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Human Rights Due Diligence by Corporate Creditors in Sovereign Debt Restructurings – A Great Missing Link

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Abstract

This article studies human rights due diligence by private corporate creditors in the context of sovereign debt restructurings. First, the legal bases of this specific due diligence are presented and systematized. Then, by providing empirical statistical evidence, the article analyses whether haircuts applied by creditors across countries regularly consider the social and economic human rights situation of the debtor countries in question, as part of creditors' due diligence. Also, the main characteristics of bond markets that contribute to understanding the asymmetric power relationship between private lenders and sovereign borrowers are described. Finally, Argentina's latest debt restructurings are studied in depth to determine whether human rights were taken into account when agreeing on the size of haircuts. From quantitative and qualitative data, this article concludes that the haircuts agreed by creditors are regularly not sensitive to the social and economic human rights situation of debtor populations or to the impact that debt agreements could have on them.

Keywords: debt restructurings; due diligence; haircuts; human rights; private creditors

I. Introduction

Private financial investors in general, and more specifically those corporations holding sovereign debt, are not exempt from complying with human rights obligations, including those systematized in the United Nations Guiding Principles on Business and Human Rights (UNGPs).

Yet, while to most people, this would sound like a basic, common-sense legal statement, the Thun Group of Banks[1] made the point in its second report in 2017[2] noting (echoing the

[1] The Thun Group is an informal group of banks created to discuss the UNGPs' implications in the banking sector. The group includes UBS, Credit Suisse, Barclays, BBVA, BNP Paribas, Deutsche Bank, ING, RBS, Standard Chartered, UniCredit and JP Morgan.

[2] Thun Group of Banks, 'Paper on the Implications of UN Guiding Principles 13b & 17 in a Corporate and Investment Banking Context' (December 2017), https://media.business-humanrights.org/media/documents/files/documents/2017_12_Thun_Group_of_Banks_Paper_UNGPs_13b_and_17.pdf (accessed 27 June 2023).

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International Monetary Fund's (IMF) and World Bank's arguments[3]) that, at its discretion, banks could never be held accountable for the adverse effects their clients' transactions may have on human rights, as this impact is not part of bank operations. This interpretation has been widely criticized by the international system for the protection of human rights, including by the United Nations (UN) Working Group on Business and Human Rights[4] and the UN Independent Expert on Foreign Debt and Human Rights,[5] in line with the interpretation of the Office of the UN High Commissioner for Human Rights (OHCHR) on this specific issue.[6] The main point made in these critical views is that lenders can be held accountable if, without their lending, a number of violations would not haven take place.

In any case, the state of this debate shows a remarkable under-development of legal theory addressing the links between finance and human rights, with, to some extent, the exception of the financing of infrastructure projects.[7] Nonetheless, when focusing on due diligence by corporate lenders and the insolvency of sovereign borrowers from a human rights perspective, the backwardness is even more evident.[8]

The causes of this phenomenon are twofold: (a) there are interdisciplinary methodological challenges posed by linking sovereign debt to human rights; and (b) these links do not attract the attention from the finance industry, because international human rights law imposes limits on what is financially possible.[9] Notably, most developed countries

[3] Arguments made by the IMF and the World Bank towards the International Law Commission when discussing the 'Draft Articles on the Responsibility of International Organizations,' explaining that lenders do not control what borrowers do and that money is fungible commodity in any case. International Law Commission, 'Responsibilities of International Organizations: Comments and Observations Received from International Organizations', A/CN.4/582 (1 May 2007).

[4] Letter to the Thun Group (23 February 2017), https://media.business-humanrights.org/media/documents/files/documents/20170223_WG_BHR_letter_to_Thun_Group.pdf (accessed 27 June 2023).

[5] Letter to the Thun Group (19 October 2017), https://www.ohchr.org/sites/default/files/Documents/Issues/Development/IEDebt/LetterThunGroup.pdf (accessed 27 June 2023).

[6] OHCHR, 'OHCHR Response to Request from BankTrack for Advice Regarding the Application of the UN Guiding Principles on Business and Human Rights in the Context of the Banking Sector' (12 June 2017), https://www.ohchr.org/sites/default/files/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf (accessed 27 June 2023).

[7] OHCHR, 'Benchmarking Study of Development Finance Institutions' Safeguard Policies', Consultation Draft (7 June 2022), https://www.ohchr.org/sites/default/files/Documents/Issues/Development/DFI/OHCHR_Benchmarking_Study_HRDD.pdf (accessed 27 June 2023).; OHCHR, 'Remedy in Development Finance. Guidance and Practice' (2022), https://www.ohchr.org/sites/default/files/2022-02/Remedy-in-Development.pdf (accessed 27 June 2023); OHCHR, 'OHCHR Response to Request from BankTrack and OECD Watch for Advice Regarding the Application of the UN Guiding Principles on Business and Human Rights Where Private Sector Banks Act as Nominee Shareholders' (30 August 2021), https://www.ohchr.org/sites/default/files/Documents/Issues/Business/finance-2021-response-nominee-shareholders.pdf (accessed 27 June 2023); UN Environment Programme, 'Human Rights Guidance Tool for the Financial Sector', https://www.unepfi.org/humanrightstoolkit/index.php (accessed 11 January 2023); Global Forum on Responsible Business Conduct, Organisation for Economic Co-operation and Development (OECD), 'Due Diligence in the Financial Sector: Adverse Impacts Directly Linked to Financial Sector Operations, Products or Services by a Business Relationship' (26–27 June 2014), https://mneguidelines.oecd.org/global-forum/GFRBC-2014-financial-sector-document-1.pdf (accessed 27 June 2023); OECD, 'Responsible Business Conduct for Institutional Investors: Key Considerations for Due Diligence under the OECD Guidelines for Multinational Enterprises' (2017), https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf (accessed 27 June 2023). On the human rights obligations of development banks, Daniel Bradlow and Andria Fourie, 'The Multilateral Development Banks and the Management of the Human Rights Impacts of their Operations' in Surya Deva and David Birchall (eds.), *Research Handbook on Human Rights and Business* (London: Edward Elgar, 2020).

[8] But see Daniel Bradlow, 'Can Parallel Lines Ever Meet? The Strange Case of the International Standards on Sovereign Debt and Business and Human Rights' (2016) 41:2 *Yale Journal of International Law* 201, 239.

[9] Private creditors have little interest to change the present situation; however, opposition by the public creditors can be even stronger as they can combine debt relief with economic concessions and increased political influence.

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systematically reject initiatives of the UN General Assembly and the Human Rights Council that elaborate the relationship between finance and human rights.[10]

We know that, based on the UNGPs,[11] human rights due diligence (HRDD) 'refers to the processes that all business enterprises should undertake to identify, prevent, mitigate and account for how they address potential and actual impacts on human rights caused by or contributed to through their own activities, or directly linked to their operations, products or services by their business relationships'.[12] This definition considers due diligence as a process to manage business risks and also, implicitly, as a standard of conduct required to discharge an obligation[13] in order to avoid infringing on the human rights of others.[14] This due diligence corporate standard reflects a basic, defensive conception of human rights accountability.[15] As seen, advancing the discussion on HRDD by lenders is ultimately about setting standards and ensuring that holding corporations and business people to account if violations occur.[16]

This article addresses the following questions: What are the legal bases and the main contents of corporate creditors' HRDD in the context of sovereign insolvency? Do creditors undertake HRDD when dealing with insolvent sovereign debtors so that there is at least some fiscal space left to ensure the minimum core human rights obligations of borrower populations? If so, how do creditors fulfil this due diligence? If not, how should they do it?

There are two important caveats. This article focuses on the private lenders' HRDD when negotiating and deciding on haircuts, but official (multilateral and bilateral creditors) are also bound by international human rights law,[17] which includes their obligation to conduct due diligence and correlatively grant debt relief when necessary in order to not deteriorate the sovereign debtor populations' human rights situation.[18] Yet, official creditors do not regularly grant debt reliefs but only reprofile their credits, even when this is an option established in their own statutes.[19] The second caveat is that lenders' HRDD does not absolve sovereign borrowers from their duty to do human rights due diligence in regard to any

[10] Considering, for example, the voting patterns in the Special Procedures' mandate on debt and human rights, industrialized countries voted systematically against (or abstained) regarding all normative production coming from this mandate, even when discussing its renewal every six years.

[11] UNHRC A/HRC/17/31, 21 March 2011, Annex, Guiding Principle 11 at p 13, and Guiding Principle 17 at p 16. The third draft (2021) of the 'Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises' also builds on the notion of business due diligence. See https://www.ohchr.org/sites/default/files/LBI3rdDRAFT.pdf (accessed 27 June 2023).

[12] Working Group on the issue of human rights and transnational corporations and other business enterprises, 'Report', UN Doc. A/73/163, 16 July 2018, para 2.

[13] Jonathan Bonnitcha and Robert McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights' (2017) 28:3 *European Journal of International Law* 899, 919.

[14] Benjamin Gregg, 'Beyond Due Diligence: the Human Rights Corporation' (2022) 22:1 *Human Rights Review* 65–89.

[15] René Wolfsteller and Yingru Li, 'Business and Human Rights Regulation After the UN Guiding Principles: Accountability, Governance, Effectiveness' (2022) 23 *Human Rights Review* 1–17.

[16] Nadia Bernaz, *Business and Human Rights. History, Law and Policy – Bridging the Accountability Gap* (London: Routledge, 2017).

[17] UN Economic, Social and Cultural Rights Committee, 'Statement on public debt, austerity measures and the ICESC', UN Doc. E/C.12/2016/1, 22 July 2016; Juan Pablo Bohoslavsky and Francisco Cantamutto, 'Not Even with a Pandemic: The IMF, Human Rights, and Rational Choices Under Power Relations' (2022) 44 *Human Rights Quarterly* 759 – 783.

