issued suggested new standard bond documentation which would make it explicit that *pari passu* means what everyone always understood it to mean and does not mean what the US judge said it meant.

Of course, it will take some 20 years for sovereigns to replace their maturing bonds with new ones having the proper interpretation of *pari passu*. In fact, the sad reality is that the vulture funds are very patient and usually collect their money in the end. They may do so again with Argentina after certain legislation expires at the end of the year. It has been one factor that prevented settlement thus far since it would require giving all Argentina's other bondholders the same deal as it gives the 'vultures'. It cannot afford that.

Nobody likes the vulture funds. Their 'winnings' come at the expense of the other bondholders as well as the debtor country. However, it is my understanding that many institutional investors (and probably rich individuals as well) from developed and developing countries gladly give them the money to pursue their financial strategies. The Argentina case has apparently been great advertising for this business [they probably also made money shorting Argentine bonds and collecting on credit default swaps (a kind of insurance) when the bond interest payment deadline passed end July].

This is too much. If not by international agreement at the UN, the international community should be able at the very least to stop future financial vultures through national legislation in the major capital market countries. After all, previous cases led to legislation to block further cases of the same type. In particular, Elliott Associates (the owners of NML Capital) collected on some Peruvian bank debt through Euroclear in Brussels in the 1990s, after which the Belgian Parliament adopted legislation to prevent misuse of Euroclear for this purpose again. Also, after Donegal International collected in the British courts in 2007 on some defaulted Zambian export credits that Romania sold them, the British Parliament adopted legislation to limit what a vulture fund could take home from a country that participated in the Heavily Indebted Poor Countries initiative, an internationally agreed process for comprehensive debt relief for a selected list of countries.

As most international sovereign bonds are issued in New York and London under their respective laws, should not those governments at least agree to propose legislation to their legislatures to outlaw vulture fund adventures against insolvent sovereigns? The argument could be, if you oppose the Argentine initiative at the UN to begin to collectively address a missing piece of the international financial architecture, at least take action at national level to stop vulture investors from interfering with debtor governments and their cooperating creditors.

A possible positive outcome

In fact, there seems to be sufficient dissatisfaction around the world with how sovereign debt crises are handled that an international reform initiative might gain enough support to lift off the ground. There is a sense in the International Monetary Fund (IMF), especially in the light of the Greek debt restructuring experience, that existing practices are not adequate and consideration of policy changes has been underway by the staff and in the intergovernmental Executive Board for over two years. In addition, multistakeholder meetings organised by the Financing for Development Office of the UN Department of Economic and Social Affairs, including in partnership with the Bank of England, have found considerable unease in the financial and academic communities as regards practices used for resolving sovereign insolvencies in developmentally and socially appropriate ways (see http://www.un.org/esa/ffd/msc/externaldebt/index.htm).

Moreover, the Norwegian government has supported the effort of a working group of experts at the United Nations Conference on Trade and Development (UNCTAD) that has engaged in a discussion of improvements in debt workouts. The working group has not offered any pre-elaborated proposals or solution, but has been drafting a set of principles that a debt workout mechanism should embody; e.g., it agreed at its last meeting that the principles of legitimacy and impartiality are important for a debt workout mechanism. Other principles discussed at earlier expert group sessions included efficiency, sustainability, transparency, ownership, fulfilling human rights obligations and providing adequate social protection (for details, see http://www.unctad.info/en/Debt-Portal/Project-Promoting-Responsible-Sovereign-Lending-and-Borrowing/About-the-Project/Debt-Workout-Mechanism/).

It is sometimes said that despite high-quality work in the secretariats of the United Nations, the UN is not the proper intergovernmental forum for addressing financial policy issues, including debt resolution policies. The people who make that argument generally point to the IMF as the proper forum, where indeed work is underway, as noted above. However, there is considerable and relevant intergovernmental and staff expertise at the United Nations for addressing sovereign insolvency. That is, the UN hosts a well-regarded intergovernmental forum on international insolvency at UNCITRAL, the United Nations Commission on International Trade Law. Working Group V of UNCITRAL is on insolvency law. It does not address sovereign insolvencies, however, but cross-border matters in mainly corporate bankruptcy. But it could address sovereign insolvency if the General Assembly requested it to do so (as per the personal opinion expressed to this author in the early 2000s by Jernej Sekolec, then the Secretary of UNCITRAL, now retired).

This suggests a possible strategy to improve debt workouts through the United Nations. While resolution 68/304 calls upon the General Assembly to specify a legal framework for resolving sovereign debt crises, it is doubtful that a consensus over a precise legal framework can be reached in the time available for negotiation before September 2015, especially in light of the lack of consensus over the enabling resolution itself. Recalling that an Assembly resolution that is adopted by vote has little effective international standing, the challenge is to gather in all member states at the UN to work together to reach a consensus text that reflects shared political priorities, which do exist.

A solution might thus be for the Assembly to adopt in 2015 by consensus and for further consideration a draft set of principles at a fairly broad level of generality, such as are being suggested in the UNCTAD working group. Although not itself a satisfying end point for discussion of debt policy reform, perhaps the consensus resolution could also request that UNCITRAL review the Assembly's proposed draft principles and devise more precise legal language that could best withstand challenges to their standing (having in mind the story of *pari passu* noted earlier).

UNCITRAL could also be asked to recommend modalities for implementation. Should it be through the drafting of a model law containing the legal framework that countries would then adopt into their domestic legislation, as proposed years ago by Professor Christoph Paulus of Humboldt University in Berlin? Or should it adopt a 'Fair and Transparent Arbitration Process', as advocated by several civil society organisations? Or would a voluntary mediation service be a more acceptable option to the parties involved in a sovereign restructuring, as proposed by the American lawyer Richard Gitlin and recently advocated in a project of the Center for International Governance Innovation in Canada? Or should there be something like a court for governments, as advocated by Jubilee South? Whatever its form, the implementation modality should be guided by the new legal framework. UNCITRAL could be asked to study the implementation options and report its views to the General Assembly, which could request that next steps be debated in a multi-ministerial, multi-institutional and multi-stakeholder follow-up process hosted by the UN, as had been envisaged at the original International Conference on Financing for Development in 2002.

In short, there is fairly wide international recognition that there is a problem and that there are various ways to address it. The international community acknowledged the problem and agreed to address it more than a decade ago when it agreed in the Monterrey Consensus that:

'To promote fair burden-sharing and minimize moral hazard, we would welcome consideration by all relevant stakeholders of an international debt workout mechanism, in the appropriate forums, that will engage debtors and creditors to come together to restructure unsustainable debts in a timely and efficient manner...'

The initiatives discussed at that time did not bear fruit and the problem remains. A new initiative has been launched in the UN. If it is nurtured, positive reform is possible. The international community agreed to a sovereign debt workout process once before, although it was in 1907 in the Hague Treaties, which included an agreement to settle sovereign insolvency through arbitration instead of gunboat diplomacy. More than a century later, Argentina's disappointment has pushed opened the door to reform a crack. A faint breeze begins to come into the room. ◆

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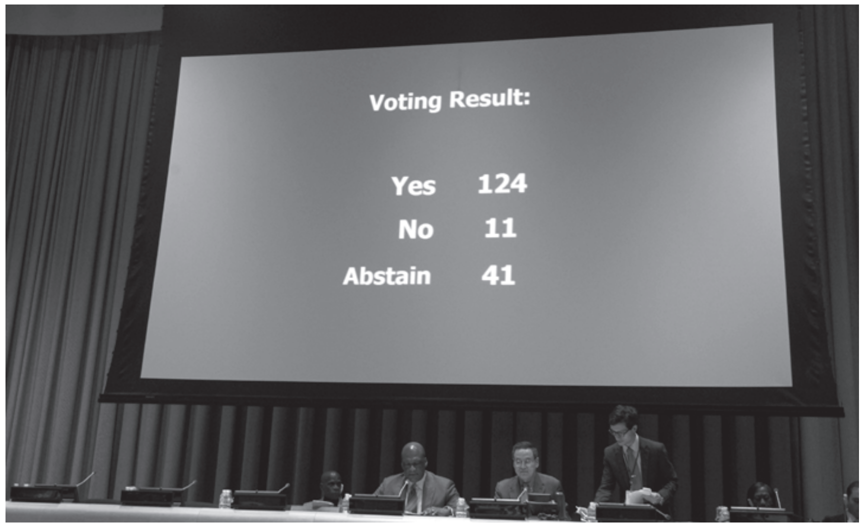
The triumph of perseverance

Oscar Ugarteche reflects on the historic UN resolution to establish a legal framework for sovereign debt restructuring in the context of some earlier proposals for such reform.



UN Photo/Loey Felipe

'The General Assembly resolution is a blow to the dominance by international financial capital of all legal mechanisms related to finance....' Picture shows an electronic display of the vote tally on the resolution at the General Assembly.

THE United Nations General Assembly on 9 September adopted a resolution backed by the G77 and China (made up of more than 130 countries) to work towards creating a multilateral framework for sovereign debt workouts. When all the G7 industrialised countries (Germany, Canada, the US, France, Italy, Japan and the UK) are highly indebted (using a World Bank definition of a debt-GDP ratio of over 100%), this framework might come in handy beyond only the emerging and developing economies. Under the resolution, the framework is to be constructed within a year.

This is a Latin American triumph led by Argentina and proposed by Bolivia as chair of the G77. The resolution was supported by all Latin American countries bar Mexico. Costa Rica and Peru shifted their vote at the last moment. The vote was, however, bad news for European civil society organisations working on debt issues as most of their governments did not support the resolution.

In Latin America, Professors Oscar Ugarteche and Alberto Acosta had proposed a UN-based International Board of Arbitration for Sovereign Debt (published in Spanish in *Polis* in 2006 and in English in the *Finnish Journal of Latin American Studies* in 2007). This feature differentiated their proposal from those put forward in Europe and by the International Monetary Fund (IMF). As of 2000, the world was heading towards a debt crisis and no new mechanisms were visible, as was evident in Argentina in 2001 and Uruguay in 2002.

