

Lending Revisited

International Conference on Illegitimate Debts (Odious Debts)

3 and 4 October 2007
Bern/Switzerland

Organisation

Aktion Finanzplatz Schweiz-Dritte Schweiz, Basel/Switzerland

With conceptual and financial support from plate-forme Dette & Développement, France

Main Sponsor

Ford Foundation, New York

Other Sponsors

The Sigrid Rausing Trust, London
Staatssekretariat für Wirtschaft SECO, Bern
Mission 21, Basel
Anawim Foundation, Baar

Content

Programme	3
Jürgen Kaiser: NGO activities 2007 in Europe	4
Beverly Keene: Argentina 1976-2007 – The paradigmatic case of an extraordinarily legitimate debt	13
Ingilab Ahmatov: Azerbaijan case study – Favorable conjuncture on the global market and conservative debt policy	21
Victor Nzuzi Mbembe: Le cas de la République Démocratique du Congo	27
Farooq Tariq: Drop Pakistan's debt – there is no other way	34
Jean-Luc Bernasconi Swiss debt management policy	42
Sabine Michalowski Alternatives to the traditional odious debts doctrine	47
Mitu Gulati The Dilemma of Odious Debts	53
Panel discussion	55
Legal Workshop	59
NGO Workshop	68
Summaries	71
Donatus Klaudius Marut/Jürgen Kaiser: The case of Indonesia	74
Plan of action	77
Speakers	80
Participants	82

Programme

Wednesday 3 October 2007

- 9.45-9.50 Aktion Finanzplatz Schweiz: Welcome speech and introduction
- 9.50-10.15 Jürgen Kaiser (Germany): NGO activities 2007 in Europe
- 10.15-12.15 Cases of Illegitimate Debts, current concepts and campaigns, presented by NGO representatives:
Victor Nzuzi Mbembe (Democratic Republic of Congo), Beverly Keene (Argentina), Ingilab Ahmadov (Azerbaijan), Farooq Tariq (Pakistan)
- 12.15-12.30 Jean-Luc Bernasconi (Switzerland): Swiss debt management policy
- 13.45-14.45 Sabine Michalowski (UK): Alternatives to the traditional odious debts doctrine
Mitu Gulati (USA): The Dilemma of Odious Debts
- 14.45-15.30 Panel discussion 1 with Southern NGOs and legal experts in the plenary
- 16.00-17.30 Panel workshop with Celine Tan (USA), Victor Nzuzi Mbembe, Beverly Keene, Ingilab Ahmadov, Farooq Tariq. Discussion and deepening of current concepts (historical, social, and ecological debts, responsible lending, debt audits), questions and requests to be addressed to the legal experts
- 16.00-17.30 Panel workshop with Sabine Michalowski, Mitu Gulati, Charles Abrahams (South Africa): Discussion and deepening of the legal approaches to illegitimate debt, feasibility and acceptance with debtors and creditors, effects on future lending

Thursday 4 October 2007

- 9.15-9.30 Workshop moderators report the results of the first day to the plenary
- 9.30-12.00 Continuation of the panel workshops with the Southern NGOs: Next steps in campaigning, set up and goals of an NGO work group.
- 9.30-12.00 Continuation of the panel workshop with the legal experts: Response to the NGO questions and requests, discussion of possible paths to a joint proposal of the legal implementation of the principle of illegitimate debts; set up and goals of a work group of legal experts.
- 12.00-12.30 Workshop moderators report the results of the second day to the plenary
- 13.45-14.45 Panel discussion with Southern NGOs and legal experts in the plenary
- 14.45-15.15 NGO representatives and legal experts draw their final conclusions in separate groups and plan their follow-up work
- 15.15-15.45 Mutual feedback in the plenary, deciding on and scheduling follow-up work
- 15.45-16.00 Conclusions and end of conference

Jürgen Kaiser

(erlassjahr.de, Germany)

NGO activities 2007 in Europe

What I would like to do in this first short time slot is to place the discussion of illegitimate debts, and the alternatives from the NGO perspective how to deal with them, in the context of the larger debt relief effort. Illegitimacy of debts has always been a central topic for the international debt relief movement. It is becoming more so, but it finds itself in a context where there are also other important points in the debt relief effort for NGOs. Therefore I would like to do three things during the next 15 minutes. First, the question: Where do we stand, in view of the campaign against illegitimate debts? Second, what are the important central points, the most important advances, that we have achieved? And then third, to see what the challenges, the possibilities, the chances, and the instruments are, that present themselves in the area of NGO activity.

There are fundamentally three ways to question the legitimacy of claims of a creditor on a sovereign debtor. That's what we're talking about – we're not talking about the debts of banks or the debts of private firms, we're talking primarily about the public or publicly-guaranteed debts of countries in the South, generally countries in Asia, Africa and Latin America.

There are three fundamental kinds of logic with which one can call for the cancellation of such debts. These diverse approaches have been discussed in varying degrees over the past 20 years of debt relief work by NGOs. The first is to say: debts are intolerable, there are simply too many, they are «unsustainable». The second approach is to say: debts or credits should never have been granted, they are illegitimate. And the third approach is to say that debts must be cancelled to make development financing possible. This is an approach that played a central role here in Switzerland, around 1992, when Switzerland became a pioneer in the area of debt conversion for development. This morning we're interested in the second of these three approaches, and it's this one that I want to address in more detail.

For NGOs, there are essentially two possibilities or two challenges to the question of how to deal with questionable, illegitimate or dubious debts. (The third term is our rather provisional translation of the English word «odious».) And they are two approaches that are of course

complementary. The first involves saying that first of all we need a workable concept, a definition that is coherent, preferably also politically enforceable, and above all durable, and with which we can differentiate between debts that are legitimate and illegitimate, odious and not odious, and normal and abnormal. This will be an important working subject for us in this conference, that we occupy ourselves with the different concepts of illegitimate debts, and I think we are well advised as NGOs, and we must be clear that we don't have a completed and ready-to-use concept, rather that conceptual work is urgently needed, and I hope that by tomorrow evening we're all a good bit wiser.

The second approach is to deal with individual cases. This means, we occupy ourselves with individual, preferably sensational, well-known, also politically significant debt cases that we can and want to call into question. These two approaches naturally don't run along completely separate paths, rather they influence each other, which means that with the case law approach it is so, that from decisions handed down in the legal domain, other decisions often result that concern the concept, the idea, the juristic practicability of illegitimacy.

To make it clear where we are in this process, I've put a quotation up on the screen. This is the kind of quotation that soccer coaches often put on the wall in the locker room, when they want to get their teams particularly worked up before the game. There are also coaches who are motivational artists and who scream at the opposing coach, «You're all worthless and you'll never win anything anyway!» Which of course motivates his players to give that extra effort. And that's the kind of quotation this is:

«It is difficult to detect, from the increasingly wide literature on the topic, a clear and legally viable concept of odious debts in the expanded version in which it is often used today. The categories that are being proposed often overlap, lack clarity, and tend to apply the concept with equal facility and often at the same time to loans, regimes, countries, and debts. This lack of precision, and the array of practical objections that confront them, make it difficult to accept the expanded concept of odious debts, which is often advanced in recent discourse (and which has not been reflected in the practice of states). A different approach is required in addressing the concerns that motivate many of these proposals.»

It is from the World Bank study, fairly notorious amongst insiders, with which the World Bank positioned itself on the subject of odious debts for the very first time. It is a paper that our Norwegian friends via their government planned for a long time, and we've been asking

ourselves for a year if the World Bank would ever produce a study with the money it received from Norway; it did, and the report is a result. The message in this entire paper, which I believe is included in your handouts, and it's worth reading if you can live with adrenaline, it's great to read. The message of the paper is, there is absolutely no usable concept of odious debts, that what these odd NGOs propose lacks any analytical clarity, it is contradictory, therefore it makes no sense at all for the World Bank to continue to pursue this subject. On the other hand, as it so often is with the NGOs, the desire behind such a subject is very commendable, that is, the improvement of the lending process in the South. And we can do that best of all by using the instruments that the World Bank has long had, to effect an even stronger influence on the lending to countries in the South in the future. That is, briefly summarized, the message of the World Bank paper. And that is the kind of position with which we must concern ourselves. Whether we like it or not, the World Bank is such an important player that we as NGOs will not be able to get around dealing with such a position, on the sidelines at IMF and World Bank conferences or in discussions with our governments, which of course have also read this stuff. We are well advised to accept this challenge, even when this paper has only limited usefulness to us.

What is our own position at this point? That is of course a fairly bold idea, one could summarize it here within five minutes. I say this cautiously, because possibly there are colleagues who see things a little differently than I do. I think I see three important points, with which we as NGOs that have worked on this subject for the past ten to 15 years, have come to somewhat of a consensus.

Firstly, we are not saying categorically that all debts are illegitimate. Even that is a position that has been advocated and that some may still be advocating, but it is not the subject we are talking about at this conference. On the contrary, we are talking about concrete credits, about specific extensions of credit, that have pros and cons, that have individual or institutional responsibilities and that as individual credits should be paid or cancelled.

Secondly, we will be dealing with many legal terms, especially of course in the legal working group, but I think it is an important message that we as NGO activists have, also for our friends in the legal domain. That the question of payment or non-payment of dubious and illegitimate debts ultimately is not a legal question, nor is it one where I can personally imagine it being broadly dealt with in the courts. Ultimately it's a political question, and

where there has been progress, it was achieved because political processes were initiated, because political will was established, not to pay or not to collect a certain debt. For this process, legal expertise has great importance. The strength of the legal argumentation is a factor that must not be underestimated, but we are well advised to keep in mind where the decisions will ultimately be made. They will most likely be made in parliaments and ministries, and not in any court of law.

And a third point, which is also directed a bit at our agenda for today. The criteria for what makes debts illegitimate or dubious, they are still absolutely open, and we can clearly see how the various political interests attempt to produce and advance various criteria, also in the political discussion. We see that clearly in the World Bank paper and the UNCTAD paper, which is also in the handouts. We are simply not the only ones occupied with the question, «What are illegitimate debts?» The World Bank does it and has very superficial motives. Another example is U.S. lawyers who find that it's a super-interesting subject and that countries in the South should not pay their debts, and that they should approach these U.S. lawyers to help assert their interest in a refusal of payment process before U.S. courts. Such a mindset logically leads to other criteria to define illegitimate debts than those that we as NGOs in the South in the debt relief movement would be interested in.

To slowly come to the point: What have been the landmarks, the big important steps of the NGOs towards a concept that is also politically enforceable? Here we can name a whole list of publications. One of the first important ones was the book by Patricia Adams, who is here today to discuss odious debts with us. Then there was an important study, conducted by Joe Hanlon for the Norwegian government, and then of course the paper by the Canadians. The University of Toronto released a fascinating paper that discussed, for the first time in an international context, the odious debts doctrine based on a discussion of Pat Adams's book, and which had a great impact at the start of the decade. Then there are the two papers that you find in your conference handouts, which originated from the decision by the Norwegian government to unilaterally cancel the debts of five countries, on the grounds of creditor shared responsibility. They are the paper by professor Howse commissioned by UNCTAD and the paper by the World Bank, which I have already referred to. As far as I know (but our Swiss friends might have more to say), the UNCTAD paper is also a subject of wider public discussion within the scope of UNCTAD itself, and that is for us all a great chance that we should use to consider how our work continues after this conference, and that is a point that

we should address. Concerning the World Bank paper, I'm not so sure the Bank wants to launch any public discussion of their deliberations. Then there is of course a set of academic papers, which we will hear about here in more detail.

Regarding the individual cases, there were a couple that had major significance for us, but I didn't want to list them all. There are two, I think, very important publications that were released, one being a casebook published by Jubilee South on dubious claims, that pertains particularly to multilateral lenders in Asia. Another publication is the one from Eurodad, prior to the G7 finance ministerial conference this year in Essen. It's called «Skeletons in the Cupboard», and it is a collection of case studies from each of the G7 countries. And they prove themselves to be quite useful (at least for us in Germany), because they are cases that are brief and to the point, with which we can exercise considerable pressure – we're noticing it now in parliamentary discussions and also with government lobbying. I think these publications are on the Web and can be made available. And an important case, which I had first forgotten about in my collection, but then it occurred to me this morning, is the case of the Khulumani Support Group. This is a group of South African activists, that together with supporters in Switzerland, Germany, and I think in a few other countries, tried before a U.S. court to belatedly question financing that benefited the apartheid regime. And specifically with a suit based on reparations that actual victims of apartheid have documented, and what's important for us is that the suit was brought for a case that was quite clear, but that has been dismissed by the District Court in New York.

Clarification by Charles Abrahams: Well the Khulumani case is one of a damages claim under the Alien Tort Claims Act (ATCA) in the United States. It does not specifically deal with the issue of odious debt. What we realized from the beginning was unlike other forms of odious debts, the South African apartheid debt was owed to private creditors such as German, Swiss, US and British banks and other corporations as well. Because of the problem around the notion of odious debts and the uncertainty of its place in international law, we realized that it would be difficult to institute an action in South Africa or anywhere else for that matter. So what was ultimately decided was because of the availability of the Alien Tort Claims Act in the United States that allows for damages claims for human rights violations, it was felt that that would be the most appropriate route to go.

Jürgen Kaiser: Thank you for that explanation. The question of cases has of course legal importance, namely, can the non-payment of debts be carried out in concrete cases, but it also has bearing on the political process. Anyone who has ever attempted to raise awareness on the subject of indebtedness of Southern countries knows how important concrete, visible, tangible and comprehensible cases are, in order to mobilize public support. And we must take note of a couple of developments, for better or worse, regarding these questions. First, we need to recognize that a number of classic odious debt cases are no longer available to us, simply because a large part of bilateral debt of the poorest countries is being cancelled, in the framework of the HIPC initiative and the MDRI, established by the World Bank and the IMF for the poorest countries. Cases with which we in Germany have very happily worked with, like Karachipampa in Bolivia, where the Germans built a lead and silver smelter at an altitude of 4,000 meters, which at this altitude can never function at full capacity, but nonetheless was paid for. Such cases are now slowly disappearing simply because either the debts are being paid, or because they fall under HIPC debt cancellation and therefore no longer exist.

On the positive side, it was of course a big advance for us all when the Norwegian government decided to cancel the debts of five countries. The word «illegitimate» does not appear in the statement, but what is probably much more important and of more value to us, is the phrase «creditor shared responsibility», which carries with it a considerably higher potential for our work. In everything we have done up to now, to a greater degree, we have primarily concentrated on bilateral debts. Which is a somewhat less illuminated field, with a few exceptions of course. What is rather less illuminating, but probably in the future for us will become steadily more important, is to view the granting of credit by multilateral creditors critically, for example the World Bank but also the Monetary Fund or other multilateral regional creditors. And I think we must note that the creditors no longer react as they once did. Whatever critical things one can and must say about the World Bank paper, the fact that it is even considering the subject, is a different reaction than that which to date and above all in the realm of the World Bank has been the case; that up to now it never even attempted to grapple with the subject, and instead attempted simply to ignore it. And the fact that the World Bank refers to it, and that the appropriate instrument against unwanted, illegitimate, dubious lending is the Bank's own anti-corruption policies, shows that such an anti-corruption policy even exists, which is in itself a relatively new development. Which means that here too, the creditors attempt – the World Bank attempts – to deal with the subject differently than it has for 15 years. Nonetheless, we must say that the fundamental dismissal of claims, that

illegitimate debts must be cancelled by the creditor, remains. Anyone who's ever talked to employees of the World Bank or other multilateral or bilateral creditors has heard these remarks before: «A loan is a loan.» «There are no usable criteria.» «Except for us, no creditor has an interest in canceling illegitimate debts.» «If we do it, then other creditors will simply profit from it, because they then have the opportunity to call in their loans.» We are not yet at the point, not even with the Norwegian decision, where this type of rather superficial counter-argument has ceased to be effective.

What can be done? Many debt relief movements and NGOs, in both creditor as well as debtor countries, now have five to seven years of experience where they have attempted to introduce this subject in parliament, in public discussion, and in the media, and to say, hey, there is such a thing as debts beyond the question of ability to pay, that should not be paid. We're slowly coming to the point where we must work towards decisions – our Norwegian colleagues have shown the way – and I think that also the more important creditors at this point will be pressed to reach decisions. That can happen in different ways. In Germany, we are in the process of obtaining a legal opinion for a specific, concrete and spectacular case of the financing of weapons exports to Indonesia that the creditors cannot get around. (I think we'll have the opportunity to talk a bit more about this later.) That means, to produce a paper that the creditors cannot simply ignore like an NGO document or paper, just because it doesn't suit them. An alternative, that's what Khulumani attempted, namely to drag the creditor before the court and to question their claim, that is an option that isn't yet often open to us, but it is of course an option.

A third option is to bring debtor governments to simply refuse to repay debts, even though they could repay them. That is one of the most interesting discussions at the moment among debt relief campaigns and networks in the South, namely to see what kind of audit processes we can advance to enable a government, or to provide it with strong arguments to actually refuse repayments. Ultimately the instrumental actors on the question of payment are of course the debtors themselves, and those are the governments in the South. The most exciting process in this context is probably the debt audit commission of the new Ecuadorian government, that by the beginning of next year in collaboration also with some colleagues is working on exactly such a concept, and in addition has initiated an investigation of debt relief processes from the past 20 years.

Finally, there is an important instrument that we as NGOs launched at the beginning of the year, and that is the Parliamentarians' Declaration for Shared Responsibility in Sovereign Lending. It is a parliamentary declaration created by Eurodad, Latindad, Afrodad, and a few other international networks together with the Parliamentary Network on the World Bank (PNoWB) at the last network conference in West Africa. It's on the Web at www.debtdeclaration.org. It got off to a good start, there are a number of prominent members of parliament that have signed the declaration, but since then not much has happened and I think as an international debt relief movement we should do more with this instrument than we have so far.

And lastly I'd like to mention a new discussion taking place among creditors at the moment, that a year ago we might not yet have expected. A large number of the poorest countries in sub-Saharan Africa and in a few other parts of the world have received relatively sweeping debt cancellation within the frameworks of the MDRI and the HIPC initiative. And at the moment there is a decidedly excited discussion among creditors within the scope of the World Bank, but also beyond, about how exactly new raising of credit should proceed today. The debt relief initiatives were created to give countries renewed access to credit markets, and that's happening now in times of international over-liquidity to the extent that the creditors are in a daze. That is, a number of the poorest countries are again exhibiting debt indicators that are higher than they were five or six years ago before the introduction of debt relief initiatives. And that is not only a legitimacy problem for the creditors. It is also a question of which new creditors, which new investors, are actually entering into these countries? And with what interests? There is a distinctly hectic discussion on the role of China, the country with the greatest foreign exchange reserves in the world. China is practicing clearly aggressive lending policies in Africa. There is great concern about what kinds of credit are being granted, there are all sorts of exaggerations and horror stories about what the Chinese are doing there. There's also little transparency on the part of the Chinese. But the question behind it has of course a lot to do with the subject that we are discussing here: What sort of regulation of lending can and should there be, based on what legal basis, so that countries don't quickly find themselves once again in the position that they accept bad credit or too much credit? What role can or must civil society play? What international instruments can be employed?