[18] See UN Guiding Principles on Human Rights Impact Assessments for Economic Reform Policies, A/HRC/40/57 (19 December 2018); Human Rights Council Resolution, A/HRC/RES/40/8 (21 March 2019), specifically Principles 12 and 15.

[19] Kunibert Raffer, 'Rethinking Sovereign Debt: Pleading for Human Rights, the Rule of Law, and Economic Sense' (2016) 6:3 *Accounting, Economics, and the Law: A Convivium*.

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restructuring, as a specific implication of the obligation to demonstrate that every effort has been made to mobilize all available resources, even in times of economic crises.[20]

This article is structured as follows. Section II restates and systematizes the scattered UN developments regarding creditors' due diligence standards in the context of debtor states' insolvency. Section III then provides empirical historical aggregated evidence to analyse whether haircuts[21] applied by creditors regularly consider the social and human rights implications of debt agreements. Section IV explains the main characteristics of bond markets that illustrate the asymmetric power relationship between private lenders and sovereign borrowers, which, in turn, highlights the importance of focusing on lenders' due diligence. Section V describes and delves into the last two debt restructurings (2005 and 2020) carried out by the Argentine government with its private creditors, with the aim of determining whether human rights obligations and the social situation of the debtor state were part of the negotiations and decisions around these debt agreements. Section VI offers some concluding remarks.

II. Corporate Creditors' Due Diligence in the Context of Sovereign Insolvency

What are the forms and components of private creditors' HRDD towards debtor States and their populations? What are the main questions to be addressed if they were to undertake human rights impact assessments of their decisions, particularly in the context of debt agreements and restructurings? Neither scholars nor civil society organizations have thoroughly approached these fundamental issues.[22] In turn, a number of UN initiatives have briefly referred to creditors' due diligence in the context of states' insolvency, distilled from international law sources.[23] In the following paragraphs, we attempt to restate and systematize these UN developments in order to better understand (and demand) what creditors (and their representatives, such as bond trustees[24]) should do in the context of debt restructurings.

It is worth mentioning that States have also their own human HRDD obligations in terms of debt policies, including in the context of debt restructurings. Yet, HRDD creditors' and debtors' obligations are both autonomous and not mutually exclusive. In this article we focus on the creditors' obligations.[25]

[20] Committee on Economic, Social and Cultural Rights, 'General comment No. 3 (1990) on the nature of States parties' obligations', paras 9–12; 'General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities' para 23; 'UN Guiding Principles on Human Rights Impact Assessments for Economic Reform Policies', A/HRC/40/57 (19 December 2018); Human Rights Council Resolution, A/HRC/RES/40/8 (21 March 2019), specifically Principle 9.

[21] This financial jargon is used to denote a reduction in the amount to be repaid to creditors, or a reduction in the face value of a troubled borrower's debt.

[22] It has been found that 'almost all jurisdictions recognize that there is a structural information asymmetry between consumers and financial institutions, which justify requiring diverging forms of due diligence from lenders', Matthias Goldmann, 'Responsible Sovereign Lending and Borrowing: The View from Domestic Jurisdictions. A Comparative Survey', Working Paper, UNCTAD and Max Planck Institute for Comparative Public Law and Institutional Law (2012), 15–17.

[23] On the hard law roots of some of these initiatives, see for example Aoife Nolan and Juan Pablo Bohoslavsky (eds.), *Human Rights and Economic Policy Reforms* (Abingdon: Routledge, 2022), and Carlos Espósito, Yuefen Li and Juan Pablo Bohoslavsky, *Sovereign Lending and Borrowing. The UNCTAD Principles on Responsible Sovereign Lending and Borrowing* (Oxford: Oxford University Press, 2013).

[24] See Grygoriy Pustovit, 'Bond trustees and debt sustainability in sovereign debt restructuring,' PhD thesis, Goethe University Frankfurt (2020), at https://publikationen.ub.uni-frankfurt.de/frontdoor/index/index/docId/71333 (accessed 27 June 2023).

[25] For the legal development of borrower states' obligations to conduct debt sustainability analyses taking into account human rights, see next footnote, in particular Principles 2, 11 and 12.

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The 2019 UN Guiding Principles on Human Rights Impact Assessments (HRIA) for Economic Reform Policies[26] establish that:

> Private creditors, when negotiating transactions with States or other public entities, including taking decisions in the context of economic reforms, should not undermine the State's ability to respect, protect and fulfil its human rights obligations. Among other things, these creditors should assess the human rights impacts of their own actions as well as those of the activities financed by them, unless they have ascertained that debtor States or international and regional financial institutions have carried out effective assessments, including with regard to gender equality and the environmental impact. (Principle 16)
>
> The obligations mentioned in the previous paragraph include, for example, participating in debt relief programmes and restructuring negotiations in good faith through a formal process of deliberative policy engagement and social dialogue. They also include actively seeking debt agreements that are financially sustainable and respect human rights. Creditors should refrain from predatory or obstructive behaviour that could compel States to act in contravention of their human rights obligations in order to repay debts or directly impact States' capacity to meet these obligations. (Principle 15.2 and Principle 16.2 establishing that good faith requirements apply to both public and private creditors)

In addition, the UN Basic Principles on Sovereign Debt Restructuring Processes, approved by the General Assembly in 2015,[27] explain that:

> Good faith by both the sovereign debtor and all its creditors would entail their engagement in constructive sovereign debt restructuring workout negotiations and other stages of the process with the aim of a prompt and durable re-establishment of debt sustainability and debt servicing, as well as achieving the support of a critical mass of creditors through a constructive dialogue regarding the restructuring terms. (para 2)
>
> Sustainability implies that sovereign debt restructuring workouts are completed in a timely and efficient manner and lead to a stable debt situation in the debtor State, preserving at the outset creditors' rights while promoting sustained and inclusive economic growth and sustainable development, minimizing economic and social costs, warranting the stability of the international financial system and respecting human rights. (para 8)

The Principles on Promoting Responsible Sovereign Lending and Borrowing of the UN Conference on Trade and Development (UNCTAD), published in 2012,[28] set out the essential responsibilities of both lenders and borrowers of sovereign debt, specifying that:

> A lender is responsible to make a realistic assessment of the sovereign borrower's capacity to service a loan based on the best available information and following

[26] UN Independent on Debt and Human Rights, A/HRC/40/57 (19 December 2018); Human Rights Council Resolution, A/HRC/RES/40/8 (21 March 2019).

[27] Res. 69/319 (29 September 2015).

[28] Available at https://unctad.org/topic/debt-and-finance/Sovereign-Lending-and-Borrowing (accessed 27 June 2023).

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> objective and agreed technical rules on due diligence and national accounts … Lending beyond a borrower's reasonable capacity to repay not only risks a default on the loan in question, it adversely affects the position of all other creditors of that sovereign debtor. (Principle 4)
>
> 'In circumstances where a sovereign is manifestly unable to service its debts, all lenders have a duty to behave in good faith and with cooperative spirit to reach a consensual re-arrangement of those obligations. Creditors should seek a speedy and orderly resolution to the problem'. (Principle 7)

The 2011 UN Guiding Principles on Foreign Debt and Human Rights[29] provide that

> All lenders should conduct due diligence to ensure that the proposed loan will not increase the Borrower State's external debt stock to an unsustainable level that will make debt repayment difficult and impede the creation of conditions for the realization of human rights. Lenders should satisfy themselves that, even with the new loan, the Borrower State is still capable of servicing its external debt without compromising its ability to perform its international human rights obligations as mentioned in section II. (para 39)

From all these legal provisions, a key content of creditors' due diligence can be distilled: they should assess how their decisions (translated into financial contractual terms) would impact the borrowing states' fiscal capacity to meet their own human rights obligations towards their populations.[30] Conceptually speaking, there is a *human rights debt tolerance threshold* that should not be exceeded. For instance, consider Sri Lanka, whose servicing costs on public and publicly guaranteed external debt as a percentage of government revenues reached 58.8 in 2020, while in Somalia this figure was 96.8 (in the same year).[31]

This due diligence may go further as contractual terms might need to be adjusted in order to prevent human rights violations. This means, in more technical terms, that debt relief ('haircut') has to be proportionally granted/agreed to ensure that debt becomes sustainable from financial and human rights perspectives. In relation to impact assessments, analyses on debt sustainability – as a principle of international law[32] – should be based on a comprehensive understanding of debt sustainability, incorporating human rights and the social and environmental dimensions of sustainability.[33] This is based on the fact that an absolutist view of the *pacta sunt servanda* principle is neither part of positive law nor of customary international law. Debt contracts exist in a broader legal and economic universe,[34] in which human rights law, the agency relationship between states and their populations, and economic constraints interact with the rights of creditors.[35]

[29] UN Independent on Debt and Human Rights, A/HRC/20/23 (10 April 2011).

[30] On creditors' HRDD, see also Principle 3 of the Dove Fund Principles, Daniel Bradlow, 'A Proposal for a New Approach to Restructuring African Eurobonds: The DOVE Fund and Principles,' Southviews No. 42, South Centre, Geneva (November 2022).

[31] According to World Bank data.

[32] Juan Pablo Bohoslavsky and Matthias Goldmann, 'An Incremental Approach to Sovereign Debt Restructuring: Sovereign Debt Sustainability as a Principle of Public International Law' (2016) 41:2 *Yale Journal of International Law* 13, 43.

[33] A/HRC/40/57, Principle 12; A/HRC/20/23, para 65.

[34] Odette Lienau, *Rethinking Sovereign Debt: Politics, Reputation, and Legitimacy in Modern Finance* (Cambridge, MA: Harvard University Press, 2014).