Professor Anne Krueger, then at the IMF, proposed in 2001 a sovereign debt restructuring mechanism (SDRM) with UN support, as an in-house mechanism. This was killed by the US Treasury in 2002. The reason for the IMF proposal was to prevent contagion of financial crises. The US Treasury was essentially against this idea and John Taylor explains well how Treasury's intervention in Uruguay in August 2002 facilitated their economic recovery (http://web.stanford.edu/~johntayl/Onlinepaperscombinedbyyear/2007/The_2002_Uruguay_Financial_Crisis_Five_Years_Later.pdf). That was the end of the SDRM initiative.

Only after the NML Capital case against Argentina in 2014 – in which a US court ordered that Argentina's holdout creditors be paid in full – did the systemic problem of sovereign debt restructuring become once again the focus of attention. The response was quick to come from the International Capital Market Association (ICMA), the same day the G77 initiative was introduced into the General Assembly for a vote (29 August 2014).

ICMA's proposed reform, backed by the US Treasury, essentially states that the US court ruling on Argentina is wrong. Under the ICMA proposal, 'the Issuer shall have no obligation to effect equal or rateable payment(s) at any time with respect to any such other External Indebtedness and, in particular, shall have no obligation to pay other External Indebtedness at the same time or as a condition of paying sums due on the Notes and vice versa' (http://www.icmagroup.org/resources/Sovereign-Debt-Information/).

Secondly, the proposal lowers new limits for bondholders to enter a negotiation 'which is passed by a majority of: (A) at least 66 2/3% of the aggregate principal amount of the outstanding debt securities of affected series…; and (B) more than 50% of the aggregate principal amount of the outstanding debt securities in each affected series...'. These reforms go in the right direction but not far enough.

The G77 and China have made an inroad into the internationalisation of the court, law and jurisdiction which will be resisted by those who voted against the resolution at the General Assembly: Germany, the UK, the US, Israel, Japan, Australia, Canada, Hungary, the Czech Republic, Ireland and Finland. Those which voted in favour were Brazil, Russia, India, China, South Africa (BRICS) plus Latin America en bloc, Africa en bloc, plus Asia. Abstentions came mainly from the European countries including, notably, France, Greece, Spain and Italy. The French abstention is significant as the Paris Club of official creditors is led by the French Treasury, while debt-ridden countries did not want to scare international financial markets by supporting the initiative. The votes of France, Greece, Spain and Italy could thus be read as France voting against and the other three voting in favour.

The reaction of the US representative, Terri Robl, suggested that they were not expecting the proposal to be presented, least of all to have a majority vote. She said a mechanism (of debt restructuring) was being discussed at the IMF. (The last time, in 2002, the US Treasury blocked it in favour of the market mechanism via the international financial institutions, according to Robl.) The other point she made was that this was going to create economic uncertainty, a point that was not raised in 2002 with the SDRM nor in the recent ICMA debate. No uncertainty arose when the UN Commission on International Trade Law (UNCITRAL) – which looks at issues of insolvency law, among others – was launched. She also stated that in the past, market mechanisms had been preferred, reminding everyone who knew what had happened in 2002.

The General Assembly resolution is a blow to the dominance by international financial capital of all legal mechanisms related to finance and is a wonderful first step towards a global mechanism for global finance. The US government will not be best pleased, but it does not matter – global problems require global solutions, whatever the US State Department and the International Capital Market Association believe. Another world is possible and we are getting there. ◆

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Human Rights Council condemns activities of vulture funds

In a resolution denouncing their activities, the UN Human Rights Council has highlighted the threat that vulture funds pose to the full enjoyment of human rights. *Kanaga Raja* reports.

Argentine Foreign Affairs Minister Hector Timerman, who had introduced the draft resolution on vulture funds at the Human Rights Council, showing the results of the vote to adopt the resolution.

THE UN Human Rights Council on 26 September condemned the activities of vulture funds 'for the direct negative effect that the debt repayment to those funds, under predatory conditions, has on the capacity of Governments to fulfil their human rights obligations, particularly economic, social and cultural rights and the right to development'.

In a resolution (A/HRC/27/L.26) adopted by a vote, the Council requested its Advisory Committee, composed of 18 experts, to prepare a research-based report on the activities of vulture funds and the impact on human rights, and to present a progress report of that research to the Council for its consideration at its 31st session.

The Human Rights Council held its regular 27th session from 8-26 September.

The resolution on the activities of vulture funds was adopted by a vote of 33 in favour, five against and nine abstentions.

Those that voted in favour were Algeria, Argentina, Benin, Botswana, Brazil, Burkina Faso, Chile, China, Congo, Costa Rica, Cote d'Ivoire, Cuba, Ethiopia, Gabon, India, Indonesia, Kazakhstan, Kenya, Kuwait, the Maldives, Mexico, Morocco, Namibia, Pakistan, Peru, the Philippines, Russia, Saudi Arabia, Sierra Leone, South Africa, the United Arab Emirates, Venezuela and Vietnam.

The Czech Republic, Germany, Japan, the United Kingdom and the United States voted against the resolution, while Austria, Estonia, France, Ireland, Italy, Macedonia, Montenegro, the Republic of Korea and Romania abstained.

The draft resolution was introduced at the Human Rights Council by Argentine Foreign Affairs Minister Hector Timerman on behalf of Argentina, Algeria, Bolivia, Brazil, Cuba, Pakistan, Russia, Uruguay and Venezuela.

Pointing out that a total of 74 co-sponsors supported this draft resolution, the Argentine Minister told the Council that the issue of foreign debt and its effects on the enjoyment of human rights had been on the agenda of various UN human rights bodies for over two decades.

Since 1990, the Human Rights Commission and subsequently the Human Rights Council, in various resolutions and decisions, had highlighted the challenges represented by the burden of foreign debt on the full enjoyment of human rights, in particular economic, social and cultural rights, he said.

Along these lines, he noted, the UN independent expert on foreign debt, Cephas Lumina, had referred to vulture funds, describing their activities as those that managed to divert a country's financial resources that were saved from debt cancellation, thereby undermining the capacity of governments to guarantee the human rights of their people.

For the most part this had happened in Africa, where the activities of vulture funds had endangered or even removed the capacity of these states to carry out their development and poverty reduction programmes.

The Argentine Minister highlighted the need for financial reform along ethical lines that would produce in its turn economic reform to benefit everyone.

It was not only developing countries that had highlighted the threat of vulture funds to the full enjoyment of human rights. As far back as 2002, the then finance minister (Chancellor of the Exchequer) of the United Kingdom, and subsequently Prime Minister, Gordon Brown, had referred to the severity of the problem in a special session of the UN General Assembly.

According to Timerman, a legal vacuum existed in terms of debt restructuring and it left sovereign states vulnerable to the abuse of speculators.

In some general comments before the vote at the Human Rights Council, Algeria, referring to a report by the independent expert Lumina, said that vulture funds had negative effects on debt relief measures that had been adopted by the international community and these funds had a destabilising effect on the economies of countries that were their victims.

Algeria said that among the main messages of the draft resolution was the fact that the international financial system was inadequate today and therefore needed to be reformed; that the debt burden had a major impact on developing countries and their development; and that there was a need to shed an objective light on the activities of vulture funds and their impact on the right to development.

Cuba said that the draft resolution brought before the Council a subject of vital importance to developing countries, namely, the negative effect of vulture funds on the enjoyment of human rights.

Venezuela said that for many years it had been hearing in international fora, in particular in the Human Rights Council, about the negative effects on the enjoyment of human rights of the excessive and unjust debt burden. Today, this was exacerbated by the global crisis of capitalism, it added.

Pakistan said that all countries had a sovereign right with regard to their debt restructuring. Calling for this to not be influenced by political and extraneous pressure tactics, it said that these tactics undermined the capacity of states, particularly developing countries, to fulfil their human rights obligations and to achieve sustainable development.

Pakistan further said that vulture funds reflected the inherent flaws in the current financial system and could be used to challenge the sovereignty of indebted countries through economic pressure and huge financial implications.

The United States said that it would call for a vote on the resolution and would vote 'no'.

It said that while it remained committed to the stability of the international financial system, this resolution raised serious concerns. Discussions on mechanisms to advance orderly debt restructuring were technical in nature and, if not handled appropriately, risked creating uncertainties which could drive up borrowing costs or even choke off financing for developing countries, it maintained.

There were already active discussions underway in other, more appropriate fora that took these complex technical considerations into account, it said, adding that the issue the resolution purported to address fell outside the scope and mandate of the Human Rights Council and did not belong in this forum.

Italy, on behalf of the European Union members of the Human Rights Council, said that there should be no doubt over its solidarity with countries that had faced or were still facing economic and financial crisis. However, in its view, the Council was not the appropriate forum for discussing issues related to financial policy.

France, announcing its intention to abstain on the vote, said that the effectiveness of international mechanisms for the restructuring of sovereign debt was a core concern for it. It said its stance and position of *amicus curiae* in the dispute between Argentina and litigious creditors before the US Supreme Court clearly demonstrated France's commitment.

However, it considered that the issue of sovereign debt restructuring did not fall within the mandate of the Human Rights Council. The issue should be discussed within the competent international bodies, which was already the case, it said, citing as examples the International Monetary Fund and the Paris Club.

In the resolution that was eventually adopted, the Human Rights Council noted the concern expressed in the declaration that heads of state and government of the Group of 77 and China issued at their June summit in Santa Cruz de la Sierra, Bolivia, that reiterated the importance of not allowing vulture funds to paralyse the debt restructuring efforts of developing countries, and that these funds should not supersede the state's right to protect its people under international law.

The Council affirmed that debt burden contributes to extreme poverty and hunger and is an obstacle to sustainable human development, to the realisation of the Millennium Development Goals and to the right to development, and is thus a serious impediment to the realisation of all human rights.

The Council also noted that 'the international financial system does not have a sound legal framework for the orderly and predictable restructuring of sovereign debt, which further increases the economic and social cost of non-compliance.'

It expressed its concern about the voluntary nature of international debt relief schemes which has created opportunities for vulture funds to acquire defaulted sovereign debt at vastly reduced prices and then seek repayment of the full value of the debt through litigation, seizure of assets or political pressure.

Condemning the activities of vulture funds, the Council reaffirmed, in this context, that '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, which directly affects the enjoyment of human rights in debtor States'.