I think this shows us very well that, in our discussion of illegitimate debts, we're not only talking about some brutal dictators from the 1970s and 1980s; we're also talking about the granting of credit today, and I think it is important for us that what we do now is also viewed in this context.

Beverly Keene

(Dialogue 2000 Argentina – Jubilee South/Americas)

Argentina 1976 – 2007:

The paradigmatic case of an extraordinarily legitimate debt

Abstract

The persistence of a massive stock of illegitimately accrued public debt claims against the Argentine state constitutes a gross and systematic violation of the Argentine people's right to self-determination, to development, and to the full enjoyment of all their human and environmental rights.

This process of debt accumulation, studiously pursued as a central policy of the civilian-military dictatorial regime which terrorized the country between 1976 and 1983, has been the subject of an important judicial ruling in Argentina, establishing clear evidence of its fraudulent and arbitrary nature, the relationship between the expansion of external debt claims and the discriminatory deterioration of human rights and social welfare, and the complicity of the International Financial Institutions – the IMF in particular – in the process as a whole. Subsequent judicial denunciations and investigations point to the ongoing pattern of criminal association between local elites and transnational corporate interests, international financial institutions, and authorities of the national government, insuring the continued accumulation of fraudulent debt claims as a key component of a model that also entails the cession of national sovereignty, the plunder and denationalization of public resources and wealth in such a way as to inhibit the future exercise of such sovereignty and self-determination.

Judicial processes, nonetheless, have yet to bring about significant results in terms of halting the criminal debt build-up and/or redressing its consequences. It is thus imperative that new avenues of judicial and/or political redress be activated in order both to prevent further deterioration of the human rights situation in Argentina and to galvanize a new era of human rights protection and promotion. Concerted global action against the impunity of those responsible for the accumulation of illegitimate debt claims is one such avenue; integral and participatory Audits and judicial demands focused on obtaining recognition, restitution, and

reparation of the Argentine people's legitimate claims of historic, social, and ecological debt are another.

Case development

Setting the foundations

When the Bretton Woods institutions were created in 1944, Argentina was not among the founding states. It was, indeed, the military coup of 1955 that put an abrupt end to the ongoing process of social organization, resource nationalization, income redistribution, and promotion of basic social and political rights, that also determined the country's entrance into the IMF, the World Bank, and the Paris Club. Then, as now, the principal argument invoked was the need to generate confidence among (potential) external investors.

The Economic Plan inaugurated by that military dictatorship was widely criticized for its tendency toward the denationalization of the economy and a regressive income distribution. Obviously elaborated and put into practice in flagrant contradiction to the expressed will of the people, the Plan had the formal approval of the International Financial Institutions -which thus inaugurated their 50-plus years of intervention into the internal affairs of the country-, concentrated its benefits in the hands of a privileged few, and marked the country's first timid steps into the modern era of external debt accumulation by converting floating commercial debt into one billion US dollars of financial debt with the Paris Club, by the end of the military rule in May, 1958.

1976 - 1983

The more recent era was inaugurated once again by a flagrant combination of military might, local economic elites, and international financial institutions and interests. The civilian-military coup of March 24, 1976, was preceded by nearly a year of frustrated negotiations with the IMF, which argued «political instability» as the motive for denying the elected government a stand-by agreement to ease the balance of payments crisis brought on, in no small part, by the implementation of the previous 20 years of IMF-induced policy prescriptions. Proof of its complicity in the coup itself was the rapidity with which the IMF recognized the military junta – second only to the US government – and the fact that in less than 24 hours it authorized a loan to what was already in motion to become the bloodiest regime in modern Argentine history. The Inter-American Development Bank quickly followed suit, and in rapid succession, the Economic Plan announced on April 2nd was

flooded with external credits then anxious to find placement in the less respectable but much more profitable «emerging markets» of South America – most of which, oh coincidence, were also quick in the process of succumbing to highly repressive civilian-military dictatorships.

Between 1976 and the end of that regime in 1983, the external debt claimed of Argentina, largely by international banks headquartered in the U.S., Europe, and Japan, rose from some US\$ 7 billion to US\$ 43 billion. Six years to the day after Martínez de Hoz inaugurated the profoundly regressive *National Reorganization Plan*, Argentine citizen Alejandro Olmos filed a complaint in Federal Criminal Court charging the then ex-Finance Minister with having conceived and implemented an economic plan with the intent of producing a disproportionate and irregular external indebtedness, the access to hard currencies being used for interest rate manipulation which in turn led to the bankruptcy and closure of local enterprises and difficulties for the country's production, export capacity, and growth. Particular emphasis was placed on the abusive indebtedness of what were then still powerful public enterprises, among them the national petroleum company, the national telecommunications company, the national water and sewage company, and the national airline, as well as the nationalization of external debts accrued by private firms – often large multinationals including the very same banks and external financial interests then making loans to the civilian-military dictatorship.

Eighteen years passed – more than ample time to consider the peoples' right to justice to have been systematically denied – before a judicial ruling could be obtained (July 2000) whose central elements, even then, contributed little to prevent the further exacerbation of that human rights violation, the continued growth of a publicly-recognized illegitimate debt, and the worsening of its consequences in terms of political-economic domination, denial of other human and environmental rights, and the deepening plunder of the country's resources and wealth to the detriment of popular sovereignty, self-determination and any pretense of development.

What the Federal Judge did recognize to have been proven, however, was *the manifest arbitrariness with which the highest political and economic authorities of the Nation conducted themselves...in no fewer than 478 occasions*, provoking a situation in which, inter alia, the *...external debt of the Nation...has been grossly incremented since 1976 by means of a vulgar and offensive political economy that forced the country to its knees as a result of the*

diverse methods used and which were described in the course of this ruling.... The Judge further concluded that the existence of an explicit link between the external debt, the entry of short term external capitals and high interest rates in the domestic market, and the corresponding sacrifice of the national budget beginning in 1976 could not have gone unnoticed by the authorities of the International Monetary Fund who supervised the economic negotiations... In effect, it must be remembered that since 1976 the country was placed at the will of its external creditors and in those negotiations, functionaries of the International Monetary Fund participated actively.

Meanwhile, innumerable citizen initiatives were undertaken in an attempt to draw attention to the illegitimacy and illegality of the debt claims accumulated during the dictatorship and their profound consequences, including the holding of an «Ethical Tribunal on the External Debt and Neoliberal Adjustment Policies», in September 2000. Among the considerations cited in that Ethical Tribunal's Sentence, is the fact that *to insure their Impunity, those involved modified the Procedural Code to make it possible to defer jurisdiction to foreign courts. They also modified the law establishing the incompatibility between being a public official and an agent of foreign interests.*

1984 - 2001

The return to constitutional rule was accompanied, in 1984, by a strong public recognition of the illegitimacy of existing external debt claims; the election of presidential candidate Raúl Alfonsín was often credited to his promise not to repay those claims found to be illegitimate and one of his first actions as president was to call on the Federal Parliament to conduct the necessary investigation. Such action was thwarted by imposition of the IMF, which in June 1984 refused approval for the popularly elected government's economic plans unless the Parliamentary investigation, then underway, was suppressed. The Argentine Finance Minister resigned, both Parliamentary and Judicial investigation of the debt claims were stopped, and the final steps were taken by the government to legalize the unquestioned nationalization of private debts assumed under the dictatorship.

Combined with the effects of the unprecedented and unilateral rise in interest rates, the fall in relative commodity prices on the world market, and the anatocism applied to the subsequent interruption of regular payments on the external claims, this denial of justice ushered in an almost uninterrupted 18 year period characterized by another four to five-fold increase in the

volume of external debt claims, a massive pauperization and social decline of the Argentine population, the denationalization of public patrimony, recommodification of the economy's productive profile, and the continued plunder and destruction of natural resources.

This manifest denial of the Argentine people's right to development, including the gross and systematic violation of their human rights to education, healthcare, decent housing, dignified work, wages, and employment conditions, access to land, among others, evidencing furthermore a systematic discrimination against children, women, and the elderly, was supervised and encouraged on a permanent basis – and indeed praised as a relevant model for other South countries – by the same International Financial Institutions – the IMF, WB, IDB – that lent their support to the earlier periods of civilian-military dictatorship. Indeed, after supervising the conversion of outstanding commercial debt claims into «sovereign» public debt in the early 1990s, these institutions took on an increasingly important role as direct lenders, accompanying and imposing on greedy, spineless, or overpowered national authorities the 10 Commandments of the Washington Consensus until such time as the implosion of the model in 2001 moved them even more forcefully into the role of unrepentant and privileged claims collectors.

2002 – ?

The present period is marked by the contradictory combination of a reluctant but ineluctable moratorium on the payment of commercial debt claims (December 2001), followed by the «sovereign» decision to negotiate the resumption of payment on said claims (2003-2005), advance payment to the IMF in contravention of the judicial questioning of its claims (December 2005), and preparations to regularize outstanding bilateral debt claims in the Paris Club – including the negotiation of a renewed supervisory role for the IMF and other IFIs. The securitization of public debt claims, implemented significantly in the early 1990s is further complemented by the «internalization» of the «external» debt.

What has not changed significantly in the ensuing period, is the pressure to accumulate in a continued, massive, and systematic manner, the only truly legitimate debt emerging from this more than 30-year old history: the debt that the international financial institutions, their owners and policy setters (North governments), the concentrated financial and corporate interests they serve, and their handful of local accomplices, owe to the people of Argentine as a result of the violation of their right to self-determination and development, to the full

enjoyment of their human and environmental rights, to international cooperation and the development of an international economic environment favorable to the respect and promotion of those same rights.

Country profile

Argentina is the second largest country in South America, with an overwhelmingly urban population of nearly 40 million people and a life expectancy of some 74 years. While adult literacy is widespread and primary education nearly universal, maternal and infant mortality rates are relatively high (82 per 100.000 and 19 per 1000 respectively). Gross national income is registered at more than US\$ 4000 per capita (2002) and the extreme inequality in its distribution is similar to the levels registered in most of Latin America and the Caribbean (In early 2007, national statistics would indicate that the bottom 10% of the population perceives 30 times less income than the top 10% – a figure that was only 12 times less in 1974). (Guía del Mundo, 2005/2006 - INDEK). More than 20% of the population remains below the poverty line.

According to the most recently available statistics, total public debt claims against Argentina are calculated at US\$ 136 billion, US\$ 15 billion of which is claimed by International organisms (WB, IDB, CAF, EIB and others), some US\$ 6.5 billion by the Paris Club (Spain, Germany, and Japan), and US\$ 80 billion by holders of hard currency and locally-denominated public issue securities. Debt claims due to be collected in 2008 total US\$ 14 billion, relative to a GNP of approximately US\$ 102 billion. Argentina made an accelerated payment to the IMF of nearly US\$ 10 billion in early 2006, canceling all outstanding claims.

National debt laws and debt policy

The Argentine National Constitution confers on the National Parliament responsibility for the National Debt (art. 75, inciso 7). The National Parliament refuses however to assume this responsibility, routinely delegating its powers to the Executive in an unconstitutional manner (ref. Art. 65 Law 24.156, delegating faculties for «arranging» the national debt to an office of the Finance Ministry). The Federal Court ruling in the Olmos Case, referred to earlier, which enjoined the Argentine Parliament to investigate responsibilities for the massive, fraudulent, and arbitrary indebtedness committed by the authorities of the ruling military juntas between 1976 and 1983 – with the knowledge and consent of the IMF and other IFIs – has to date never been debated even in Commission. A similar fate of silence and inaction has been the

destiny of various parliamentary bills and the Citizens' Initiative presented in March, 2006, whose stated intention was to galvanize the investigation and Audit of the external debt as well as to nullify those claims already identified in the Olmos Case as fraudulent or arbitrary.

Numerous criminal and civil complaints have been filed in national jurisdiction, including Case No. 17.718, originally filed by Alejandro Olmos in 1992 as a continuation of his 1982 denunciation, and covering the period of indebtedness immediately following on the 1983 conclusion of the civilian-military dictatorship. One central finding of this judicial investigation – still in process – is that all of the credits solicited of the IMF, the World Bank, and diverse foreign private banks by the Argentine government, after 1983, were for the exclusive effect of refinancing the debt claims accrued during the dictatorship.

The reform of the National Constitution in 1994 incorporated a series of international human rights pacts and treaties (art. 75, incisa 22), granting them constitutional status and reinforcing the social guarantees and rights already enumerated in previous versions of the Constitution. On some occasions, these rights have been successfully invoked to prevent actions that would be deemed deleterious to their defense (ie. the collective right to health, in order to prevent closure of the National Health and Medicines Institute). The Supreme Court of Justice has also, in recent actions, advanced in the development of jurisprudence establishing a broad interpretation of the rights incorporated into the Constitution and an active role for the judicial authority in regard to their implementation.

In this regard, although the Supreme Court has yet to act, for instance, in any of a number of complaints filed in relation to the deferral of jurisdiction incorporated into any number of public credit documents, as well as the more than 50 bilateral investment protection and promotion treaties that have given rise to more than US\$ 80 billion in pending or future claims against the country in the ICSID, just days before the Executive announced its decision to anticipate payment of «services» to the IMF, the Court did instruct the Federal Appellate Court to investigate the denunciation pertaining to the illegality and illegitimacy of the IMF credit to the country in December 2000, which was used to fuel the enormous capital flight during 2001, bringing about the final collapse of the Washington Consensus model, one year later (Judicial investigation still pending).

On a final note, it should be stated that not withstanding the ineffectiveness of judicial

recourse to date, in resolving matters arising either from the illegitimacy or illegality of the claims, or the application of economic and social rights, or the right to development itself, the Argentine government now pursues an official policy of reducing indebtedness (*desendeudamiento*). Decisions to resume payments on the claims of commercial bondholders in 2005, and to make an advance pay-off of IMF claims against the country, according to official discourse, form part of this policy of debt reduction. At the same time, recent official statistics recognize that over the past year, the external debt claimed of Argentina rose nearly 10 billion US dollars, growing in the most recent quarter by some 8.8%. The Federal Budget recently proposed for the year 2008 suggests that interest payments alone will account for nearly 15% of Federal revenues.

Without legal and political enforcement of the right of the Argentine people to their own self-determination and development, entailing among other aspects the repudiation and non-payment of illegitimate and illegal debt claims and the restitution and reparation of historical, social, and ecological debt claims legitimately held against those responsible for perpetrating the illegitimate financial debt, it will be increasingly difficult to break this spiral of debt, death, and destruction.

Ingilab Ahmadov

(Public Finance Monitoring Center, Azerbaijan)

Azerbaijan case study: Favorable conjuncture on the global market and conservative debt policy

Country profile

The Republic of Azerbaijan is situated in the South Caucasus.

Official languages: Azerbaijani.

Independence from the Soviet Union confirmed in the 18 October 1991.

Total Area: 86,600 km².

Population (July 1, 2007): 8,580,000.

Currency: Manat (AZN).

GDP per capita: 7023 USD (PPP)

Azerbaijan is an economy that has completed its post-Soviet transition into a major oil based economy (with the completion of the Baku-Tbilisi-Ceyhan Pipeline), from one where the state played the major role. Azeri GDP grew an astonishing 41.7 % in the first quarter of 2007, very likely the highest of any nation worldwide. Of course, such rates cannot be sustained, but interesting enough, despite reaching 26.4 % in 2005 (second highest GDP growth in the world) and 2006 over 36.6 % (world highest), GDP has been accelerating every year.

Stages in borrowing

At present the state's foreign debt process is managed by the Law «Public Debt», adopted in 2007 and recently entered the force. The Law reflects instances competent for debts and responsibilities of the Ministry of Finances and National Bank as well as limitations of debts during a year. Determination of limitations prevents from possible risks in this field, namely the desire of state to be engaged in debts with a higher rate.

Since regaining its independence Azerbaijan has passed several stages in borrowing:

1. Borrowing directed to provision of financial stability (1994-1999).
2. Borrowing related to structural changes and institutional reforms (2000-2004).
3. Borrowing related to infrastructural, economic development and other commercial projects (since 2005).

Due to several reasons since regaining its independence Azerbaijan has been experiencing a stable, permanent and conservative policy in the field of debts.

1. Not taking into account civil confrontation of 1991-1993 in the country, war with Armenia and domestic anarchy, the fact, that from mid 1993 the same political authority has been in power up to present time has decreased volatility and risk to minimum. In the

first years of independence political authority did not go into debts. This means that the basis for cooperation with international financial institutions and creditors was laid by current authority.

2. From the very beginning Azeri authority sensitively addressed to foreign, refused from risky debts as much as it was possible and after the restoration of financial stability attracted foreign credit only in exceptional cases. Such policy actions enabled Azerbaijan always to occupy successful place in this field. It is not accidentally that by the ratio of foreign debt to GDP Azerbaijan occupies one of the best places among CIS countries.

3. Due to oil revenues entering the country's economy from 2005 and increasing with every past year the need for foreign debts has considerably decreased.

4. Having seen that Azerbaijan's financial stability is strong enough (oil factor) creditors have shown great enthusiasm in financing various projects.

Azerbaijan's specific environment. Debt policy

Due to a range of its stipulating factors at present Azerbaijan continues its conservative and cautious policy towards foreign borrowing:

1. There is strong enough and stable political authority in Azerbaijan. In near future current authority intends to continue this political course and retain its permanence. From this point in short- and mid term authority addresses to debts, in particular to foreign debts as to its exceptional business. It does not intend to leave this issue as a legacy to any other political group or party.

2. Azerbaijan's modern oil history has completely determined its political course for short- and mid-term perspective and this course is directed to determination of management ways of large revenues that will enter the country (according to the most pessimistic forecasts if the oil price in world market remains the same as it is at the current level, then in near 20 years the country will get about 200 bln.\$). For comparison: at present overall amount of revenues of the state budget does not exceed 7 bln. \$). In such case there is no place for high rate foreign debts.