[35] UN Doc A/70/275 (4 August 2015), 14.

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More specific regulation on HRDD at the national level is, obviously, desirable[36] and feasible.[37] Yet, as known, effectiveness of the protection of human rights should not depend on the existence of national laws incorporating/regulating international human rights obligations. Hence, corporate creditors have HRDD obligations that should guide debt restructuring as a general rule, and this should not depend on the existence of national laws regulation of debt restructurings. The opposite would mean that HRDD can variate among countries, with creditors having to fulfil their HRDD depending on the State that owes the debt. This would further intensify power imbalances effects (Section III).

In this regard, the role of official creditors is relevant, as they can guide restructuring process to meet HRDD. More specifically, debt sustainability analyses (DSA) undertaken by the IMF and World Bank indicate 'how much' debtor States can repay and private investors usually take this evaluation as an important indicator – jointly with those provided by credit rating agencies – to take decisions regarding their debt portfolios. Criteria used by the IMF-World Bank to perform DSA have been criticized by scholars and civil society organizations as this framework blatantly side-lines the human rights implications of the IMF-World Bank's fiscal estimations and policy recommendations made to back its debt sustainability evaluations.[38] Moreover, these official creditors have actually been reluctant to provide diligent debt relief to countries facing crisis, limiting their initiatives – such as HIPC – to a few severe-impoverish countries. In this context, creditors cannot take IMF-World Bank's criteria as a *revealed truth*, being responsible to collect reliable information and make informed decisions to perform their own HRDD.

Are creditors' due diligence duties, as described in the previous paragraphs, taken into account when concretely restructuring sovereign debts? What are the concrete and specific questions that creditors should pose as key parts of their due diligence? These aspects are discussed in the next section.

III. Haircuts Through History. Have Human Rights Mattered?

As seen in the previous section, creditors should seek debt agreements that are financially sustainable and respect human rights. This is why studying how haircuts have worked through history refers to the resources left to sovereign debtors to guarantee the human rights of their populations. It is key to understand whether decisions on the size of haircuts are regularly sensitive to the social (human rights) situation of debtor countries.

Even when private creditors exercise their power over debtor countries in various ways (e.g., delaying negotiations, settling debt disputes in foreign courts or arbitration panels, etc.), by comparing haircuts (debt relief ultimate volumes) resulting from debt restructurings, we can better reflect how compliance or non-compliance with due diligence by private creditors can affect human rights of sovereign debtor populations.

Let us begin this exercise by explaining that the number and volume of sovereign debt restructuring processes with private creditors have increased in recent decades. This

[36] Malina Stutz, 'Das Potenzial nationaler Gesetze für die faire Lösung globaler Schuldenkrisen: Eine Übersicht und Bewertung bestehender Gesetze und Gesetzesvorschläge' (2022), Fachinformation 71, erlassjahr.de (German Jubilee Campaign), November, at https://erlassjahr.de/wordpress/wp-content/uploads/2022/11/Fachinfo-71_V02.pdf (accessed 27 June 2023).

[37] See, for instance, the Directive on corporate sustainability due diligence adopted in 2022 by the European Commission, available at https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en (accessed 27 June 2023).

[38] Christina Laskaridis, 'Debt sustainability: Towards a history of theory, policy and measurement', PhD thesis, SOAS University of London, 2021; Martín Guzmán and Daniel Heymann, 'The IMF Debt Sustainability Analysis: Issues and Problems' (2016) 6:2 *Journal of Globalization and Development* 387–404.

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evidences the structural changes undergone in the global economy since the 1980s,[39] of which four are worth mentioning: (1) the increase in the participation of investment funds as creditors – decreasing the importance of bank loans and official credits;[40] (2) the reduction of default events as a negotiation tool;[41] (3) the growth of global indebtedness, including sovereign debt;[42] and (4) the prolonged absence of a regulatory framework or an effective multilateral mechanism for the resolution of creditor-debt disputes.[43] In this context, sovereign debt restructuring processes with private creditors have become increasingly important: debt is higher, private funds are more relevant, and, without a resolution mechanism, debtor countries aim to restructure before having a default or debt crisis.

The selection and use of indicators for debt sustainability analysis might at first appear to be a very technical issue, but it is highly political. Therefore, it is of paramount importance to bear in mind that certain principles should be upheld, such as sustainability and its relationship with human rights.[44] However, negotiations focus only on capital, interest, terms, currency and legal clauses, and, more contextually, on fiscal projections to ensure the repayment flow. Human rights do not appear as a relevant element in the negotiations and evaluations of sovereign debt restructuring processes, as shown in the paragraphs below.

In the specialised literature,[45] there are different methodological approaches to calculate haircuts through the history of debt restructurings, which lead to a variety of results.[46] Contemporary external debt restructurings (2013–2020)[47] were made as 'preventive

[39] Sebastian Horn, Carmen M Reinhart and Christoph Trebesch, 'Hidden Defaults' (2022), Kiel Working Papers, No. 2208; Jerome Roos, *Why Not Default? The Political Economy of the Sovereign Debt* (New Jersey: Princeton University Press, 2019); Carmen Reinhart and Kenneth Rogoff, *Esta Vez es Distinto*, (Madrid: Fondo de Cultura Económica, 2009).

[40] World Bank, *International Debt Statistics* (2020).

[41] David Beers, Elliot Jones, Zacharie Quiviger and John Walsh, 'BoC–BoE Sovereign Default Database: What's New in 2021?' (2021), *Bank of England Staff Analytical Note*, 2021-15. Since the 1980s, most restructurings have proceeded without the declaration of default. Ross (2019) identified different enforcement mechanisms used by financial power to prevent debtor countries from defaulting on their sovereign debt (such as the market discipline, the conditional lending, and the bridging role of domestic elites).

[42] Institute of International Finance, 'COVID Drives Debt Surge – Stabilization Ahead?', *Global Debt Monitor* (17 February 2021).

[43] Julian Schumacher, Christoph Trebesch and Henrik Enderlein, 'Sovereign Defaults in Court' (2018), ECB Working Paper, Series No 2135. Given the referred absence of such a mechanism, some national courts have increased their importance – in particular, London and New York. See below the case of Argentina against vulture funds in the New York Courts.

[44] Michael Reigner, 'Legal Frameworks and General Principles for Indicators in Sovereign Debt Restructuring' (2016) 41:2 *Yale Journal of International Law* 141, 175.

[45] Chuck Fang, Julian Schumacher and Christoph Trebesch, 'Sovereign Defaults: The Price of Haircuts' (2013) 3:5 *American Economic Journal: Macroeconomic* 85, 117; International Monetary Fund, 'Sovereign Debt Restructuring – Recent Developments and Implications for the Fund's Legal and Policy Framework' (26 April 2013); International Monetary Fund, 'The International Architecture for Resolving Sovereign Debt Involving Private-Sector Creditors' (23 September 2020), https://doi.org/10.5089/9781513557472.007 (accessed 27 June 2023); Federico Sturzenegger and Jeromin Zettelmeyer, 'Haircuts: Estimating Investor Losses in Sovereign Debt Restructurings, 1998–2005' (2008) 27:5 *Journal of International Money and Finance* 780, 805; Christoph Schröder, 'Haircut Size, Haircut Type and the Probability of Serial Sovereign Debt Restructurings' (2014) *Centre for European Economic Research* (*ZEW*), Die Discussion Papers 14, 126.

[46] Fang, Schumacher and Trebesch (note 45) used a method similar to Sturzenegger and Zettelmeyer (note 45) and Cruces and Trebesch (2013), but obtained a difference of 1.7 percentage points with the work of Sturzenegger and Zettelmeyer (note 45) and 8 percentage points with the estimates of Cruces and Trebesch (2013). On the other hand, Fang, Schumacher and Trebesch (note 45) applied a different methodology than that of Moody's (2012), so the difference is greater (13 percentage points). The 'Sovereign Defaults' series of Moody's completed the sovereign bond exchanged database up to the year of the start of the pandemic and complemented the study it undertook on the credit rating agency in 2010 on the causes of default.

[47] IMF (2020) analyses thirteen cases of debt restructuring in nine countries.

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measures' (i.e., before a default[48]); they had a shorter average duration (1.2 years, less than the average of 3.5 years for restructurings in 1978–2010) and a higher average creditor participation than in previous periods. The absence of a default means that creditors continue to charge for services while negotiating, which is particularly costly for debtors, as they follow paying while not receiving any fresh resources. As countries facing a debt crisis need resources, they intend to remedy the situation as soon as possible. This gives creditors a huge advantage.

Higher overall haircuts are in fact associated with a lower probability of serial restructurings, as opposed to low debt reliefs, which lead to difficulties in servicing sovereign debt, forcing new events of distress[49]. Guzmán understands that these results show the insufficiency of sovereign restructurings, as they are not sufficient to 'restore sustainability,' and, in a short time, countries default or undertake new restructurings[50]. Despite more haircuts avoid the need for an immediate new restructuring process —and free resources to protect human rights—, this goes against creditors' participation (it increases the holdout rate, the percentage of creditors who do not engage). Fang, Schumacher and Trebesch[51] found that greater haircuts have the highest holdout rates (i.e., lower participation of creditors). Private creditors intend to limit haircuts to cash their bonds as quickly as possible and avoid increasingly resorting to legal litigation against debtor countries. An ECB document states that more than half of recent sovereign debt restructurings involved creditor litigation, a way of leveraging the bargaining position of creditors by increasing the costs of delaying to debtor countries – litigation involves costs, and delays the potential return of debtor to credit markets.[52] Finally, it is worth mentioning that, as Ams, Baqir, Gelpern and Trebesch stressed, 'private creditors generally face a higher risk of default and steeper haircuts than official bilateral creditors',[53] as bilateral and multilateral creditors usually simply refuse to participate in debt restructurings or are able to impose better conditions (lower haircuts).

