

(1)// AFRICAN FORUM AND NETWORK ON DEBT AND DEVELOPMENT
(A) Case for the establishment of a fair and transparent ...

A CIVIL SOCIETY DOSSIER

**The Case for the
Establishment of a Fair and
Transparent Arbitration
mechanism on illegitimate
and odious debts**

**SYNTHESIS REPORT ON COMPILED
CASE CLAIMS FOR ARBITRATION**



African Forum and Network on Debt and Development

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Institute of Abbreviations and Acronyms

ADB	<i>Asian Development Bank</i>
AU	<i>African Union</i>
BWIs	<i>Bretton Woods Institutions</i>
CSOs	<i>Civil Society Organizations</i>
DRC	<i>Democratic Republic of Congo</i>
ECA	<i>Export Credit Agencies</i>
EU	<i>European Union</i>
FTA	<i>Fair and Transparent Arbitration</i>
GDP	<i>Gross Domestic Product</i>
HIPCs	<i>Heavily Indebted Poor Countries</i>
IDB	<i>International Development Bank</i>
IFIs	<i>International Financial Institutions</i>
LDCs	<i>Less Developed Countries</i>
MDGs	<i>Millennium Development Goals</i>
MDRI	<i>Multilateral Debt Relief Initiative</i>
NGOs	<i>Non-governmental organizations</i>
SAPs	<i>Structural Adjustment Programmes</i>
SDRs	<i>Special Drawing Rights</i>
TCSSP	<i>Tree Crop Small-holder Sector Project</i>
UN	<i>United Nations</i>
USA	<i>United States of America</i>
WB	<i>World Bank</i>



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Most, if not all developing countries, particularly in Africa, are burdened with the problem of an ever expanding debt portfolio. It is beyond debate that there has been an inverse proportion between an expanding developing world debt portfolio vis-a-vis an increase in debilitating poverty and destitution. As a result, most developing countries are caught up in a debt trap which basically ensures that the more money they borrow, the poorer their inhabitants become.

It is a notorious fact that the overwhelming majority of the developing world's debt is odious at law. It is, therefore, imperative for developing countries to adopt the modern approach to international relations; which approach essentially dictates that developing countries should be given a more formal platform where they can challenge the legitimacy of their debts to creditors with a view towards ensuring that their development is not stifled by otherwise odious and/or illegitimate debts which militate against sustainable development. Developing countries are humbly urged to join the global voice that seeks the establishment of an international debt arbitration mechanism under the auspices of the United Nations. With a membership of 192 countries, the legitimacy of the United Nations is unquestionable and therefore, beyond reproach. An international debt arbitration mechanism should be urgently established with the core mandate of dealing with disputes centred on odious debts. It is our considered view that developing countries burdened by the debt crisis should not arbitrarily repudiate all the financial obligations that they may suspect to be odious and therefore, illegitimate. Whilst such a revolutionary and hardline approach might attract huge political mileage in the developing world, it has the inherent danger of causing global economic and financial anarchy. A recommendation is also made that the onus of proving the illegitimacy of a debt should be placed upon the debtor countries. Surely, it should not be very difficult for developing countries to prove the odiousness of the majority of their debts.


Lending countries are also largely to blame for nurturing the odious debt portfolio in the developing world mainly because some lenders have gone out of their way to lend monies to despotic and corrupt regimes fully



aware or, at the very least, reckless as to whether or not the monies advanced were used for the good or for the bad.

Less Developed Countries (LDCs) especially those in sub-Saharan Africa, should come together and speak with one voice in order to bargain for an improved system of dispute resolution of their financial obligations. Individually, LDCs lack the political and financial gravitas to seek the cancellation of odious debts. Obviously, a concerted movement within an important and central international body such as the United Nations is bound to produce better results.