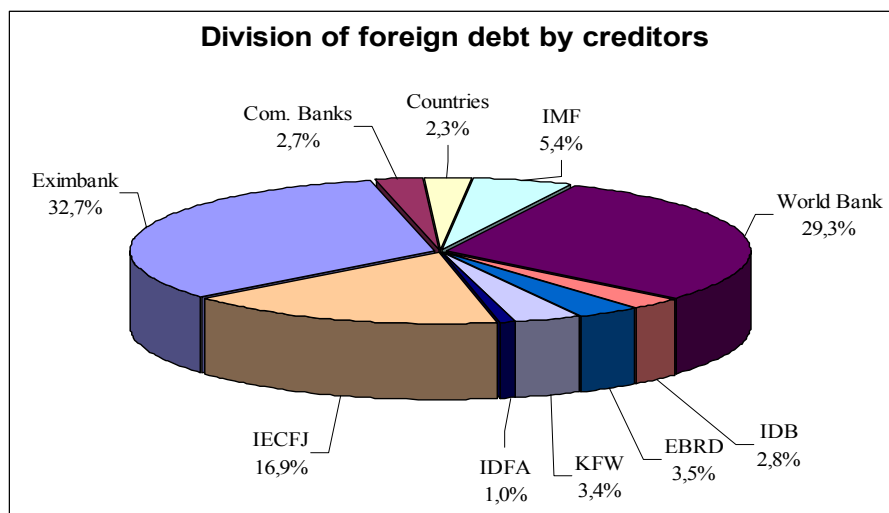
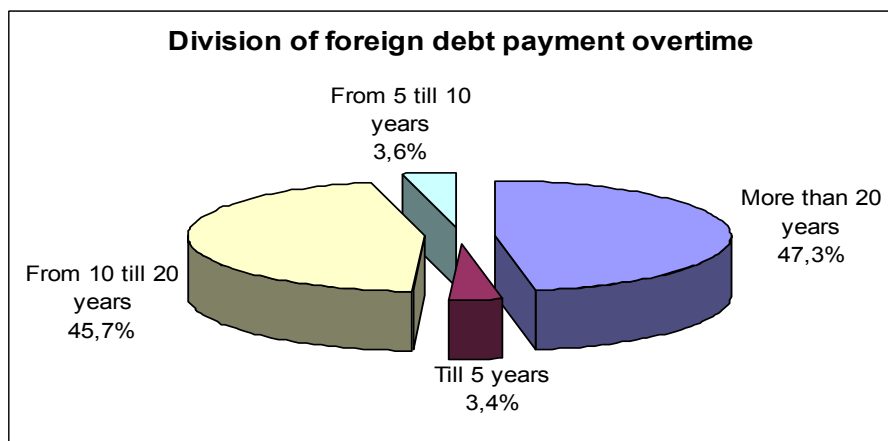
3. During disadvantageous political situation there is a risk of state's entering debts because oil economy itself is a risky field. Experience of the most oil countries (Nigeria, Angola, etc.) shows the possibility of this scenario which will be the worst one.

4. Depending on state policy oil revenues can be used by economy as a starting chance and as a result economy can gain its valid and effective competitiveness. The opposite variant is also possible: in order to retain economic balance like number of oil countries

which committed traditional mistakes, state can enter forced debts.. In such case this debt can become a controversial debt for future generations.

The Structure of foreign debt

At present (July 1, 2007) Azerbaijan has a debt of 2 bln. 089 mln USD. In comparison with GDP this amount comprises 7,7 % and is accepted as one of the best indicators in CIS. By the amount of foreign debt per capita Azerbaijan with 242,9 USD occupies relatively favorable place in the world.



IMF - International Monetary Fond

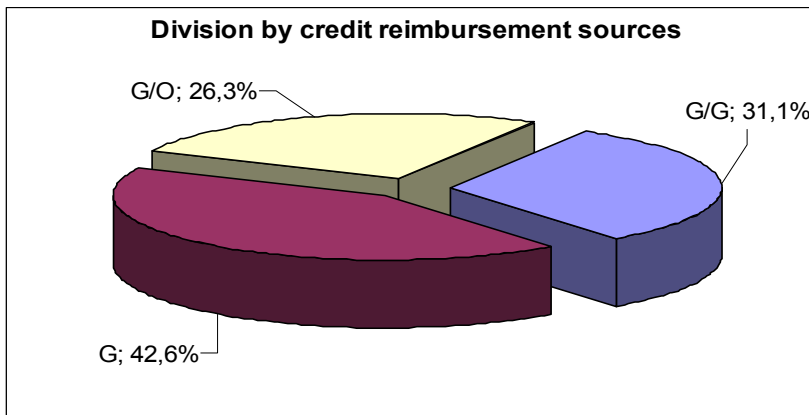
IDB - Islam Development Bank

EBRD - European Bank of Reconstruction and Development

KFW - Germany Bank

IDFA - International Development Fond of Agriculture

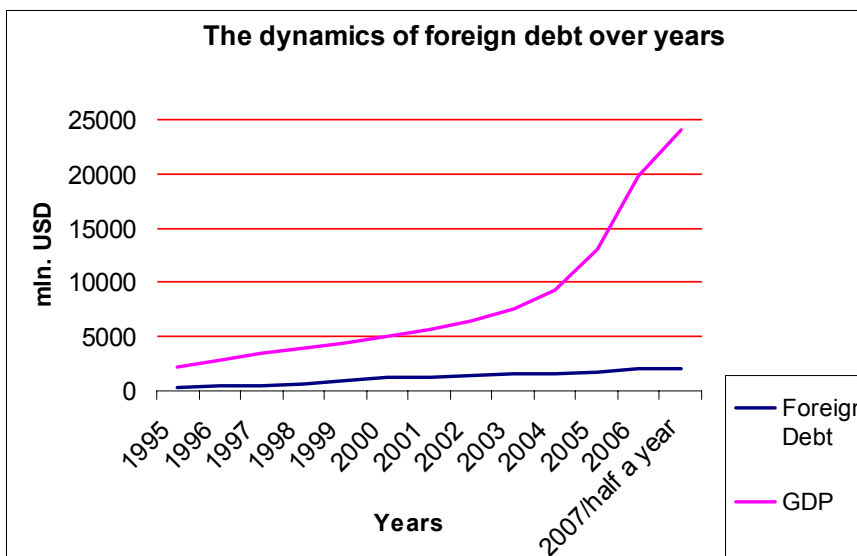
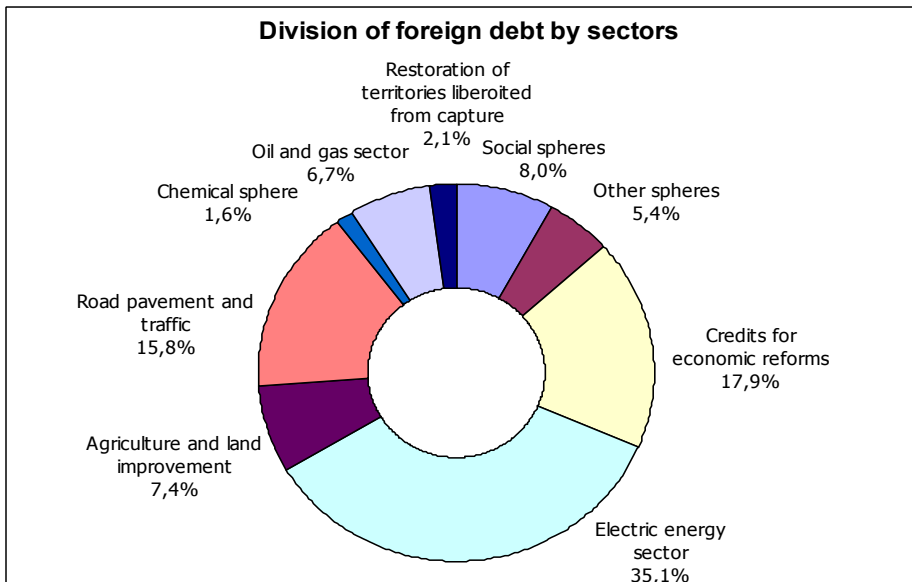
IECFJ - International Economic Cooperation Fond of Japan



G/O - credit given to Government, passed to implementer and reimbursed by implementer

G/G - credit presented by Government guarantees, but reimbursed by implementer

G - credit given to Government and paid at the expense of public budget



Risk factors in borrowing

Despite the fact that the total amount of Azerbaijan's foreign debt is relatively little, legislative base regulating debts is perfect and its structure is relatively advantageous yet there is a range of risks in foreign debts:

1. In short- and mid-term perspective the country's successful financial and overall economic policy depends mainly on oil. In its turn oil depends on world market conjuncture and is unsteady and of a high risk.
2. The main part of attracted foreign credit is under the management of state natural monopolies. From the perspective of effective management and accountability not subjected to reforms, the majority of these enterprises SOCAR (State Oil Company), Azerigaz (State gas company), Azerenergy (State energy company), etc. have lots of problems with effective management.
3. In the future problems in investments and business can create another problem in reimbursement of number of credits on time.
4. Problems in management as well as high corruption rate can cause additional problem in effective management of foreign debt.
5. Lack of transparency and accountability in government activity.

Bad debts

Despite the fact that in its relatively short history Azerbaijan did not have global problems with foreign debts during this period it had a range controversial debts of local character part of which still remains unsolved. As a result 3.4 mln.\$ debt dispute with Turkish company «Saka Korkmaz» in 2004 aircrafts of «Azal» State Concern and «Caspar» (State Shipping Company) were arrested as well as various penalties were applied.

Direct damage to «Azal» comprised 578 000\$ and to «Caspar» 3.4. mln. \$. Afterwards the situation was discussed on intergovernmental commissions' level with the participation of companies' representatives. Azerbaijani government reimbursed the whole debt. Along with this case the government faced with Turkish Eksimbank over 74 mln \$ debt dispute and with Turkmenistan over 60 mln. as well.

Foreign legal entities also had debt disputes with Azerbaijani government. For instance, Ukraine's State Company «Ukrresursi» insisted on reimbursement of 20 % of diesel engine (5.3 mln.\$) which it had bought from SOCAR in 1999-2000 in the form of product. This debt problem was also solved within the framework of intergovernmental economic commission. Debt disputes with CIS members and neighboring countries were settled through

bilateral negotiations. However a number of debt disputes (France, Cyprus, etc.) resulted in suing some of which have not found their solution yet.

Perspectives of borrowing

Positive scenario

The Government conducts serious changes in institutional and management field; economy gradually increases its competitiveness. Not like unsuccessful experience in number of countries, oil revenues are managed more effectively and gradually the dependence of economy on oil decreases and its competitiveness increases. There will be no grave problem in foreign debt management and in the future credits are attracted to commercial projects. Specific weight of credits by government guarantee decreases. The credit rating of Azerbaijan is measured not only by large amount of its currency reserve but also by the increase of its competitiveness.

Negative scenario

The Government slows down implementation of reforms. Relying on its oil revenues it carries out budgetary and social expenditures at the expense of oil. After the oil boom and in order to retain the level of public expenditures carried out at a high limit the state, along with expending finances from State Oil Fond (SOFAR) also enters the debts. Thus the amount of foreign debt abruptly increases and that in the future complicates management and timely reimbursement of debt by state.

Realistic scenario

The Government partially paves way for reforms. Weak entrepreneurship environment is organized and as an alternative to oil mainly service sector (Dutch disease) is established which plays a definite role in budget formation. Government gets little profit from management of large oil revenues abroad and at the expense of that equalizes non-profitable economic situation. Even despite of the fact that there are no serious problems in borrowing, creditors refuse from financing different subjects of the country, instead, meeting mainly state's own needs. Government loses unique chance created by oil revenues but nevertheless it does not become a controversially debt country.

Victor Nzuzi Mbembe

(Plate-forme Dette et Développement, République Démocratique du Congo)

Le cas de la RDC

1. Présentation de la RDC

La République Démocratique du Congo est un état indépendant depuis 1960. Sa population est estimée à 60 millions d'habitants sur une superficie de 2,345 millions de km² (soit plus de quatre fois la France). Aujourd'hui, le pays est encore plongé dans la guerre ayant déjà causé plus de quatre millions de morts. Mon pays a une longue histoire... Coloniale d'abord : un état indépendant est créé en 1885 par la résolution de la Conférence de Berlin sur le partage de l'Afrique. Le Congo actuel a été attribué au Roi des belges Léopold II. Il deviendra ensuite colonie belge à partir de 1908, ceci en réponse aux violations des droits de l'homme commises par les administrateurs du Roi pour obtenir le caoutchouc et l'ivoire.

Pendant la Seconde Guerre Mondiale, le Congo a soutenu l'économie belge et surtout livré non seulement le cuivre et le caoutchouc, mais surtout le minerai d'uranium qui permit aux Alliés de bombarder Hiroshima et Nagasaki, mettant ainsi fin à la guerre. Le service rendu par la Belgique aux pays alliés grâce aux matières premières du Congo a permis à la Belgique de voir sa dette vis-à-vis des USA annulée. Ce pays a ainsi pu bénéficier d'un statut privilégié tout au long du processus du plan Marchal, alors que le Congo pourvoyeur de ce minerai n'a reçu aucune récompense. Bien au contraire, il aura pour héritage plus de 200 millions de dollars de dette coloniale. La Belgique imposera en effet un paiement à travers l'hypocrisie de l'Aide Publique au Développement. Par ce système, la Belgique violait le droit international basé sur le principe de succession des états.

2. Dette de la RDC

A. Contexte de la guerre froide et processus d'endettement de la RDC

La Belgique, non contente de la présence du Premier Ministre Lumumba à la tête du Gouvernement congolais, va soutenir la balkanisation du Congo en appuyant les différentes sécessions des provinces minières du Katanga et du Kasai. Comme si cela ne suffisait pas, la Belgique et ses alliés vont carrément assassiner Lumumba. Le désordre qui fit suite à cet assassinat conduit à placer à la tête du Congo le dictateur Mobutu, un homme favorable aux

idéaux capitalistes dans un espace où proliféraient les idées socialistes (Angola, Congo Brazzaville).

Pour légitimer leur présence dans ce territoire aux richesses naturelles énormes, les Alliés lanceront un vaste programme de construction des infrastructures, avec une présence militaire pour soit disant protéger les investissements. En réalité, cette présence de l'armée sera l'occasion de mater toute tentative d'opposition de la population à la dictature.

La dictature de Mobutu va donc servir des intérêts de l'Occident qui ferme les yeux face à toutes les violations des droits du peuple congolais et surtout à toute forme de corruption. Pour preuve, la coopération militaire belge et française évoluait bien et Mobutu, ainsi que les dignitaires de son régime, pouvaient sans contrainte placer l'argent volé ou celui des commissions dans les banques occidentales. L'actualité sur les avoirs de Mobutu en Suisse démontre bien cette complicité. L'Afrique du Sud ou le Maroc offraient d'ailleurs également cette opportunité au dictateur congolais...

B. Les infrastructures ayant conduit à l'endettement

1. A propos de la dette coloniale :

La dette du Congo commence par la dette coloniale (voir ci-dessus). Il s'agit en effet non seulement de la dette léguée injustement au Congo le jour de l'indépendance, mais aussi de la dette ayant servi à dédommager les entreprises minières pendant la « nationalisation » (ex : création de la Gécamines en 1968, contrat signé entre Moïse Tshombe et Paul-Henri Spaak). Cette précision est importante car à l'indépendance, les entreprises sont restées belges et lorsqu'il fut question de faire le compte avec les autorités de l'état souverain du Congo, un conflit appelé le « contentieux belgo-congolais » est né. Le Congo était désormais contraint de payer, alors que c'est la Belgique qui devait le faire vis-à-vis du Congo.

2. Les Grands travaux : initiative italienne de SICAI.

La base de la dette du Congo est la construction des barrages hydroélectriques d'Inga I et II sur le Fleuve Congo vers l'océan. Bien qu'économiquement non rentable pour le Congo dans les années 1970, ce projet porté par différentes multinationales et bureaux d'études sera présenté à Mobutu comme un élément hautement favorable au développement du pays.

A la tête de ce mensonge se trouvait le bureau d'étude italien SICAI (Société Italo-congolaise de développement industriel), fabriquée de toute pièce par l'IRI (Institut pour la Reconstruction Industrielle), un holding paraétatique. Pour affirmer son mensonge sur la rentabilité du barrage d'Inga, les Italiens de SICAI vont demander l'aide des chercheurs belges de l'IRES (Institut de Recherches Economiques et Sociales de Léopoldville). Ensemble, ces chercheurs ont inventé les arguments les plus diaboliques pour convaincre les plus hautes instances, jusqu'aux structures de l'ONU, comme la commission Economique pour l'Afrique (CEA) ou la Commission Européenne.

En réalité, les états, les banques et les multinationales ont accepté le projet d'Inga et toutes les autres propositions similaires des industries dans le seul but de vendre leurs technologies. De nombreux projets n'aboutiront d'ailleurs pas et l'électricité du barrage ne sera consommée qu'à 20%. En outre, si les barrages ont été construits, plusieurs équipements n'ont jamais fonctionné. Ainsi, sur les huit installations qui constituent Inga II, quatre seulement sont en état de marche. Ces machines fabriquées par les société Belge ACEC et Brugeoise de Nivelles sont un exemple frappant du non sens de la dette. Le Congo paie en effet jusqu'à ce jour une dette pour des machines qui sont en panne depuis leur installation !

C. Exemple d'infrastructures entourées d'irrégularités

Nous avons choisis sept projets recommandés aux autorités Congolaises, mais qui ont juste permis aux multinationales occidentales de vendre leurs technologies en laissant le peuple congolais endetté : l'aciérie de Maluku , la cimenterie de Kimpese, le projet de l'Office national de transport pour l'électrification du chemin de fer Matadi-Kinshasa , la ligne à haute tension Inga Shaba , l'extension de la Gécamines pour la production du cuivre et du cobalt, le pont route-rail suspendu sur le Fleuve Congo à Matadi et la ferme présidentielle de Nsele. On peut également citer quelques autres projets : le Centre de Commerce International du Zaïre (CCIZ), la Cité de la voix du Zaïre (radio nationale), les stations de télécommunications, le monument aux morts (échangeur de Limeté), ...

Présentons brièvement les irrégularités de ces projets devant conduire à l'annulation de la dette :

1. L'aciérie de Maluku

Cette usine fut proposée (vendue) par les Italiens pour justifier l'importance du barrage d'Inga I. Les irrégularités du projet : il devait produire de l'acier mais en utilisant les

mitrilles importées , alors que le Congo est qualifié de « scandale géologique » et que l'usine est située à plus de 400 km de la mer sur un site non relié au chemin de fer . Pour encore illustrer les intentions des concepteurs de ce projet, soulignons que l'usine ne pouvait pas fabriquer le type des cornières nécessaires à la fabrication des poteaux de la ligne à haute tension Inga Shaba, alors qu'un marché de ce genre aurait vite rentabiliser le projet... Aujourd'hui encore, les outils agricoles utilisés au Congo proviennent du Brésil. Le cahier des charges n'est d'ailleurs aucunement respecté et cette usine est finalement restée fermée faute de matières premières.