It called upon states to consider implementing legal frameworks 'to curtail predatory vulture fund activities within their jurisdictions'.

The Council encouraged all states to participate in the negotiations aimed at establishing a multilateral legal framework for sovereign debt restructuring processes, as referred to in UN General Assembly resolution 68/304, and invited states participating in the negotiations to ensure that such a multilateral legal framework will be compatible with existing international human rights obligations and standards. ◆

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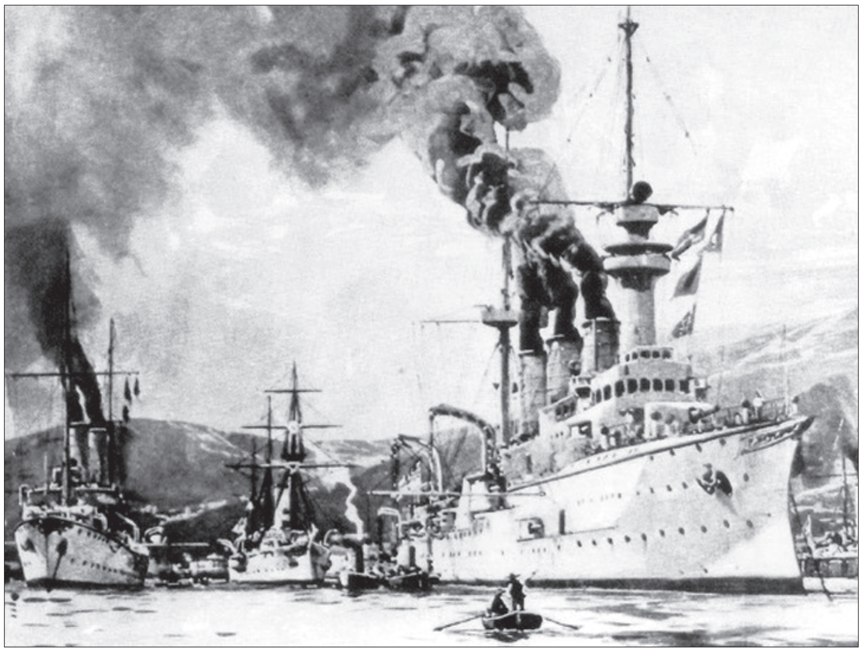
The sovereign, its creditors and the law

When the sovereign struggles to pay its debts, the world remains a lawless place now as before, observes *Roberto Bissio*.



Willy Stower

In 1902 the navies of Britain, Germany and Italy blocked the ports of Venezuela to collect their debt in arrears. Picture shows an engraving depicting the blockade.

TO make ends meet, sovereigns borrow. In the not-so-distant past, sovereign debt financed military adventures or profligate lifestyles of monarchs and their courts. In the contemporary world, the first obligation of states is to respect, promote and protect human rights, and therefore it is the need for welfare-maximising development that justifies sovereign debt.

There is a huge ethical and political progression from the absolutist state to one based on the democratically organised sovereignty of the people. However, when the sovereign struggles to pay its debts, the world remains a lawless territory now as before.

In 1307, Philip IV of France avoided bankruptcy by accusing his creditors, the Knights Templar, of heresy and sodomy and sending them to the stake. If, however, force was on the side of the creditors, they did not hesitate to use it against the sovereign debtor at fault (default). In 1902 the navies of Britain, Germany and Italy blocked the ports of Venezuela to collect their debt in arrears. Dozens died as a result of this exercise in 'gunboat diplomacy' and the European powers took control of Venezuelan customs until 1930.

Popular reaction in Latin America against this abuse was widespread but only one government showed solidarity with the victims. Argentine Foreign Minister Luis Maria Drago issued on 29 December 1902 a document outlining what is now known as the Drago Doctrine: violent recovery of a debt is illegal. This is obviously most helpful for small debtor states, defending them against the arbitrary powers that frequently act as judge, jury and executioner.

Apart from banning acts of war against debtors, however, nothing has been done since then to resolve with legitimacy and impartiality disputes between creditors and sovereign debtors.

In 1956, the Argentine government could not repay short-term debts contracted by the government of General Pedro Aramburu after overthrowing Juan Peron the year before. Argentina accepted the invitation of France to negotiate a settlement with the creditor countries, and thus was born the Paris Club, in which sovereign creditors negotiate with sovereign debtors the rescheduling of official debts. It is an informal and partial mechanism where each small debtor country must sit down and negotiate in very difficult conditions with the governments of 19 powerful countries (the United States, most of Western Europe, Canada, Japan, Israel and Russia). After almost 60 years, the Paris Club has reached 430 agreements to renegotiate the official debt of 90 debtor countries totalling $583 billion.

But in the last two decades the nature of sovereign debt has changed, as governments no longer borrow from other governments but sell bonds to domestic and foreign private investors. A state lending to another has the assurance that it will recover its money, if not by gunboats, then by the collective pressure of the Paris Club. But who will defend the individual investor? Market logic is implacable. If the debtor is perceived as risky, the bond buyer will demand high interest rates. The countries that most need the money pay more dearly for it.

To lower risk rates, countries issue bonds in 'hard' currencies (dollar, euro or yen), they use large international banks as intermediaries and eventually resign legal sovereignty, allowing the laws and courts of New York, London or Tokyo to address any dispute with creditors. Thus, the banks and the financial systems of these cities thrive at the expense of the needs of developing countries.

Sovereign bonds were first issued in the 16th century by Philip II, who made history as the greatest king of Spain, despite three defaults (and subsequent restructuring) of his debt. The issuing of bonds to finance development skyrocketed in the last two decades. A total of $55 trillion in sovereign bonds is now in circulation, a hundred times more than the entire government-to-government debt renegotiated by the Paris Club in its history.

But the financial architecture underpinning all this depends ultimately on a bunch of judges such as Thomas Griesa from New York, of whom the *New York Times* said that he ‘seems not to have understood’ the functioning of the bond market under his jurisdiction and whose decision in favour of so-called ‘vulture funds’ and against good-faith investors ‘hardly inspired confidence in the American legal system’.

The International Capital Market Association (ICMA), which groups the intermediaries of sovereign bonds, started to demand new rules and the Group of 77 and China drafted at the United Nations a resolution to start negotiating ‘a multilateral legal framework for sovereign debt restructuring processes … to [increase] the efficiency, stability and predictability of the international financial system’.

On 9 September the General Assembly of the UN voted 124 to 11 (and 41 countries abstained) in favour of this crucial resolution. The United States, the United Kingdom, Japan and Germany voted against, but a majority of the European countries abstained, as well as New Zealand. Russia was the only Paris Club member voting in favour. The decision opens the door to negotiations to establish for the first time in history a fair way out of external debt crises. This can change the history of sovereign debt, which is the financial expression of the history of global inequities. ◆

Roberto Bissio is coordinator of Social Watch, an international network of civil society organisations. The above is a revised version of an article that was first published in Spanish in Uno *(Peru).*

Apocalypse Now, Iraq Edition

Musing on his country's renewed role in Iraq, a former US State Department diplomat who worked for a year (2009-10) in that country as part of the American occupation wistfully concludes, 'America is now fighting the Iraq War for the third time, somehow madly expecting different results, while guaranteeing only failure.'

Peter Van Buren

Sailors from aircraft carrier USS *George HW Bush* guide a fighter jet from a squadron which has conducted an airstrike against Islamic State artillery in Iraq. 'America's wars in the Middle East exist in a hallucinatory space where reality is of little import.'

I WANTED to offer a wry chuckle before we headed into the heavy stuff about Iraq, so I tried to start this article with a suitably ironic formulation. You know, a *déjà-vu*-all-over-again kinda thing. I even thought about telling you how, in 2011, I contacted a noted author to blurb my book, *We Meant Well: How I Helped Lose the Battle for the Hearts and Minds of the Iraqi People*, and he presciently declined, saying sardonically, 'So you're gonna be the one to write the last book on failure in Iraq?'

I couldn't do any of that. As someone who cares deeply about this country, I find it beyond belief that Washington has again plunged into the swamp of the Sunni-Shia mess in Iraq. A young soldier now deployed as one of the 1,600 non-boots-on-the-ground there might have been eight years old when the 2003 invasion took place. He probably had to ask his dad about it. After all, less than three years ago, when dad finally came home with his head 'held high', President Obama assured Americans that 'we're leaving behind a sovereign, stable and self-reliant Iraq'. So what happened in the blink of an eye?

The Sons of Iraq

Sometimes, when I turn on the TV these days, the sense of seeing once again places in Iraq I'd been overwhelms me. After 22 years as a diplomat with the Department of State, I spent 12 long months in Iraq in 2009-10 as part of the American occupation. My role was to lead two teams in 'reconstructing' the nation. In practice, that meant paying for schools that would never be completed, setting up pastry shops on streets without water or electricity, and conducting endless propaganda events on Washington-generated themes of the week ('small business', 'women's empowerment', 'democracy building').

We even organised awkward soccer matches, where American taxpayer money was used to coerce reluctant Sunni teams into facing off against hesitant Shia ones in hopes that, somehow, the chaos created by the American invasion could be ameliorated on the playing field. In an afternoon, we definitively failed to reconcile the millennium-old Sunni-Shia divide we had sparked into ethnic-cleansing-style life in 2003-04, even if the score was carefully stage-managed into a tie by the 82nd Airborne soldiers with whom I worked.

In 2006, the US brokered the ascension to power of Prime Minister Nouri al-Maliki, a Shia politician handpicked to unite Iraq. A bright, shining lie of a plan soon followed. Applying vast amounts of money, Washington's emissaries created the Sahwa, or Sons of Iraq, a loose grouping of Sunnis anointed as 'moderates' who agreed to temporarily stop killing in return for a promised place at the table in the New(er) Iraq. The 'political space' for this was to be created by a massive escalation of the American military effort, which gained a particularly marketable name: the surge.

I was charged with meeting the Sahwa leaders in my area. My job back then was to try to persuade them to stay on board just a little longer, even as they came to realise that they'd been had. Maliki's Shia government in Baghdad, which was already ignoring American entreaties to be inclusive, was hell-bent on ensuring that there would be no Sunni 'sons' in its Iraq.