Notably, the above referred specialized literature does not incorporate 'human rights' as a relevant variable to measure and understand the implications of debt restructurings. We depart from there and will now study empirical data to verify whether human rights and the social situation in debtor countries are regularly considered in debt restructurings. We take as a benchmark the debt restructurings undertaken between the outbreak of the Global Crisis (2007–2008) and that of the COVID-19 pandemic (March 2020). These account for the restructuring processes of recent times, with a common legal framework and an international financial architecture, so they can give a general and comparative picture of our argument. Our presentation is an exploratory description of the matter, not a full statistical approach. Through a review of specialized literature, we have identified all the

[48] Arms, Baqim, Gellpern and Trebesch (2020) recognized different types of defaults events.

[49] Schröder (2014) used a database of 180 sovereign debt restructurings with foreign commercial creditors in 68 countries since 1970, taking data from Cruces and Trebesch (2011).

[50] Martín Guzmán, 'Reestructuración de Deuda Soberana en una Arquitectura Financiera Legal con Huecos' (2016) 85 *Revista Jurídica Universidad de Puerto Rico* 611, 626.

[51] Fang, Schumacher and Trebesch (note 45). This paper reviewed all sovereign debt restructurings with foreign bondholders from 1994 to 2015. The EBC's sample includes 23 sovereign debt restructurings by 16 countries.

[52] European Central Bank (ECB) working paper compiling 418 instruments in 23 debt-restructuring agreements with external bondholders since 1994. The report does not include debt restructurings denominated in local currencies, such as the cases of Paraguay 2006, Jamaica 2010 and 2013, and Cyprus 2013. It takes as a reference the year 1994, when Panama became the first country to default on sovereign bonds since the 1980s crisis.

[53] Julianne Ams, Reza Baqir, Anna Gelpern and Christoph Trebesch, 'Sovereign Default' in S Ali Abbas, Alex Pienkowski and Kenneth Rogoff (eds.), *Sovereign Debt. A Guide for Economists and Practitioners* (Oxford: Oxford University Press – IMF, 2020), 275, 327.

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restructuring processes in the period.[54] These include 19 sovereign debt restructurings by 13 countries: Barbados in 2018 and 2019, Belize in 2013 and 2017, Chad in 2019, Côte d'Ivoire in 2010 and 2012, Ecuador in 2009, Grenada in 2015, Greece in 2012, Jamaica in 2010 and 2013, Mongolia in 2017, Mozambique in 2016 and 2019, St Kitts and Nevis in 2012, Seychelles in 2009, and Ukraine in 2015.

These 19 events can be characterized in relation to literature usual features. Only five out of these 19 events included a default declaration as part of the negotiation. In this regard, it should be noted that the countries that defaulted on their sovereign debt are the countries with the largest haircut sizes in this period.[55] In this context, the Ecuadorian case stands out, where the government unilaterally declared sovereign default, undertook a citizen audit of the external debt and finally repurchased the bonds. The negotiations lasted on average 10 months before an agreement was reached, with only four cases exceeding one year. On average the haircut was 22.76 per cent of the debt's present value, but this shows great variation: starting from five cases of reprofiling (which only modifies the maturity of bonds) to four cases with more than half of debt haircuts. Three of the latter had previously defaulted their debts. The amounts of debt negotiated ranged from US$140 million to US $276.5 billion, weighting from 0.2 to 76 per cent of GDP.

To verify whether lenders' due diligence – as understood in this article – in debt sustainability restructurings has been fulfilled,[56] haircuts were compared with a range of indicators. All referred cases were assessed using the available data to show the economic and social situation of human rights. The lack of comparable data is a severe problem that limited the selection of indicators. Nevertheless, some general pictures can be shown.[57]

In the first place, we present three indicators centred on debt weight on the countries' economies: (a) external debt service as a percentage of GDP (Fig. 1); (b) external debt service as a percentage of revenue, excluding grants (Fig. 2); and (c) total debt service (percentage of exports of goods, services, and primary income) (Fig. 3). These comparisons evidence the situation of the countries when restructuring their sovereign debt with private creditors. If creditors take into account the weight of debt on the country's economy (the so-called 'debt (in)tolerance'), there should be a relationship: the heavier the burden for the country, the bigger the sacrifice requested from creditors, in order to prevent further human rights deprivation. This would be represented by a positive relationship between the variables considered in the following graphs: the heavier the burden is, the higher the discount from the original principal or the total loan sum should be.

However, as expected, in none of the three figures it is possible to establish a significant correlation between the variables. These graphs show that the weight of public debt on the national economy – therefore, on the resources available to finance the realization of human rights, in particular economic and social ones – is not regularly relevant when agreeing on debt restructurings. This is observed in the dispersion of the dots in the graph, showing no particular relationship with haircuts. This means that there is no general rule that can be

[54] Other restructuring processes may have been undertaken during this period, but we intended to review those that the literature accept as such. The universe of cases is built based on these secondary sources and crossed with new data associated with human rights, taken from comparable datasets (mainly from the World Bank). The bibliographic sources are IMF, ECB, Sturzenegger and Zettelmeyer (2008), Cruces and Trebesh (2014), Moody's (2020).

[55] This problem is beyond the scope of this paper. In this regard, see Roos (note 39).

[56] Due diligence is an obligation that concerns the means, not the results. In the context of debt restructurings, due diligence consists of analysing whether, at that time, getting repaid 100% would not most likely entail pushing the debtor population to an even more vulnerable economic and social situation.

[57] This might be improved in future research, by collecting further data that allow control of other intervening variables. In the figures: in red the countries that defaulted; in blue, preventive sovereign debt restructurings with private creditors.

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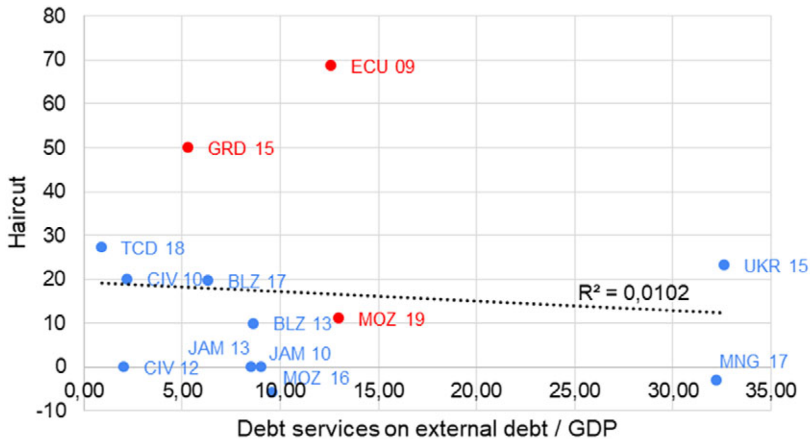

Figure 1. Haircut vs Debt services on external debt / GDP.

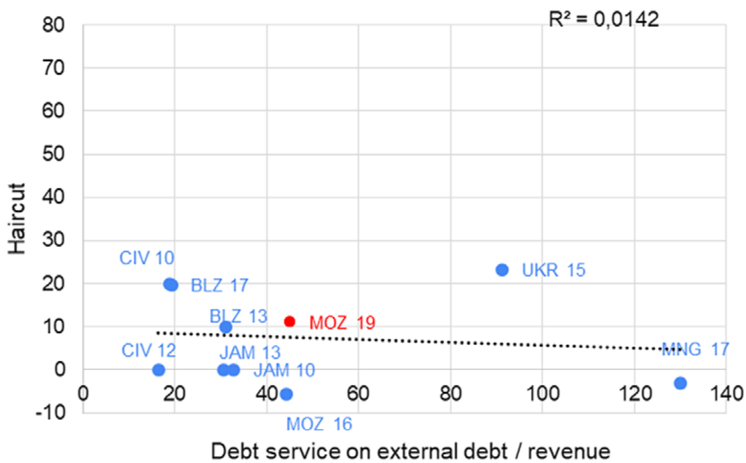

Figure 2. Haircut vs debt services on external debt / revenue.

identified; each case is a matter of specific negotiation. Cases with similar weight of debt services got different levels of haircuts, while other cases with lower debt weights got higher haircuts. R^2 is a common statistical measure of a correlation (in this exploratory exercise, linear correlation), with a higher value implying a stronger association between variables. Estimated R^2 for selected variables show an insignificant low value.

Second, we compared haircuts to the fiscal effort to respect, protect and promote economic and social human rights. The selected available indicators are government expenditure on health (Fig. 4) and government expenditure on education (Fig. 5), both as a percentage of GDP. Although there is no specific value considered universally enough to guarantee human rights (as it depends on concrete situations and trajectories), as all cases are developing countries, the expected relationship should be that greater haircuts must be applied at lower levels of fiscal expenditures for budgetary lines deeply linked to economic and social rights. This is due to the fact that freeing fiscal resources could then be channelled to these uses (e.g., to increase government expenditures on health and education). From Figs 4 and 5, no relationship can be found, which means that these variables are not taken into account in debt restructuring processes.