2. La Cimenterie de Kimpese

Il s'agit d'un projet réalisé par des industriels allemands (KLÖCKNER ANLAGEN). Cette cimenterie a été surfacturée à 20%, un taux (escompte) d'intérêt de plus de 3% que celui pratiqué à la Bundesbank. Cette cimenterie fonctionnait avec un four qui posa des problèmes dès son installation. Les études préalables à l'installation de la cimenterie furent d'ailleurs complètement tronquées. Un expert de l'ONUDI de l'époque qui avait enquêté sur ce projet avait même fait connaître des résultats favorables aux revendications congolaises...

3. Office national de transport et l'électrification du chemin de fer Matadi-Kinshasa

Ce projet belge devait redynamiser le transport ferroviaire. Le chemin de fer n'a finalement pas été électrifié : un cahier des charges non respecté ! Ce projet, plus politique qu'économique pour le Congo, a permis néanmoins de sauver les entreprises belges ACEC et BN... Mais même les experts belges ont estimé que ces travaux qui devaient servir à augmenter la capacité du trafic n'avaient pas de sens dans la mesure où les charges à transporter avaient à ce moment-là diminué de moitié. Notons qu'à cette période, toutes les grandes entreprises du Congo étaient dirigées par les Européens placés sous le contrôle du FMI, même la Banque Centrale.

4. La ligne à haute tension Inga Shaba

Imaginée par l'Italie et des USA, cette ligne de transport du courant relie les 2000 Km qui séparent le barrage d'INGA à la région minière du Katanga. Tout au long de la ligne, aucune ville, aucun village n'a accès à l'électricité. Le village situé à côté du barrage vient juste d'avoir le courant en 2006 ! Cette ligne n'avait par ailleurs aucune raison d'être car il existait d'autres potentialités au Katanga... La ligne est finalement arrivée lorsque tous les projets qui devaient utiliser ce courant se sont retirés à cause de la chute du prix du cuivre et de

l'insécurité sur les voies d'évacuation de l'Angola et du Mozambique ... Le coût de ce projet fut trois fois plus élevé que prévu, atteignant ainsi près d'un milliard de dollars. Toutes les grandes puissances occidentales ont été engagées dans ce projet: USA, France, Angleterre, Allemagne, Italie, Belgique... Il sera à la base de la chute totale du Congo.

5. Le projet d'expansion de la Gécamines pour la production du cuivre et cobalt

Ce projet mené en autres par la Banque Mondiale avec une participation de 100 millions de dollars, la Banque libyenne arabe avec 100 millions de dollars également et la Banque Européenne de Développement n'a jamais produit un seul kilo de cuivre, alors qu'il a pourtant englouti près d'un milliard de dollars. Les créanciers ont fini par se désengager suite à la chute du prix du cuivre et aux problèmes de transport.

6. Pont route rail sur le fleuve Congo à Matadi

Conçu par des Japonais suite à une compensation sur une tricherie dans une exploitation minière, ce pont devait renforcer le transport et relier par rail le port de Matadi à celui qui devait être construit en eaux profondes à Muanda Banana (et qui n a jamais été construit). Si la route est opérationnelle, les rails n'ont jamais été posés comme prévu. Il en va de même pour le chemin de fer Matadi-Boma. Comme l'idée du port en eaux profondes sur l'océan est toujours d'actualité, la vraie raison ayant conduit à l'abandon du projet rail sur le pont va probablement ressurgir...

7. La Ferme présidentielle

Inspirée en grande partie par des Français, cette infrastructure devait produire des poulets, du lait, des boîtes de conserves de tomates, etc. Pourtant, dans cette région, aucune culture n'a jamais été développée à ces fins. Parmi les régions indiquées pour être impliquées dans ce projet, relevons par exemple le Kivu.

Outre ces projets, on peut citer de nombreux autres projets manqués : le monument aux martyrs ou l'échangeur de Limeté (conçu par des Italiens, ce devait être un monument proche du style de la tour d'Axoum ou peut-être la tour de Paris...). La Radio Nationale ou la Voix du Zaïre, œuvre des Français, est un ensemble de bâtiment avec une tour de 23 étages et une bonne dose d'amiante. Fallait-il vraiment ces infrastructures pour installer une radio ou TV ?... Le Centre de Commerce International (CCIZ) élaboré par la France est une tour de

20 étages dont la climatisation sophistiquée n'a jamais fonctionné. Actuellement, le bâtiment est inhabitable...

► Conclusion par rapport aux infrastructures: la présence d'une volonté véritable et jusqu'à présent impunie de nuire à un peuple.

3. Politique de la dette en RDC

Avec le programme PPTE, le Gouvernement s'est engagé au paiement de la dette sans se poser la moindre question sur son origine. Cependant, ce même Gouvernement fustige la gestion de prédation, la spoliation et la corruption qui ont caractérisé la dictature.... Notons malgré tout que les engagements qu'il vient de prendre avec la Chine démontrent qu'un doute réel sur les relations avec les IFI existe. Relevons également que le Gouvernement n'est pas maître de sa politique d'endettement et qu'il se précipite vers n'importe quel créancier, quelle que soit son appui ou les conditions qu'il impose.

4. La campagne sur la dette illegitime et odieuse

Cette campagne est apparue lors de la chute de Mobutu, lorsque le Président Laurent Désiré Kabila a refusé de payer la dette du dictateur déchu. Par la suite, en 2000, dans le milieu universitaire, un séminaire sur le développement a exigé l'audit de la dette à l'Université de Lubumbashi. En 2000 également, la campagne pour l'annulation de la dette de la RDC fut lancée dans le monde associatif avec le Conseil National des ONG du Congo, pendant que l'Eglise Catholique avec CIAM récoltait les signatures pour la campagne Jubilé.

Depuis 2004, un engagement formel a été pris par des militants pour vulgariser la campagne sur la dette odieuse. Celle-ci sera couronnée par une conférence internationale sur la dette illégitime et odieuse soutenue par SLUCK (Norvège), le CADTM et le CNCD (Belgique). A ce jour, grâce aux différentes participations et aux activités à travers le monde (avec le CADTM et JUBILE), les acteurs congolais, des plateformes composées des syndicats, d'ONG, d'associations paysannes font un grand travail d'éducation populaire sur la dette. C'est le cas par exemple de la Plateforme Dette et Développement qui regroupe 34 organisations sous la conduite de l'association NAD (Nouvelles Alternatives pour le Développement).

Le Congo, pour la première fois dans son histoire, viens d'adopter un régime démocratique. C'est donc l'occasion pour pouvoir demander aux autorités les comptes sur les finances de l'Etat. C'est la raison de notre lutte et de la pétition que nous avons lancée pour l'audit de la dette.

Ainsi, au Forum Social Congolais, la dette fut au centre des discussions et la pétition lancée par la Plateforme Dette a connu l'adhésion de tous. La stratégie de travail consiste à mobiliser la population et les autorités sur base des documents juridiques officiels sur base de l'article 56 de la Constitution qui donne aux citoyens la possibilité de dénoncer les accords du Gouvernement qui leur rendent la vie insoutenable. Les articles 213, 214 et 215 sur la personne ou institution habilitée à signer les accords d'emprunt donnent également beaucoup de matières. Les discours officiels du Président, du chef du gouvernement sur la dette, l'impunité ou la corruption animent aussi nos débats. Certains medias, bien que payants, participent à notre campagne et soutiennent nos actions. La mobilisation seule ne peut rien donner si nous n'arrivons pas à faire des recherches. Nous sommes en effet confrontés à des grosses difficultés de moyens matériels et financiers et nous ne pouvons engager quelqu'un pour assurer la permanence de notre structure et s'occuper spécialement de la dette.

La question de la dette devient multiforme, surtout avec l'entrée de la Chine qui relance débat sur la dette gagée ou le fond « Mobutu ».

Les procès contre la Banque Mondiale est aussi une de préoccupation lorsqu'on sait qu'en RDC, cette structure déstabilise l'économie. Il suffit de voir son programme sur la réforme de la Gécamines dans lequel plus de 10 000 emplois ont été supprimés sans respect des normes légales. Son implication dans le massacre de Kilua est aussi une des raisons qui nous poussent à vouloir mettre un terme à cette structure. Mais notre sécurité est aussi une grande préoccupation...

Farooq Tariq
(CADTM Pakistan)

Drop Pakistan's Debt: There is no other way

Debt is no longer a private affair because it now has a political dimension which concerns all people and all societies. The indebtedness of most countries of the South is becoming all the more unbearable because the repayments and interest payments demanded by creditors are beyond their means and prevent all forms of development.

It is essential to put the history of Third world Debt into the context of Bad Development of a capitalist system in crisis and of the unequal distribution of wealth and a system of domination which is reproduced within each country. The external debt crisis of the third world has been talked about for over 20 years and the rich creditor countries claims that it wants to provide a solution. Official solutions have come and gone but the debt of developing countries continued to swell; from about \$ US 70 billion in 1970, it grew to \$US 540 billion in 1980 and reached \$US 2,800billion in 2006 , having increased 40 times in 35 years.

It is now agreed that debt crisis is structural, where as it had been initially presented as a crisis of insolvency. Of course the indigenous factors, such as the decisions taken by national leaders, corruption etc. have played an important role in the development of this crisis. But it is above all exogenous factors, such as terms of trade, the trans-national companies, and increase of interest rates, among others, which are responsible for triggering it.

Basically the debt serves as pretext for bleeding third world populations dry by reducing social budgets, for exploiting their natural resources and for imposing on these economies measures, favorable to the creditors, reducing their sovereignty to practically nothing. In the 60's and 70's international loans were presented to the countries of the south as fast track to development. It was claimed that these countries had everything needed for getting out of underdevelopment: abundant manpower, inexhaustible natural resources, etc. They only need capital and new technologies to increase their production and multiply their exports. A few years of efforts and they would catch up. Well-being would spread throughout the whole world.

Massive misappropriations, unsuitable projects, prestige expenditures, arms purchases, forced purchase of goods from donor country and suppression of all forms of opposition are some the ways in which the funds borrowed were used, practically never serving the humans development. When the debt crisis arose in the early 80's, the IMF took control of the economies of these over- indebted countries in order to guarantee the resources necessary for the repayments. New loans then repaid the old ones or met debt service and interest payments. For from stimulating the progress, the debt little by little emerged as major obstacle to development.

Under the pretext of increasing the capacity to repay, whole economies were restructured at the wish of IMF: Health, education and housing budgets were drastically reduced, public services decimated, currencies devalued, public enterprises privatized and local markets sacrificed. Whole economies were pushed towards an export-oriented model to repay the debt. The debt bill of the third world countries is constantly increasing and the phenomenon is nothing less than goldmine for the donor countries and institutions. Since 1985 to 2005 the amounts paid by the South in repayments of the initial capital borrowed amounted to more than \$US 5,800 billion. The sum paid in debt service exceeds \$US 450 billion in 2004. Despite this the debt is not decreasing, rather it is constantly increasing. In Latin American countries this process has taken a new turn.

Debt was a tool of colonization and has become an instrument of re-colonization. The debt is not mere an economic issue rather it is a pure political issue and should be dealt accordingly.

The case of Pakistan

The official external debt has never gone down since 1999 when the present military regime of General Musharraf took over, although after 9/11, Pakistan received a record aid. The external debt has gone up to \$ 40 billion in 2007 from \$ 33 billion in 1999. In fact, Pakistan is the fourth largest borrower of the World Bank and fifth-largest recipient of US aid to foreign nations but even then the country has not been able to reduce external debt. But the borrowing record is littered with corruption and wasteful spending. Despite the fact that Pakistan is spending an estimated amount of \$ 4 billion on debt servicing every year, it is going up and up.

This is contrary to the process of debt which is taking place in some other developing countries. This shows the level of corruption under a military government and the sheer advices of Asian Development Bank and IMF to build mega projects with new loans from them.

The foreign debt is not coming down substantially as new loans are taken when the old loans are repaid. In the fiscal year 2006, foreign debt of \$3.1 billion was repaid, but new loans of \$3.05 billion were taken. The Debt Policy Statement issued by the Pakistan finance ministry says that if new loans are not taken, the present external loans will take about 30 years to be repaid at a rate not exceeding \$1.6 billion per annum — a total of \$48 billion.

The government claims that large new loans will have to be taken for building the five large dams and rebuilding the infrastructure for industrial and commercial development particularly from the World Bank and the Asian Development Bank. The building of mega dams have been opposed fiercely by the three of Pakistan's four provinces. The regime only think of big and no alternative to big dams who are seen by many and rightly so that they will have devastating effects on the climate change and environment pollution. The big dam building is also opposed as this will deprive the tail end province from their just share of water.

The Musharraf regime had borrowed a staggering amount of over \$ 15 billion since 2003, while countries total debt liabilities had peaked to an all time high of \$ 40 billion. During 2003-04, the total external debt was \$ 33.352 billion. Had government stopped borrowing, the debt would have declined to \$ 23.646 billion after payment of principal amount by end June 2007. A 'Debt Policy Statement' issued by the finance ministry reveals that total domestic currency debt also jumped by Rs957 billion to Rs2.346 trillion in the first quarter of 2007 from Rs1.389 trillion in 1999, registering an increase of about 69 per cent. Likewise, the foreign currency debt went up by Rs508 billion to Rs2.065 trillion in the first quarter of 2007 from Rs1.557 trillion in 1999, up by 32.6 per cent in seven years.

The report says total public debt increased by 165 per cent since 1995 when it stood at Rs1.662 trillion. Its two components, domestic currency and foreign currency debt surged by 197 per cent and 136.5 per cent, respectively, since 1995.

«The coming years will see an increase in borrowing particularly in foreign currency

component to finance the infrastructural development programme. The large infrastructure projects envisaged in the next decade will increase the debt burden if sufficient revenues are not generated from within the country», says the report. The country's total outstanding domestic debt reached Rs2.422 trillion by the end of November 2006, showing an increase of 36.5 per cent (Rs648 billion) since fiscal year 2002 when it stood at Rs1.774 trillion.

The total public debt was 100 per cent of GDP in 1999 and now been claimed by the military regime that it has come down to 50 per cent in the first quarter of 2007, the government claim basing itself with high proceeds of revenue collection. The revenue collections is mainly raising of the prices of all basic services, 15 percent general sales tax, fast and forced privatization and favorable attitude by the rich countries after 9/11. But despite that, Pakistan's liquid foreign exchange reserves, after jumping to \$10 billion-level in 2002-03, have more or less stayed around that level on average. The foreign exchange reserves of even Sub-Saharan countries (excluding South Africa and Nigeria) doubled to \$50 billion during the same period. Brazil and Argentina repaid all of their \$25 billion debt – by utilizing their foreign exchange reserves – to the IMF in early 2006 to rid their countries of its influence.

The domestic debt, unlike foreign debt may not seem to have a political dimension, but the fact remains that year after year, the debt servicing cost is going up. It rose to Rs301 billion in year 2006 from Rs247.7 billion the year before. The interest payments on domestic debt amounted to Rs190 billion. Most of the internal debt has gone to buy the luxury items and majority of it has ended up in the contractors, civil and military bureaucrats and corrupt politicians. The Musharraf regime also availed the highest foreign exchange inflow in history of the country with over \$ 25 billion coming through remittances of overseas Pakistanis and \$ 10 billion in assistance from the US. It shows the elitist economic policies of the regime and least concern about the rising debt.

How independent our economic polices are, could be easily gagged from the fact that the last three governors of the State Bank of Pakistan were «imported» from the IMF, World Bank and Asian Development Bank. The present prime minister of Pakistan is still an employee of Citi Bank and is on leave. He was hand picked by general Musharraf as finance minister and promoted him to become prime minister in 2004. So the international finance institute has no confidence on the bureaucracy of Pakistan and have send their own men to collect and amount

and to make sure that it is been spent on repayments of the loans on regular basis. Pakistan's economy is being held hostage to foreign neo-colonial economic interests.

It has not helped to reduce the unemployment or poverty in real sense. For example, in the 1970s the average official unemployment rate in Pakistan was 2.4 per cent, exactly half of the real GDP growth recorded. Similarly, unemployment actually rose to three and a half per cent in the 1980s against a real GDP growth of 6.1 per cent. And interestingly in the 1990s the average unemployment rate further increased to 5.7 per cent even as the real GDP growth fell to 4.6 percent. Over the last six years too the GDP growth has touched a record peak but unemployment figures have soared to an all-time high of 7.6 per cent. These statistics indicate how far removed macroeconomic growth and loan taking are from poverty reduction.

In Pakistan, majority of decisions are taken at the whim or fancy of either an individual or a group of individuals who may have a vested interest in maintaining the status quo. This status quo strongly favours spending in sectors and areas, which create few, if any at all, benefits for the people at large. An analysis of the priorities in public spending shows that only 0.7 per cent and two per cent of the GDP are spent on health and education, respectively. The major share of the GDP is spent on military expenditures and debt service (3.4 per cent and four and a half per cent, respectively). Composition of our current expenditure reflects that half of it is consumed by defense expenses and interest payments, 7.9 per cent of it is spent on current subsidies, 14 per cent on general administrative expenses and the rest on development.

In fact, a major chunk of our economic gains are spent on the two Ds; defence and debt-repayment. Indeed we can safely say that in Pakistan, colonial rule has only been replaced by colonel rule. And as a functional democracy is missing, decisions are taken by a handful of persons who in the process are bound to marginalize the masses.

There is a large scale corruption involved even in the management of the debt services. A new post was created and one Ashfaq Hassan Khan was appointed as director-general of Debt Coordination Office, in MP-1 scale. Overnight, he graduated from Rs32,000 (\$533) per month to an open ended package worth Rs0.3 million (\$5000), without retirement, resignation or re-hiring. Nothing, however, changed in his office, not even the files and chairs that he used to have before. He has also been appointed as Special Secretary Finance, without any summary from the concerned ministry. The package now stands inflated to about half a

million (\$8333) a month. His only achievement has been the publication of an annual debt policy statement. His colleagues also feel jealous when he travels abroad to attend quarterly board meetings of various banks and companies with government shareholding and is paid attendance fee at the rate of \$4000- 4,500 per meeting. This is in the back ground where officially minimum wage of a workers is Rupees 4600 (\$76) per month and government tall claim of per capita income stands on around \$900, a claim that is not accepted by majority in Pakistan.

