

OD conference report
Berne, 3/4 October 2007

Session 3

Wednesday, 3rd of October 2007, 14.45-15-30

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.

Tariq Farooq

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.

Session 4a

Wednesday, 3rd of October 2007, 16.00-18.15

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 be able to convince a court that we had sufficient interest in the contractual agreement between government and bank. Instead we looked at tortious claims concerning the consequences of the contracts, and made a case against an odious state which violated *ius cogens*.

Markus Stierli

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:

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

Thursday, 4th of October, 9.15 to 10.30

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.

Patrica 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.

Session 5

Thursday, 4th of October, 10.45-11.15

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.

Session 6

Thursday, 4th of October, 11.30-12.30

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.

Thursday, 4th of October, 14.15-15.00

Indonesia, continued

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 were 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 ministers give some assurances 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.

Session 7

Thursday, 4th of October, 15.00-15.45

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.

Max Mader lists some activities in the near future

15/10/07 Public Hearing on the World Bank The Hague. Friends of the Earth
19&20/10/07 Auditing the Debt. Case studies of four countries. Brussels. CADTM
28/10/07 Eurodad Annual Conference. Oslo. Eurodad
19/11/07 UNCTAD-Forum, Paris

Max Mader thanks all the staff, translators and participants for all their efforts and closes a sometimes exhausting, but successful conference.