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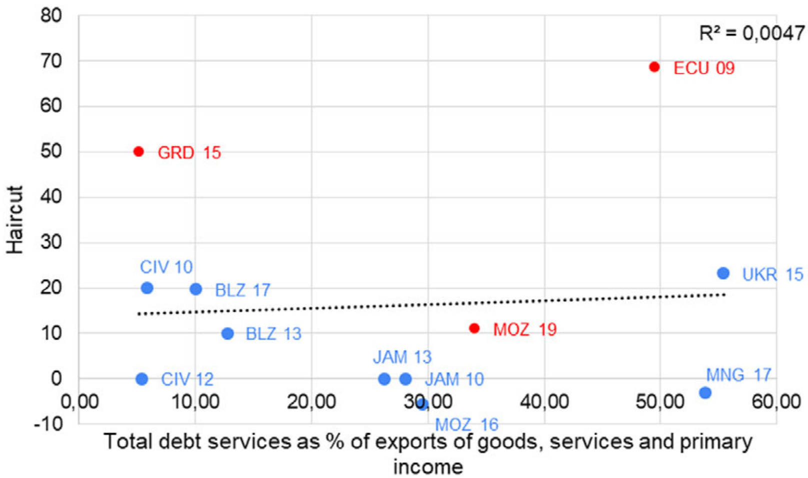

Figure 3. Haircut vs Total debt services as % of exports of goods, services and primary income.
Source: Based on World Bank data.

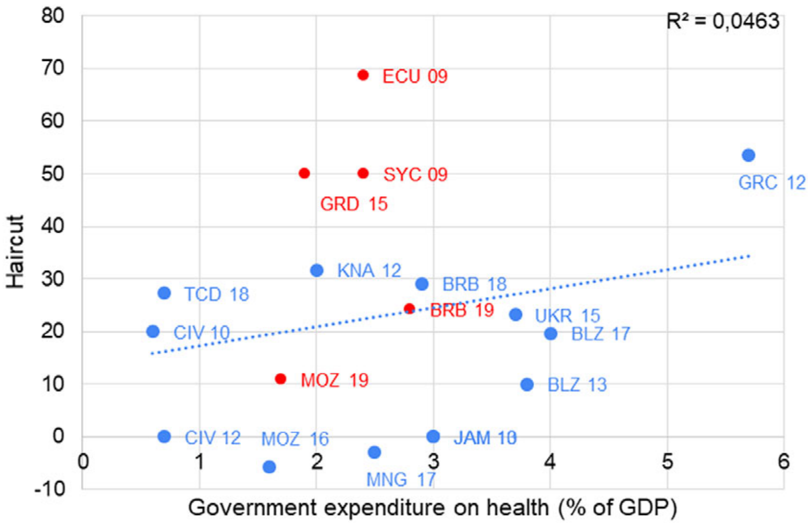

Figure 4. Haircut vs Government expenditure on health (% of GDP).

Third, haircuts can be compared with some indicators explicitly related to the human rights situations in debtor countries. These indicators were selected based on the availability of proper data and their sensitivity to annual changes. Greater haircuts should be applied in the context of more acute situations reflected by these indicators. Figure 6 shows the unemployment rate, where higher levels of unemployment would be expected to result in greater haircuts, in order to release resources to boost the economy or to finance employment programs. Meanwhile, Fig. 7 evidences the variation of the Human Development Index (HDI, built on growth, health and education variables) between the year of restructuring and the preceding year. Here, it would be expected that negative variations (i.e., worsening HDI situations) should be associated with greater haircuts, so that levels of realization of human rights are considered.

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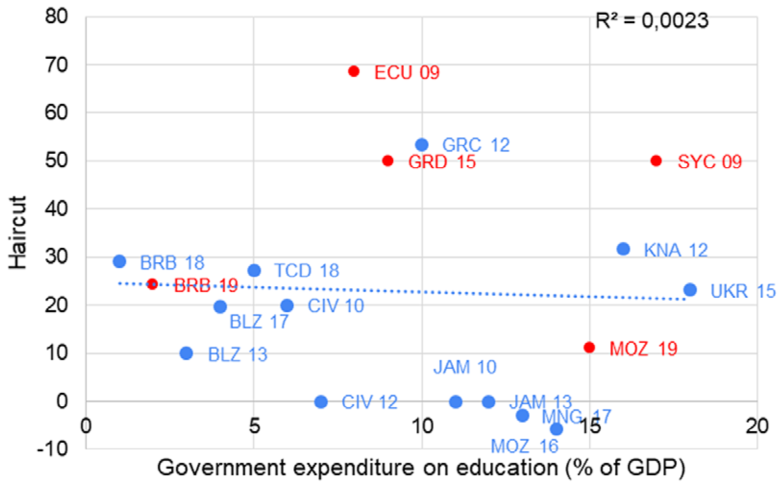

Figure 5. Haircut vs Government expenditure on education (% of GDP).
Source: Based on World Bank data.

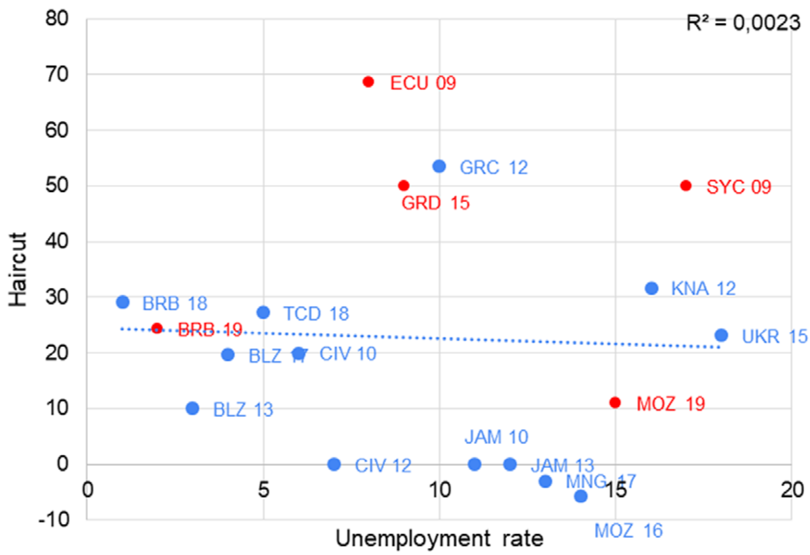

Figure 6. Haircut vs Unemployment rate.

None of the figures shows clear relationships. In all cases, correlation seems low, and the low values of R^2 confirm this. All in all, the data presented here do not evidence any relationship between the economic and social situation of human rights in debtor countries in distress and substantive outcomes – measured in haircut size – as a result of debt restructuring agreements. This is a general picture that requires further empirical investigation. Given the lack of enough available data to conduct such research, Section IV provides an in-depth study of a specific and recent case: Argentina.

IV. Why Focusing on Lenders' Due Diligence Matters, A Lot

Why don't private lenders include due diligence on the economic and social human rights of the borrower's population in the negotiations for sovereign debt restructuring? The

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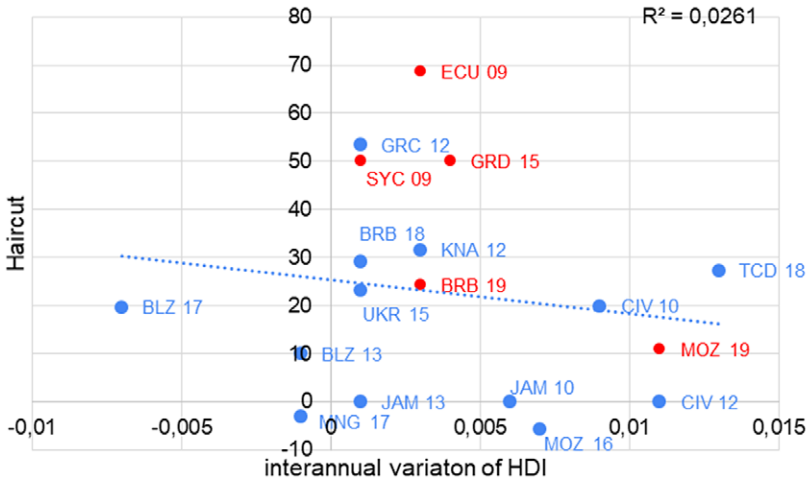

Figure 7. Haircut vs interannual variaton of HDI.
Source: Elaborated with World Bank and UN Development Programme data.

restructuring process, as explained in the previous section, focuses on debt sustainability. Therefore, old bonds are replaced by new ones with allegedly better repaying conditions. States tend to commit to trim fiscal deficit, which compromises human rights-related fiscal allocation, to engage with repayments and reduce the need for new debt issuance. Hence, sustainability centres only on the debt repayment capacity, not on the country's growth one[58] or, even less, the state's ability to realize (finance) economic and social human rights.

The main cause of this phenomenon is not only related to the above-mentioned underdevelopment of legal theory addressing the links between finance and human rights, but also to the negotiation conducted in a deeply asymmetrical relationship. In the last decade, worldwide a huge concentration of financial capital has taken place. Due to deregulation in the main financial markets, some investment funds have grown to reach a critical influence in the capital markets. This elite of investors comprises a limited number of related firms, which operate in different jurisdictions and specific financial markets. Several approaches – in methodology and scope – have identified the existence of this elite. Vitali, Glattfelder and Battiston (2011) observed that 147 companies controlled around 40 per cent of global wealth.[59] In addition, Haberly and Wojcik (2017) evidenced that 158 of the world's 205 largest sales firms share at least 5 per cent of their equities.[60] In turn, Phillips (2018) estimated that the total capital managed by the 17 largest financial firms exceeded US$41.1 trillion.[61] Moreover, the Boston Consulting Group publishes an annual evaluation of capital markets. In its Global Asset Management 2021,[62] they found that total assets under

[58] Martín Guzmán and Domenico Lombardi, 'Assessing the Appropriate Size of Relief in Sovereign Debt Restructuring' (2017) *Columbia Business Research Paper* 18-9, https://www.ssrn.com/abstract=3088081 (accessed 27 June 2023).

[59] Stefania Vitali, James B Glattfelder and Stefano Battiston, 'The Network of Global Corporate Control' (2011) 6:10 *PLoS One* e259, https://doi.org/10.1371/journal.pone.0025995 (accessed 27 June 2023).