The Pakistan government economic policies are dictated by the preachers of neo liberal agenda. It is on fast track of privatization, reducing taxes on multi national companies, imposing new taxes on ordinary people including a 15 per cent general sales tax imposed in year 2000 on most of the every day use items. There is an open rule of the so-called free market polices which has resulted a maximizing of monopolization of economy and a new layes of super super rich. One of the main pillars of this neo liberal agenda is repayments of the debts. Even before Musharraf military regime, the four civilian governments of Pakistan Peoples Party and Muslim League has also gone on the same road of repayments. This is done in a country where most basic facilities like clean water, sanitation, health and education is a historic low in percentage terms with other countries.

Before the national budget 2007/08 was presented, it was said the subsidies would be to the extent of Rs200 billion but now these are only Rs114 billion. The state subsidies are going only to the industrialists and not to the ordinary people. Ten industries have been given concessions. These include textile spinning industry which gets them in the form of interest reduction. So the new loans are not spent on human development instead of making few people richer.

The capability of Pakistan to pay off the foreign liabilities is decreasing day after day as reserves are declining and imports are sharply rising, together with the external debt. Contrary to the economic mantra that the governments keeps chanting, the most alarming fact is that in the event of any major external shock, there is a danger that the reserves will just vanish in no time. The emergence of the phenomenon of free trade and World Trade Organization (WTO) clearly places some nations ahead of and at the expense of others. The so-called 'free market' is clearly anti-people, in nature. Free market can never be a fair market.

The World Bank (WB) and the Asian Development Bank (ADB) are among the key multilateral donors providing loans and grants. Ever since the country joined the WB in July 1950, the institution has approved more than 17.27 billion dollars in loans and credit. The current fiscal year's ongoing portfolio consists of 18 projects under implementation with a net commitment of 1.1 billion dollars. Pakistan has received about 15.39 billion dollars in total assistance from the ADB since 1996. By the end of 2005 it had disbursed 10.31 billion dollars of that assistance. But this has not changed the basic socio economic structure which remains feudal, religious fundamentalist and military dominated in all sphere of life.

The government's claim of having broken the begging bowl has also proved wrong as its share in total public and publicly-guaranteed debt has increased from 37.5 per cent to 50.2 per cent in 2006. The economic experts have already refuted the tall claims of economic growth by the power corridors and warned that the GDP growth rate could not be maintained in the current fiscal.

«Unrealistic claims of economic growth in recent days by the power corridors have made economy's future bleak as they, instead of taking appropriate measures to arrest the negative indicators, are only making paper-claims», said Dr Shahid Hasan Siddiqui, a renowned independent economist of Pakistan. At present, the trade deficit, current account deficit, budgetary deficits, internal and external debts and the pace of throwing away national assets through privatization is the highest in the history of Pakistan, Dr Shahid noted.

There is no way out for Pakistan on the present economic priorities. Repayments of debt which are not spent on the people but have gone to pockets of ruling elite and also on bad economic policies and mismanagements have no moral ground either. "Debt is a curse" is an old saying in Pakistan. Debt which is not spent on the purpose it was taken is considered even worst. You take a small loan to buy a cow to start a small business and spend it in gambling, no one will be have any sympathies for you. But the creditor can not go the community for the repayments of this loan which is been spent by one individual on bad habit. So is the case of the state of Pakistan. It isolated from the people, it is undemocratic, it has never asked people consultation for the new loans, and all loans have only polarized the class differences.

CATDM Pakistan demands full foreign debt cancellation for Pakistan. Without this, it would be impossible to be on the path of progress for all and to get rid of the domination of religious fundamentalist forces and imperialists.

It will help launch a struggle against anti-poor economic policies of the country and help create atmosphere for building public support against IFIs through popularizing strong demand to abolish Pakistan external debt and level social and political grounds to refuse external debt.

Jean-Luc Bernasconi
(SECO, Switzerland)

Swiss debt management policy

I'd like to thank first very briefly before I get to the heart of the matter, I'd like to thank Aktion Finanzplatz Schweiz for the invitation. We work with NGO's, be advocacy NGO's, implementation NGO's, quite closely, dialogue is very important, we don't always agree and sometimes we don't even find a common ground but I think we learn a lot from this dialogue and it is been usually an inspiration for us when we have this sort of discussion. But there already I put in a disclaimer and have to disappoint you perhaps, I'll not be able to speak very specifically to the topic of odious debts, it is also something I discussed to the conference organizers, really because we don't have a position from the government on this issue, I have some personal ideas which may be interesting but I'd like rather to speak in the area of debt and how we see the future and it will in the end tie in again to the discussion we had this morning. So this will be a slightly different perspective if I can take it very useful the classification that Mister Kaiser took this morning, a systematic approach, an illegitimacy approach of freeing up resources for development, we are really at this stage more into the systemability and the freeing up resources concepts as the government is concerned.

I'll be very brief. Indeed I think Switzerland has had a pioneering and multifaceted approach to debt relief, (...), I wasn't part of that, that was really before my time, and when I look back to the arcade of work, that people did, Switzerland was among the foreigners on the official side in terms of debt relief and putting the discussion on the table internationally. Now, to be fair, the role of Swiss NGO's and some of them are represented here, has been instrumental, they had weight, they started in 1999 a big campaign, in the anticipation of the 700th anniversary of Switzerland. On the occasion of this jubileum, we needed to do something about third world debts, that has been a very strong campaign with a petition, interestingly enough, the NGO's at that time didn't call for cancellation, they created for creative debt relief. That's something we tried to implement when we actually worked on that.

We buerocrats and technocrats, I think we are quite responsive to that campaign, because within 2 years the administration prepared pretty big framal credit which were submitted by

parliament to follow up on this campaign. The NGO's had asked for 700 millions, we eventually got 500 millions of cash to finance this, this wasn't a bad result. The bilateral debt relief program concerned classic OD debt cancellation, we moved very swiftly to a grant only parts in terms of OD. There was a guarantee for commercial debts, cancellation as well and that was meant to our transaction with our export credit agency. And then I think, many guaranteed debt there is always a (...) which is guaranteed, so we use a percentage of this program to buy back part of this commercial debt and to have as much relief as possible and this was I think at that time pretty innovative.

International commercial guarantee debt will be one of the early sponsors of the debt reduction facility, where basically the idea was to buy back purely commercial debt on this counterance and also to facilitate creditor conciliation. Multilateral debt relief, heard about this morning, early in the discussion, many in postconflict countries, setting them in restablishing relationship with the IFI, and as we heard this morning, St. Petersburg doesn't think this is a good idea, we think it was, it helped to circumstance the HIPC initiative. To summarize: It has been influenced by the Swiss bilateral program and more recently MDRI and I'd like to speak to them also. And finally very important I think, complementary measures in terms of bans of payment for better support for those countries which were not in a bad situation, because in a way they were sort of left behind, these countries, which were just under the stressful, because they hadn't gone into that boring colicit but still we're faced with (...). And then the most important I think is the capacity building, because this was totally forgotten in recent years during the HIPC initiative. And capacity building for us is really the only way to attend to avoid a new bad debt cycle

Here are some facts and figures about the bilateral program, we are not going to details, what I'd like to point out here is the establishment of counterpart finance and local currency, you can call them debt conversion funds or debt for development slops at a conversional rate ranging from 8% to 20% and these were settled for development program, this was 1991, so early and innovative at that time, with a very strong role of NGO's in my training of implementation of these programs. One of the persons here in the audience, Bruno Stöckli from Alliance Sud, a coalition of NGO's here in Switzerland has been involved quite closely with this program and can tell you actually lot more than I can on this. We still have a couple of these debt conversion funds open and most of them are closed, are determinated, in some

countries, where the political situation was difficult, mainly Cote d'Ivoire, but in most of the cases this was successfully implemented

Multilateral financing, briefly again: We organized a conference in 1994, which was settled on a loose ground because the NGO's played a very strong role in putting the issue of multilateral debt relief on the table. But from an official side in these times, as we recall, even talking about multilateral debt relief was a tabu, this was just not on the books. And in this conference, the topic was discussed and with some, you know, I think, some success. We also had concluded to a relief clearance, I mentioned that before. We are financing the HIPC initiative, mainly through the compensation of its costs of regional development banks, like the African development bank, mostly. And more recently support to the multilateral debt relief initiative MDRI, which was also discussed this morning. Yeah, we just like to make a brief comment on this. HIPC was mainly about sustainability, I can take again Jürgen Kaiser's very useful classification, MDRI is mainly about freeing resources for the development and while supporting the initiative, we have two problems with it.

The first one was that, you know, debt cancellation is also a sign of a fad somewhere. These projects which were financed did not yield the expected results and we wanted to have a discussion on that in the eye of these fundamental issues. That was number one. Number two: This MDRI relief actually translated in actual additional cash because this generated a surplus in all of these countries. This was actually cash available and we thought it is useful to have a discussion about monitoring while this money is used. We were attacked, because, also from the NGO side, on the account that you are again attaching conditionalities, we want this to be no strings attached. Ironically, the same NGO's we were providing budget support, tell us that we're supporting corrupt government and the NGO's said, tell me what is the difference between a dollar of the MDRI and a dollar of the budget support, I don't really get it, I think, we should be concerned about monitoring how this dollar is used in both cases and that's something we brought quite prominently to the boards of the international financing institutions with some success. Clearly the big promoters of the initiative, that's the G8 weren't too interested, the main issue here was to get away and get the political dividend if you want this. In a conclusion: Switzerland has contributed, perhaps more than its share to this multilateral debt relief issue.

Here just to give you an overview of the program, it's still going on to some extent, here just a couple of numbers. On the top is what it actually costs and these figures variable in years but they are not in real terms, so they don't mean much, I mean we have a low inflation still. And on the bottom its a number value of the relief of the cancellation actually, it is close to two billion swiss francs, it is quite significant for Switzerland.

Our current and future priorities: MDRI again, MDRI needs to be implemented, I mentioned this idea of monitoring how budgets of the countries actually contribute to poverty reduction. We heard some struggling figures this morning from Pakistan, this is very important, how much resources are allocated to health education, how is a budget managed, how is a budget different as it is executed from parliament, all these issues are very important and I think they are worth taking a look at. We have a specific problem about financing MDRI because debt relief in its only sense is additional in many things and this presents pretty high costs for us. At this stage we have a really tight budget constraint, so there's a big political discussion about how to finance this, should we can have additional money but we have to compensate from our bilateral aid programs. It's these issues that are open and it's taking quite a lot of our time currently. There are outstanding IFI cases, which we probably will want to contribute to, like (...), the most prominent one. One issue which has been touched slightly and I think it might be an issue for NGO's also here, the whole shift rewriting and litigating creditors and the (vultural) funds. This has been brought to the Paris Club and to many instances. There is no simple solution to that but it is very worrying to us seeing these vultural funds proliferate and actually free riding on the debt relief.

The framework, the system will also contribute to that technically, the system of making sure that whatever new money comes in is analysed to be sustainable by the medium to long one and making sure that this sort of sustainability analysis is done by the countries themselves and not by (...) buying in and out, this is very important for us.

And again, it is tied in with a continuing support to debt management, I don't know how many of you have visited the debt offices within the past 15 years, and 10 years ago in a typical debt office in an African country, people would have no clue of what to do, we heard about Argentina this morning, we even defined the debt or loan agreement and that alone to do a sensitivity analysis of what happens to our position if we're hit by a draught or by a exhaustion shock. That has changed. You can go to some debt offices now, where people are

able to do that and are able to engage in a dialogue in the IFI's, and say, no sorry, this is how we see the macro-framework and I think that's very important.

And there are new issues arising, domestic debt was discussed this morning, it's certainly a very important issue among traditional lenders, China was discussed, it's also an important issue. And these are all treated by the countries, consensus by abilities, especially in the framework of new infrastructural programs where it's not to straight out loan but a variation on the theme, being a (PPP), a (BOT) or whatever. And capital market access also, this raises a new challenge, Ghana to extralarge its first global bond, it's in charge of the authorities, I'm sure the IFI wasn't happy about it in the first place, they said we want to finance our infrastructure ourselves, we want a debt relief, this is a fresh start, we will do it and the bond was 4 times over subscribed. In a way, some can see it as a challenge, some can see it as a success, but certainly part of these credit issues in terms of debt management and so on and here also we are trying to provide support.

Now, to close this intervention. The synergies with the work you're doing, as I said, we have a different approach but I think there are similarities in fundamental objectives: good governance, efficient use of public money, accountability these are things we all work on, not only in the framework of our debt relief operation but also in budget support and so on, this is very important, we are active in budget support in 6 countries, which I think it's starting to accumulate a fairly good track record on how to use their budget funds. An increasing focus on the asset issues as another side of the coin, I mean (...) was quoted several times this morning and we have also worked with some of you on the recovery of stolen assets and this was mainly in the cases of Nigeria and more recently Kazakhstan. And I think, Switzerland has been maybe too late but has been one of the pioneers in that discussion, it's incredibly complicated, what we focus here is also the monitoring aspect, it's no Swiss money, this money is clearly of the countries but there is a need, that countries make sure that this money is invested for poverty reduction purposes. Focus on responsible lending and borrowing, I think it is a double side of responsibility, sure there's responsibility on the lending side but there is also responsibility on the borrowing side, that's where the capacity building programs come in. And then active programs, taking into consideration capacity building, (...), emborrowment, governance. Use of public resources in general, frankly what are they? Debt, grant, tax payer money from the country itself, it's all very important that these issues are looked at systematically and not just from the debts.

Sabine Michalowski

(University of Essex, UK)

Alternatives to the traditional odious debts doctrine

With the current boom in academic literature on the topic of odious debts, it is impossible to discuss and evaluate all approaches to odious debts in one short paper. I will therefore not even attempt to do that, but instead, very briefly, summarise my own critique of the traditional odious debts doctrine and then present some reflections on potential alternatives.

1. Critique of the ‘traditional’ odious debts doctrine

The ‘traditional’ doctrine of odious debts, as formulated by Alexander Sack in 1927 and then further developed, more recently, for example in the CISDL working paper, states that a sovereign debt is odious and can be repudiated if (1) it was contracted without the consent of the people of the country that is said to owe the debt; (2) it was not contracted for the benefit of the people of that country; and (3) the creditors were aware of the odious nature of the debt. The odious debts doctrine as it is usually understood and promoted is not only not a principle that is firmly established in international law, but it has moreover many insufficiencies as a means to address the debt problem. This is mainly because of the vagueness of its criteria, but also because of the ideological connotations of the doctrine which cause problems of sovereignty and political bias (for example by vesting the power to decide whether a loan was beneficial to the people of the debtor state in an international tribunal) and raise concerns as to the implementation of the doctrine. Moreover, although it is based on the idea that odious debts do not need to be repaid, the doctrine mainly seems to be regarded as providing a defence against claims for debt repayment, which means that it would not help the debtor states to reclaim payments that were already made. Overall, from a legal perspective, the doctrine of odious debts in its traditional form has so many weaknesses that it does not provide a useful tool with which debt repayment can be successfully challenged.

2. Alternative approaches

2.1. International law approach

In his report to the ILC on a draft of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts (1983), Special Rapporteur Bedjaoui suggested that in

addition to the traditional definition, the term odious debts should comprise ‘all debts contracted by the predecessor State with an aim and for a purpose not in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations’.

The differences to the traditional doctrine are that the international law approach:

- concentrates on conformity with international law, and it is then primarily the international community that is harmed by the odious nature of the debt, not the people of the debtor state
- if, as Sack foresees for the traditional odious debts doctrine, it is not the people of the debtor state, but instead an international institution that will define the beneficial or unbeneficial nature of the debt, the decision to be made by an international body would here be whether the loan was in violation of international law principles, an evaluation seems to fall much more comfortably within the competence of international bodies than whether a loan benefited the people of a state.
- Its prerequisites could be determined in analogy to Article 53 of the Vienna Convention on the Law of Treaties (1969): ‘A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law [*ius cogens*] is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.’

How can it be determined that a loan agreement violates *ius cogens*?

- One of the problems here is that the loan agreements themselves will in most cases be neutral with regard to *ius cogens* violations, unless it can exceptionally be determined that the loan contract included the agreement on a purpose which amounts to a violation of *ius cogens*, such as a loan that was contracted for the purchase of torture equipment.
- In many cases, it will only be possible to demonstrate that governments use the loans obtained in order to commit violations of *ius cogens* norms, for example where they use the incoming money in order to purchase arms with which they commit crimes against humanity within their own country, or acts of aggression towards the people of other countries. When focusing on the use of the borrowed money it becomes more difficult to establish a direct link between the loan and the *ius cogens* violation, or at

least a sufficiently close link that would justify to regard the loan contract itself as void. However, it could be argued that it is sufficient that the loan contributed to the *ius cogens* violation. A loan can make a contribution to a *ius cogens* violation whether or not the money lent to the regime is directly used to finance this violation; for example because it facilitates the violation by adding to the financial resources of the regime or makes it possible by having a stabilizing effect on the political position of the regime. A loan that directly financed torture equipment or operations has a significant effect on the commission of torture, but the same might also be true, though this would be more difficult to establish, for a loan that enables a regime to remain in power and carry on with torture practices.

- If it were accepted that loans to regimes that commit *ius cogens* violations will in all likelihood at least indirectly facilitate these violations, a presumption could be applied in favour of the odiousness and consequent invalidity of such loans, unless it can exceptionally be shown that the loan did not even have such an indirect effect. This would require a determination of the regimes to which such a presumption could be applied, that is which regimes qualify as committing *ius cogens* violations. While this would include judgments on the policies of regimes, to invite the international community and potential lenders to beware of dealing with regimes that violate *ius cogens* is different from asking them to make a democracy assessment as sometimes suggested in the context of the traditional odious debts doctrine. After all, despite all its uncertainties, the concept of *ius cogens* is recognized as part of international law, and it has at least a core content on which wide agreement exists. However, it is submitted that a seriousness threshold should be applied with regard to the *ius cogens* violations of the relevant regime. The ILC's Articles on State Responsibility distinguish between serious and other breaches of state obligations arising under peremptory norms of international law (Articles 40 and 41) and attach particular consequences to the former. A serious breach is defined as one that 'involves a gross or systematic failure by the responsible State to fulfil the obligation' (Article 40(2)). While a systematic violation is one that is 'carried out in an organized and deliberate way ... the "gross" refers to the intensity of the violation or its effects.' Similar considerations should be applied in the context of loans.

Consequences:

- This would mean that banks could see loans declared to be odious simply on the basis that they were made to regimes that commit *ius cogens* violations.