Without a systematic and co-ordinated master plan to challenge illegitimate debts, the countries covered in the case studies and, indeed, all indebted developing countries, will continue to wallow in poverty whilst the developed world will continue to embark upon irresponsible habits of lending. In such a scenario, the countries covered by the case studies will remain perpetually under-developed and impoverished. Fair and Transparent Arbitration (FTA), is thus perceived as an empowerment tool for the countries dealt with in this study. A culture of responsible lending and borrowing is easily sustainable once FTA is recognized as the bedrock for dealing with the challenges posed by odious and illegitimate debts. For the foreseeable future, developing countries will continue to incur debt, thus it is imperative for the affected countries to take FTA very seriously.



In 2005, AFRODAD started building up ten (10) cases that would be viable for Fair and Transparent Debt Arbitration under the auspices of the United Nations. The case claims were to be built around illegitimate and odious debts, and the role of International Financial Institutions (IFIs) in the indebtedness and development processes of debtor countries. These case claims will be deposited first with Chairman of the African Union (AU) and with the Secretary General of the United Nations (UN), calling for their hearing at the beginning of the envisaged Debt Arbitration Tribunal.

The first set of case claims envisaged for arbitration dealt with the role of the International Financial Institutions (World Bank, International Monetary Fund) in the development processes of African countries resulting from pushed privatization/investment projects in Zambia, Cameroon-Chad, Tanzania and Malawi. These case claims demonstrate that the International Financial institutions' insistence and experimentation with privatization did irreparable damage that still affects the country's ability to stand on its economic feet today-years after such programmes were abandoned. There is empirical evidence that poverty and poor standards of life in these countries are directly attributable to the interventions and policy advice from the IFIs. Currently, the third and moral worlds are up in arms against the two institutions for the negative impact of the structural adjustment programmes and the conditionalities that are associated with them. The conclusions suggested by the case claims indicate clearly that countries such as Zambia have legitimate cases against the IMF and World Bank for the wrong wrought upon Zambia for following the adjustment programmes.

The other set of case claims dealt with illegitimate and odious debts. One case focus on Nigeria's stolen wealth which was deposited in Swiss banks during the military regime rulers. The other four illegitimate debt cases dealt with the illegitimate debts in the Democratic Republic of Congo (DRC), Philippines, Argentina, Ecuador and Indonesia. The studies have generally indicated that debt can be considered "illegitimate" from various perspectives: ethical, financial, legal and social. The flagrant violation of human, economic, social and ecological rights caused by the debt makes it illegitimate, unjust, immoral and unrepayable.



Although not all Heavily Indebted Poor Countries (the HIPC) have benefited from the HIPC Debt Relief initiative (1999) and the subsequent Multilateral Debt Relief Initiative (MDRI 2005), we have been left with many lessons of enduring these processes. The lessons include the fundamental fact that the debt relief initiatives were not sustainable due to the following reasons: *i)* they were creditor-led with decisions about who could and who could not get debt relief being made by creditors on premises that sometimes were arbitrary. The debtor countries were in a minor position on the whole selection process; *ii)* the initiatives were a result of pressure from civil society and were not structural and not based on fair or just global financial architecture; and *iii)* they were based on some philanthropic attitude which would seem to condone the value system of a brutal capitalism.

Critical mass of civil society pressure was not sustainable and today's campaigns for debt relief must be based more on a common value system based on position of justice, equity and human rights.

AFRODAD has extensively researched cases of debtor responsibility over the years and the studies have shown that internal mechanisms have also contributed to the debt crisis. People found guilty of perpetuating policies that exacerbated the debt crisis should be brought to book as a deterrent. Activities of the Export Credit Agencies (ECA) and that of Vulture Funds which should be examined closely as they easily constitute illegitimate and odious debts. Arbitration is important in these cases. One cannot work within the legal system because they are legal and need an independent arbiter. UN through the charter can protect the people. The African Union need to approached and take up cases on behalf of the African people.

There is need to act now and establish a fair and transparent arbitration court to resolve the current debt impasse. AFRODAD is convinced that despite the UN's weaknesses as a global institution, it is still the most suitable to establish an arbitration court because of its legitimacy across nations.