False alliances and double-crosses were not unfamiliar to the Sunni warlords I engaged with. Often, our talk – over endless tiny glasses of sweet, sweet tea stirred with white-hot metal spoons – shifted from the Shia and the Americans to their great-grandfathers' struggle against the British. Revenge unfolds over generations, they assured me, and memories are long in the Middle East, they warned.

When I left in 2010, the year before the American military finally departed, the truth on the ground should have been clear enough to anyone with the vision to take it in. Iraq had already been tacitly divided into feuding state-lets controlled by Sunnis, Shias and Kurds. The Baghdad government had turned into a typical, gleeful third-world kleptocracy fuelled by American money, but with a particularly nasty twist: they were also a group of autocrats dedicated to persecuting, marginalising, degrading and perhaps one day destroying the country's Sunni minority.

US influence was fading fast, leaving the State Department, a small military contingent, various spooks and contractors hidden behind the walls of the billion-dollar embassy (the largest in the world!) that had been built in a moment of imperial hubris. The foreign power with the most influence over events was by then Iran, the country the Bush administration had once been determined to take down alongside Saddam Hussein as part of the Axis of Evil.

US soldiers on patrol in Iraq in 2007. 'The nine-year attempt [after the US invasion in 2003] to create an American client state in Iraq failed, tragically and completely.'

The Grandsons of Iraq

The staggering costs of all this – $25 billion to train the Iraqi Army, $60 billion for the reconstruction-that-wasn't, $2 trillion for the overall war, almost 4,500 Americans dead and more than 32,000 wounded, and an Iraqi death toll of more than 190,000 (though some estimates go as high as a million) – can now be measured against the results. The nine-year attempt to create an American client state in Iraq failed, tragically and completely. The proof of that is on today's front pages.

According to the crudest possible calculation, we spent blood and got no oil. Instead, America's war of terror resulted in the dissolution of a Middle Eastern post-Cold War stasis that, curiously enough, had been held together by Iraq's previous autocratic ruler Saddam Hussein. We released a hornet's nest of Islamic fervour, sectarianism, fundamentalism and pan-nationalism. Islamic terror groups grew stronger and more diffuse by the year. That horrible lightning over the Middle East that's left American foreign policy in such an ugly glare will last into our grandchildren's days. There should have been so many futures. Now, there will be so few as the dead accumulate in the ruins of our hubris. That is all that we won.

Under a new president, elected in 2008 in part on his promise to end American military involvement in Iraq, Washington's strategy morphed into the more media-palatable mantra of 'no boots on the ground'. Instead, backed by aggressive intel and the 'surgical' application of drone strikes and other kinds of air power, US covert ops were to link up with the 'moderate' elements in Islamic governments or among the rebels opposing them – depending on whether Washington was opting to support a thug government or thug fighters.

The results? Chaos in Libya, highlighted by the flow of advanced weaponry from the arsenals of the dead autocrat Muammar Gaddafi across the Middle East and significant parts of Africa, chaos in Yemen, chaos in Syria, chaos in Somalia, chaos in Kenya, chaos in South Sudan and, of course, chaos in Iraq.

And then came the Islamic State (IS) and the new 'caliphate', the child born of a neglectful occupation and an autocratic Shia government out to put the Sunnis in their place once and for all. And suddenly we were heading back into Iraq. What, in August 2014, was initially promoted as a limited humanitarian effort to save the Yazidis, a small religious sect that no one in Washington or anywhere else in this country had previously heard of, quickly morphed into those 1,600 American troops back on the ground in Iraq and American planes in the skies from Kurdistan in the north to south of Baghdad. The Yazidis were either abandoned or saved or just not needed anymore. Who knows and who, by then, cared? They had, after all, served their purpose handsomely as the *casus belli* of this war. Their agony at least had a horrific reality, unlike the supposed attack in the Gulf of Tonkin that propelled a widening war in Vietnam in 1964 or the nonexistent Iraqi weapons of mass destruction that were the excuse for the invasion of 2003.

The newest Iraq war features Special Operations 'trainers', air strikes against IS fighters using American weapons abandoned by the Iraqi Army (now evidently to be resupplied by Washington), US aircraft taking to the skies from inside Iraq as well as a carrier in the Persian Gulf and possibly elsewhere, and an air war across the border into Syria.

The truth on the ground these days is tragically familiar: an Iraq even more divided into feuding state-lets; a Baghdad government kleptocracy about to be reinvigorated by free-flowing American money; and a new Shia prime minister being issued the same 2003-11 to-do list by Washington: mollify the Sunnis, unify Iraq, and make it snappy. The State Department still stays hidden behind the walls of that billion-dollar embassy. More money will be spent to train the collapsed Iraqi military. Iran remains the foreign power with the most influence over events.

One odd difference should be noted, however: in the last Iraq war, the Iranians sponsored and directed attacks by Shia militias against American occupation forces (and me); now, its special operatives and combat advisers fight side-by-side with those same Shia militias under the cover of American air power. You want real boots on the ground? Iranian forces are already there. It's certainly an example of how politics makes strange bedfellows, but also of what happens when you assemble your 'strategy' on the run.

Obama hardly can be blamed for all of this, but he's done his part to make it worse – and worse it will surely get as his administration once again assumes ownership of the Sunni-Shia fight. The 'new' unity plan that will fail follows the pattern of the one that did fail in 2007: use American military force to create a political space for 'reconciliation' between once-burned, twice-shy Sunnis and a compromise Shia government that American money tries to nudge into an agreement against Iran's wishes. Perhaps whatever new Sunni organisation is pasted together, however briefly, by American representatives should be called the Grandsons of Iraq.

Just to add to the general eeriness factor, the key people in charge of putting Washington's plans into effect are distinctly familiar faces. Brett McGurk, who served in key Iraq policy positions throughout the Bush and Obama administrations, is again the point man as Deputy Assistant Secretary of State for Iraq and Iran. McGurk was once called the 'Maliki whisperer' for his closeness to the former prime minister. The current American ambassador, Robert Stephen Beecroft, was deputy chief of mission, the number two at the Baghdad embassy, back in 2011. Diplomatically, another faux coalition of the (remarkably un)willing is being assembled. And the pundits demanding war in a feverish hysteria in Washington are all familiar names, mostly leftovers from the glory days of the 2003 invasion.

Lloyd Austin, the general overseeing America's new military effort, oversaw the 2011 retreat. General John Allen, brought out of military retirement to coordinate the new war in the region – he had recently been a civilian advisor to Secretary of State John Kerry – was deputy commander in Iraq's Anbar province during the surge. Also on the US side, the mercenary security contractors are back, even as President Obama cites, without a hint of irony, the ancient 2002 congressional authorisation to invade Iraq he opposed as candidate Obama as one of his legal justifications for this year's war. The Iranians, too, have the same military commander on the ground in Iraq, Qassem Suleimani, the head of the Iranian Revolutionary Guards Corps's Quds Force. Small world. Suleimani also helps direct Hezbollah operations inside Syria.

Even the aircraft carrier in the Persian Gulf launching air strikes, the USS *George HW Bush*, is fittingly named after the president who first got us deep into Iraq almost a quarter-century ago. Just consider that for a moment: we have been in Iraq so long that we now have an aircraft carrier named after the president who launched the adventure.

On a 36-month schedule for 'destroying' IS, the president is already ceding his war to the next president, as was done to him by George W Bush. That next president may well be Hillary Clinton, who was secretary of state as Iraq War 2.0 sputtered to its conclusion. Notably, it was her husband whose administration kept the original Iraq War of 1990-91 alive via no-fly zones and sanctions. Call that a pedigree of sorts when it comes to fighting in Iraq until hell freezes over.

If there is a summary lesson here, perhaps it's that there is evidently no hole that can't be dug deeper. How could it be more obvious, after more than two decades of empty declarations of victory in Iraq, that genuine 'success', however defined, is impossible? The only way to win is not to play. Otherwise, you're just a sucker at the geopolitical equivalent of a carnival ringtoss game with a fist full of quarters to trade for a cheap stuffed animal.

Apocalypse then – and now

America's wars in the Middle East exist in a hallucinatory space where reality is of little import, so if you think you heard all this before, between 2003 and 2010, you did. But for those of us of a certain age, the echoes go back much further. I recently joined a discussion on Dutch television where former Republican Congressman Pete Hoekstra made a telling slip of the tongue. As we spoke about IS, Hoekstra insisted that the US needed to deny them 'sanctuary in Cambodia'. He quickly corrected himself to say 'Syria', but the point was made.

We've been here before, as the failures of American policy and strategy in Vietnam metastasised into war in Cambodia and Laos to deny sanctuary to North Vietnamese forces. As with IS, we were told that they were barbarians who sought to impose an evil philosophy across an entire region. They, too, famously needed to be fought 'over there' to prevent them from attacking us here. We didn't say 'the Homeland' back then, but you get the picture.

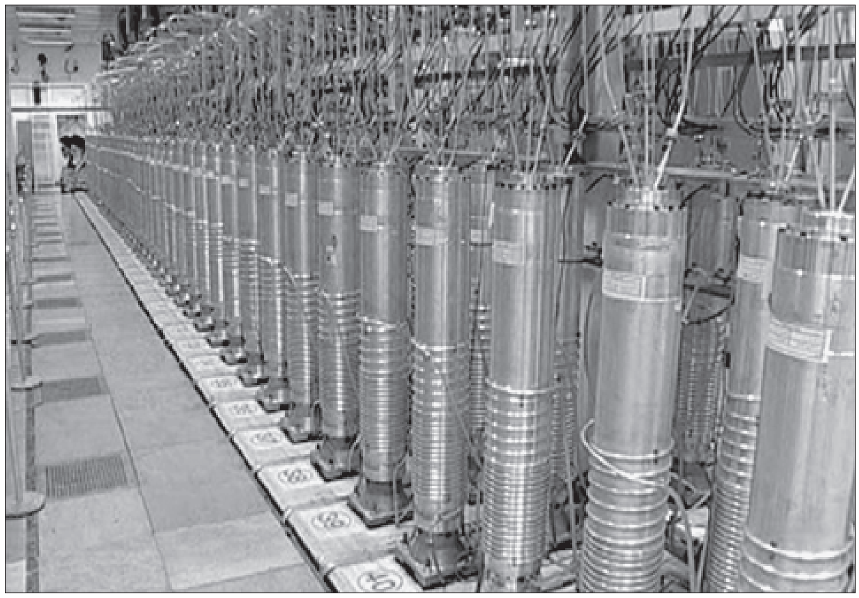
As the similarities with Vietnam are telling, so is the difference. When the reality of America's failure in Vietnam finally became so clear that there was no one left to lie to, America's war there ended and the troops came home. They never went back. America is now fighting the Iraq War for the third time, somehow madly expecting different results, while guaranteeing only failure. To paraphrase a young John Kerry, himself back from Vietnam, who'll be the last to die for that endless mistake? It seems as if it will be many years before we know. ◆

Peter Van Buren blew the whistle on US State Department waste and mismanagement during the Iraqi reconstruction in his first book, We Meant Well: How I Helped Lose the Battle for the Hearts and Minds of the Iraqi People. *He writes about current events at his blog, We Meant Well, and is a regular contributor to TomDispatch.com, from which this article is reproduced. His latest book is* Ghosts of Tom Joad: A Story of the #99Percent.

