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Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Juan Pablo Bohoslavsky

Report on financial complicity: lending to States engaged in gross human rights violations

Summary

The present report, submitted in accordance with Human Rights Council resolution 25/16, focuses on the question of lending to States engaged in gross human rights violations. It is intended to contribute to a better understanding of when financial support may contribute to, or sustain the commission of, large-scale gross human rights violations by sketching a rational choice framework premised on the incentives of authoritarian Governments and private and official lenders. In the report, the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, reviews the existing empirical evidence of the relationship between sovereign financing, human rights practices and the consolidation of Governments engaged in gross violations of human rights. In the report, the Independent Expert presents some interim conclusions and invites stakeholders to discuss them. The legal and policy implications of financial complicity will be discussed in a future study.

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I. Introduction

1. In his report to the General Assembly (A/69/273), the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, identified the question of lending to States that are responsible for gross human rights violations as one of his six thematic priorities. The holders of the mandate have repeatedly advocated that lending by international financial institutions, private actors and States should respect international human rights standards, in particular in the context of development cooperation and export credit insurance (see A/66/271 and A/68/542) calling for human rights safeguards in project financing or promoting a human rights-based approach to development cooperation (see A/HRC/25/50/Add.2 and A/HRC/17/37/Add.1). The main focus of the mandate has been to study the human rights impacts of foreign debt, debt relief, structural adjustment policies and austerity measures adopted in response to the debt crisis (see A/HRC/23/37 and Add. 1, A/HRC/25/50/Add.1 and Add. 3 and A/HRC/20/23/Add.1 and Add.2).

2. Previous mandate holders have not, however, addressed in detail the issue of what States, international financial institutions and private financial actors should do when they are confronted with the question of whether they should provide financial support to Governments or State institutions that are allegedly responsible for gross violations of human rights. In cases where States or other actors provide financial support in such contexts, how should they ensure that such support does not facilitate the commission of further gross human rights violations? The Human Rights Council has explicitly requested the Independent Expert to consider the effects of foreign debt and related financial obligations on the enjoyment of "all human rights", it is therefore more than appropriate to fill that gap, considering that the issue of financial complicity has, apart from some exceptions (see, for example, E/CN.4/Sub.2/412, Vols. I-IV and Corr. 1),[1] not been studied in a systematic manner by independent experts appointed by the United Nations.

3. The focus of the present report is on authoritarian regimes involved in gross human rights violations, but the Independent Expert also argues that there is a link to the protection of economic, social and cultural rights. Withdrawing financial support to States may negatively impact the enjoyment of economic, social and cultural rights for the affected populations, a problem that has been recognized, for example, in the context of comprehensive economic sanctions imposed by the Security Council. In addition, autocratic regimes have frequently perpetrated gross violations of human rights to suppress public dissent, violating core social, economic and cultural rights. Human rights defenders working on social rights, trade union representatives and land rights defenders are often the first to be targeted.

4. There have been difficulties in understanding the causal link between sovereign financing and gross human rights violations by States. However, there is a rational

[1] See also the report of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Assistance to Racist Regimes in Southern Africa. Impact on the Enjoyment of Human Rights* (United Nations publication, sales No. E.79.XIV.3). From 1981 to 1992, the Special Rapporteur continued to submit regular reports to the Commission on Human Rights and the General Assembly under the title "Adverse consequences for the enjoyment of human rights of political, military, economic and other forms of assistance given to the racist and colonialist regime of South Africa", which also covered the issue of lending by States and commercial banks to the apartheid regime in South Africa.

explanation for why human rights violations committed by officials of authoritarian regimes may be influenced by the external financial support they receive.

5. Suitable legal and policy concepts are critical to recognizing better the connection between finance and gross human rights violations, taking into consideration the fungibility of the money and the complexity of the administrative and economic structures and the dynamics of authoritarian regimes. The purpose of the present report is to contribute to a better understanding of those links and provide a framework for a future report that will address some legal considerations pertinent to preventing financial complicity and holding lenders accountable for assisting in the empowerment of abusive regimes.

6. The Independent Expert follows the definition of complicity provided by the International Commission of Jurists: "enabling," "facilitating," or "exacerbating" human rights abuses through financing.[2] In order to address the notion of complicity and to grasp its implications in the financial field, the Independent Expert proposes a macro and holistic approach, interpreting the various connections to sovereign financing. In the present report, sovereign financing refers to every financial loan or provision of assistance to States which includes financing by private, bilateral or multilateral lenders, based on commercial, development or concessional objectives.

7. For the purpose of the present report, the Independent Expert understands "gross human rights violations" to mean severe and systematic violations of international human rights, which may amount to an international crime, as codified by the Rome Statute of the International Criminal Court, or any other systematic, widespread and severe violation of internationally recognized physical integrity rights, such as torture, enforced disappearances, extralegal, arbitrary or summary executions, or arbitrary detention.[3]

II. Why does financial complicity matter and what has the United Nations done in that field?

8. Political institutions influence sovereign borrowing, but lending to States also shapes the political institutions of the recipient, including those which are used to perpetrate crimes. That is the fundamental reason why it is important to reflect, from a human rights perspective, whether and under what conditions States engaging in gross human rights violations should receive financial assistance.

9. During the founding years of the United Nations, the issue of financial complicity came up during the 12 subsequent war crimes trials held by the United States of America in Nuremberg after the Second World War. The Military Tribunal of Nuremberg, when judging whether certain German industrialists who had donated money to the Schutzstaffel (SS) were responsible for criminal acts, reasoned that "it remains clear from the evidence that each of them gave to Himmler, the Reich Leader SS, a blank check. His criminal organization was maintained and we have no doubt that some of this money went to its

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[2] See International Commission of Jurists, *Corporate Complicity and Legal Accountability* (Geneva, International Commission of Jurists, 2008), vol. 1.

