

Presentation by Jürgen Kaiser (erlassjahr.de, Germany)

Yes, good morning to you. Fifteen minutes ago I received the good news that I can speak in my mother tongue this morning. That is great for me, but not so good for my slides, which I had already prepared in English. Therefore there will be a slight mix between spoken German and written English, but we have a wonderful team of translators there in the back that will keep things straight.

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. (I hadn't realized that I'd be translating it back into German, but I'll give it a try.) 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."

Does anyone know where this quotation is from?

André Rothenbühler. Is it this World Bank report, this draft paper from Nehru?

Right. 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 Pat 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.

André Rothenbühler: Barbara Müller, could you perhaps elaborate?

Barbara Müller: Or Charles Abrahams knows more?

André Rothenbühler: Or Charles Abrahams, of course!

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 cancelling 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 roll 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.

Thank you very much.