Problems with this approach:

- Whether *ius cogens* is recognized by customary international law beyond the particular case of treaties between States is not clear, but a good case can be made that this is the case.
- *ius cogens* is a very narrow concept and only very few principles are regarded as forming part of it, such as the outlawing of wars of aggression and crimes against humanity, the prohibition of torture, and the right to self-determination
- The *ius cogens* approach developed here will in all likelihood be unacceptable to all those who regard trade with regimes that commit *ius cogens* violations, including those that were as blatant and as widely and strongly condemned as those of the apartheid regime, as acceptable or even desirable. It would also probably be objected that such an approach might have a negative impact on developing countries and their access to the international financial market. However, it should not be forgotten that what is under discussion here is no more than the suggestion that contracts might be invalid and unenforceable if they make a contribution to *ius cogens* violations, that is acts that are regarded as so reprehensible by the whole international community that they cannot be tolerated. An application of the odious debts doctrine to cases in which principles that are commonly accepted to be part of *ius cogens* are violated by a state would not hinder trade or investment, but instead only make sure that trade and investment do not have the effect of enabling or facilitating such violations.

Advantages of this approach:

- A doctrine based on *ius cogens* violations provides clearer criteria than the traditional doctrine of odious debts
- it overcomes one of the fundamental weaknesses of the doctrine in its traditional form in that it would extend to restructured debt, because where a contract violates *ius cogens*, it is not only void, but it can moreover not be ratified. Thus, not only the original loan transactions taken up by dictators who violate *ius cogens* norms would be invalid, but the restructuring and refinancing agreements referring to debt that falls into this category could not be regarded as valid ratifications of these loans. Furthermore, many argue that no limitation period applies to claims based on a violation of *ius cogens*, which would be significant with regard to potential claims for restitution of payments made on such loans.
- While the underlying assumption that the mere fact of doing business with a regime that violates *ius cogens* norms could lead to the invalidity of a loan transaction will in

all likelihood mean that the doctrine will not be greeted with enthusiasm by large parts of the international community, it is exactly this focus that makes it attractive, as the doctrine challenges the assumption that it is only a moral, but not a legal obligation not to contribute to such violations. Furthermore, to the extent that the content of *ius cogens* might gradually expand, such a doctrine might see its scope of application increase.

- Ideally, this approach would involve an international tribunal, but it could also be invoked before national courts that hear claims for debt repayment, to the extent that the relevant legal system within which the court operates requires the national courts to take principles of international law into account. As the courts would then be prevented from handing down decisions that violate international law principles, the creditors' contractual claims could be countered by relying on the invalidity of the loans because of their violation of *ius cogens* norms. Moreover, an argument could be made that the reasons that militate in favour of the recognition of such a doctrine as part of international law also favour integrating the doctrine into the national *ordre public* of countries.

2.2. Focusing on the potential invalidity of the loan

The traditional odious debts doctrine does not question the general validity of loan transactions that were concluded with dictatorial regimes. However, it is not at all evident that contracts entered into by dictators on behalf of the country will always create legally binding obligations for the country. Indeed, Sack distinguished between regular and irregular despotic regimes, although it does not become clear according to which criteria the distinction is to be made. Where a loan was not contracted by a regular government and according to the correct procedure, he seems to have assumed that the creditors were limited to recovery according to the principles of unjust enrichment. The odious debts doctrine, on the other hand, would only apply to those cases in which a debt was properly contracted by a regular government, but nevertheless odious. This distinction between contracts that validly bind the country, and those that do not, is important in law, but largely overlooked by discussions of the doctrine of odious debts. If a contract is invalid, for example because the dictator did not have the power validly to indebted the country, or where the contract was void because of other irregularities, *pacta sunt servanda* cannot apply, and a reliance on the odious debts doctrine would be unnecessary.

One reason for which a loan contract with a dictatorial regime might be invalid is that of lack of agency, ie that the acting government was not, under its own constitutional or other law, duly authorised to represent the country in this way, which might lead to the invalidity of the contract. The potential of this approach would vary according to the law of each country. However, my research into the particular situation of Argentina showed that constitutional law could have played an important part in dramatically reducing the problem of the debt burden. Indeed, if constitutional principles had been complied with, large parts of Argentina's debt could not have been incurred, and the debt crisis would accordingly have been avoided and that, based on constitutional arguments, the validity of the debt can be challenged.

2.3. Private law approaches

An alternative to the approach suggested here would be not to focus on the domestic law of the debtor country, but instead on the law that governs the loan contract, and to develop legal arguments against the validity or enforceability of the contract on the basis of the provisions of that law. This could, for example, be achieved by extending private law principles to states by way of analogy. While the possibilities of such an approach are worth exploring, it is submitted that an approach that refers the questions of actual and ostensible authority and ratification to the law of the debtor state is, in principle, preferable, as it allows to take into account the specific situation of a state as sovereign and the constitutional limitations imposed on state organs, instead of artificially treating the state as if it was in the same position as a private actor.

3. Concluding remarks

As a form of conclusion, it is submitted that in the context of any discussion of the doctrine of odious debts and potential legal ways of implementing such a doctrine, it is essential to be clear about the goals one wants to achieve. As the recent academic discussion shows very clearly, the proposals vary considerably depending on the authors' views on whether the primary goal should be to change future lending policies; to search for convincing legal ways to repudiate parts of the existing Third World debt; or to develop a theory that achieves both. More importantly, the approaches will differ fundamentally depending on where one stands with regard to the question of whether it is desirable that certain regimes should not receive any loans, or whether one rather thinks that all depends on the use that is made of a specific loan.

G. Mitu Gulati et al

(Duke University, Durham/USA)

The Dilemma of Odious Debts

Abstract

Public international law requires that states and governments inherit («succeed to») the debts incurred by their predecessors, however ill-advised those borrowings may have been. There are situations in which applying this rule of law strictly can lead to a morally reprehensible result. Example: forcing future generations of citizens to repay money borrowed in the state's name by, and then stolen by, a former dictator.

Among the purported exceptions to the general rule of state succession are what have been labelled “odious debts”, defined in the early twentieth century as debts incurred by a despotic regime that do not benefit the people bound to repay the loans. The absconding dictator is the classic example.

The removal of Iraq's Saddam Hussein in 2003 sparked a resurgence of interest in this subject. By enshrining a doctrine of odious debts as a recognized exception to the rule of state succession, some modern commentators have argued, a successor government would be able legally to repudiate the loans incurred by a malodorous prior regime. This, they contend, would have two benefits: it would avoid the morally repugnant consequence of forcing an innocent population to repay debts incurred in their name but not for their benefit, and it would simultaneously force prospective lenders to an odious regime to rethink the wisdom of advancing funds on so fragile a legal foundation.

The authors argue that in this recent debate the adjective «odious» has quietly migrated away from its traditional place as modifying the word «debts» (as in «odious debts»), so that it now modifies the word «regime» (as in «debts of an odious regime»). This is a major shift. If this new version of the odious debt doctrine is to be workable, someone must assume the task of painting a scarlet letter «O» on a great many regimes around the world. Who will make this assessment of odiousness and on what criteria? The stakes are high. An unworkable or vague doctrine could significantly reduce cross-border capital flows to sovereign borrowers generally.

The authors are skeptical that this definitional challenge can be met. Rather than jettison the whole initiative as quixotic, however, the authors investigate how far principles of private (domestic) law could be used to shield a successor government from the legal enforcement of a debt incurred by a prior regime under irregular circumstances. A wholesale repudiation of all contracts signed by an infamous predecessor may be more emotionally and politically satisfying for a successor government, but establishing defenses to the legal enforcement of certain of those claims based on well-recognized principles of domestic law may be the more prudent path. The authors believe that such defenses exist under U.S. law (and presumably elsewhere) and could be used to address many, although admittedly not all, cases of allegedly odious debts.

Panel discussion

with Victor Nzuzi Mbembe, Beverly Keene, Sabine Michalowski, Mitu Gulati, Charles Abrahams, Ingilab Ahmadov, Farooq Tariq. Facilitator: Max Mader

This session aims to sketch the main points of the different approaches. Max Mader asks the speakers to concentrate on two main areas:

- On a political level: Does it make more sense to work with international or domestic law? Are these two approaches mutually exclusive?
- Is it possible to elaborate the legal aspect in more concrete terms, to show the different forms and categories, how it would work in contracts and conditionalities and terms of delivery?

Charles Abrahams

We are confronted with complexities, as activists as well as legally. The connection between the two areas has not been established yet. Firstly we have to acknowledge that Alexander Sack argued in a specific historic situation, and that international law has changed since then. He was only ever interested in states as sovereign legal subjects, and at that time banks, for instance, were represented by states. And he lived in a period of succession of states. Today, we don't have to discuss succession of states, but succession of governments which might even be true in the cases of Iraq and South Africa. This is why we have to look at today's international law and how it has evolved. Otherwise the gap between legal and political activities will deepen.

Victor Nzuzi Mbembe

The question of odious debts needs solidarity between the movements of the North and the South, and the legal experts have to help us in our quest. We have to be very clear about the consequences of debts. The peoples of the South are traumatised by these consequences. Who shoulders the burden, who is dying from malaria if there is no money available to buy medication or to build hospitals? We have to be careful concerning the different meaning of debts. For Europe, for Switzerland or Belgium, debts mean something else as they do for us. Intellectuals have to serve humanity and human rights, and they must help the ones who suffered most. As we are in Switzerland: Switzerland obviously has an obligation to return the illegitimate money which is stacked away in its banks. The legal situation is clear-cut. The Congolese constitution contains some rights which can only be realised if the debts are

cancelled and the debts of the North towards the South have been repaid. For this we need all the support from the North we can get.

Sabine Michalowski

As I showed earlier in my presentation, from a legal point of view it is difficult to combine the two points of the consequences of debts and the illegitimacy, indeed I am sceptical if we can define in legal terms the illegitimacy or if we should not rather concentrate on the consequences of the debts, combined for instance with social rights. I wrote an article recently about this topic and again, it is fairly disappointing for everybody and for me as well, but there has been not much work done in academic terms on this question. So it is very difficult again to find principles, but it is important, and it might be supported by private law issues. On the other hand, domestic law approach and odious debt doctrine are not mutually exclusive, but complimentary. But my point is that the original concept is not worthwhile pursuing, instead we need to enhance it and then it can be used complementary to a domestic law approach.

Mitu Gulati

I think about these things very pragmatically: To use whatever works best. Try to use the *ius cogens* approach, try using domestic law, or you could use what Charles is trying, the Alien Tort Claims Act ATCA. However, we have to take one thing into consideration: Incoming governments might be very reluctant to start a lawsuit. You have to be realistic: If the succeeding government also wants to steal money, why should they bring a lawsuit against the former government, so that they can no longer borrow money on the international market? But under specific domestic law you don't need the government to start a lawsuit. In theory, the *populus* should be able to bring a claim and to represent itself. Now obviously this is a much more difficult legal argument to make, but it is done all the time in domestic law.

Beverly Keene

The legal discussion is challenging. My approach is pragmatically as well: If it works, use it, if it doesn't work forget it. In Argentina there was an overriding view: We tried everything and none of it worked, so what are we doing now? We have gone the constitutional route, we tried domestic law, there were quite a few legal arguments on international and national level, and yet we have not been able to stop the reality of debt policy, or the reality of hunger or torture, or the reality of programmes of economic structural adjustments of which everybody

knows that they create hunger. So this frustration poses the question if we can collectively come up with better ways to fight. And this leads to very specific concerns. First of all: Who are the actors? If the concept of odious debts requires an external adjudication, this poses a serious dilemma for an organisation like ours. Who is engaged in the process? Is the government representing our interests? But when it does not challenge the legitimacy of the former contracts: what is our chance to defend the concept of odious debts? So who is the actor? Secondly, as Charles stated, the reality of international law has changed very much. But because of the changes in the legal setting, not only through debt agreements, but through trade agreements and investment agreements as well, we, the people, have less and less access to domestic jurisdiction, because for instance the government has to sign that all disputes stemming from the investment agreement will be decided in a New York court. It may be that we find some useful ways to use this route, but at the moment we find that our means are increasingly limited, because domestic law is superseded by courts in New York or London. Thirdly, the question of impunity is not only important for reducing the burden of debts, but if we are not able to advance in terms of sanctions and responsibility this behaviour will be repeated. That is the lesson history told us. If a government thinks, as the Argentinean does, that an IMF-policy is genocidal, why should it then just turn around and pay the debts? Fourthly, I would like to ask how we can address the debts, the social debt of the North and the West towards the peoples of the South. How can we enforce it? - this requires much more legal thinking. For instance, in Latin America it is much easier to build a campaign for the right to water than to build a campaign against the payment of debt, and yet, it would make a much more active campaign if we could combine these campaigns, on a national as well as an international level.

Farooq Tariq

In March 2007, the Chief Justice of Pakistan was suspended because of alleged corruption. But that was not the real reason. Indeed he had taken a stance in favour of ordinary people, for instance against bonded labour, and in favour of strengthening the rights of women. There was quite a strong movement to install him again, and this has been successful. So there were quite a few hopes in the restored Supreme Court, everything wanted their problems solved by the court.

Now at the moment, General Musharraf wants to hold two positions, he is head of the army and he wants to stay president of Pakistan. We think that this is not legal, so two political

parties took the case to court. But the Supreme Court has decided to let the election go ahead, although it has reserved a verdict on it on the 17th of October. So we can't leave political decisions to the court, and we can't leave the question of illegitimate debts to the courts. It is a political question, and needs a mass movement to be resolved. In the case of Pakistan it is very clear that the money has been miss-spent. It has been used to buy weapons and not to fight against poverty. So you can't leave the case to the lawyers, but it has to be connected with a strong campaign.

Ingilab Ahmadov

For the new republics and the peoples of the former Soviet Union, this discussion is interesting and important in many ways. For us it is a problem of implementation of structures and laws. Our institutional fundamentals are still weak. So we need a clear view of the legal process. At the moment we might not have any clear-cut and huge cases of illegitimate debts, but the framework of our economy with its reliance on oil might create these cases in the near future, and so we need to be prepared, and prepare actively for it.

Legal Workshop

Facilitators: Celine Tan, Jean Merckaert

This workshop brings together lawyers and activists. It aims to bridge the gap, experts can clarify the issues, debunk myths and clear up confusion about terms; on the other hand it should be discussed how political questions feed into legal scholarship on litigation and legal processes. There are two short presentations, followed by discussion.

Charles Abrahams

Indeed, there is a disjunction. How can we bridge it? I will use South Africa as a case study for the problem of a political campaign and at the same time a law suit, with consequences of normativity. In 1998, when the campaign started, the new South Africa was crippled by Apartheid debts, and we targeted mostly Swiss, German and British banks which would not relent to the campaign. So there was the question if the political campaign could and should start a juridical, legal campaign. But we became, after an intense discussion, aware that this could not be done under the notion of odious debts, because the traditional concept as it was then discussed is framed under the notion of state succession and the three well-known criteria (not democratically decided, not in the interest of the people, the lenders knew about the illegitimacy). But we were confronted with the reality that the South African government was very reluctant to support the litigation, indeed, it denied that an Apartheid debt even existed, or meant that it was too small to be of any significance. As the state opted out as an actor, we as members of the civil society had to look for innovative ways. And we found one in a litigation in the USA on completely different terms, namely under ATCA (Alien Tort Claims Act). So the Apartheid debt is dealt with in a litigation against banks and corporations which aided and abetted the Apartheid regime. This is a compromise, not based on the odious debt doctrine, but based on human rights violation, ius cogens violations. So we are trying in a roundabout way to deal with the concept. The traditional form is indeed not useful, unless you consider the doctrine from a different perspective, [which Charles Abrahams proposed in a brochure by Aktion Finanzplatz Schweiz in 2005 and] which Sabine has suggested this morning. When you deal with sovereign debts, the first hurdle is access to information, because the contracts are normally not open to public scrutiny. So we decided not to challenge the contract head-on, because we as affected group were not directly party to the agreement and would not been able to convince a court that we had sufficient interest in the contractual agreement between government and bank. Instead we looked at tortuous claims concerning

the consequences of the contracts, and made a case against an odious state which violated *ius cogens*.

Markus Stierli (University of Zurich/Switzerland)

I would like to look not so much at the legal, but at the political and economic framework of the discussion. In trying to solve a problem you have to ask in which framework you are working. I think it has become clear in the discussion so far, that most governments are reluctant to go the way of litigation. On the other hand, markets tend to forget quite quickly, so there is scope for forfeiting debts. Obviously quite a few actors in the financial system would not be happy about such a step, but the market as an entity tends to accept such behaviour.

On the political level there is disagreement about the procedures and principles. There used to be a similar argument in the field of human rights in which the claim for an international jurisdiction was raised. But there are different aims: security and social security and human rights and development, even access to capital markets. And I don't think you can achieve all these goals with one single entity. So you have to look for alternative solutions, call it soft laws, call it following-up procedures, even solutions within the multinational financial institutions. I think there might be scope for a facility which deals with these institutions, because they have to keep up a playing field for their investments. So we have to look for alternative avenues.

Jean Merckaert tries to sort out the different approaches we have heard so far. But we don't have to enter into a competition. At the same time we don't have to be content with the present law. One can create law, international treaties and the International Court on Human Rights are a result of political movements, and one of the aims of NGO's is to force a change of law. In identifying different approaches it might be useful to distinguish three levels:

- nature of regime
- use of loans (no benefit / faithfulness of agency / violation of *ius cogens*)
- validity of contracts.

Matthias Rau-Goehring thinks that in this typology a sort of third dimension is missing, because different types of debts have to be considered, domestic debts, international debts, and *ius cogens* might be used for external debts or sovereign external debts but not for private debts. The reality today is that more than 50 % of the debts are domestic debts.

Charles Abrahams agrees that it has to be taken into consideration on which level international law can be used, and so you have to look at the specific domestic law. In international law it is very clear if you deal with a contract between state and state, or state and multinational organisation, or state and private commercial lender. So the specific form of the debt matters a lot. **Sabine Michalowski** underlines that, indeed, private actors are not bound by international law. The subjects of international law are normally states, or some international bodies. So a case is much more complicated, in some states courts have to take international law into account, and this is an indirect way. On the other hand, for an internal debt you don't need to use international law, because you can do a lot with your own constitution.

Jürgen Kaiser urges to consider that in reality most private loans are secured by state guarantee; that they very often have been socialised, taken over by the state. Many private loans have been transferred to the public realm. **Charles Abrahams** reiterates that it depends on the context, and how we arrive at a special contract. A commercial loan would be covered by the law of firms and not the law of governments. Hundred years ago it would have been the opposite. Now the international law has advanced, but there is international law the states are bound to, and there is international law which they are not, and there is international law which has become so imperative that it is applicable to all states: that is meant by *ius cogens*. There are only very few norms which have risen to this level. As Sabine has explained these are torture, acts of aggression, crimes against humanity, although we have to define exactly what we mean by this, and it is debatable if the right to self determination has risen to this level. Now the argument can then be made that even a commercial contract that operates outside of the realm of international law can infringe this area. **Anthony Odiadi** adds that states are normally free to interact with private entities, for instance trying to get a credit. Some years ago the state was able to defend his immunity as an absolute value, but now he is bound by encroaching international rules. The state steps into the commercial arena and is therefore bound by the rules of the market. Lawyers and NGO's have to work further on concepts and approaches to establish a framework to reject the liability to certain debts. We shouldn't be too pessimistic about the doctrine, because it needs all the support and it needs time. This happened with other humanitarian principles which became law and are now enforced. It might be difficult to use it properly, but there are several legal procedures we

could use, some of them in the domestic area, which might be transported into the area of trans-national commercial relations. There is a broad range of rules we can tap into.