[3] This definition is set out only to clarify the meaning of gross violations of human rights for the purpose of the present report, in order to emphasize that the Independent Expert has in mind multiple and large-scale violations of such rights. That should not be interpreted as an attempt to come up with an official definition of the term for the United Nations, or limit the scope of application of the term to civil integrity rights only.

maintenance. It seems to be immaterial whether it was spent on salaries or for lethal gas."[4] To hold them criminally liable, the Military Tribunal found it sufficient to prove that two of the defendants, Flick and Steinbrinck, regularly provided substantial funds to a State organization responsible for the mass extermination of Jews, brutalities and killings in concentration camps, and other crimes under international law. The Nuremberg Trials were not held under the auspices of the United Nations and the crimes against humanity adjudicated in Nuremberg were of an unprecedented nature, but the ruling was nevertheless a landmark judgement, emphasizing that individuals may incur liability under international criminal law for financially contributing to a State organization responsible for mass extermination, war crimes and other gross violations of human rights.

10. At the United Nations, the question of whether States, international financial institutions or private finance should refrain from lending to States involved in gross human rights violations has mainly been discussed in the context of sanctions. Several sets of economic sanctions, or lending bans, have been called for by the General Assembly or imposed by the Security Council, with the aim of curtailing or minimizing gross human rights violations. In the 1960s, the General Assembly requested the World Bank and other international institutions to refrain from lending to South Africa and Portugal because of their poor human rights records. While the request was initially fruitless, the World Bank did stop approving further loans to the apartheid regime after 1966;[5] the International Monetary Fund (IMF), however, continued lending to South Africa until 1983. Human rights concerns were at the core of the first comprehensive sanctions regime of the United Nations, imposed on the white minority regime in Southern Rhodesia by the Security Council in resolution 253 (1968), which included a prohibition on making investment funds or any other financial or economic resources available to the illegal regime.

11. In 1977, Antonio Cassese was appointed as Special Rapporteur by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities with the specific mandate of assessing the link between the financial aid then being allocated to the Pinochet military regime and the human rights violations suffered by the Chilean population. His report analysed the political, institutional, economic, budgetary, fiscal and financial conditions then prevailing in Chile and considered how financial aid contributed in this context to the commission of the crimes of the regime, and several countries decided to not lend to the Pinochet regime because of its human rights record (see E/CN.4/Sub.2/412, vols. I–IV).

12. The pros and cons of more comprehensive economic sanctions against the apartheid regime in South Africa were feverishly debated for more than two decades. While mandatory sanctions imposed on the regime by the Security Council in resolutions 181 (1963) and 418 (1977) were limited to an arms embargo and to a prohibition of military and nuclear cooperation, the General Assembly repeatedly urged the Security Council to consider comprehensive mandatory sanctions against the racist regime in South Africa, condemned transnational corporations and financial institutions that continued to collaborate with South Africa and repeatedly called upon the IMF "to terminate credit and other assistance to the racist regime of South Africa".[6] In 1987, in resolution 42/23B, the General Assembly urged all States to induce transnational corporations, banks and financial

[4] *United States* v. *Flick*, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, vol. VI (Washington, D.C., United States Government Printing Office, 1952).

[5] See Samuel A. Bleicher, "UN v. IBRD: a dilemma of functionalism" *International Organization*, vol. 4, No.1 (winter 1970) and E/CN.4/Sub.2/1987/8/Rev.1, para. 54.

[6] See, for example, General Assembly resolutions 40/64A and 41/35B.

institutions to withdraw effectively from South Africa and prevent them from investing in the country and granting loans and credits to South Africa, and to hold them accountable for any transgressions.[7]

13. After the end of the cold war, the Security Council applied comprehensive sanctions, including financial sanctions, to Iraq (1990–2003), Libya, the former Yugoslavia (during the 1991–96 break-up) and Haiti (1993–94).[8] In the case of Yugoslavia, the Security Council decided in resolution 757 (1992) that no State should make any funds available to the authorities or any commercial, industrial or public utility in the Federal Republic of Yugoslavia and should prevent any person within their own territories from making those funds available (except payments exclusively for medical or humanitarian purposes and foodstuffs). The sanctions were justified by ceasefire violations, forcible expulsions and attempts to change the ethnic composition of the populations in Bosnia and Herzegovina and Croatia.

14. The sanctions regime imposed on Iraq and Haiti raised serious concerns about their adverse impact on the enjoyment of economic, social and cultural rights by the affected population,[9] prompting the Committee on Economic, Social and Cultural Rights to adopt its general comment No. 8 (1997) on the relationship between economic sanctions and respect for economic, social and cultural rights.

15. To avoid such negative effects on the enjoyment of human rights, Security Council sanctions have become more targeted and have included arms embargoes, travel bans, financial sanctions and comprehensive asset freezes on specified individuals and entities. The majority of current sanctions regimes of the United Nations include, as part of their justification, violations of international human rights or humanitarian law, or make explicit reference to particular violations, such as recruiting child soldiers, committing rape and gender-based violence, targeting civilians and other similar offences.[10] Sanctions have been imposed on individuals in decision-making positions and on non-State actors, such as rebel and terrorist groups, and private sector actors. As of November 2013, there were 575 individuals and 414 entities designated for asset freezes by the Security Council.[11] While targeted sanctions avoid a number of negative human rights impacts associated with comprehensive economic or financial sanctions, they have raised concerns about due process and unintended negative impacts on economic, social and cultural rights, such as blocking legitimate humanitarian work or preventing the transmission of remittances to family members abroad (see, for example, A/HRC/16/50, paras. 1–27, A/65/258 and A/HRC/6/17 paras. 42–50).

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7 The General Assembly had earlier requested all States, pending Security Council action, to adopt legislative and/or other measures to ensure, inter alia, the prohibition of financial loans and investments and the withdrawal of investments from South Africa. See, for example, resolution 40/64.