[60] Daniel Haberly and Dariusz Wójcik, 'Earth Incorporated: Centralization and Variegation in the Global Company Network' (2017) 97:3 *Economic Geography* 241, 266.

[61] Peter Phillips, *The Global Power Elite* (New York: Seven Stories Press, 2018).

[62] Boston Consulting Group, 'Global Asset Management 2021' (30 June 2021), https://www.bcg.com/publications/collections/creating-people-advantage-reports (accessed 27 June 2023).

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management in 2020 reached US$103 trillion, exceeding total world's GDP; the referred firms control most of these assets.[63]

Available data suggest that US firms own most of peripheral countries' bonds. In fact, the majority of bonds are issued in US dollars, with jurisdiction in New York courts. In this market, Citigroup is traditionally one of the largest investors, and a new giant has emerged in the last decade: Blackrock. This investment fund acquired Barclays in 2009 and holds shares in two-thirds of the 200 biggest US firms.[64] This concentration is under-estimated because of indirect participations and the use of underwriters, which builds a complex network of investors connected to each other. This can even reach rating agencies: Blackrock and Vanguard hold shares in Moody's and Standard & Poor's. This leads to a significant capacity not only to have information, but also to generate data on countries in debt distress. A possible conflict of interest arises from this fact. For debtor countries, it makes it easier to hire these firms that can rate and issue bonds and even buy them after that. However, this creates an automatic concentration mechanism, which increases the power of the largest investors.

On the other hand, this elite meets the growing demand for credit from developing countries. Besides poor countries, which mainly rely on official credits and aid, peripheral ones resort to private capital markets as an important source of funding. In past decades, they have issued bonds, which can reach a wider range of possible creditors than bank loans, but bonds also imply higher degrees of exposure to volatility in creditors' moods.

Permanent market negotiation can take advantage of liquidity, but it also increases the influence of creditors on public policies, given that the government is interested in attracting capital to its economy. This is an important fact not evident to public opinion: the growing capacity of potential creditors to influence domestic policies, even without the need to do anything explicit. Rating agencies and the financial press can express their view on which policies to follow (or which to prevent), manufacturing consent by which financial interests are presented as the solely universal. International Financial Institutions can also translate these demands and interpretations, in the form of reports or even conditionalities, to their credits that supposedly work to attract private funding.

A World Bank report on the debt of 122 low- and middle-income countries examines the financial situation of what could be considered the global periphery.[65] The total debt of these countries went from US$3.46 trillion in 2008 to US$7.81 trillion a decade later. The biggest jump was observed from 2008 to 2014, when it duplicated in value. Both public and private debt more than doubled between 2008 and 2018. The public (or state-guaranteed) debt incurred with private creditors grew faster (174 per cent between the two years) than that with official creditors (57 per cent in that period). Private debt, especially that taken on through bonds, is the one that expands the most, increasing by 222 per cent. Thus, while in 2008 this last type of debt represented a third of the total public external debt, in 2018 it was almost half.

In this matter, the European Network on Debt and Development (Eurodad) published a report showing that the annual issuance of bonds by the national governments of peripheral countries more than doubled (from less than US$1 trillion in 2000 to around US$2.5 trillion in 2019).[66] In this period, foreign currency bonds have grown in importance. This report analyses 549 sovereign bonds, issued in foreign currency and government law, from a group

[63] Sergio Cabrera Morales, 'Financiarización y Desacumulación en América Latina: Administradoras de Fondos de Inversión (2000–2019)' (2022) 345 *Realidad Económica* 9, 34.

[64] Haberly and Wójcik (note 60).

[65] World Bank (2020).

[66] Daniel Munevar, 'Sleep Now in the Fire: Sovereign Bonds and the Covid-19 Debt Crisis' (26 May 2021), *Eurodad*, https://www.eurodad.org/sovereign_bonds_covid19 (accessed 27 June 2023).

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of 62 countries with a total public external debt of US$2.1 trillion in 2019. The average rate on these bonds was about 5.7 per cent in 2021, which is particularly high compared with near 0.25 per cent that Federal Reserve Bank (Fed) bonds were paying at the same time. It has been pointed that this vast difference between interest rates can be a powerful mechanism leading to defaults and debt distress situations.[67] This means that the terms of the negotiated bond create the need for new restructuring processes.

This is a rather unusual report, given the lack of transparency in this matter, despite the fact that creditor and investor associations handle specific information.[68] Bond issuance implies the presence of secondary markets, which can hinder identifying who owns the credits. Unregistered secondary market or off-market transactions, the existence of custodians and nominee accounts, and securities sold under repurchase agreements are some of the problems in reaching real bondholders,[69] amid the general lack of regulations that force investors to reveal their positions. As shown in negotiations preceded by defaults, stop paying and waiting for legal claims seem to be the most straightforward ways to know who owns debt.

All in all, the Eurodad report shows a significant asymmetry between the needs of debtor countries and the high capacity of creditors to stand a negotiation. The top 25 institutional creditors had US$42.7 trillion in assets under management, a figure that was equivalent to four times the GDP of the countries considered. These firms held a total of US$113 billion in sovereign bonds, which represented only about 0.4 per cent of their asset portfolio. This allows capturing a highly asymmetric relationship: debtors need investors for issuing bonds, which are mainly held by a small number of firms, but those sovereign bonds do not weigh much in their asset portfolio. As explained in the report:[70]

> At times of debt distress, the power imbalance becomes even more significant … While debtors cannot coordinate their positions, as negotiations are arranged on a case-by-case basis, lenders can organize themselves into creditor committees. These are then responsible for conducting discussions with debtors and thereby allow lenders to establish a common negotiating position. While such committees can help to address creditor coordination problems, they also increase creditors' leverage over a country. This leads to an outsized disparity in the availability of financial, legal and technical resources that favour creditors to the detriment of sovereign debtors. Consequently, the latter are at a structural disadvantage with respect to their creditors in the context of a debt restructuring.

All those puzzle pieces result in a picture of an asymmetrical relationship where creditors gain power over debtor countries. This results in sequential events of restructuring with very low haircuts, followed by new debt distress episodes and restructurings.[71] If private

[67] Ugo Panizza, 'Long-Term Debt Sustainability in Emerging Market Economies: A Counterfactual Analysis' (2022). Graduate Institute of International and Development Studies Working Paper, No. HEIDWP07-2022.

[68] Benjamin Braun, 'Asset Manager Capitalism as a Corporate Governance Regime', in Jacob S Hacker, Alexander Hertel-Fernandez, Paul Pierson and Kathleen Thelen (eds.), *The American Political Economy: Politics, Markets, and Power* (Cambridge: Cambridge University Press, 2021), 270, 294

[69] International Monetary Fund, *Public Sector Debt Statistics: Guide for Compilers and Users* (Washington, DC: International Monetary Fund, 2011). See chapter 7.

[70] Munevar (note 66), p 25.

[71] 'Unfortunately, debt restructurings can become a bargaining game in which the country debtor is often (rightly) willing to exchange higher future debt for lower payments now, fully intending to restructure debt again as necessary … And creditors may often be willing to repeatedly renew (or "evergreen") debt in order to temporarily make their balance sheets look better', Jeremy Bulow, Carmen M Reinhart, Kenneth Rogoff and Christoph Trebesch, 'The Debt Pandemic' (2020) *Finance & Development*, *IMF*, 12, 16.

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creditors are not forced to comply with human rights obligations (such as due diligence in the context of debt restructurings), debtors are constrained in their capacity to meet their own ones. This is even more true in extreme situations, as it was with the COVID-19 pandemic. In March 2020, the World Health Organization declared this pandemic, which threatened human rights throughout the world – not only in health-related matters, but also in terms of education, decent work, food, social protection, or housing, according to the case.[72] The pandemic triggered the worst economic crisis in a century.[73] States reacted with different policies under stimulus packages, which raised their fiscal needs.

The pre-existing situation and the growing fiscal needs posed a threat of a generalized debt crisis, which was quickly recognized by the IMF, the World Bank, and the G20. In April 2020, these institutions launched the Debt Services Suspension Initiative (DSSI) and the Common Framework for debt negotiations. Both were focused on multilateral lending agencies and the Paris Club creditor states, excluding private creditors. This proved to be a problem. Countries avoided entering DSSI because it would show that they were facing problems to fulfil their debt obligations, inducing a downgrade of their debt ratings, thus making new funding more expensive. As shown in Table 1, private credit grew to become the main source of resources. As the Common Framework excluded corporate creditors, they could expect official ones to bear the cost of debt relief and cash their credits without significant haircuts. Of course, official creditors did not find this to be fair. Indeed, these initiatives did not provide enough relief to debtors; 41 out of 46 countries participating in DSSI were in debt distress by April 2022.[74] The reluctance of official creditors to make rapid and significant relief does not contribute to HRDD or tempt corporate creditors to do so. In fact, many calls were made for private creditors to join the Common Framework, but none of them had concrete enforcement measures.[75] How did private creditors behave in the pandemic-global crisis situation? We lack thorough and updated information on the matter, but we can focus on a particular case: Argentina. The next section provides this analysis.

V. The Argentine Case in the Spotlight

We now study the Argentine case in depth to verify if and to what extent the social and human rights situation of the debtor country has been considered when agreeing debt restructurings in past years.

During neo-developmentalist administrations (2002–2015), public debt went from a default (December 2001) to an improved sustainability, due to a major restructuring in 2005 and full repayment to the IMF in 2006,[76] which leads to the idea of a debt relief process.[77] In the first decade of the twenty-first century, Argentina, as well as other Latin American countries, benefited from better terms of trade (increased international prices for

[72] Juan Pablo Bohoslavsky (ed.), *Covid-19 y Derechos Humanos en Argentina. La Pandemia de la Desigualdad* (Buenos Aires: Biblos Editores, 2020).