Stop cyberweapons now!

This article presents the need for a treaty to ban cyberweapons and cyberwar, and also to ensure that public telecommunications and Internet networks are not used for offensive military purposes.

Prabir Purkayastha and Rishab Bailey



Centrifuges for uranium enrichment at the Natanz nuclear plant in Iran. An attack on this facility using the Stuxnet computer virus was the first instance of the deployment of a cyberweapon.

CYBERSPACE is increasingly being militarised and used for offensive military operations. Considering that the Internet is becoming a necessary part of the global information and communications network, this represents a big threat to the future of the world.

Damaging a country's infrastructure systems and networks can result in physical damage to property and people and even loss of life. Such attacks can take down a country's electrical grid and water and sewage systems, cause flooding by opening dam gates and even set in motion a Bhopal- or Fukushima-like disaster. Even more worrying is the prospect of one country controlling nuclear and other weapons systems – all of which are operated through computerised control systems – of other countries around the world.

As more and more critical infrastructure resources around the world are maintained and operated through computer control systems, ensuring the security of these installations from targeted attacks is critical. The damage caused by the US and Israel to Iranian nuclear centrifuges in Natanz (using the Stuxnet computer virus) is only one example of offensive cyber-operations. Such attacks on nuclear reactors, dams, hazardous chemical facilities, etc. can cause enormous damage to a country.

Edward Snowden has shown how the US and its closest allies (constituting the Five Eyes intelligence alliance and Israel) have compromised the entire global network and turned it essentially into a war machine. We now know, for instance, that the US National Security Agency (NSA) carried out over 230 offensive cyber-operations in just one year (2011).[1] Thanks to Snowden we know that the NSA has subverted nearly all the devices that run our and by extension our countries' vital infrastructure. Perhaps the most dangerous part of the surveillance that Snowden has revealed is the computer network exploitations (CNEs).[2] These are software implants in other countries' networks that have the ability not only to tap into the data streams of these networks but also to disable these networks – they are cyberweapons that have been armed and can be activated with just a single command. Fifty thousand such CNEs have been reported to have been implanted in global telecom networks. The implants persist through software and equipment upgrades and can therefore lie dormant for long periods of time till triggered.

US President Barack Obama's Presidential Policy Directive 20[3] (which authorises targets for cyberattacks) clearly shows that foreign networks[4] have been penetrated and their security systems are already compromised. Vital infrastructure of other countries has been pre-targeted, with a cyberattack able to be triggered on command.[5]

The fact that the most powerful and richest nations are devoting increasing resources to defensive and offensive cyberwar capabilities creates a clear imbalance of power and can encourage those powerful states to engage in cyberattacks on others. The attack by the US and Israel on Iran's Natanz nuclear facilities is one example of this.

Though it is generally recognised that longstanding rules of customary international law governing conflict do apply to the area of cyberwarfare as well,[6] there are no treaty provisions that ban or limit cyberwarfare.

The attack on the Iranian nuclear plant[7] was the first instance of the use of a cyberweapon. Various experts have held[8] that it was a huge mistake.

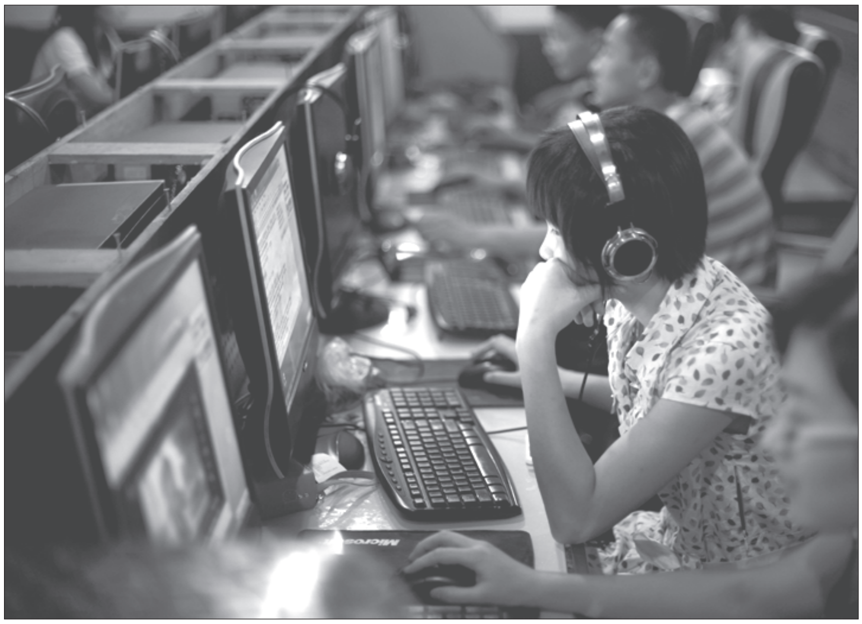
The scary figure is the estimation that the Stuxnet virus that took down the centrifuges in Natanz would have taken about $100 million to develop – a big sum for an individual or an organisation but small change for a country. And today, vital infrastructure in all countries is run by control systems that have computers embedded in them and are therefore vulnerable to such attacks.

Bruce Schneier, one of the world's leading security experts, has written[9] on the need for a treaty banning cyberwar. 'We're in the early years of a cyberwar arms race. It's expensive, it's destabilising, and it threatens the very fabric of the Internet we use every day. Cyberwar treaties, as imperfect as they might be, are the only way to contain the threat.'

It is not enough that cyberwar be banned, but the ability to wage such forms of war must also be curbed by banning the development and deployment of cyberweapons. Due to the nature of the online medium and cyberweapons and cyberattacks, there is a need to update and clarify the relevant norms and laws in a binding international treaty.

Such a treaty is necessary to inter alia clarify the scope of cyberwar, what constitutes cyberweapons, and the actions that may follow in international law to prohibit the development and deployment of cyberweapons. For instance, at what point in time does the right to self-defence apply and what are appropriate responses to such attacks? The treaty will also need to deal with the scope of the application of international humanitarian law/the laws of armed conflict to this domain (and therefore the applicability of important concepts such as the protection of civilians and so on).

Demilitarisation of the Internet is essential to ensure that the Internet is used for productive purposes rather than as an instrument of warfare. It is necessary that this be recognised by states in a binding and enforceable legal instrument. We already have precedents for such regulation in the form of treaties governing disarmament in outer space and Antarctica, as well as treaties regulating the use of chemical and biological weapons.



Cyberweapons pose a real threat to the Internet, which plays a key role in almost all spheres of activity today.

What is cyberwarfare?

There has been much debate about what exactly the term 'cyberwarfare' means. The absence of an established definition is one of the first issues that ought to be addressed in any international effort to demilitarise the Internet.

The definition of a cyberwar, much like any traditional war, must rely on the effects of the attack (in any determination of whether a 'cyberwar' exists). The only real difference to a traditional use of force (constituting a war) is that such a war is conducted using computers or computer networks – either by damaging networks themselves or by using computers and computer networks to cause damage to objects/people by damaging vital infrastructure and installations.

The term 'cyberattack' is defined as 'a cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects'[10] or as 'deliberate actions to alter, disrupt, deceive, degrade, or destroy computer systems or networks or the information and/or programs resident in or transiting these systems or networks'.[11]

We believe that a cyberwar is the launch of a cyberattack by one state against another, using software or code that is intended to:

• prevent the use of an essential computer network and thereby damage critical infrastructure or substantially impair the ability of essential services to function, or

• cause physical damage to property or people including loss of life, or both.

The key issue is the effect of such a weapon – physical damage either by disabling systems or by making systems behave in a way that causes physical damage. Cyberwar as defined above refers exclusively to actions carried out against a computer system or network that result in situations that would, if carried out through traditional means, be construed as an act of war, with physical harm to people and/or property.

In order to constitute cyberwar, the actions must be of such a scale as to constitute a use of force (or threat of a use of force) as required under Article 2(4) of the UN Charter.

Accordingly, states must agree to prohibit the creation of software or code that can reasonably lead to cyberwar. Creation of such software or code would constitute weaponisation of software and therefore a cyberweapon. Any international treaty on the subject must prohibit both the development and deployment of such weapons, as well as cyberwar.

Private individuals and organisations cannot be the protagonists in cyberwar though they may commit cyberattacks/cybercrimes. Cyberwar is an issue between sovereign states (even if indirectly acting through intermediaries). However, this will necessitate clarifying, in the context of the Internet, rules regarding the establishment of state responsibilities of which international law already has various precedents.

The primary disagreement on the definition of cyberwarfare seems to be about whether actions constituting 'information terrorism', disinformation and so on would constitute cyberwarfare.[12] We believe that the primary issue is physical harm and damage caused to people and property by cyberattacks and any global proscription must be restricted to such issues rather than any attempts to stop the spread of disinformation which could also be construed as 'divergent' views, as this could hamper free speech.

Cyberwar must also be differentiated from various other concepts such as cybercrime/online crime and cybersecurity, automated weapons and the use of robots, Internet fraud and identity theft, spamming/phishing, spyware/trojans/bots, surveillance, electronic warfare, cyber-exploitation, etc. While these are all genuine problems concerning the (mis)use of the Internet, they do not constitute cyberwar and must be treated separately.