8 See Security Council resolutions 661 (1990), 748 (1992), 757 (1992), 820 (1993) and 841 (1993).

9 See, for example, Center for Economic and Social Rights, "UN-sanctioned suffering: a human rights assessment of United Nations Sanctions on Iraq" (New York, May 1996), available from http://cesr.org/downloads/Unsanctioned%20Suffering%201996.pdf; George. A. Lopez and David Cortright, "Economic sanctions and human rights: part of the problem or part of the solution?" *International Journal of Human Rights*, vol. 1, No. 2 (1997); E. Gibbons and R. Garfield, "The impact of economic sanctions on health and human rights in Haiti, 1991 to 1994", *American Journal of Public Health*, vol. 89, No. 10 (October 1999); and E/CN.4/Sub.2/2000/33.

10 See, for example, Security Council resolutions 1533 (2004), 1572 (2004), 1591 (2005), 1970 (2011) and 2127 (2013).

11 Security Council special research report, "UN sanctions", 25 November 2013, available from www.securitycouncilreport.org.

16. In the case of terrorism, money received by a suspect terrorist group may not have been used to actually commit an act of terrorism.[12] However, that does not mean that the funding did not sustain a terror group and its terrorist acts. The issue may be more complex in relation to funding provided to States perpetrating gross violations of human rights, but the same argument can be made.

17. One would of course have to differentiate between whether funding provided to States directly finances the commission of gross violations of human rights, or maintains the general functioning and sustainability of a regime that violates human rights, and to what extent funds provided to such regimes might still be used for the realization of human rights, including social and economic rights.[13] Sometimes funds facilitate the commission of gross human rights violations in a more direct way, for example when they are used to equip intelligence services, police or other security forces with tools or weapons of repression. In many cases, financial support may rather have an indirect effect through enabling a regime that violates human rights to last longer by, for example, allowing it to fund patronage. We need to better understand when, whether and how official and private lending may contribute to gross human rights violations, in order to design and implement effective laws and policies at the national and international level aimed at minimizing the risk that financial support enables Governments or non-State actors to commit such violations.

18. With the present report, the Independent Expert intends to contribute to a better understanding of when financial support may contribute to or sustain the commission of large-scale gross human rights violations by sketching a rational choice framework premised on the incentives of authoritarian Governments and private and official lenders. As developed further below, authoritarian regimes make rational policy choices when they try to stay in power, using available funds to foster loyalty or repress opponents. Lenders also make rational calculations when deciding on loans, for which the likelihood that they will be paid back is key. Complementing the qualitative explanation, the Independent Expert will discuss the existing empirical evidence of the relationship that exists between sovereign financing, human rights practices and the consolidation of non-democratic Governments engaged in gross violations of human rights. Finally, the Independent Expert will present some interim conclusions and invite stakeholders to discuss them. The legal and policy implications of financial complicity will be discussed in a future study.

III. How additional funds consolidate authoritarian regimes in most situations

19. Authoritarian regimes committing gross human rights violations are politically vulnerable because of their problems of legitimation. Such regimes endeavour to retain power and do so by securing privileges for part of the population, the elites, the military or the security apparatus, by allocating economic benefits and/or political concessions in exchange for support. To remain in power, a regime must address economic constraints in ways that secure a minimum of political support, or enable the bureaucratic or repressive machinery to function efficiently, control society or repress the population. There is a

[12] See the discussion in *Holder* v. *Humanitarian Law Project*, US, 130 S .Ct. 2705 (S.C., 2010); *Boim* v. *Holy Land Foundation for Relief and Development*, 549 F.3d 685 (7th Cir. 2008); *Almog et al.* v. *Arab Bank plc*, 471F.Supp.2d 257 (E.D.N.Y. 2007); *Weiss et al.* v. *National Westminster Bank plc*, 453 F.Supp.2d 609 (E.D.N.Y. 2006); *In re Terrorist Attacks on September 11, 2001*, 349 F.Supp.2d 765 (S.D.N.Y. 2005); *Linde* v. *Arab Bank plc*, 384 F.Supp.2d 571 (E.D.N.Y. 2005).

[13] Those ideas have been developed by the Independent Expert in “Tracking down the missing financial link in transitional justice”, *International Human Rights Law Review*, vol. 1, No. 1 (2012).

mutually sustaining interaction between loyalty and repression, but there are also trade-offs, depending on the target of the strategies.[14] Both tactics require that Governments possess sufficient economic resources. The national economy, and more specifically the State budget, must support an effective system to buy loyalty or ensure repression.

20. Loyalties can be acquired through (targeted) economic benefits that can consist of resource transfers, subsidies, tariff protections and regulations that guarantee profits, employment and consumption. At the same time, public finance and repressive expenditures should be considered: the budget allocation and bureaucratic apparatus will reflect, to some extent, the repressive capacity and policy of the regime. The loyalty of the military, police or secret services in controlling or repressing opponents are imperative priorities for autocratic regimes that rule mainly through violence. Consequently, global data confirm that autocratic regimes frequently increase military budgets and often overcompensate the military police and other officials who control instruments of violence and coercion.[15] Indeed, military expenditures used to strengthen the coercive capacity of the regime and its stability,[16] have been found to contribute strongly to a country's external debt burden.[17]

21. It is true that Governments can frequently sustain themselves by taxes, income generated by investments, trade in commodities and other internal revenue, allowing them to buy key loyalties and fund agencies of repression, but sovereign financing may frequently be crucial for maintaining autocratic rule and overcoming critical periods of dissent or economic downturns. With a longer time horizon in mind, it is reasonable to expect that external actors who contribute financially to the regular functioning of a regime that violates human rights are helping to consolidate it. Sovereign financing may assist it in attaining its principal feature: retaining power, either through the acquisition and maintenance of key loyalties, or the use of coercion to minimize and marginalize dissident voices. In many authoritarian regimes, the majority of the population remain in a situation of exclusion or dependency, unable to improve their condition or the way they are ruled, fearful that dissent may result in discrimination, torture or death. Freedom of association and assembly are limited, so that dissident voices cannot organize collectively or call for changes. Sovereign financing may serve to further uphold that status quo.