[73] World Bank, *Global Economic Prospects* (June 2021).

[74] Data available at https://www.imf.org/en/About/FAQ/questions-and-answers-on-debt-restructuring-in-lics (accessed 27 June 2023).

[75] For example, Kristalina Georgieva and Ceyla Pazarbasioglu, 'The G20 Common Framework for Debt Treatments Must Be Stepped Up' (2 December 2021), *IMF Blog*, https://www.imf.org/en/Blogs/Articles/2021/12/02/blog120221the-g20-common-framework-for-debt-treatments-must-be-stepped-up (accessed 27 June 2023).

[76] Again, public creditors do not regularly agree debt reliefs, only debt reprofilings.

[77] Giselle Datz, 'What Life After Default? Time Horizons and the Outcome of the Argentine Debt Restructuring Deal' (2009) 16:3 *Review of International Political Economy* 456, 484; Francisco J Cantamutto and Daniel Ozarow, 'Serial Payers, Serial Losers? The Political Economy of Argentina's Public Debt' (2016) 45:1 *Economy and Society* 123, 147; Roos (note 39).

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Table 1: Peripheral countries' debt, by creditor and instrument

		2008		2018	
		US$ billions	Percentage	US$ billions	Percentage
Total public debt		1,372		2,935	
Official creditors	Total	704	51%	1,103	38%
	Multilateral debt	391	28%	667	23%
	Bilateral debt	313	23%	437	15%
Private creditors	Total	668	49%	1,832	62%
	Bonds	433	32%	1,393	47%
	Banks and others	235	17%	439	15%

Source: elaborated with World Bank (2020) data.

its exportations). Argentina took advantage of that scenario with the implementation of national economic policies, which boosted its trade balance (and fiscal surplus).[78] This abundance of *commercial* foreign currency made it possible to accelerate economic growth.

After four years in default, and 22 months of negotiations since the first formal proposal, Argentina managed to restructure 76 per cent of the bonds in distress (US$81.8 billion, equivalent to half of its total public debt), reducing the number of currencies and jurisdictions agreed, as well as interest rates. By that time, GDP was growing fast (more than 8 per cent annually), but poverty and extreme poverty still affected 38.9 and 13.8 per cent of the adult population, respectively, with an unemployment rate at 13 per cent of the active population. The new bonds included a nominal haircut of 75 per cent on the original principal, but the interests generated during the default were added to it, then lowering this haircut. The novelty was a bonus linked to GDP growth, which induced creditors to accept this haircut, given they would recoup some earnings while the economy recovered. Despite the magnitude of this haircut, it must be considered that the defaulted bonds were valued in the capital markets at 22 per cent of their nominal value; hence, in fact, buyers even made some capital gains. The total haircut was calculated to be between 21 and 36 per cent of the total value involved.[79]

Nonetheless, a small group of creditors refused to participate in the process, demanding full repayment. Some of these initiated an early strategy of legal and political harassment, for which they are known as 'vulture funds'. Given that these defaulted bonds did not have collective action clauses (CACs), the restructuring process was not mandatory for the hold-outs. This meant that the interpretation of the *pari passu* principle was left to the intervening court. In fact, a New York judge – Thomas Griesa – accepted the claims of the vulture funds for full repayment, rejecting Argentina's proposal, which had been accepted by almost 93 per cent of the creditors. This judicial ruling criterion allowed resolving the debt restructuring, as, by definition, in a situation of insolvency, creditors cannot be fully repaid. It lasted until 2016, when the *Cambiemos* administration (2015–2019) applied a

[78] Andrés Wainer and Paula Belloni, 'Balance-of-Payments Constraints as the Key to Dependency: The Case of Argentina' (2022) 49:2 *Latin American Perspectives* 144, 162.

[79] Mario Damill, Roberto Frenkel and Martín Rapetti, 'La Deuda Argentina: Historia, Default y Reestructuración' (2005) 45:178 *Desarrollo Económico* 187, 233; Alberto Müller, 'Default y Reestructuración: ¿Cuál fue la Real Quita de la Deuda Pública Argentina?', Working Paper 32 (Buenos Aires: CESPA, 2013).

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profound change in economic policies that included the total repayment of vulture funds demands (for which more debt was taken).

The *Cambiemos* administration's debt management was quite different. The liberalization of the economy included freeing capital movements and paying temptingly high interest rates. In fact, the bias towards deregulation and the intensified use of external private borrowing exposed the economy to external shocks. In April 2018, the announcement of possible increases in Federal Reserve interest rates caused such a sudden stop, inducing a 'flow to quality' movement of capitals, leaving peripheral economies. This led to a currency and financial crisis in Argentina, which triggered the IMF's biggest loan in history (US$57.1 billion approved, US$44.5 billion disbursed). The Stand-By Agreement's objective was to rebuild Argentina's access to private capital markets, but, in fact, it only provided resources to finance a large and sustained outflow of capital – compared with the IMF agreement, article VI. Capital controls were later reintroduced, but the economy was already in a spiral of devaluation, inflation and recession. By September 2019, the IMF interrupted disbursements and the government rescheduled the national denominated bonds in a mandatory way. Public debt rose to US$323.07 billion, an increase of 34 per cent in just four years. The proportion of bonds denominated in foreign currency also expanded to 77.7 per cent of the total. Debt services grew to 4.3 per cent of GDP or 18 per cent of total public expenditure. At the same time, poverty and extreme poverty intensified considerably, affecting 35.5 and 8 per cent of the adult population, respectively. Argentina's economy was already trapped in a crisis with adverse human rights implications by the time the pandemic crisis broke out.[80]

When the new administration of Alberto Fernández took office in December 2019, debt restructuring was a top priority. Thanks to an official international tour, Argentina obtained the support of Paris Club members in February 2020. Given that those same countries control the IMF, its support came in hand. In a technical note associated with this support,[81] the IMF staff urged a debt restructuring process that needed to achieve debt relief of US$50–85 billion by 2030 in the form of face value haircuts, maturity extensions, grace periods, and interest rate cuts. The summary of that report states, 'Restoring public debt sustainability with high probability will require a decisive debt operation, with a meaningful contribution from private creditors'.[82] Being a middle-income country, Argentina was not eligible for the DSSI. As explained, the Common Framework did not summon private creditors. Official creditors had no rush to restructure, because the main maturities of their debts were from 2022 onwards. Hence, there was no debt relief of any kind from official creditors. Instead, the IMF explicitly appealed to private investors to engage with the restructuring of Argentina's debt and reduce their assets, but did not intervene itself.

The Argentine government launched its first offer to private creditors under foreign law in April. It proposed exchanging 21 bonds for 10 new ones, for a total of about US$66.7 billion. Unlike the situation in 2005, bond holdings appeared to be highly concentrated in the hands of a few funds (notably Blackrock, Fidelity, Gramercy, Greylock, Pimco and Templeton). This allowed a more fluid negotiation with better defined interlocutors. In addition, unlike at that time, the new bonds included CACs. This limited the blocking power of vulture funds, while consolidating the bargaining power of the majority holders. In fact, because of both elements, there was a rapid convergence among creditor funds, which were

[80] UN Committee on Economic, Social and Cultural Rights, 'Concluding observations on the 4th periodic report of Argentina', E/C.12/ARG/CO/4, 1 November 2018.

[81] International Monetary Fund, 'IMF Country Report No. 20/83' (20 March 2020), https://www.imf.org/en/Countries/ARG/summary-of-staff-technical-note (accessed 27 June 2023).

[82] Ibid.

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organized around three groups.[83] This shows that the concentration of creditors facilitates their coordination, which finds on the other side a single country in great and urgent need for resources. The field of negotiation was asymmetrical from the beginning.

The initial proposal presented sought to extend the maturity terms, with a three-year grace period and a low payment burden until 2026. The reduction on the principal averaged 5.4 per cent, although in some bonds it was null, and the interest decrease was around 62 per cent. All things considered, the total discount was far from being aggressive, even in the financial market itself: once the offer was published, it rose the price of defaulted bonds. Despite this, it was almost unanimously rejected by the creditors, initiating a period of offers and counter-offers that would last until August 2020, when an agreement was reached.

Behind this rejection, several aspects converged. First, Argentina took 15 years to solve its last default declaration to regain access to capital markets. Highly concentrated creditors can paralyse restructurings. Second, surely, any government facing a pandemic crisis would not want to face such a long-standing controversy. Private creditors knew that time was on their side in this matter.[84] Third, Argentina's creditors included major players in global finance, with credit exposure to third countries. The negotiation with Argentina served as a potential example of the course to follow in the face of the imminent risk of widespread defaults. Any deal accepted would be a precursor to negotiations to come. Fourth, despite the existence of limits on vulture funds' behaviour, the main creditors had veto power in particular series, which strengthened their negotiating position. All this helps to understand the creditors' rejection, even considering it as a friendly offer.

In fact, this forced the government to present four successive offers, extending the maximum term to close the swap eight times. In this period of time, US$503 million of maturities were not paid in May, which led the country to a default rating. However, by keeping the channels of dialogue open and the negotiation ongoing, this did not result in litigation by the creditors. Argentina submitted each proposal to the US securities authorities, as well as to the courts involved, in order to demonstrate 'good faith' in the negotiations and seeking to act under criteria of reasonableness by showing its interest in reaching a repayment agreement.

Finally, the minister of Economy announced in early August that an understanding has been achieved with the three groups of creditors, an agreement that was terminated one month later. Similar conditions were extended to bondholders under national law, for US $41.4 billion. This was a five-month negotiation (nine since reprofiling), half the time involved in the average previous ones reviewed in Section III, and certainly shorter than the 22-month process that led to the 2005 restructuring. It was the second largest one in the world, behind Greece. This same proposal was extended to foreign currency bonds under national legislation.