1 The Illegitimate framework

The concept of illegitimate debts is a broad concept which basically posits that any debt which is not founded upon the common good of the people for which it was contracted and lacks the consent or mandate of the people is not and cannot be sustained. It encompasses issues of legality as determined by both domestic law and international law. The concept "refers to a broad range of debts encompassing both odious and illegal debts, as well as debts resulting from losing a war, debts to creditors who lent irresponsibly, and debts resulting from loans made for ideological or political reasons. The concept also includes: debts incurred by undemocratic means, without transparency or participation by civil society or representative branches of government; debts that cannot be serviced without violating basic human rights; and debts incurred under predatory repayment terms, including situations where original interest rates skyrocketed and compound interest made repayment impossible." From the foregoing it can be noted that the concept is general and broad in its approach to the subject of debt management. It goes beyond the parameters of odious debts. In substance, therefore, the concept of illegitimacy lays a basis for an investigation into the nature of a debt with a view to determining whether or not in principle the so-called debtor owes anything to the so-called lender. The concept of illegitimacy has been advanced from a legal, economic, social, political and financial point of view. At best, it presents itself as a rallying point for arbitration in as much as it is embodied and inspired by principles of equity and justice.

The illegitimacy framework advances the following arguments as a basis for debt arbitration and eventual cancellation. Firstly, a debt is illegitimate and therefore unenforceable to the extent that it:

- i) Is against the law or constitution or sanctioned by the law of the debtor country.
- ii) Is unfair, improper or objectionable.
- iii) Infringes people's rights.
- iv) Undermines sovereignty.

In substance the aforementioned indicators of illegitimacy raise the oft common principles of justice and equity applicable in virtually all legal



jurisdictions on acceptable standards of fair dealings between subjects such that they are as common as they are self-evident. They provide reasonable and acceptable grounds for arbitration. They shall be examined within this context hereunder.

1.1 Illegal or unconstitutional debts

It is trite law that any act which is specifically prohibited by law whether directly or indirectly is a nullity. No rights or obligations arise therefrom for the very transaction or act is a nullity at law. Proceeding from this legal standpoint, it stands to reason, therefore, that a debtor country cannot be saddled with a debt burden contracted outside the legal parameters of that country. For instance, it is a common feature in many countries that for a loan to be legally contracted by a country it has to be approved by Parliament or some other State functionary before it can be considered legally binding.

A ready example among such numerous loans is the Indonesian loan for the purchase of war ships from German¹. It is noted that this loan agreement violated the Indonesian Constitution to the extent that it did not comply with the requirement that it should have been approved as law by the Indonesian Parliament. Parliament represents the will of the people meaning that anything approved by Parliament binds the country as accepted by those who wield the mandate of the people. It follows therefore that where the mandate of the people does not attach to an obligation that obligation cannot be sustained and the lender cannot be heard to say it is not conversant with the legal requirements of the lending state. It is a recognized defence to a claim at law to assert that the obligation is tainted with illegality and therefore cannot be enforced. This objection has to be properly ventilated by an arbitral tribunal and using these clear principles of law can properly arrive at a determination of the legality of the loan agreement. The same objection attaches to other loan agreements like the infrastructure development loans from Japan where Indonesia embarked upon the construction of Dams which did not produce the set targets but in fact brought suffering as they brought environmental degradation and dislocated communities falling within

¹ *The Case of Illegitimate Debt in Indonesia: A Case Study*

their range. For instance in the construction of the Bilibili Dam where families were forced to move from their communities to make way for the dam and affected their economic activities insofar as they had to depart from dependence on plantation, farming and forestry as sources of income. These people were also not compensated for their homes when they moved which created unnecessary hardships in migrating to other areas.