22. As money is fungible, funds lent or granted to a regime committing gross human rights violations might of course also be spent in a beneficial way. However, there are several reasons why such economic support may not be in the long-term interest of the population.

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[14] See Daron Acemoglu and James A. Robinson, *Economic Origins of Dictatorship and Democracy* (New York, Cambridge University Press, 2005); Bruce Bueno de Mesquita and others, *The Logic of Political Survival* (Massachusetts Institute of Technology Press, 2003); Ronald Wintrobe, *The Political Economy of Dictatorship* (Cambridge University Press, 1998).

[15] See Justin Conrad, "Narrow interests and military resource allocation in autocratic regimes", *Journal of Peace Research*, vol. 50, No. 6 (November 2013). Specifically for military expenditures by Latin American dictatorships, see Thomas Scheetz, "The evolution of public sector expenditures: changing political priorities in Argentina, Chile, Paraguay and Peru", *Journal of Peace Research*, vol. 29, No. 2 (May 1992).

[16] See Michael Albertus and Victor Menaldo, "Coercive capacity and the prospects for democratization", *Comparative Politics*, vol. 44, No. 2 (January 2012).

[17] See, among others Robert E. Looney, "The influence of arms imports on Third World debt", *Journal of Developing Areas*, vol. 3, No. 2 (January 1989); John Dunne, Samuel Perlo-Freeman and Aylin Soydan, "Military expenditure and debt in small industrialised economies: a panel analysis", *Defence and Peace Economics*, vol. 15, No. 2 (2004); Russell Smyth and Paresh Kumar Narayan, "A panel data analysis of the military expenditure-external debt nexus: evidence from six Middle Eastern Countries", *Journal of Peace Research*, vol. 46, No. 2 (March 2009).

23. Firstly, even if it is proven that loans are employed for a beneficial use, such spending could also release other funds that can then be spent for harmful purposes. If lending is used to build roads, construct homes or other public infrastructure, there is little doubt that external financing was not directly allocated for repressive use. However, such projects may also be critical to quelling discontent or buying loyalty. Even funds allocated directly to social programmes or projects aimed at realizing economic, social and cultural rights can reduce social and political protest and resistance, thus prolonging the survival of the regime. Furthermore, government revenue that would otherwise have been spent on social or economic development can be distributed to strengthen clientelistic relations and fortify the national security system.

24. External funds may temporarily provide more fiscal space for regimes so that they can rely more on buying loyalties and depend less on repression. In fact, when Governments take into consideration the preferences of outside (non-supportive) groups that have their own financial and budgetary priorities, they will probably garner some social and political support, while at the same time contributing to their primary goal which, in the case of authoritarian regimes, may imply surviving in power and carrying out their political and economic plans.[18]

25. Secondly, while the domestic population may perceive that there has been a short-term improvement in well-being, as a result of additional public spending, that is directly at odds with the positive conditions that normally surround the enjoyment of human rights. Multilateral loans might not really benefit the enjoyment of human, social and economic rights, but may have a propagandistic purpose in making a regime look more benign externally than it actually is. The docile nature of the population can potentially be misinterpreted as acceptance of, or support for, a regime, confusing public compliance with expediency. In his report of 1977, the Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities demonstrated that sentiment in the case of the Pinochet regime. Authoritarian regimes have sometimes been able to withstand international pressure from other countries, or the United Nations, to improve their human rights record, because multilateral banks not only provide direct financial assistance to repressive Governments but also facilitate access to more sizeable amounts of private capital.

26. Finally, Governments with access to foreign income usually rely much less on the taxes levied from their citizens to obtain revenues.[19] That gives political elites little or no incentive to grant democratic representation, or the right to effective political participation, to citizens in exchange for their economic compliance as taxpayers. Economic elites and other relevant groups may be rewarded without the need for political bargaining, voter control or democratic decision-making on the use of funds. As has been explained, “in developing countries, tax bases are typically narrow and the state’s ability to extract taxes is notoriously limited. Therefore, governments utilize their ability to sell loans internationally to generate revenue needed to fund domestic spending projects.”[20] However, under authoritarian Governments, those public spending projects have clear and specific political

[18] See Sabine Michalowski and Juan Pablo Bohoslavsky, “Ius cogens, transitional justice and other trends of the debate on odious debts: a response to the World Bank discussion paper on odious debts”, *Columbia Journal of Transnational Law*, vol. 48, No. 1 (2010).

[19] On oil revenues, see Kevin Morrison, “Oil, nontax revenue, and the redistributional foundations of regime stability”, *International Organization*, vol. 63, No. 1 (January 2009). See also Michael L. Ross, “Does taxation lead to representation?” *British Journal of Political Science*, vol. 34, No. 2 (April 2004).

[20] Irfan Nooruddin, “The political economy of national debt burdens, 1970-2000”, *International Interactions*, vol. 34, No. 2 (June 2008).

objectives, including rewarding the loyalty of regime insiders, self-enrichment and financing the coercive apparatus.[21]

27. Increases and decreases in external financing can impact human rights in various ways. There are obviously cases in which foreign (including financial) investments can actually benefit the enjoyment of social and economic rights or promote the virtuous circle of growth and democratization, fostering greater respect for civil and political rights, but additional financing can also have the reverse effect. Debates on the effectiveness of international sanctions reflect the existing uncertainty as to whether reduced lending or economic support will lead to the desired policy outcomes, including better respect for human rights.[22] There are several examples in which sanctions limiting foreign investments contributed to a reduction in repression, but sanctions have also sometimes pushed regimes into intensified repression. The matrix below provides a framework highlighting the potential effects loans provided to an authoritarian regime may have on human rights. Frequently those effects will be mixed.