Cyber-exploitation and surveillance by and large look to collect data from either the public or government sources through actions which are generally probing in nature, are non-destructive and attempt to remain as low-profile as possible. They do not generally cause any physical damage or loss of life and will not usually prevent usage of a computer resource (as this would defeat the purpose of conducting the surveillance in the first place). However, computer network exploitations or 'logic bombs' that are capable of taking down telecommunications networks and other vital infrastructure controls would fall under the category of cyberweapons and need to be banned under any global agreement.

In 2011 alone, the US National Security Agency carried out over 230 offensive cyber-operations.

Electronic warfare is broadly understood to mean 'military action involving the use of electromagnetic and directed energy to control the electromagnetic spectrum or to attack the enemy'[13] and is clearly different in scope and nature from cyberwar.

Broadly speaking, automated weapons differ from cyberweapons as they generally utilise computer technology to enhance the ability of traditional weapons systems. They do not specifically target computer networks or systems. Intelligent weapons (or ones that can learn from their environment and do not necessarily need a human handler) do not generally attempt to destroy computer systems and networks 'from within' but use computer systems to enhance their own capabilities. Therefore a drone may be automated to fire missiles when certain prearranged conditions are met, but this would not constitute a cyberattack or cyberwar. While such weapons do constitute new threats to global peace and disarmament, they must be dealt with separately as still constituting conventional weapons systems (even if advanced).

What is already in place and what is missing?

There are essentially no existing international agreements that would restrain cyberwarfare.

The Russian government has been pushing since 1998 for a UN treaty to address conflict in cyberspace, though there has been little movement on this front.

The US has so far blocked all attempts to initiate a cyberwar treaty, arguing that such a treaty is not enforceable/required (and that it is better to focus on issues of cybercrime) while at the same time steaming ahead with its cyberwar preparations. Some noises have been made from time to time about the willingness to sign a treaty, for instance with Russia around 2010, but no progress has been made.[14]

An attempt to examine the applicability of traditional international law mechanisms to the cyber realm was made in 2009. The NATO Cooperative Cyber Defence Centre of Excellence convened an international group of legal scholars and practitioners to examine the issue of how to interpret international law in the context of cyberwarfare. The meeting produced a document, known as the *Tallinn Manual on the International Law Applicable to Cyber Warfare*, which is an academic and non-binding study.

The document importantly leaves no doubt as to the applicability of traditional rules of warfare to the cyber arena.

Some simple measures that would have protected the network of one country from another were proposed to be included in the International Telecommunication Union (ITU)'s 2012 International Telecommunication Regulations, which include an article calling for cooperation to improve network security. However, this treaty has not been signed by most developed countries (most notably the US). Such cooperation could conceivably act as a restraint on some types of cyberattacks, but the scope of ITU is limited to peaceful use of telecommunications, so it is not clear whether any ITU instrument could in fact constrain cyberwar.

Proposals for a treaty or other agreements

International legal frameworks such as the United Nations,[15] Council of Europe, NATO,[16] Organisation of American States[17] and the Shanghai Cooperation Organisation have all provided different and often ambiguous legal structures. Despite the importance of the issue, all these bodies have failed to agree on an effective legal framework that can govern all cyberattacks, mainly due to opposition from the US and its allies.[18]

Various proposals to deal with cyberwar have been discussed in the UN at the insistence of Russia, which has moved several resolutions to draw attention to the potential use of cyber technologies for purposes 'inconsistent with the objectives of maintaining international stability and security' – notably at the First Committee of the UN General Assembly.[19]

So far these efforts have only resulted in the creation of various expert groups, which submitted reports in 2010[20] and 2013[21]. These reports have generated several recommendations, including that states sustain a dialogue regarding 'norms of responsible state behaviour' and consider adopting confidence-building measures 'to help increase transparency, predictability and cooperation'. The 2013 report also included the significant affirmation that 'international law, and in particular the Charter of the UN, is applicable [in cyberspace]', that 'State sovereignty and international norms and principles that flow from sovereignty apply to State conduct of ICT [information and communication technology]-related activities, and to their jurisdiction over ICT infrastructure within their territory', and that 'States must meet their international obligations regarding internationally wrongful acts attributable to them'.

On 27 December 2013, the UN General Assembly unanimously adopted resolution 68/243, in which it took note of the 2013 expert group report and requested the UN Secretary-General to establish a new expert group that would report to the General Assembly in 2015. The new group of governmental experts, with 20 members, held its first meeting in New York in July 2014 and elected Brazil as the Chair. The group will have three more meetings in 2015.

Conclusions

It is clear that the US, which believes it leads the world in cyberwar and cyberweapons capabilities, regards all attempts to restrict cyberwar or cyberweapons as unilateral disarmament. In a sense, this is similar to the situation that came up when nuclear disarmament was discussed in the postwar period. The US, which was the only nuclear power at that time, believed that it would be able to maintain its nuclear monopoly for at least a decade. Though the Truman administration had proposed the Baruch Plan in 1946,[22] it had conditions that the US knew the Soviet Union would not accept, and turned down the alternative Soviet proposals for a total ban on nuclear weapons.

Not only is the belief in such a monopoly on cyberwarfare dangerous, but cyberweapons constitute a real threat to the Internet, which plays a key role in almost all spheres of our activities today. There has been talk of balkanisation of the Internet. But the biggest risk of balkanisation comes not, as has been claimed, from independent domain names and Internet Protocol addresses outside the ICANN (Internet Corporation for Assigned Names and Numbers) system, but from the threat that cyberweapons pose to the domestic networks of countries. The balkanisation of the Internet would then be seen as a protective measure against the threat of cyberweapons from other networks and countries.

We must try and build a broad unity and movement among not only Internet activists but also peace and disarmament activists around the world, to ban cyberweapons and cyberwar right now. We have a small window of opportunity to stop cyberweapons. Tomorrow may be too late. ◆

Prabir Purkayastha and Rishab Bailey are with the Society for Knowledge Commons, India and also a part of the Just Net Coalition. This article draws upon Sally Burch's 'Notes on the Need for a Cyber Peace Treaty', Just Net Coalition, June 2014, available at http://justnetcoalition.org/notes-need-cyberpeace-treaty-english.

Notes

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3 http://www.theguardian.com/world/interactive/2013/jun/07/obama-cyber-directive-full-text
4 https://www.schneier.com/blog/archives/2013/06/us_offensive_cy.html
5 http://www.washingtonpost.com/world/national-security/us-spy-agencies-mounted-231-offensive-cyber-operations-in-2011-documents-show/2013/08/30/d090a6ae-119e-11e3-b4cb-fd7ce041d814_story_1.html
6 The United States set forth its position on the matter in its International Strategy for

Cyberspace: 'The development of norms for State conduct in cyberspace does not require a reinvention of customary international law, nor does it render existing international norms obsolete. Long-standing interna-tional norms guiding State behaviour – in times of peace and conflict – also apply in cyberspace.' Also refer to the *Tallinn Manual on the International Law Applicable to Cyber Warfare*, prepared by the International Group of Experts at the Invitation of the NATO Cooperative Cyber Defence Centre of Excellence, ed. Michael Schmitt, Cambridge University Press, 2013.

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10 Rule 30 of the *Tallinn Manual on the International Law Applicable to Cyber Warfare*, prepared by the International Group of Experts at the Invitation of the NATO Cooperative Cyber Defence Centre of Excellence, ed. Michael Schmitt, Cambridge University Press, 2013.

11 William A. Owens, Kenneth W. Dam and Herbert S. Lin, *Technology, Policy, Law, and Ethics Regarding US Acquisition and Use of Cyberattack Capabilities*, http://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CBsQFjAA&url=http%3A%2F%2Fwww3.nd.edu%2F~cpence%2Feewt%2FOwens2009.pdf&ei=MDjXU7yRD8O2uATni4DIBw&usg=AFQjCNFOSG-r4Ut6SJ0FmyFL26qLF3NPQA&bvm=bv.71954034,d.c2E

12 While the US government mostly takes on an objective-based definition of cyberthreats, the Shanghai Cooperation Organisation, on the other hand, adopts a more expansive means-based definition of cyberwarfare to include the dissemination of information to undermine political, economic and spiritual stability in a country. Tom Gjelten, 'Seeing the Internet as an Information Weapon', NPR, 23 September 2010, http://www.npr.org/templates/story/story.php?storyId=130052701. This difference is illustrated, for instance, when members of the Shanghai Cooperation Organisation in September 2011 proposed to the UN Secretary-General a document called 'International code of conduct for information security'. This approach was not endorsed by Western countries which argued that this approach would lead to political censorship of the Internet. See http://en.wikipedia.org/wiki/Cyberwarfare

13 See, generally, US Department of the Army, 'Electronic Warfare in Operations', Field Manual No. 3-36 (25 February 2009). cf. Colin Crawford, 'Stuxnet: Cyber Conflict, Article 2(4) and the Continuum of Culpability', http://works.bepress.com/colin_crawford/1/. The *Tallinn Manual* defines electronic warfare as 'the use of electromagnetic (EM) or directed energy to exploit the electromagnetic spectrum. It may include interception or identification of EM emissions, employment of EM energy, prevention of hostile use of the EM spectrum by an adversary, and actions to ensure efficient employment of that spectrum by the user-State'.

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15 http://www.itu.int/ITU-D/cyb/cybersecurity/docs/UN_resolution_58_199.pdf

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19 The issue was taken up at the 68th session of the First Committee, and the resolution titled 'Developments in the field of information and telecommunications in the context of international security' (A/C.1/68/L.37) is available at http://www.un.org/ga/search/view_doc.asp?symbol=A/C.1/68/L.37. Also see http://www.un.org/News/Press/docs/2010/gadis3419.doc.htm, http://www.un.org/News/Press/docs/2009/sgsm12108.doc.htm, and more generally http://opencanada.org/features/the-think-tank/comments/cyber-security-takes-the-floor-at-the-un/

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The intersection of human rights and tax justice

A human rights approach provides an entry point to challenge regressive and unfair tax and fiscal policies, says *Peter Gillespie*.