Another prominent example on this aspect is Argentina where an unconstitutional government contracted loans contrary to the wishes of the people as expressed through Parliament. As aptly noted, *"the main argument for illegitimacy lies in the fact that the debt was contracted by a government not chosen by the people in free elections and according to constitutional valid rules"*. Argentine loans went beyond the criterion of illegitimacy as they also constituted odious debts which were contracted by an illegal regime which suppressed the very people it claimed to represent in loan agreements. The loans were contracted *"by a de facto military government which had usurped power between 1976 and 1983; this debt was refinanced and continues to be paid. The International Financial Institutions were not unaware of this fact, and supported it. From the beginning of the dictatorship, the IMF and the WB from their offices in the Central Bank of the Argentine Republic controlled the indebtedness process. These loans were not used for the people's benefit, but were used to finance the repression of all kinds of resistance, and for the disappearance of 30 000 women and men who fought for a different society..."*² A dictatorship of this kind is clearly illegal and the acts committed by it cannot be made legally binding as no rights or obligations emanate from a legal nullity. It is a universal principle of law. The Argentine debts were *"contracted during the military dictatorship that usurped the constitutional government between 1976 and 1983, systematically violating fundamental Human Rights, and disposing of citizens' lives; were taken violating basic rules of the national Constitution, without the endorsement of the national Parliament and arbitrarily breaking or modifying laws, therefore the legal principles were not observed."* In a nutshell, the regime did not perform any legal acts in this regard and as such the debts so contracted cannot attach to the State.

¹ *The Case of Illegitimate Debt in Argentine, A Case Study, p28*

² *ibid.p10*



1.2 Unfair, improper or objectionable loans

Loans under this heading have been assessed on the basis of their attendant inequities which, on public policy grounds, should make them void. Within the context of loan agreements, the essential point emphasized is that loans should be for the common good of the people and not just the lending state or institution such that where loans are advanced at usurious rates, advanced for the sole purpose of enabling the debtor country to service past loans and are also purely for consumption without in any way capacitating the borrowing state to achieve permanent solutions to its consumptive needs then these are improper, unfair and objectionable to make them void. However, this is not a purely legal proposition and should not be assumed to carry weight though arguments on usurious conditions are arguable on legal terms on policy grounds.

The formulation of illegitimate debts by the Latin American Parliament provides an insight into the essential nature of these loans. These have been stated to include:

- i) The origin of the debt (national criminal and civil laws need to justify whether there is forgery, fraud or irregularities involved);
- ii) Where the creditor increases interest rates unilaterally and in unlimited fashion;
- iii) The Brady Plan Agreements which forced governments of debtor countries to renegotiate debts with implicit and forced recognition of illegitimate debts, charging interest on interest;
- iv) And the co-opting of government negotiators who signed agreements then resigned to assume posts in benefiting private companies from the agreements¹.

Essentially, therefore, debt is viewed within its broader socio, economic and political context as it cannot be perceived in a vacuum.

Ready examples of such objectionable loans are loans advanced by the Western countries and IFIs to the Democratic Republic of Congo during the dictatorship of Mobutu Sese Seko. A prominent characteristic of these loans is that they were advanced more as support for a political agenda

¹ *The Illegitimacy of External Debts, The Case of The Democratic Republic Of Congo*, p9

and ideology rather than efforts to address the needs of the people. In other words, they were actuated more by the needs of the lending state and institution than the needs of the people. To this end, they are adjudged improper and objectionable. It is observed that *"the IMF and the World Bank were also used as instruments in servicing American policy and geostrategic interests during the Cold War in that they rewarded Mobutu for his fight against communism in Central Africa especially Angola and Chad".* These loans are also especially objectionable in that they were advanced without regard to the known undemocratic, corrupt and fraudulent tendencies of the regime. The lenders actually knew the nature of the regime they were sponsoring and as such cannot seek to bind the people to a fraud they are accomplices to. As observed, *"these two Bretton Woods institutions became accomplices of extortion against human, social and cultural rights by sponsoring a tyrannical regime that was sustained by the capitalist world against the people's will. Despite the Blumenthal report of 1982 that exposed how the two institutions' loans were looted by Mobutu and his cronies, they continued to lend money to Mobutu's regime, a practice that is contrary to the strictness they observe elsewhere in issuing out loans".*¹ The institutions' actual complicity amounts to an actionable disregard of their duty of care as they were actually supposed to ensure that the loans would be put to good use by the regime. This is, in strict legal terms, an actionable wrong recognized by virtually all legal jurisdictions under the law of delict or tort.