Jean Merckaert states that different national jurisdictions are obviously differently structured, with different hierarchical settings, and this reflects the difference between the Anglo-Saxon tradition of Common Law and the tradition of Roman Law. In France certain contracts can be in breach of the constitution and therefore void, whereas in other countries with Common Law this might not be the case. But **Anthoni Odiadi** adds that this is the case in many Common Laws for instance when the contract is in contradiction with obligations of state policy. **Patricia Adams** recalls that in 1991 the doctrine of odious debt became popular because it was all there was at that moment on legal arguments that if a government borrows money it must use the money in the interest of the state. Now, with time, we have discovered and developed more arguments, reinforcing the principle that governments have to use money sensibly. At the moment it would be useful to collect the new principles, collect the cases and test new cases. **Sabine Michalowski** objects that this principle (governments have to use the money properly) lets the creditors off the hook, so we must stress the responsibility of both sides.

Jürgen Kaiser mentions that erlassjahr.de at the moment has a prominent case they would like to pursue: The selling of German warships to Indonesia. He has learned so far four things for this case:

- Hands off Sack, because his original doctrine is no longer applicable.
- Ius cogens is a powerful argument; in the case of Indonesia, some ius-cogens-violations are clearly proven.
- Concerning the agency of the contract: Suharto didn't act faithfully.
- We have to accept that there might be a partial odiousness. Using the ships to fight against piracy might not be contestable, but their use as weapons of aggression is: so we might have a case of 15 % of odiousness.

Mitu Gulati thinks that concerning agency, there are indeed possibilities, for instance: a government which is unwilling to sue might violate its faithful behaviour towards the state and the people; a legal idea about which **Sabine Michalowski** is fairly sceptical. But **Mitu Gulati** stresses that cases because of misbehaviour are quite frequently. This is conceptionally fairly simple. But there lurks a further question: would a US-government intervene in such a court case?

Jürgen Kaiser thinks that a consensus seems to emerge not to try to qualify the nature of the regime, but to judge its actual behaviour. And he adds that, in his view, *ius cogens* is fairly strong. But there is a further controversy: should a regime which violates these principles, receive no loans at all? (Even in the case of South Africa one might argue that certain loans were for the benefit of the population. Dictators tend to mollify their people from time to time with gifts.) **Charles Abrahams** underlines not to completely neglect Sack, but to strengthen his concept politically. At the same time, in juridical cases you have to make compromises. What is new: you don't need state succession. And the case in the USA, *Sosa vs Alvarez*, in which the claims for damages to a victim of the US security services was accepted on the basis of ATCA, is fairly strong. New standards have been set: you don't have to show actual flows of money to a devious purpose, but just to argue that the lenders should have been aware of the situation, should have had a constructive knowledge.

Legal Workshop, continued

Facilitators: Cecile Tan, Jean Merckaert

Jean Merckaert summarizes that we started with mapping of legal avenues, pro/cons.

- There has been a lively discussion if it is feasible to argue with the odious nature of a regime.
- Concerning past loans: to invoke a court against debts of a sovereign regime because of massive violations of *ius cogens* might be worth a try, but remains uncertain.
- Future loans: there were discrepancies, who defines and sets rules for future lending and makes lender more responsible / what about the risk of a general decrease of access to the financial markets?
- Can we link the responsibility in state actions with the agency law on a domestic level? One of the advantages would be that the agency-law-approach applies to both categories of loans, private and public ones. It has never been used yet; there is a question mark about the applicability of the agency law to the state.
- We started discussing corruption, either as a concern to invalidate the contract, or in the use of the loan, when the money was used for corrupt purposes.

Sabine Michalowski specifies that the agency principle might come into play at an earlier stage, in constitutional law: You could look at whether a government actually had the authority to represent the people in this particular loan agreement, if not, then it obviously didn't act as legal agent. This doesn't invalidate the contract as such, but it changes who the contract is with, for instance not with a dictator but with a government (by the way, this distinction was already made by Sack). **Mitu Gulati** thinks this a plausible application of the agency principle. It is in some ways the most basic principle of agency law which deals with authority. You can show that a government or a head of state or a minister does not have the authority for signing a contract. There are classic cases of sovereign debts, for instance a lot of different American states didn't pay their debts, in a number of states you had legislators who were corrupt and the states repudiated that, and this was largely based on constitutional law. The legislator is corrupt and it doesn't have the authority to incur the debt, so a new body repudiates it: that is a well-established procedure. **Sabine Michalowski** clarifies: Concerning the contract you might look at the private agency law, but the constitutional law might give you a provision which organ is representative to make such a contract.

Charles Abrahams explains the example of the deal the South Africa government concluded with British Aerospace. A group reviewed if the minister of finance did have the authority to sign the contracts. That is squarely a constitutional matter. There were different steps to the agreement: a cabinet decision, then they designated the minister of finance as representative, and the actual state corporation which bought the hardware. And our argument was that the minister of finance didn't have the authority, because in various other respects the deal should have gone through parliament. This falls squarely in the ambit of constitutional law which operates differently from private agency law. But coming back to the issue around past loans: You can litigate on two grounds. The one is on the contract, and the other one is on the consequences of the contract. As we have heard, states will be very reluctant to contest a contract directly, and it is debatable if civil society has the capacity to do that. If you want to invoke the validity of the contract then you have to be part of the contract. So it seems to be better to concentrate on the consequences, on the potential harm, and the tort claim itself is based on *ius cogens*. This provides a basis for affected groups to bring potential claims. But in contesting the consequences, we are one step further down the line, and so the more difficult it gets to actually prove that the original intent of the loan and the harm done is in a causal connection. So it makes it easier for affected communities to sue, but it makes it more

difficult to make the case, especially that the lenders should have known the consequences of the loan.

Patricia Adams wants clarification when a group of citizens wants a litigation against the consequences say from a hydro-dam: who would they litigate against, the government or the lenders? **Charles Abrahams** responds that this depends on the consequences you are contesting; if they are of an environmental nature or if you are contesting human rights abuse. If a company (Unocal in Burma) made use of forced labour, then you would litigate against Unocal, whereas on environmental damage you would use a different approach. So it depends on the aims, you might even look for prevention, for instance an injunction against the building of the dam. **André Rothenbühler** would like to know if a reversal of the burden of proof is feasible to that the lender would have to prove that his loan didn't do any damages. **Charles Abrahams** explains that in their case against Swiss and German banks, the lenders maintained that it would not be possible to raise the question that lenders knew that loans would be used for human rights violations. Indeed we couldn't sustain this argument (normally, commercial agreements are formalised, and you really would need a so-called smoking gun, a specific clause or a secret memorandum). So we restricted the argument that there was some constructive knowledge that the banks should have known about the odiousness of the loan. Indeed this is central in our appeal of the case. What was the standard of knowledge? Was there intentional knowledge or just constructive knowledge? But the problem of aiding and abetting is not very much advanced in domestic law, so you go back to international law.

Jean Merckaert adds that the World Bank report defines several types of debts, and we are discussing criminal debts at the moment (dictatorial regimes, oppressive means). But we have to look at Third World debt in a wider sense, at development projects and export enhancement for industrial nations, what the World Bank calls ineffective debt: Is there a chance to deal with these kinds of debts? **Charles Abrahams** responds that their court case concerning the weapons deal South Africa-British Aerospace raised such questions. One of the basic arguments was that the weapons were not necessary. But the court rejected it, saying the decision was in the discretion of the government, of the executive. The governmental decision might not have been prudent or popular, but it is not for the judiciary to decide about the policy of the executive. It would need very exceptional circumstances, say, a violation of the

constitution or of *ius cogens*. This shows the limits of litigation, but then you rather start a political campaign.

Patricia Adams wants to reinforce this point. The OECD came up with the recommendation that export agencies should no longer make unproductive loans. That sounds like a good idea and it is an admission of mistakes which have been made. Does it provide a legal opening and an enforcing argument? Quite a few of the development projects are vehicles for corruption, on both sides. For example feasibility studies are mostly very poorly done. So she wonders if there are some legal avenues here we could use. **Mitu Gulati** underlines the point that there is a high level of state discretion. Judges regularly tell you that voters should challenge a government. You need a very detailed pleading. If you can show with details that there has been corruption, then that removes from the state actor the level of discretion. Normally the discretion is so big that even a stupid decision is not a valid argument. It is a classic case of the separation of powers. But there is an avenue, if you can show that a deal has been a dirty deal. **Patricia Adams** raises the case of a hydro-dam which doesn't work. Can you go back and invalidate the contract? **Charles Abrahams** thinks that if you want to attack the validity of the contract on a constitutional basis, in South Africa any person can bring a claim on behalf of a larger group of people, as a public interest litigant. This may not be the case in other countries. Normally it would be the parties to the contract who would be entitled to bring a claim against the contract. It is generally people who are harmed by the contract who are entitled to bring a claim not to challenge the validity of the contract, but a tort claim. **Patricia Adams** presses on with the case of development projects that are plagued by corruption. Are there any suggestions how we can get at the aspect of corruption? **Mitu Gulati** stresses the necessity of detailed information. Allegations are not enough, and the worst case is the allegation that a project didn't work, because that feeds into the discretionary decision of an executive body. To show the corruption especially at an early stage of the deal is a good start. **Charles Abrahams** mentions the interesting case of the Lesotho hydro-dam project as a case study concerning corrupt practices. A very small sovereign state decided to take the state officials (CEO of a state company) as well as Western corporations (Canadian Acres, with intermediary banks in Switzerland) to court. Acres was found guilty and was barred by the World Bank.

François Mercier raises the proposal of an international debts tribunal which would arbitrate the validity of debts between creditors and debtors. At the moment, if a country cannot or

does not want to pay a debt it has only access to the Paris Club or other Western dominated institutions. **Sabine Michalowski** is sceptical about an international tribunal, already proposed in Sack's doctrine. Would it look at restructuring or at the odiousness of debts? **François Mercier** thinks it would be an independent arbitration tribunal, and an insolvency law on an international level. **Patricia Adams** mentions that in the case of Iraq a one-off-structure was proposed with the power of forensic audits. She is a little bit nervous about a permanent structure, but a one-off exercise would be useful. **Mitu Gulati** means that you don't need a tribunal: if what you want is arbitration, just ask for arbitration. Brazil has done that and El Salvador as well. There are arbitral tribunals all over the place. Creditors are obviously very reluctant to have arbitration, but some countries use it and it is not clear if they really suffer market penalties for it. For **Sabine Michalowski** not so much the body is the problem, but the principles it would use. In the case of Argentina the country hardly ever got something positive out of arbitration. But the mechanism should be discussed only as a second step, because we have to be clear about the principles and the criteria. **Celine Tan** mentions that the SDRM (sovereign debt restructuring mechanism) is a sort of arbitration mechanism, where you can call a debt standstill. **Anthony Odiadi** adds that not so long ago Bolivia refused to take part in arbitration. **Patricia Adams** thinks that the terms of insolvency and bankruptcy are problematic and shouldn't be used because they are loaded against the borrower.

Jean Merckaert closes with remarking that the workshop has started mapping the possibilities, but we have to do this systematically and to evaluate the different possibilities properly.

NGO Workshop

How can law and campaigns support each other?

Facilitator: Kjetil G. Abildsnes

Legal Avenues – Case Studies of Campaigns connected with legal concepts

Participants mentioned the case examples of Pakistan (Bonded Labour Revolution Act), Indonesia, Norway, D.R. Congo and Argentina. In most cases NGO actions base part of their campaigns on expertises by legal scholars. It is stated as important, that the civil society does have an insight in the cooperation agreements between borrowers and lenders. The legal basis can be used to support actions of NGO's.

Is a definition of Odious Debts possible?

The definition of the concept is seen as part of the challenge. Sacks doctrine can help in campaigning and is useful for rethinking the debts. Other concepts like the UN-conventions on the right to development, on the right to a socio-economic development and the convention against corruption are as important as the OD-doctrin in campaigning for debt relief.

Participants mention the importance of pushing their respective national governments and convince them to deal with the subject of odious debts. More pressure has to be exerted on international institutions that they include the OD-concept in respective policies, e.g. ENP (European Neighbour Policy).

NGO's work politically, legal scholars with legal argumentations

OD have to be seen in a broader context than just in a legal sense, because the social crisis in many countries is caused by the pressure on debt reimbursement of the countries. Moral and legal aspects have to be linked and both are already taken into consideration in international agreements like the Convention on corruption. The OD-concept elaborated by legal scholars can be used by the NGO representatives for the campaigning.

But the OD-doctrine is only one of several doctrines that NGO's can use for their campaigns. It is also possible to win a case with reference on the collective rights as the example of Argentina shows: The population argues with the collective right to an efficient health system as a reason why the reimbursement of the debts cannot be supported.

Concrete proposals to push the UN? Are audits a reasonable proposal?

Participants agree on the importance of elaborating common strategies to be applied on new cases. It would also be important to work out a strategy for audits on common characteristics of different cases. NGO's should continue to act on a national level, cases like Belgium or Norway show the effectiveness of pushing national governments or courts. Law agreements should always be tested before implemented in connection with loans.

Concrete Actions and Proposals to the legal experts

- testing of loan agreements
- Audits (WB, other audits)
- Evaluation of chances to develop the international law
- Push and act on a national level, elaborate common strategy (following example of Norway and Belgium)
- Elaboration of 10 general law principles as legal basis for NGO representatives

Actor Analysis (Opponents, Recipients, Core Group, Facilitators, Observers)

<i>Opponents</i>	<i>Recipients</i>	<i>Core Group</i>	<i>Facilitators</i>	<i>Observers</i>
World Bank	Society of	Legal experts	UN (FFD)	WB
ADB	Southern	Illegitimate debt	Norway	Paris Club
All regional banks	Countries	campaign	Ecuador	G8 (maybe
All banks	Tax Payers	(Nairobi,	Parliamentarians	divided different
Paris Club	World (ideal?)	Rostock, ...)	International	countries)
ECA's		NGO's	Court of Justice	
London Club			UNCTAD	
			Human Rights Council	
			Belgium Senate	

ADB: Asian Development Bank

ECA's: Export Credit Agencies

FFD: Finance for Development (UN-Conference)

Difficulties with the Actor Analysis:

- Definition of Categories
- Same actors can be located in several categories (e.g. Worldbank → opponent and observer)

Action Analysis (Which steps shall the mentioned actors take?)

(Actor	→ Action)
Legal experts	→ Help for Campaign; Peer review of the Study of Norway
Legal experts and NGO's	→ audit of the bank(s)
Norway / Ecuador	→ Studies shall be elaborated
Ecuador	→ Debt Commission (audit) shall be observed
Belgian Senate	→ Audit as case example
Illegitimate Debt Campaign and Norway	→ engaging debt movement

Comments on the Actor Analysis

The future work between legal experts and NGO representatives is seen as a unification of knowledge: NGO's propose concrete cases, the legal scholars analyse these and the NGO's finally implement the proposals from the legal scholars in their campaigns.

Participants of the Workshop highlight the importance of case studies (Belgium, Norway) which shall be followed and taken as examples for further cases. The analysis of different cases could also help to elaborate a code for responsible lending which could be applied for past and future projects in the field of loans. The building of a global audit would also depend on good documented case studies.

The elaboration of similar standards which can be applied to different cases should be the main focus of a common work with legal scholars. Another aspect is lying in the explanation of legal contracts between borrowers and lenders to the civil society. In this field, legal scholars are very useful for NGO's who do not dispose of the necessary knowledge to understand these legal contracts. On the other side the transparency of such contracts has to be guaranteed by government and lenders.

Concrete Actions / Case Studies to be followed:

- Austrian loan to Indonesia (hospital)
- Warship-selling from Germany to Indonesia
- Ecuador audit (process to elicit the debt situation)
- Haiti (financial and ecological debt)
- Pakistan (building of dams)

Summaries

Celine Tan summarizes the discussion in the legal workshop. Common law is useful, but limited. If we want to challenge contracts in general or development projects we are limited by the discretion of executive bodies. If we look at groups which are harmed by contracts, there are two options. Firstly we can look at the contract directly or, secondly, at the tort, the harm the contract has done. The contract itself might be invalid, because a) the signatory had no capacity to sign it, or b) the contract is in violation of international or domestic law. a) might be challenged with constitutional law or agency law. b) can be contested via odious debt-doctrine or *ius cogens* approach as far as international law is concerned and when the contract is criminal in domestic law. Another possibility is to establish a link between the contract and yourself. In South Africa, for example, a group which is affected can start a claim as a public litigant.

If we look at the tort we have to look at the harm suffered as a consequence of a contract, be it environmental, human rights abuse or even financial. There are two difficulties. One you would have to show knowledge by the lender that this particular loan will result in damages. In the case of South Africa again you could use the notion of constructive knowledge which means that you know that this particular regime, undemocratic or corrupt, might use the loan for unsavoury purposes. The other problem is what defines a list of harmful consequences, for instance under *ius cogens* norms.

There are other options in private law, for instance criminal law or administrative law which covers the mechanisms of borrowing and lending. Furthermore, a sort of international option would be something akin to the sovereign debt restructuring mechanism SDRM, or a tribunal about legitimacy and default of debts which might be more in favour of borrowers as is the Paris Club.

Jean Merckaert stresses that the different avenues must be explored and evaluated. We need a more complete picture of all possibilities and where and when we can use which tool. Sack's doctrine has to be enhanced. Especially there was consensus that it doesn't make much sense to concentrate on the nature of a regime in a court case, because that will be too difficult an argument, although it might help to prevent future misappropriation of funds.