AT the 26th session of the UN Human Rights Council last June, the UN Special Rapporteur on extreme poverty and human rights tabled a report on the human rights impacts of fiscal and tax policies. The report, based on consultations with governments, business enterprises and civil society organisations, outlined a human rights approach to assessing fiscal and tax policies and noted that tax revenue shortfalls, debt and austerity measures undermine the obligations of states to achieve economic, social and cultural rights for their citizens.

The Human Rights Institute Task Force of the International Bar Association also published a report examining the intersection of tax abuses, poverty and human rights. The 'Tax Abuses, Poverty and Human Rights' report was based on consultations held in Brazil, Swaziland, South Africa, Zimbabwe and Jersey, as well as expert opinions from legal specialists. The report concluded that tax abuses have negative impacts on virtually all human rights principles and that the consequences are particularly severe for poor people in developing countries.

Both of these reports were presented at a symposium on human rights and tax justice held at McGill University in Montreal, Canada, last June. The symposium, attended by 100 researchers, academics and activists from Europe, Africa, and North and South America, aimed to encourage research on the relationship between human rights and taxation, and provide new tools to policy advocacy initiatives to put an end to tax abuses.

All of these activities reflect a growing international discussion on the human rights consequences of illicit financial flows, the illegal cross-border movement of finance due to crime, corruption and tax evasion. Since the largest proportion of these illicit outflows is due to tax abuses by corporate entities, this discussion holds major implications for corporate tax policies and accountability standards.

Since the adoption of the Universal Declaration of Human Rights in 1948, member states of the United Nations have ratified a variety of human rights covenants related to civil, political, social, cultural and economic rights. In addition, several human rights instruments provide protections to children, women and the disabled. UN bodies such as the Human Rights Council also are involved in developing principles, policies and standards that shape the interpretation and practice of human rights protection.

All of these conventions require member states to fulfil certain human rights obligations. The International Covenant on Economic, Social and Cultural Rights asserts that states have a duty to provide health services, to reduce infant mortality, to deliver universal and free primary education, and to ensure that citizens have adequate food, clothing and housing. The Convention on the Rights of the Child requires states to provide primary health care, primary education, access to adequate and nutritious food and clean drinking water, and to provide protection from exploitation and abuse.

Fulfilling these obligations requires resources. The UN-supported High Level Panel on Illicit Financial Outflows from Africa reported that the continent loses $50 billion a year in illicit outflows. A 2009 study commissioned by Christian Aid estimated that the world's 49 poorest countries lose $160 billion a year in lost tax revenues due to trade mispricing by transnational companies. Clearly, it is not possible to meet basic human rights responsibilities given this massive haemorrhage of resources.

Despite the fact that human rights are universal, many states have interpreted their obligations as applicable only within their own borders. In order to address this gap, leading jurists from around the world came together in 2011 to assert that states also have extraterritorial obligations. The Maastricht Principles call on states to refrain from activities that impair the enjoyment of human rights outside of their own territories. Such extraterritorial activities relate to international agreements, to trade, finance and investment, as well as to business corporations operating internationally.

For social justice activists, a human rights approach provides an entry point to challenge regressive and unfair tax and fiscal policies. Human rights obligations are based on internationally agreed principles that most states have agreed upon. A human rights analysis helps shift the discourse on tax justice by bringing principles of equity and non-discrimination to the forefront. Moreover, a human rights framework strengthens demands for corporate and government accountability and transparency.

The staggering levels of inequality between high-income and low-income countries have been created and maintained by the flow of resources from the South to North. While Northern countries proudly proclaim the virtuousness of their international aid programmes, they have deliberately created the conditions that have led to this reality. Achieving accountability, fairness and transparency in taxation is one of the most important policy issues of our time. This insane economics must end. Justice demands it. ◆

Peter Gillespie is with the Halifax Initiative, a coalition of Canadian social justice organisations.

Women – the pillar of the social struggle in Patagonia

The women of the southern wilderness region of Patagonia in Chile have played a central role in the struggle against the central government's neglect of the region. *Marianela Jarroud* reports.

IN few places in Chile are women the pillars of community, grassroots rural and environmental movements as they are in the southern wilderness region of Patagonia. It is a social role that history forced them to assume in this remote part of the country.

'Patagonian women had to give birth without hospitals, they had to raise their children when this territory was inhospitable,' social activist Claudia Torres told Inter Press Service (IPS). 'And they also had to take on the responsibility of the social organisation of the communities that began to emerge.'

'The men worked with livestock or in logging and they would leave twice a year for four or five months at a time. So the women got used to organising themselves and not depending on men, in case they didn't come back.'

Women in this region not only raise their families and run the household but also shoulder the tasks of producing and managing food and natural resources – raising livestock, growing and selling fruit and vegetables, collecting firewood used to heat homes and cook – and making and selling crafts.

The region of Aysen, whose capital, Coyhaique, is 1,630 km south of Santiago, is the heart of Chilean Patagonia. It is home to 91,492 people, of whom 43,315 are women, according to the last official census, from 2002.

According to Torres, '70% or 80% of community, grassroots rural and environmental leaders and activists' are women, who were the core of the month-long mass protests that broke out in Aysen in 2012, posing a major challenge to the government of right-wing President Sebastian Pinera (2010-14).

Local women from Aysen were at the forefront of 2012 protests calling for better support from the Chilean central government for the region.

The Aysen uprising began on 18 February 2012, after months of demands for better support for development in this isolated region and subsidies for the high cost of living in an area lacking in infrastructure and subject to low temperatures and inclement weather.

'There were nights when it seemed like we were in a war,' said Torres, who helped reveal, in her programme on the Santa Maria radio station, the harsh crackdowns on the demonstrators in Coyhaique and Puerto Aysen, the second-largest city in the region.

For 45 days Torres broadcast coverage, night and day, on what was happening in the region. 'There were accounts from people who were beaten, shot, arrested, women who were stripped naked in front of male police officers,' she said.

In her coverage of the protests, Torres saw local women taking on a central role in the demonstrations against the central government's neglect of the region. 'It was women who were leading the roadblocks, organising the marches, the canteen, the resistance, caring for the injured,' she said.

She was referring to the movement brought to an end by the government's promise to listen to the region's demands – although two and a half years later, 'it has only lived up to 15% of what was agreed.'

The 40-year-old Torres, who studied design and tourism, started to work in the media in Caleta Tortel, the southernmost town in Aysen. She worked at a community radio station there, but her opposition to the HidroAysen project, which would have built five enormous hydropower dams on wilderness rivers in Patagonia, forced her into 'exile'.

'We were activists, and we produced a programme informing people about Endesa [the Italian-Spanish company that was going to build the dams] and reporting on dams in other parts of Chile and the world. But it had political costs and I lost my job. I came back to Coyhaique without work, without anything,' said the married mother of two.

Torres, who describes herself as

'Patagonian, messy, foul-mouthed, dishevelled, ugly and happy', continued the struggle against the dams and is now on the Patagonia Defence Council, which finally won the fight against HidroAysen when the government of socialist President Michelle Bachelet cancelled the project on 10 June.

Now Torres is the owner of a gift shop and forms part of the Aysen Life Reserve project, focused on achieving sustainable development in the region by capitalising on its wild beauty and untrammelled wilderness by preserving rather than destroying it.

Marianela Jarroud/IPS

Social activist Miriam Chible ***(second from left)*** **with her partner, two of her daughters and one of her grandchildren standing outside her restaurant in Coyhaique which is well known for sourcing quality local products.**

Mirtha Sanchez, a 65-year-old obstinate smoker, told IPS that life here is better now than when she was a little girl.

'I was five years old when I came to Coyhaique to live, and then I moved with my mother to Puerto Aysen, where she opened a boarding house that catered to workers,' Sanchez, who sees the strong role played by Patagonian women as a regional trademark, told IPS.

A decade ago she sold her business in Puerto Aysen and moved back to Coyhaique. She now runs a hostel that only brings in income in certain seasons.

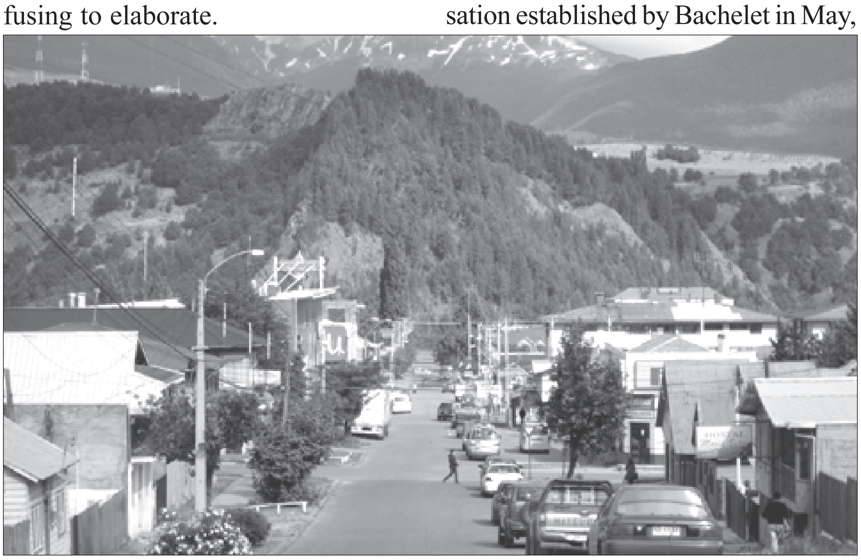
'I thought it would be more restful, but it wasn't,' she complained. 'This region has changed radically. The *nouveau riche*, with created interests, have arrived,' she added, refusing to elaborate.

She defends the 1973-90 military dictatorship of General Augusto Pinochet, saying, 'Aysen started to improve in that period, and it has gone downhill in recent years.'

Miriam Chible, 58, disagrees with that assessment. She believes the region 'has only good things to offer'.

Chible is an example of Patagonia's women leaders. She told IPS that when she was widowed, she and her four children successfully ran a restaurant that is not only the leading eatery today in Coyhaique but is also an example of sustainable development.

She works tirelessly for the region to achieve energy and food sovereignty, forms part of the Presidential Advisory Commission for Regional Development and Decentralisation established by Bachelet in May, and participates in initiatives to create a model of alternative economic development for Aysen.