Interlinks between finance and human rights, possible scenarios

	More human rights violations	*Fewer human rights violations*
More funds	Strengthen the regime, free up funds for criminal purposes	Promote the circle of growth and democratization or directly benefit the people
Fewer funds	Provoke instability and subsequently more repression	Weaken the regime and open up a democratic transition

28. Cutting off loans can destabilize authoritarian regimes, but whether increased repression will ensue is a more complex question. Two different outcomes are possible: when a regime faces financial constraints and cuts the resources for its population, dissent may occur and the regime may retaliate with elevated repression in the short term. Social and economic instability can beget escalation effects, radicalization of opposition groups and even defections from the security forces. The alternative scenario is that financial difficulties actually reduce repression, because the State has less financial capacity to operate its repressive apparatus, thus reducing the medium- and long-term sustainability of the regime, and ultimately shortening its political life. In sum, refraining from lending to a regime may have negative or positive outcomes depending on those different chains of causality. There are trade-offs between buying loyalty and repression and the regime may be unable to find a sustainable equilibrium between those two options.

29. It should be noted that gross human rights violations are increasingly committed in failed States or in the context of weak government structures. A further withdrawal of lending to weak or failing States could therefore cause further harm, as in such contexts the loss of administrative capacity and the lack of effectiveness of law enforcement by the State is a fertile ground for human rights abuses by private individuals or rogue agents of the

[21] William Easterly, "How did heavily indebted poor countries become heavily indebted? Reviewing two decades of debt relief", *World Development*, vol. 30, No. 10 (2002).

[22] See Joy Gordon, "Smart sanctions revisited", *Ethics & International Affairs*, vol. 25, No. 3 (Fall 2011); David Lektzian and Mark Souva, "An institutional theory of sanctions onset and success", *Journal of Conflict Resolution*, vol. 51, No. 6 (December 2007); William H. Kaempfer, Anton D. Lowenberg and William Mertens, "International economic sanctions against a dictator", *Economics and Politics*, vol. 16, No. 1 (March 2004); and Dursun Peksen, "Better or worse? The effect of economic sanctions on human rights", *Journal of Peace Research*, vol. 46, No. 1 (January 2009).

State.[23] Weakening a State and its law enforcement institutions may sometimes increase the probability of gross human rights violations by further decreasing State capacity. However, just providing funding to a weak or failed State, or its law enforcement authorities, is unlikely to ensure the building-up of State institutions based on the rule of law and respect for human rights. The risk is that resources will rather be invested in repressive, State structures that disrespect human rights, or allocated to sustaining patronage networks.

30. As every situation needs to be separately assessed, lenders should respect fundamental due diligence standards, in order to understand the likely consequences of their own behaviour. Risk analysis should not only be focused on the likelihood of whether the loan will be serviced in the future, but needs to assess the impact lending will have on the population and their enjoyment of human rights. That includes not only considering whether the funds will consolidate an authoritarian regime, but also whether the debt obligations imposed on future generations of the country are just. To make informed decisions about their lending, States, the international community, multinational financial institutions and private lenders need to understand how the regime finances itself; to what extent it is dependent on external financing; which State agencies or other actors are mainly responsible for gross human rights violations; what the intentions of the regime are; and whether there are opportunities for a transition to democracy. When financial assistance would predictably contribute to strengthening a regime perpetrating gross human rights abuses, lenders should refrain from allocating funding that will sustain it. Curbing lending under that scenario would ceteris paribus presumably lead to lower levels of human rights abuses in the country.

31. The Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities explained that point in his report on the financial contributions received by the Pinochet regime: depending on the circumstances, financial assistance can have a positive or negative impact on the human rights situation of any given country. Loans with the precise objective of building houses for the poorest and funds that are earmarked to alleviate suffering will be less likely to have a negative impact than loans granted for general spending needs.

32. To some extent, State behaviour has already become sensitive to such human rights arguments. A recent study analysing how States responded to physical integrity violations in developing countries in their bilateral development assistance between 1981 and 2004, revealed that, overall, donor States reduced their infrastructure, general budget and programme support for countries in which physical integrity violations had increased. On average, however, in such countries they maintained their development spending for the social sector, including health, education and water supply, or the promotion of human rights and democratization.[24] However, bilateral development financing is only a small part of all financial support or lending and the Independent Expert is not aware of studies that have analysed in a similar way non-concessional lending by States or private lenders.

33. Experience with past lending and recent developments should be analysed by lenders to enable them to recognize changing trends. A due diligence analysis should take into consideration at least the following information and factors: the amount, type, objective and timing of the proposed loans; information from post-disbursement monitoring of earlier loans; the growth of debt and the sustainability of public funds to service further debt; the type and character of gross human rights violations and potential changes in the

[23] For an empirical study providing evidence for this trend, see, for example, Neil A. Englehart, "State capacity, State failure, and human rights", *Journal of Peace Research*, vol. 46, No. 2 (March 2009).

[24] Richard A. Nielsen, "Rewarding human rights? Selective aid sanctions against repressive States", *International Studies Quarterly*, vol. 57, No. 4 (December 2013).

human rights record of the country in question; information from civil society; the nature of the authoritarian regime; and the actions taken by international organizations and other Governments. Hence, a due diligence analysis to assess the impact of loans or additional loans on human rights should be viewed as a continuous process.