Argentine debts also fall squarely into the mould of such improper and objectionable loans as they were contracted for the benefit of international capital in arrangements which, for all intents and purposes, sought to make the country a ready debtor. Argentina entered into all sorts of arrangements with her creditors in what were measures meant purportedly to address the debt crisis for the better. However these measures never attained their stated objectives as Argentina was underdeveloped and never released from debt. It is noted that *"the primary target of these processes was to ensure the reimbursement of the external debt to the supposed creditors".*² Notable examples are the Financial Shield agreement of December 2000 where funds were advanced to the tune of US\$ 39.7 billion *"with the intention of providing foreign currency to Argentina so that it would not default again".*³ The

¹ Ibid, p24

² *The Illegitimacy of External Debts, The Case of The Democratic Republic Of Congo*, p24

³ *The Case of Illegitimate Debt in Argentina, A Case Study*, p28

⁴ Ibid, p13



primary objective of this agreement therefore was to ensure the security of international capital at the expense of the needs of the people of Argentina. Such an arrangement is undoubtedly objectionable when viewed within the broader picture of national development and since it constitutes a threat to development issues it cannot be sustained and should be cancelled. The same goes for what was termed the "Mega Exchange" of June 2001 where there was a "re-programming of the debt with high interest rates...by an approximated amount of US\$30,000 billion and consisted of changing Argentine bonds that were abroad turning them into guaranteed loans with long expiry terms, suffering a surcharge for the rest of the period (31 years) of US\$55,281.04 billion¹".

Argentina also suffered prejudice under the notorious Brady Plan in terms whereof it ensured "preferential payment of the debt services, allow the transference into the hands of big foreign economic groups of almost all public assets from fiscal and monetary to those of education, health, social security and even security and justice to the conditions of the creditors; and bring Argentina back to the selected club of "trustful countries" so that international capital could start a new stage of indebtedness, still faster than the previous one²."

The debts incurred by Ecuador have featured prominently as an instance of an illegitimate debt in view of the manner in which it was contracted. The debt grew from the time of the military dictatorship from USD241 million in 1970 to USD16 995 million in June 2006. When the debt in the country became unsustainable the IFIs intervened with measures meant to protect the international bankers and creditors in a manner which severely prejudiced the interests of the nation. These measures ranged from the "sucretization" process, The Brady Plan, The Global bonds etc. Basically sucretization was a measure of transferring private debts to the state in circumstances which increased state indebtedness as the State was made to guarantee private debts "by exchanging dollar bonds for bonds in sucres, with parity and interest-rate fixed at the signing of the contract. The result was that the private parties did not have to bear the cost increased interest rates and the devaluation of the sucre. Through the sucretization process, the government transferred the greater part of the external private debt to the State³".

¹ *The Case of Illegitimate Debt in Argentina, A Case Study*,p13

² *Ibid*,p21

³ *Ecuador at the Crossroads: An Integral Audit of the Public Debt, A Case Study*,p19

As had happened with many heavily indebted countries, Ecuador also took part in the Brady Plan which was a facility meant to *“reduce the debt service burden by reducing the principal due”*. In essence the country was being made to accept its indebtedness and create a further burden to be met at a later debt simply to protect international capital and creditors at the expense of its people. The debt arising from the Jaime Roldos Auilera Multipurpose Project also represents an illegitimate loan as it brought more harm than good to the people. Whereas it was meant to ensure the provision of water through the construction of a dam it failed to do so as it proved to have a substantial negative net value. This had actually been proven before the project had started by the IDB and the University of Guayaquil. As noted, *“the project's beneficiaries were financiers, the builders and operators. The water transfer objectives were not met since when water is taken from one side to provide for the other, on the one hand the land floods and on the other hand it dries up”*¹.

In principle, therefore, loans should be adjudged objectionable as soon as they have the tendency to create a certain level of dependency by a borrowing state on outsiders for its very survival. The borrower should not be put in a position where it is bound to make payments for an almost indeterminate period in an indeterminate amount as such loans have generally been deemed against public policy in all the civilized jurisdictions of the world. Roman-Dutch common law recognizes this principle and as such no problems can be encountered in bringing same as a cause of action.