Kjetil Abildsnes summarizes the discussion in the NGO-workshop. There is, not so astonishingly, a different starting point: We shouldn't care too much about the different aspects of law in our campaigns. Not that we should ignore it, but use it in an eclectic way, choosing what is useful for our argument. The workshop discussed proposals which we could give to the legal workshop, for instance

- testing of loan agreements
- a list of pitfalls and cases which might be avoided
- audits, alone or combined
- and to narrow down the whole discussion: Please give us 10 general principles we should stick to

After that the workshop discussed examples

- Pakistani bonded labour
- Legal status of corruption
- Law is useful to challenge the sanctity of debt. Because there is this misconception that debt is something sacred. So it is really refreshing to hear all these very different examples where debts have been cancelled.
- And we discussed the Belgium law, in connection with the Democratic Republic of Kongo

Then the workshop did an analyses of the actors in our area, of facilitators, observers, opponents, participants and core group which showed that sometimes the actors can act in several categories (for instance the World Bank)

Finally some proposals for actions

- bring an actual case to court
- agree on a definition of debts
- enhance legal literacy
- underline the importance of transparency

Victor Nzuzi Mbembe is puzzled why the nature of the regime should not be contested. This is one of the main planks of our work, to denounce dictatorial and corrupt regimes, and this is mostly quite straightforward. **Beverly Keene** stresses that we need a more complete picture of what has been achieved, of what has worked and what does not work. **Anthony Odiadi** underlines the possibilities of a contract law approach, with its criteria of force majeure and undue influence. And he mentions the Community Re-Investment Act, USA 1989, which states a certain obligation for banks to act socially responsible. **Jean Merckaert** responds to

Victor's question, that it is only in the existing law that to try to use the criteria of the nature of the regime might be not very successful, although if the regime conducts obvious ius cogens violations or torture then this can be pursued. But obviously on a political level and in a political campaign to denounce a dictatorial regime is still an imperative.

Donatus Klaudius Marut / Jürgen Kaiser

(INFID, Indonesia; erlassjahr, Germany)

The case of Indonesia

Donatus Klaudius Marut presents the case of Indonesia, crippled by debts incurred under Suharto and the following debt regimes. The campaign to cancel the debt started in 1999. Together with Erlassjahr.de, the Indonesian campaign concentrates at the moment on German warships which were bought by Indonesia in 1991, but were subsequently not used or were in use for the suppression of independence and social movements. A classic example of odious debts would be the Koto-Panjang-dam which produces electricity just for Japanese companies. So there are environmental and human rights costs, but then there are vanishing projects as well, because of the Tsunami, some projects are wiped out, in Aceh, or because of the independence of East Timor. There are some multilateral debts which can be categorized as illegitimate, because they don't fulfil the original aim for which they were planned or because they were not used in the interest of the country and its population. Programmes supported by the World bank were corrupt, and even some of the loans which went to the anti-corruption-programme were corrupt.

Jürgen Kaiser elaborates the case of the German vessels. These were the warships of the former GDR which were, in 1989, moored, and in 1991, 39 of them, sold to Indonesia. Because German weapons proliferation prohibits the export of military equipment to regions of political tension, Indonesia was declared as a region without any political tensions. However, the ships were de-armed, sold to Indonesia and re-armed in Indonesia and were meant to be used for two purposes, namely the protection of the coast and to combat piracy. So although the German government declared Indonesia as a country without any tensions, it had some mistrust and put a specific clause into the sales contract, which stipulates that the ships must only be used for these two purposes, which is quite unusual in commercial sales. But we can prove that some of the vessels were used in internal conflicts, in Aceh and East Timor, where torture and other atrocities occurred. In 1998 when Indonesia had to declare a moratorium on debt payment, the debt was re-scheduled, and so it is still on the official books. Now we are trying to challenge the German government on the legitimacy of this deal, because it violates German export regulations.

In answering some questions from the floor, **Jürgen Kaiser** explains that the warships are still in Indonesia, although it is not clear exactly where, and he adds that some of them, when sold, were in quite a bad shape; at the moment there is no law suit, there is a political campaign and it is a challenge for us to see which legal instruments can support the political campaign and to see if a law suit is feasible; **Donatus Klaudius Marut** sketches some of the corruption cases which reach into the highest echelons of the government and mentions the conference about the Indonesian debts in 2001 as an important stepping stone for the campaign.

Charles Abrahams rephrases the case in legal terms. A bilateral agreement, a state-to-state-sale, with specific entities of each state involved, and with a further loan-deal attached in which the German development bank (KfW) puts up the money and the state agency (Hermes) undertakes a guarantee for the loan. Now we can start with looking if there has been a fundamental breach of agreement by the Indonesian government. The agreement has been very specific, and prior to the agreement, Indonesia has been declared a non-conflict-zone. This might have been subject to a review, and it would be interesting to know if the decision at the time has been questioned. The other question is: If we have a breach of agreement, has the German government tried to enforce the terms of the agreement? Or would it be able to enforce the terms and on what basis? If the violation of the agreement is clear then Germany would have some kind of recourse, mostly under contractual law, although it is difficult to envisage how the German state could enforce the implementation of the contract.

Sabine Michalowski thinks that if it can be proven that the ships were used for purposes which were in breach of *ius cogens*, then the doctrine could be tested. However, she is not quite sure about the significance of the clauses of the contract, because this could even weaken the case, because it could be used by the German government as proof that they were especially careful and considerate. So this might work against an *ius-cogens*-approach. **Mitu Gulati** supports this view: Not only might it be used as proof that the Germans were especially careful but that they were also generous and didn't enforce the covenants, but basically gave away the money. To him, this case looks harder and harder to establish. **Jürgen Kaiser** counters that this clause was drafted immediately after the Santa Cruz-massacres, during a time where the Indonesian occupation of East Timor was ongoing and the security forces murdered a few hundred people. So one can argue that this clause was drafted

although and despite the German government knew that it would, in all likelihood, be violated. **Mitu Gulati** agrees that for a political campaign one could argue that Germany violated this clause, but for a court case you would have to consider that these covenants include specific promises, and Germany has fulfilled its promises, whereas Indonesia, and only Indonesia, is in breach of its promises. So we would have to show that these covenants are different from normal covenants in these kinds of agreements, so that they are two-way-promises which include promises by the German government as well. So it might be useful to recover contemporary newspaper reports in which the discussion of the covenants and protests against the sale are documented and German minister give some insurances against a misuse. **Anthony Odiadi** sees three avenues: Is the contract itself in accordance with the law? Have the vessels really been seaworthy? Has the contract been fulfilled? But **Mitu Gulati** disagrees: As Jürgen Kaiser specifies, it is about the use of the vessels for atrocities and the undeniable knowledge of the German government about the possibility of this use – so it is not about the validity of the contract but about the enforcement of the covenants which is a much narrower question. But that is a good thing because you can focus on the enforcement of the covenants. **Donatus Klaudius Marut** delivers some details about the contract. The Indonesian prime minister refused to pay the debt, the navy commander didn't want to use the vessels, but both were outvoted by ministers with personal interests. **Jürgen Kaiser** adds that there were protests by the parliamentary opposition, by Portugal as the former colonial power of East Timor and by the World Bank who said Indonesia should not be allowed to finance this kind of deal in view of its financial situation. So the creditors knew about the situation and can't hide behind the specific clause in the covenant. **Charles Abrahams** concludes that it depends on the context one wants to use the case. For a political mobilisation, the arguments which were presented till now, that the contract was violated etc., are very useful. For a litigation case however it is more difficult. However, it still might be able to prove constructive knowledge. **Max Mader** thanks for this experiment which was done on short notice and put the legal people on the spot, but it was an attempt to test the feasibility of a working group, and Aktion Finanzplatz has some capacity to facilitate such a group, which will be the topic of the concluding session.

Plan of action

Max Mader elaborates that Aktion Finanzplatz has a limited budget, to facilitate a working group, and one of the aims of the concluding session would be to establish interest in this group, obviously a not-yet-binding commitment, and to discuss in which direction this working group should go from here.

Patricia Adams thinks it would be useful if campaigners can contact lawyers and say: here is the problem; can you propose some legal remedies? It would be really useful to get practical cases and to have concrete examples how to act in particular situations. **François Mercier** would like to distinguish between past and future cases. For the past we have to concentrate on specific cases, because every case is so complex. But for the future we need more general principles of responsible lending. In October Eurodad will organise a conference in Norway about illegitimate debts, so we have to liaise with that. **Beverly Keene** stresses that international campaigns begin to actively coordinate in the international South-North campaign on illegitimate debts: many of us have been in Nairobi in January and in Rostock in June. And we agreed to establish what kinds of initiative are necessary for mutual support and collective action. So the present conference has to join hands with other actions. If we are thinking of a next activity it has become clear that we could learn a lot by a much more inclusive review of cases. We have focused here on three or four cases, but a lot more is going on, so we need a sort of inventory. One initiative we should support is the audit in Ecuador, and we should think how we can use it to constructively define illegitimate debts and how can we bring this thinking into the realms of the World Bank. **Max Mader** is not sure if this needs a working group with legal experts or if it would be possible to share information, for instance, on-line. Coordination is another thing as a working group on legal matters. **Farooq Tariq** and **Ingilab Ahmadov** think that a joint-working group and round-tables will help to focus new cases. **Jürgen Kaiser** states that it doesn't need another working group to bring NGO's together. There are already coordinating efforts by the four regional organisations; this works and it is the appropriate forum. But what has been specific and extremely valuable is the set-up between the two sides of the table, activists and lawyers. This has happened for the first time in such a systematic way. So we should try to extend this approach. He has learned a lot about Sack and about *ius cogens* and agency contractual law. For further activities in this kind he would expect well-prepared presentations on these aspects, their limits and possibilities, which will bring us forward. **Max Mader** adds that the audit process in Ecuador

might deliver some more material for this approach. Would it make sense to build a new conference on this experience? **Victor Nzuzi Mbembe** mentions that in November 2007 there will be a meeting in Kinshasa, and it would need some support and legal advice. On the other hand there are numerous initiatives in Africa, Latin America and Asia, and it is these actions which have to be considered and which might widen the scope of the discussion. **Henk van den Heuvel** thinks that a shadow report to the World Bank report on odious debts would be useful, and also a kind of short manual, with information and instructions how to use the concept. **Jean Merckaert** welcomes in the name of platforme further initiatives and mentions four points: a mapping of possible avenues; a list of specific case studies which is important for the question of impunity; a reaction to the World Bank report; and an intervention into the UN-structures.

Sabine Michalowski thinks that the dialogue has been interesting, in general as well as in the specific case of Indonesia, although at times this dialogue is quite difficult because we are talking different languages. One has to be clear that justice and law are not necessarily the same thing, so from a legal perspective one has to play *advocata diaboli* to explain that this is not working and that is not applicable and so on. **Mitu Gulati** reinforces that it is exciting to talk to activists. But if you want concrete applications of certain approaches, then you need the best people in the world, for instance concerning agency law, and so you need to figure out how to persuade these people to come to a conference. It can be done, but it needs preparation. And one means for it might be the World Bank and the UNCTAD report. The first one is sloppy enough to make a lot of good people interested and even angry. You have to give the people enough time to do serious research, but you have to do it quickly enough so that the report is not forgotten. **Sabine Michalowski** adds that a working group must be prepared very specifically: what do you want to get out of it, what are the aims, and in which ways you want it to pursue: for instance do you want a general approach or looking at specific cases. You get from lawyers all the time a sort of brainstorming, so you have to focus and to decide where you want to go. **Charles Abrahams** reiterates that the aim is to enhance the capacity of campaigns. At the moment there are around 160 countries in the world, so we are looking at about 160 different national legislations. There has been a study of domestic law in 26 countries concerning the role of trans-national corporations. Through such studies we have to identify the common principles concerning odious debts, and when we have these principles we can hone in on specific cases. He would help in such an undertaking but only

under one condition: that we don't use the term legal experts, which sets us apart from the activists, but that we speak of legal resource people.

In summarizing the discussion, **Celine Tan** stresses that for the first time legal scholars, legal resource people, and campaigners have met in such a setting. We started with trying to clarify the terms and concepts of odious debts, both as a legal and a political tool, to map the different approaches, and showed the complex relationship between the two, and to synergise political and legal activities. The conference managed to achieve quite a good overview of the concept and its limitations as well, and the campaigners took care to look at the political context for legal initiatives. So there is a chance for more bilateral discussions.

There are four concrete proposals on the table:

1. Strengthening the legal literacy, map the legal concepts, and make a sort of manual (at Duke University there is at the moment work done on this).
2. Mapping case studies.
3. A Critique of the World Bank study and involvement in the discussion process in international institutions
4. Elaborating the idea of a standing working group to exchange ideas and/or to work on concrete papers.

Speakers

Charles Abrahams is attorney and partner of Abrahamsn Kiewitz Attorneys in Bellville/South Africa. He is legal adviser of the NGO coalition Jubilee South Africa and legal representative of the Apartheid, Debt & Reparations Campaign. In 2002, together with US lawyer Michael Hausfeld, he filed a class action lawsuit on behalf of 85 victims of Apartheid against several companies and banks. He wrote a thesis entitled «The Doctrine of Odious Debts. A contemporary case of the Apartheid Debts».

Ingilab Agajan Ahmadov holds a PhD degree in Economics from the Saint Petersburg State University (formerly Leningrad). In 1997-1999, Mr. Ahmadov was Advisor to the Minister of Economy of the Republic of Azerbaijan. In 1995-2004 he was Director General of «Trend» analytical information agency. Since 2004, Mr. Ahmadov is Director of «Public Finance Monitoring Center», a local NGO founded with the support of OSI-AF. He is a well-known independent expert in the field of public finance in Azerbaijan.

Jean-Luc Bernasconi is Head, Macro-economic Assistance, at the State Secretariat for Economic Affairs SECO, Switzerland.

Mitu Gulati is law professor at the law faculty of the Duke University in Durham, North Carolina, USA. He researches in the areas of Securities Regulation, International Debt Transactions, Corporate Law, Employment Discrimination and Judicial Behavior. Most of his current research is on Odious Debts. He began his life 97 as a professor at the UCLA School of Law, continued as a visiting professor then faculty member at Georgetown University Law Center and the University of Virginia School of Law.

Jurgen Kaiser, political coordinator of the German debt campaign organisation «erlassjahr.de - Entwicklung braucht Entschuldung». In 2005 on behalf of the development program of the United Nations (UNDP), he managed the project «Millennium Development Goals and debt relief in HIPC- and SIUC-countries». In the past he already worked in the field of debt relief for different ecclesiastic organisations.

Beverly Keene is an economist and coordinator with Jubilee South and Asia Pacific Movement on Debt and Development. Furthermore she is member of the Argentine human rights and nonviolence organization, Servicio Paz y Justicia (Peace and Justice Service).

Victor Nzuzi Mbembe is farmer and coordinator of Plateforme Dette et Developpement in the Democratic Republic of Congo. PDD is a Congolese network of 34 NGO, trade unions, churches, research institutions and farmers cooperatives. He is also member of Jubile Sud and president of Groupement de reflexion et d'appui pour la promotion rurale GRAPR, a farmers organization that is member of the network Comite pour l'annulation de la dette du Tiers Monde CADTM.

Sabine Michalowski holds a German law degree, a PhD from the University of Sheffield and is Reader in Law at the University of Essex, UK. Her main areas of research are health care law as well as constitutional and human rights aspects of economic law. Her most recent book, *Unconstitutional Regimes and the Validity of Sovereign Debt: A Legal Perspective*, was published in 2007. Forthcoming is the article *Sovereign debt and social rights -legal reflections on a difficult relationship*, (2008) 8(1) *Human Rights Law Review*.

Celine Tan is a researcher with the Third World Network, an NGO working on issues of

social, economic and ecological importance to people in developing countries. She recently completed her PhD at the School of Law, University of Warwick, UK, on the regulatory framework of the Poverty Reduction Strategy Paper (PRSP) approach to development financing. She has also written and published on issues relating to debt and development and on the operations of the international financial institutions.

Farooq Tariq holds a master degree in Applied Psychology from University of Punjab Lahore (1974-1976) and a degree of doctor from University of Amsterdam in Mass Communication (1980-1982). He is political coordinator of the Campaign For Cancellation of Third World Debt Pakistan (CATDM Pakistan). He is also secretary of the Anti Privatisation Alliance Pakistan. He has been jailed several times by successive military regimes in Pakistan. In June 2007, he was behind bar for twenty days by present military regime for his part of democratic movement in Pakistan.

Participants

Kjetil Abildsnes SLUG, Norway
 Charles Abrahams, Jubilee South Africa
 Patricia Adams, Probe International, Canada
 Ingilab Ahmadov, Public Finance Monitoring Center, Azerbaijan
 Mboup Amadou, Association Jeunesse Education Sante, Senegal
 Diagne Assane, Association Jeunesse Education Sante, Senegal
 Muhammad Bashir, Pakistan
 Jean-Luc Bernasconi, SECO, Switzerland
 George Dor, Jubilee South Africa
 Gina Ekholt, SLUG, Norway
 Guillaume Fardel, Déclaration de Berne, Switzerland
 Ivo Germann, SECO, Switzerland
 Anne-Kathrin Glatz, Déclaration de Berne, Switzerland
 Mitu Gulati, Duke University, Durham/USA
 Beatrice Hampl, Swiss Export Insurance Agency, Switzerland
 Henk van den Heuk, Jubilee Netherlands
 Stefan Howald, Aktion Finanzplatz Schweiz, Switzerland
 Emi Ipala, Droit à un environnement Sain, Switzerland
 Jürhen Kaiser, erlassjahr.de, Germany
 Kaara Kiama, Kenya Debt Relief Network, Kenya
 Beverly Keene, Oficina Jubileo Sur Americas, Argentina
 Madlen Kobi, Aktion Finanzplatz Schweiz, Switzerland
 Simone Knapp, Kirchliche Arbeitsstelle Südliches Afrika, Germany
 Sophie Lambert, Lutheran World Federation
 Max Mader, Aktion Finanzplatz Schweiz, Switzerland
 Donatus Klaudius Marut, INFID, Indonesia
 Victor Nzuzi Mbembe, Plateforme Dette et Développement, Democratic Republic of Congo
 François Mercier, brot für alle, Switzerland
 Jean Merckaert, Plate-forme Dette et Développement, France
 Sabine Michalowski, University of Sussex, United Kingdom
 Barbara Müller, Swiss Apartheid Debt and Reparations Campaign, Switzerland
 Lida Nunez, Latindad, Colombia
 Anthony Odiadi, Nigeria
 Peter Prove, Lutheran World Federation
 Antje Queck, erlassjahr.de, Germany
 Claude Quemar, CADTM, France
 Matthias Rau-Goehring, UNCTAD
 Vivien Renaud, CADTM, Belgium
 André Rothenbühler, Aktion Finanzplatz Schweiz, Switzerland
 Bettina Rutschi, SECO, Switzerland
 Markus Stierli, University of Zurich, Switzerland
 Bruno Stöckli, AllianceSud, Switzerland
 Celine Tan, Third World Network, Great Britain
 Farooq Tariq, Labour Party, Pakistan
 Alphonso Weah, Youth for Community, Academic and Development Service, Liberia