34. At the time lending decisions are made, a micro- and macroanalysis of the situation of the borrowing country should include the following questions:

(a) Whether the money would directly serve, or be easily diverted, to finance human rights violations (for example, funding for death squads, death camps, weapons or other tools to repress or control the population);

(b) Whether financial resources provided to the Government would make the regime politically stronger or extend its life;

(c) Whether the loan would improve the enjoyment of economic and social rights of marginalized people, or would more likely be used to sustain clientelistic relations, or whether funding spent in the social sector would rather free government funds for repressive investments than improve the overall human rights situation.

35. Lenders should ask themselves those questions before granting any loan. Failing to exercise due diligence may not only come with considerable reputational risk. As legal standards and customs in the area of business and human rights are evolving, it cannot be ruled out that courts may start reviewing such lending decisions, even if many years later.[25]

IV. Do funds consolidate regimes engaged in gross violations of human rights?

36. As explained in the previous section, in theory, net lending may have a profound influence on regimes engaged in gross violations of human rights. Funds can influence regime structure and stability, as well as the choices for survival and domination of the elite of a country. However, to what extent is the theoretical, rational choice explanation of the abusive behaviour of a regime confirmed by reality?

37. It should be noted that there has been some research analysing whether lending by international financial institutions or structural adjustment programmes imposed by them have had an impact on physical integrity rights. Those studies found that World Bank and IMF adjustment programmes lowered the overall level of government respect for human rights, including physical integrity rights.[26] While some scholars have found that net World Bank and IMF lending has improved respect for human rights, their data confirms that physical integrity rights increase when payback of loans exceeds new loans, suggesting that

[25] In recent civil lawsuits in Argentina, based on responsibility for financing criminal regimes, victims have sued the banks that financed the military junta between 1976 and 1983. Those cases include *Ibañez Manuel Leandro y otros casos/Diligencia Preliminar*, Juzgado Nacional de 1º Instancia en lo Civil 34, Buenos Aires, No. 95.019/2009; and *Garramone, Andrés* c. *Citibank NA y otros*, 2010, Juzgado Nacional en lo Contencioso Administrativo Federal N° 8, Buenos Aires, N° 47736/10. See also Juan Pablo Bohoslavsky and Veerle Opgenhaffen, "The past and present of corporate complicity: financing the Argentinian dictatorship", *Harvard Human Rights Journal*, vol. 23, No. 1 (October 2010).

[26] See for example M. Rodwan Abouharb and David L. Cingranelli, "The human rights effects of World Bank structural adjustment, 1981–2000," *International Studies Quarterly*, vol. 50, No. 2 (June 2006) and by the same authors, "IMF programs and human rights, 1981–2003", *Review of International Organizations*, vol. 4, No. 1 (March 2009).

it is not the painful payment process which triggers such violations, but rather an indicator of a domestic crisis fuelling repression.[27]

38. Other studies have assessed whether development assistance or conditionalities attached to such lending have been able to reduce human rights violations, showing disparate results.[28] While some scholars find that European Union development assistance has had overall a positive impact on certain human rights, such as the right to freedom of movement, freedom of religion and workers' rights, other experts have concluded that United States foreign aid, despite human rights conditionalities, is associated with increased physical integrity violations.[29]

39. Studies have also been carried out on the impact of economic sanctions on different autocratic regimes and their human rights record, finding that the likelihood of repression depends on the type of autocratic system.[30] They have, however, not investigated the impact of net lending on human rights. The Independent Expert is therefore not aware of any empirical research tackling the specific question of the link between foreign debt and regime survival in a systematic way. It is crucial to explore that issue, as the question he is raising has obvious policy and legal implications.

40. In the following paragraphs, the Independent Expert will discuss some preliminary evidence of the relationship between foreign financing and the likelihood that an authoritarian regime transitions to democratic rule.[31] He is using democratic governance as a proxy indicator for a low likelihood that gross human rights violations are being committed. Ideally, reliable data on gross human rights violations would need to be compiled as well, to assess whether there is a direct correlation between lending and gross human rights violations, but there are several methodological challenges. For example, there is no data set available which tracks over a long period and a large number of countries to what extent States have or have not been engaged in gross violations of human rights. While several data sets exist, which measure on a country basis violations of physical integrity, they usually fail to include in a systematic way information produced by the human rights mechanisms of the United Nations. The Independent Expert was therefore hesitant about using them for this report.

[27] Silja Eriksen and Indra de Soysa "A fate worse than debt? International financial institutions and human rights, 1981–2003", *Journal of Peace Research*, vol. 46, No. 4 (July 2009).

[28] For a reflection on and discussion of the link between foreign aid and political liberalization in the recipient country, see Abel Escribà Folch and Joseph Wright "*Foreign Pressure and the Politics of Autocratic Survival*", ch. 4 (forthcoming from Oxford University Press).

[29] See, for example, Allison Sovey Carnegie, Peter M. Aronow, and Nikolay Marinov, "The effects of aid on rights and governance. Evidence from a natural experiment", unpublished working paper, 6 August 2012, available from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2124994. See also Hyun Ju Lee, "The impact of U.S. foreign aid on human rights conditions in post-Cold War era", Iowa State University graduate theses and dissertations, available from http://lib.dr.iastate.edu/etd/12068.

[30] See, for example, Abel Escribà-Folch, "Authoritarian responses to foreign pressure, spending, repression, and sanctions", *Comparative Political Studies*, vol. 45, No. 6 (June 2012) and Christian Davenport "State repression and the tyrannical peace", *Journal of Peace Research*, vol. 44, No. 4 (July 2007). It is argued that single party systems, especially those that involve more people and organizations, are less likely to engage in repression than other types of autocratic regimes, such as dictators or military regimes.

[31] This section is based on research undertaken by the Independent Expert, together with Abel Escribà-Folch. See Juan Pablo Bohoslavsky and Abel Escribà-Folch, "Rational choice and financial complicity with human rights abuses: policy and legal implications" in *Making Sovereign Financing and Human Rights Work*, Juan Pablo Bohoslavsky and Jernej Letnar Cernic, eds. (Oxford, Hart Publishing, 2014).