Coyhaique, capital of the Aysen region. The people of the region are demanding respect for its right to development free of invasive and destructive projects.

'I'm not an expert in anything, but I care, I'm an involved citizen,' said Chible. Her new partner is also a social activist, who goes around the country drumming up support for Aysen's demands for respect for its right to development free of invasive and destructive projects.

'Sometimes people ask me "How's your issue going, the dam thing?" and they're wrong, because it's not "my issue". Excessive industrialisation in the region of Aysen will hurt us all, which is why we have to fight to stop it,' she said.

Her three daughters and one son share the work of purchasing food, serving the tables and running the restaurant. One of her daughters also manages a small ski rental and tour business.

The hard work has borne fruit: the Historico Ricer restaurant is one of the best-known businesses in the region, and its quality locally-based products are celebrated by locals and outsiders alike.

'This is a region of enterprising women,' said Chible, 'women who are seeking a development model on a human scale, focused on an appreciation of the binational culture that we share with Argentine Patagonia, and on our own kind of development that puts a priority on the use of local raw materials.'

'That's what we're working towards, and that's where we're headed,' she said. – *IPS* ◆

VIEWPOINT

A distant province

Commenting on the Scottish referendum, *Jeremy Seabrook* says that the visionless ignorance that Britain's rulers displayed in their campaign to keep Scotland from breaking away only served to underscore their remoteness from the rebellious Scots.

An independence supporter walks down a street in Edinburgh after the results of the Scottish referendum were announced. In its No campaign leading up to the referendum, the establishment had aroused ancient colonial echoes.

THE referendum in Scotland on whether the people wanted it to become independent or remain part of the United Kingdom was, ostensibly, an expression of what politicians call 'the settled will' of the people. In practice, they were subjected to a formidable barrage of propaganda, menaces and prophecies of doom from the No campaign. Leaders of the three main political parties rushed to Edinburgh, united in an heroic epic to save the union, and offering promises to offer greater devolution of power than ever before. Banks, financial institutions and big companies threatened to abandon Scotland, to 'disinvest' and remove their headquarters to London. Scotland would not be permitted to use the pound sterling. Jobs would be forfeited, and Scotland would become, not a flourishing small country like Denmark or Norway, but a kind of iceberg, floating, isolated and friendless, in the wastes of the North Atlantic.

The media were almost unanimous in support of the No campaign, only the Scottish *Sunday Herald* a sole advocate for an independent country. Listening to the rhetoric of the No campaign, it sounded as though Scotland were already a foreign country. When Westminster politicians talked about 'winning the hearts and minds' of the Scottish people, these were precisely the words they had used in relation to Afghanistan and Iraq; only, of course, those places, they invaded and occupied. Scotland was merely subjected to what the press called 'love-bombing', a sort of benign air strike. The British state concentrated its formidable power on ensuring that the United Kingdom 'family of nations' – a distinct echo of the Commonwealth – should not be rent asunder.

In any case, that domestic 'family' has historically been treated with scarcely greater tenderness than its fictive international equivalent when this remained empire – the Glencoe massacre, the destruction of the clan system after Culloden, the Highland clearances, large-scale emigrations of despair, the economic violence of industrialisation, and its equally arbitrary dissolution. The ties that bind have also been bonds that tether. These memories evaporated in lachrymose exaltations over 'our shared history', particularly the overarching (and seemingly imperishable) story of the Second World War.

When banks and businesses orchestrated their wails of economic disaster for a separated Scotland, the profession of sorrow sounded eerily like punitive economic sanctions: rhetoric lately used in relation to Putin's Russia, to Iran and Assad's Syria was heard in the authoritative tones of those who know that it is economics which determine the stability or fall of regimes. In a cliché which must be familiar even to those who have only the haziest notion of Scotland, the threat of rising prices in the shops would surely appeal to the Scots, who irresistibly attract the epithet 'canny', as befits the thrifty inhabitants of the home of political economy. Even the Queen suggested that the people should 'think very carefully' before casting their vote; such counsel, issued while in her Balmoral retreat, could scarcely have been interpreted as a vote in favour of independence.

Rudimentary understanding

The establishment, swooping on the country with its imperial portmanteau of clichés of (mostly failed) foreign policy initiatives elsewhere in the world, only confirmed what many Scots knew – these people have only a rudimentary understanding of the sensibility they wish to conciliate or, perhaps, subdue. And true to lingering imperial custom, their first recourse was to invoke the identical disastrous consequences of independence forecast during the long retreat from empire. They deployed familiar, if now archaic-sounding, arguments widely heard during the period of decolonisation in the middle of the last century.

There was desperation in David Cameron's reference to the heartbreak a 'yes' vote would cause him. That far-from-delicate organ, his heart, has remained intact through greater misfortunes, not least the ruin of the lives of others, caused largely by his deeply inhumane policies, against which many Scots were also rebelling – bedroom tax, benefit 'sanctions' (there we are again, since the poor are also foreigners, who must be coerced into 'behaviour' acceptable to their betters, masters or overlords), the dismantling and privatisation of the National Health Service. Cameron's grief must have been inflected by the easily imaginable epitaphs on his political career, had he permitted such an important piece of territory as Scotland to drift away from the three-hundred-year-old union.

In the events leading to the Falklands War in 1982, many people in Britain believed those islands to be located 'somewhere off the Scottish coast'. It was now Scotland's turn to be treated as though it were some distant outpost, a colony perceived only dimly, through the mists, not so much of northern latitudes as of imperial unknowing.

What Westminster belatedly offered to Scotland in the closing days of the campaign – 'devo-max' – also aroused ancient colonial echoes. For were not most of the former territories governed by Britain offered something like 'home-rule', 'autonomy', 'federalism', as a substitute for independence? 'Self-government' was the term offered as an inducement to remain under the imperial umbrella, that increasingly threadbare shelter, until such time as peoples reached the maturity necessary to 'govern themselves' (the ruled are always infantilised), a prospect adjourned indefinitely at the time of the offers of limited self-rule.

It all underlined the clouded insight of the ruling classes into those they would clasp to their insentient bosom. Devoid of understanding of their 'subjects', they can only bluster and threaten, a position of last resort for a truncated imperial entity threatened with secession in its heartland.

It was easy to see how political, business and media elites made such a hash of their campaign. It had not even occurred to them, until alerted by an opinion poll in early September, that the beneficiaries of their wise rule would consider leaving the union. This was why David Cameron had refused a third option on the ballot paper of 'greater devolution', so certain was he of victory.

First victims of colonialism

Nor is the visionless ignorance of our rulers confined to their response to mutinous Scots. It is apparent in every aspect of what they call, in their lordly vocabulary, their 'governance' of the rest of us. 'Senior politicians', 'high-placed' CEOs, 'influential' opinion-formers, the whole range of strategies designed to paint the indissolubility of a United Kingdom, show that their detachment from the people of Scotland is matched by their remoteness from the North-East, Wales, Cornwall, the North-West or even the Midlands. They speak only for the counties that used to be designated 'home' – and the Conservatives seem bent on alienating even those it has always thought of as 'its own people', by its espousal of fracking, the construction of HS2 (a new railway costing untold billions that will make Birmingham accessible in under an hour), building on green belts and relaxing planning rules.

This is good reason for the rest of us not to be divided from the Scots. We, in England and elsewhere, desperately need their scepticism, generosity of spirit, political consciousness and radicalism, to help us resist the manipulations of a political class which sought to browbeat Scotland into submission with threats, as well as promises that, true to form, did not outlive the day which dawned on the No vote. As soon as the 55%-45% victory was announced, and the union secured, David Cameron appeared in Downing Street, an avenging angel, determined to unpick the very union he had so passionately defended: he demanded that 'English voices' also be heard, and that if the devolved powers promised to Scotland – including control over taxes and welfare – were to be honoured, then the English should have a right to control their own affairs, and Scottish MPs would have to be excluded from voting on laws affecting England. This showed how close to the surface remains the imperial divide-and-rule instinct. Cameron's Conservative Party is scarcely represented in Scotland; by appealing to a renascent English nationalism, the opportunity to nullify Labour's advantage in Scotland took precedence over the very unity which he claimed to cherish above all else.

It cannot be stated too strongly that all the people of Britain were the first victims of colonialism: the enclosure of common land, brutal poor laws, a punitive penal code, the laying waste of traditional communities, repression, transportation of felons, the economic violence of industrialism – all this was tried and tested at home, long before such elegant policies were exported to the rest of the world, significantly coloured blood-red on the map. If the union is secure, perhaps we in the rest of the country may learn something from the vigour and passion that galvanised Scotland: those of us untouched by the perpetual shimmer of wealth and power also feel we are treated as restive and wilful, lesser people, over whom those born to rule have once more asserted their claims. And when they reappoint bankers and financiers to be both bearers of morality and arbiters of the good of the people, we all become like the occupants of a spectral Afghanistan, whose lives are constantly reshaped by their unaccountable necessities, but whose hearts and minds are closed to their malignant probings and their attempts to win us over to their version of peace, progress and plenty. ◆

Jeremy Seabrook is a freelance journalist based in the UK. His latest book is The Song of the Shirt *(published by Navayana, June 2014).*

Poet *Susmita Nepal* belongs to a generation of Nepalese writers which came into prominence from the 1990s onwards. Herself a mother and a daughter, she wrote the following poem which uses simple language to portray the profound and great love of a mother.

Mother

Susmita Nepal

Mother cuts each morning
with the edge of a sickle
With all her strength she bundles life
into a heap of grass
then lays it down
before the hunger of cattle

While milking cows,
in each stream she sees
the white teeth of laughing children
She is puzzled by the way pots and plates
stare at herself, ablaze at the stove

Sorrows appear before her
and dance rhythmically
She just gazes at them
Unspoken words she gathers
for her unmarried daughter
She wants to hide the rising moon
in the folds of her clothes –
a snack to erase her hunger
sharpened by loneliness

Memories of her son gone abroad
become a thousand days and vanish
Each time, Mother plants seeds of hope
in the folds of forty year-old scarcity

But these seeds never grow
It can't be said when he'll return
to fix the broken dam in her heart –
her son gone abroad

Translated by Manjushree Thapa
From *The Country Is Yours* by Manjushree Thapa (Penguin Books, 2009).