As in previous restructuring processes, the focus was not on debt relief, but on an extension of maturities: to delay the problem. The proposal contained relief in terms of immediate disbursements, as payments were strongly reduced during Fernández's presidency (2019–2023). According to calculations by the Institute for Fiscal and Economic Studies, between 2020 and 2023, US$56,686 million were saved, plus another US

[83] José Fernández Alonso, 'El Proceso de Reestructuración de la Deuda Argentina 2020: ¿Demasiado Poco?', Análisis CIPEI No. 109 (Rosario: Centro de Investigaciones en Política y Economía Internacional, 2020).

[84] During negotiations, one of the IMF officers threatened by arguing that they could wait for a Minister of Economy more likely to hear their claims. Alejandro Bercovich, 'Cruces Internos y Amenazas Externas por la Oferta a Bonistas y el Impuesto Forbes' *BAE Negocios* (16 April 2020), https://www.baenegocios.com/columnistas/Cruces-internos-y-amenazas-externas-por-la-oferta-a-bonistas-y-el-impuesto-Forbes-20200416-0136.html (accessed 27 June 2023).

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$15,656 million for the following presidential term.[85] However, during 2029 and 2035, the burden is reversed, as US$51,693 million more than expected are charged. In aggregate terms, nominal savings were US$34,555 million, far below the value estimated as sustainable by the IMF report in March, which stated that relief should be around US$50–85 billion. The haircut centred on reducing interest and the longer maturity of the bonds was around 18.3 per cent. As can be compared with the figures in Section III, this is below precedent restructuring haircuts, despite being carried out during a worldwide crisis.

Thus, in the context of the pandemic, private creditors were not forced to coordinate with other creditors to meet common objectives. Instead, they agreed among themselves to obligate a single country to negotiate in the context of increased fiscal needs. Creditors did not deal with a cease of payments, and therefore had no risk of facing default on their own. The process took less time than previous cases, but pursued the same objective: to extend maturities, not to grant debt relief. The high interest rates charged on the original bonds (7 per cent), which was a cause of default, were more than halved (3 per cent). However, this was still a lot: fed funds paid between 0 and 0.25 per cent at the same time, which is less than a twelfth part. All in all, the relief was insufficient in the view of IMF estimations (US$34.5 compared with the US$50–85 billion suggested), and the haircut was lower than pre-pandemic ones (22.76 per cent). Creditors made no evident effort in the face of a severe crisis and the vital state obligation to protect lives in the context of the pandemic and related-economic recession. By the time of the agreement, poverty and extreme poverty affected 42 and 10.5 per cent of the adult population, respectively, and GDP was falling at a rate of 9.9 per cent. The public health emergency due to the pandemic, the acute social and economic situation, and the recommendations made by international official financial institutions were not taken into consideration for the purposes of calculating the haircuts needed to restore debt sustainability. In that sense, the lengthy negotiations of 2005, with a default involved, seem to have worked more efficiently as a way to pressure corporate creditors into accepting greater haircuts in line with the fiscal and human-rights needs of the state.

VI. Concluding Remarks

Private lenders are bound by international human rights law, as the rest of corporate mortals in the world. When dealing with sovereign borrowers, these creditors should follow the HRDD standards – which have been crystallized and systematized in official documents of UN bodies and agencies – to ensure that, at the very least, they do not harm debtor populations. More specifically, this means that, when dealing with States in debt distress and having to take financial decisions that will have profound fiscal (therefore, human rights) implications for these populations, lenders should undertake due diligence in order to determine and agree to a haircut (debt relief) that is sensitive to the socio-economic situation of the country in question. The size of the haircut applied must meet fiscal needs of the social and economic human rights.

Yet, reality shows that social variables, intrinsically linked to economic and social human rights, have not been regularly considered when negotiating and deciding on haircuts for borrowing countries in debt distress. More specifically, the debt weight of the economies of countries in general, the volume of government expenditures on health and education, and the more specific indicators directly reflecting the economic and social human rights situations (such as unemployment) have not been relevant variables in determining the

[85] Instituto de Estudios Fiscales y Económicos, 'Informe Mensual No. 189' (2020), *IEFE*, La Plata.

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haircut size in debtor countries in distress.[86] This conclusion is based on aggregated evidence of sovereign debt restructurings that took place between 2007 and 2020, and by the specific case of Argentina's 2005–2006 and 2020 debt restructurings.

Both the increasing financialization of the world and the hyper-concentration of sovereign bonds in a few funds of wealthy corporate investors help to understand the neglected role that HRDD has been playing in debt restructurings. In turn, this asymmetric power relationship between lenders and borrowers highlights the paramount importance of creditors' due diligence.

In the search of creating incentives and disincentives to encourage businesses to respect human rights and remediate adverse impacts,[87] courts can play a key role in determining the contents of hold-out creditor claimants' property rights in cases where debtor States defend themselves arguing that minimum fiscal resources are vital to ensure the realization of core human rights. Indeed, exogenous and enforceable standards are needed to maximize cooperative behaviours among creditors and minimize free-riders' expectations as all should base their decisions regarding haircuts, to some extent, on the social and economic situation of the concerned debtor countries.

With this article, we attempted to put this topic on the radar of academic and policy debates about the human rights obligations of financial corporations, as well as sovereign debt. Further research is needed in, for example, extending the historical data series of debt restructurings and cross-country comparative socioeconomic indicators (yet, this proved to be a real challenge during the statistical research for this article), and studying the legal and institutional implications of the conclusions proposed here for credit rating agencies.

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Competing interest. The authors declare none.

[86] Actually, data show that after default debt restructurings agreements entail higher haircuts than negotiated pre-emptive ones. This would imply that creditors are more inclined to take financial losses when confronting cease of payments than to rather more dialogue-based mechanisms. This shows that the calculation of haircuts is negotiated/decided on a basis in which human rights are not relevant.

[87] Surya Deva, 'From "business or human rights" to "business and human rights": what next?', in S Deva and D Birchall (eds.), *Research Handbook on Human Rights and Business* (Cheltenham: Edward Elgar Press, 2020), 1–21.

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APPENDIX 1

Sovereign debt restructurings with private creditors in the inter-crisis period, 2007–2020

Country and year of restructuring	Start of restructuring (date)	Default (Y/N)	Preventive or post-default?	End of default (date)	Duration (years)	Haircut	Exit yield	Debt exchanged (US$ million)	Debt exchanged (% of GDP)	External debt (US$ million)	CACs included in original bonds (Y/N)
Ecuador 2009	Jan-09	Yes*	Post-default*	Jun-09	0.83	68.6%	13	3,190	20%	70,600	No
Seychelles 2009	Mar-09	Yes	Post-default	Feb-10	0.92	50.0%	9.9	320	3%	767	No
Jamaica 2010	Jan-10	No	Preventive	Feb-10	0.08	0.0%	n.a.	7,800	2%	14,193	n.a.
Saint Kitts and Nevis 2012	Jun-11	No	Preventive	Apr-12	0.83	31.7%	7.9	140	5%	317	Yes
Greece 2012	Jul-11	No	Preventive	Mar-12	0.7	53.5%	15.3	276,520	5%	533,289	Yes
Belize 2013	Aug-12	No	Preventive	Mar-13	0.58	10.0%	8.1	550	3%	1,248	Yes
Jamaica 2013	Feb-13	No	Preventive	Feb-13	0.08	0.0%	n.a.	8,900	2%	12,951	n.a.
Côte d'Ivoire 2010	Mar-10	No	Preventive	Apr-10	0.05	20.0%	9.9	2,940	12%	14,895	Yes
Côte d'Ivoire 2012	Oct-12	Yes	Preventive	Nov-12	0.05	0.0%	7.7	2,711	n.a.	12,791	Yes
Grenada 2015	Mar-13	Yes	Post-default	Nov-15	2.7	50.0%	13	260	21%	613	Yes
Ukraine 2015	Jan-15	No**	Preventive**	Dec-15	0.9	23.2%	8.8	18,000	20%	126,181	Yes

(Continued)

Continued

Country and year of restructuring	Start of restructuring (date)	Default (Y/N)	Preventive or post-default?	End of default (date)	Duration (years)	Haircut	Exit yield	Debt exchanged (US$ million)	Debt exchanged (% of GDP)	External debt (US$ million)	CACs included in original bonds (Y/N)
Mozambique 2016	Jun-15	No	Preventive	Apr-16	0.9	–5.7%	8	700	7%	14,205	n.a.
Belize 2017	Nov-16	No	Preventive	Mar-17	0.4	19.7%	9.1	500	29%	1,339	Yes
Mongolia 2017	Feb-17	No	Preventive	Mar-17	0.05	–3.0%	n.a.	600	5%	27,963	No
Chad 2018	Feb-17	No	Preventive	Jun-18	1.4	27.3%	n.a.	1,200	11%	3,243	n.a.
Barbados 2018	Jun-18	No	Preventive	Oct-18	0.3	29.1%	7	3,900	76%	1,599	No
Mozambique 2019	Oct-16	Yes	Post-default	Sep-19	2.9	11.0%	n.a.	700	5%	20,110	Yes
Barbados 2019	Jun-18	Yes	Post-default	Dec-19	1.5	24.3%	7	800	0%	1,599	Yes

* It was not a restructuring, but a repurchase of bonds by the Ecuadorian government after unilaterally declaring default and initiating a citizen audit.

** Declaration of default on the official debt with Russia. The post-Maidan Ukrainian government declared that the US$3 billion Eurobond under English law was illegitimate.

Source: Elaborated with data from ECB (2020), IMF (2020), IMF (2013), Cruces and Trebesch (2013); Sturzenneger and Zettelmeyer (2008).

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