41. Using democratic governance as a proxy indicator for a low likelihood of gross human rights violations can nevertheless be justified. Empirical studies have found a close and consistent correlation between democratic governance and respect for human rights, including physical integrity rights, using different data sets.[32] In other words, widespread and systematic gross human rights violations are rather seldom found in countries that show certain fundamental features of democratic governance. The close link between human rights and democratic governance is not only well tested by empirical research, but has also been stressed in resolutions of the General Assembly (55/96), the Commission on Human Rights (2000/47 and 2002/46) and the Human Rights Council (19/36).

42. Of course there some caveats: authoritarian or non-democratic regimes are not tantamount to systematic and gross violators of human rights. There is, however, robust empirical evidence that such violations have been more prominently committed by authoritarian regimes. Vice versa, gross violations of human rights may happen as well under democratic governance. The empirical research has only established that democratic regimes and their agents have a significantly lower predisposition to engage in gross violations of human rights, in particular against people living within their own territory.

43. It should be acknowledged that distinctions between democratic and autocratic regimes are not always very clear. Democratic governance can be organized in many different ways and the diverse nature of democracies reflects the rich social and cultural traditions of the world. The General Assembly has recognized that there is not one universal model of democracy, but that all democracies share common features (see resolution 55/96).

44. One such common feature is described in article 21, paragraph 3, of the Universal Declaration of Human Rights, which states that "the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures." Similar provisions are included in article 25 of the International Covenant on Civil and Political Rights. For his research, the Independent Expert has relied on those human rights provisions to distinguish between autocratic and democratic types of governance, reflecting also the current state of the art in political science, which stresses the importance of periodic, free and competitive elections as a key feature of democratic governance.[33]

45. The Independent Expert would also like to acknowledge that there may be a time lag between the allocation of funding and its potential impact on gross violations of human rights. According to the explanations provided in the previous section, a regime may either invest funds to buy loyalty or strengthen the repressive apparatus. The life of the regime may thus be prolonged without necessarily seeing an immediate human rights impact in the form of more or less gross human rights violations. However, as long as an autocratic

[32] See, for example, Christian Davenport, "The promise of democratic pacification: an empirical assessment", *International Studies Quarterly*, vol. 48, No. 3 (September 2004); Christian Davenport and David A. Armstrong, "Democracy and the violation of human rights: a statistical analysis from 1976 to 1996", *American Journal of Political Science*, vol. 48, No. 3 (July 2004); Steven C. Poe, and C. Neal Tate, Repression of human rights to personal integrity in the 1980s: a global analysis", *American Political Science Review*, vol. 88, No. 4 (December 1994); and Steven C. Poe, C. Neal Tate and Linda Camp Keith "Repression of the human right to personal integrity revisited: a global cross-national study covering the years 1976–1993", *International Studies Quarterly*, vol. 43, No. 2 (June 1999).

[33] For the data presented further below, the Independent Expert has relied on the classification made by Barbara Geddes, Joseph Wright and Erica Frantz in "Autocratic breakdown and regimes transitions: a new data set", *Perspectives on Politics*, vol. 12, No. 2 (June 2014).

regime remains in power, there remains a greater risk that such a regime will engage in systematic suppression.

46. Preliminary empirical evidence shows that foreign financial sources might have an important impact on the durability of authoritarian regimes in power.[34] The authors of the study in question consider whether net transfers of public and publicly guaranteed external debt have an impact on the likelihood that an authoritarian regime transitions to democracy during the same year, using data covering the period 1970–2006.[35] The analysis is based on a data set capturing 158 different episodes of authoritarian rule in 91 countries.

47. The results show the negative impact over a period of 36 years that foreign debt has had on the likelihood of a transition to democracy.[36] While more research is needed and the preliminary results should be interpreted with caution, the effects are statistically significant at conventional levels. They suggest that foreign loans contribute to the perpetuation of authoritarian regimes. While the gross probability of a transition to democracy (within one year) in the sample is 2.2 per cent, moving from the minimum to the maximum value of the debt variable brings about a 1.65 per cent (per year) decrease in the probability of democratization (then reaching 0.3–0.4 per cent).[37] Over a 10-year period, for example, the effect would obviously be higher. The data set would predict that, on average, 22 per cent of all authoritarian regimes not benefitting from public or private lending would transition to democratic governance. However of those regimes regularly receiving net public or private lending, only 3.35 per cent would become democratically ruled. Some additional tests also reveal that foreign borrowing might be of special relevance in times of economic downturn, which usually lead to severe shrinkages in State revenues.

48. Rerunning the regime survival model detailed above, but distinguishing between net transfers on external debt (public and publicly guaranteed external debt) from official creditors and those from private lenders, it is possible to observe the impact of foreign debt provided by private and official creditors on the likelihood of democratization.[38]

49. The results suggest that, although both sources of funds have helped authoritarian regimes endure, loans from private creditors have actually been more likely to stabilize authoritarian regimes than official lending and thus are probably also more harmful to human rights.[39] Additional research is needed to establish whether funds provided to authoritarian regimes are used to buy loyalties through patronage (thus prolonging the life of the regime), or are used to boost the repressive apparatus of the regime.

50. The different impact of official and private lending might partially be explained by the fact that official creditors, in particular bilateral lenders, may be subject to some (although frequently limited) political accountability. As most of the world's large bilateral lenders enjoy some form of democratic governance, voters and civil society might resent their Governments using taxpayers' money to support States violating fundamental human rights. Similarly, albeit frequently criticized for their lack of transparency and democratic

[34] See Bohoslavsky and Escribà-Folch, "Rational choice and financial complicity with human rights abuses: policy and legal implications" in *Making Sovereign Financing and Human Rights Work*.
[35] Measured in constant (2000) dollars per capita. Data compiled from the World Bank *World Development Indicators*.
[36] To estimate those probabilities, the other variables have been held constant at their means.
[37] The results remain largely unaltered if one controls for trade (imports plus exports as a percentage of GDP).
[38] See Bohoslavsky and Escribà-Folch "Rational choice and financial complicity with human rights abuses: policy and legal implications" in *Making Sovereign Financing and Human Rights Work*.
[39] Ibid.

control, international financial institutions are subject to the scrutiny of public opinion, transnational groups, civil society and member States.[40]

51. In contrast, while civil society is increasingly monitoring corporations, voters exert less control over private lenders operating in international financial markets and States have so far prohibited private lenders only in exceptional circumstances by legal regulation from providing funds to States or State institutions with a bad human rights record.[41] Market discipline alone provides insufficient incentives for lending that is sensitive to human rights. It looks mainly at debt sustainability and the likelihood that the loan will be repaid, not at the democratic character of a regime, nor its predisposition for human rights abuse. The market does not prevent loans to dictators. On the contrary, once loans are provided to autocratic regimes, the market rather provides incentives to grant additional funds to such a regime, in order to stabilize it and ensure its repayment capacity. Market logic thus becomes a self-fulfilling prophecy.

V. Next steps

52. **Lending to regimes that commit gross human rights violations may contribute to regime consolidation, prolong disrespect for human rights and increase the likelihood of gross violations of human rights. Those conclusions can stand for both official and private financial assistance to Governments. Nevertheless, private lending seems to be more damaging, as it might enjoy lower public accountability compared to lending between States and to loans allocated by international financial institutions.**

53. **The statistical analysis presented above, which is based on 158 different episodes of authoritarian rule in 91 countries, suggests that net fund transfers may prolong autocratic rule and thus increase the risk of gross violations of human rights. However, each country situation must be assessed individually. The rational choice model presented by the Independent Expert, suggesting the likely causalities and the quantitative data presented, must be checked by case studies that serve to illustrate the causal linkages between the financial aid received and gross violations of human rights perpetrated by authoritarian regimes.**

54. **According to the argumentation developed in the previous sections, unless lending decisions are subjected to human rights impact assessments, appropriately targeted or mitigated by contractual measures, financial lending can have a persistent impact on authoritarian regimes, making it possible for them to consolidate autocratic rule and perpetuate political exclusion and human rights violations, and reducing the need for political concessions. However, it may sometimes be best not to lend on any condition, as financial inflows could impair the human rights situation, either immediately or over the longer term.**

55. **States engaged in gross human rights violations not only torture and kill people, but may also impose economic models that violate fundamental social, economic and cultural rights. As Antonio Cassese explained in a paper he wrote in**

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[40] James H. Lebovic and Erik Voeten in “The costs of shame: international organizations and foreign aid in the punishing of human rights violators, *Journal of Peace Research*, vol. 46, No. 1 (January 2009), found that multilateral development cooperation commitments showed greater sensitivity to criticism of human rights records by the United Nations Commission on Human Rights compared to bilateral commitments.

[41] On how Latin American dictatorships received funds from private lenders see Robert Bejesky and Juan Pablo Bohoslavsky, “Contemporary lessons from Carter’s incorporation of human rights into the financing of Southern Cone dictatorships” in *Making Sovereign Financing and Human Rights Work*.

1979, the ways in which different rights violations are interlinked is often part of the survival strategy of a regime.[42] Foreign investors may benefit from the failure of a regime to respect human rights, such as the right to freedom of association and to form trade unions, or from countries with weak social, safety and health standards. If foreign actors make decisions based on profitability, and profitability is more likely to be higher when human rights are restrained, then economic assistance can contribute to the perpetuation of human rights abuses and such abuses, in turn, might potentially bring about the necessary conditions to attract and obtain additional economic assistance or investment. Moreover, a set of practices that have pernicious consequences for development may be part of the legacy of an authoritarian regime in the transition to democracy and the economic structures created under authoritarianism will influence the prospects for consolidating democracy.[43]

56. **The present report has not dealt with the legal aspects of financial complicity in human rights, or international or national law. The purpose of the report is to provoke discussion and to obtain feedback from stakeholders, to be able to assess the robustness of the framework and data provided, stimulate further data collection and determine how measurement methods and theoretical arguments could be improved accordingly. The Independent Expert intends to present a future report with a legal analysis of financial complicity and policy guidance as to how States and private financial actors should deal with the issue. He hopes that in a future report, he will also be able to present a revised analysis incorporating a direct statistical check between net lending and gross violations of human rights, although there are certain methodological challenges that need to be addressed in that respect.**

57. **The aim of the Independent Expert is to increase political and institutional interest in developing adequate guidance and policies that should assist States, multilateral institutions and private actors to make better and more informed decisions as to whether or not they should lend to Governments suspected of committing gross violations of human rights. Should decisions be made to lend to States or State institutions with questionable human rights records, such guidance should also specify how lending could be implemented to minimize the risk that it will contribute to gross violations of human rights or international crimes. The Independent Expert also intends to discuss in a future report whether the development of additional legal standards is required to address the issue. That includes clarifying to what extent lenders might be held responsible for financial complicity and how victims might enjoy access to remedies.**

[42] Antonio Cassese, "Foreign economic assistance and respect for civil and political rights: Chile - a case study," *Texas International Law Journal*, vol. 14, No. 2 (1979).

[43] See Tony Addison, "The political economy of the transition from authoritarianism," in *Transitional Justice and Development: Making Connections*, Pablo de Greiff and Roger Duthie, eds. (New York, Social Science Research Council, 2009); and, generally, *Justice and Economic Violence in Transition,* Dustin Sharp, ed. (New York, Springer Publications, 2014).