1.3 Infringes people's rights

Under this heading people's rights should be viewed from the broader socio-economic-political perspective. To this end it encompasses the people's rights to development, social progress and the realization of the broader human rights. To this end whenever debt servicing is prioritized above the needs of the people in whose name the debt payment is made then that debt is no longer legitimate viewed from the perspective of its broader socio-economic-political implications.

¹ *Ecuador at the Crossroads: An Integral Audit of the Public Debt, A Case Study*, p22



The Philippine debt servicing falls into the mould of such debts. The Arroyo administration has made unprecedented debt payments which do not take into account the essential needs of the people. The administration is noted as having made the *"most public debt payments and is the most indebted government in Philippine history, as well as being among the most heavily indebted in East Asia. Central government foreign and domestic payments in 2005 ate up 83% of total revenue –the highest ever recorded-even as the total public sector debt stock of P5.1 Trillion (US\$92.6 billion at prevailing exchange rates) was equivalent to 93% of GDP¹."* The country's debt problem has been summarized thus: *"The country has already made repayments accumulating to over US\$127.3billion over the period 1981-2005. There is moreover a further US\$8.3billion in debt servicing from 1970-1980...Debt servicing since 1970 then amounts to at least US\$135.6 billion²."* This level of debt cannot be sustained in a developing country yet to realize the MDGs and as such an enquiry has to be made into the actual debt and the paid interests with a view to establishing whether or not the country is not paying the debt over and over again under circumstances which create a vicious circle of cumulative poverty. These payments are being made at the expense of the basic needs of the people. It has been noted that these payments were only possible due to *"government cuts in spending on social services...Real spending per capita on education of P1.508 (US\$30.16) in 2006 is 22% lower than in 2001, on health of P159 (US\$3.18) is 25% lower, and on social security, welfare and employment of P532 (US\$10.64) is 9% lower. As it is, social and economic services are already inadequate from having suffered decades of accumulating neglect³."*

The debts incurred by the regime of Mobutu Sese Seko are classic examples of illegitimate debts which were incurred by illegitimate debtors and creditors acting illegitimately. The Democratic Republic of Congo is today burdened with debts which left the people destitute and without the basic needs because of a regime which borrowed to loot with the complicity of the lending nations. Mobutu was supported by the EU and US for purely political and ideological reasons. It is noted that *"each year, the DRC is required to pay more than US\$15 million to rich country creditors and the international financial institutions, the World Bank and the International Monetary Fund(IMF). This is more money than the DRC*

¹ *Illegitimate Debt & Underdevelopment in the Philippines, A Case Study*, p25

² *Ibid*, p17

³ *Ibid*, p25

receives in new aid, or loans, or investment...¹" The country's precarious financial situation is aptly put thus: *"The DRC is a country that has been looted of its prime resources under the West's alliances with Mobutu Sese Seko. It will be unfortunate and unfair to request a country, that finds itself after more than 40 years of independence at the same level of economic development to repay the debt. The country, according to United Nations Human Development ranks among the least developed, ranking from the position of 165th to the last, 175th, in terms of development indices. The people of DRC have never had an opportunity to fully exploit their resources and design their own path to development since colonialism. The World Bank has estimated that with an average growth rate of 7% the country must spend 60 years before coming back to the same social level it had in 1960. Debt repayment leaves DRC with no economic independence and national sovereignty²."*

The country's debts cannot therefore be paid without compromising the people's rights to basic social needs like health, education, social security and even employment. To this end, the debt should be advanced for arbitration and subsequently cancellation.

¹ *The Illegitimacy of External Debts, The Case of The Democratic Republic of Congo*, p24

² *Ibid.*



2. Illegitimate debts and their eradication

Illegitimate debts have been aptly noted in many developing countries including, but not limited to, Nigeria, Indonesia, Philippines, Democratic Republic of Congo, Zambia, and Argentina. From the situation which obtained in these countries it can be seen that the debts incurred were not only marred by illegality but plunged the debtor state in a financial quagmire without any prospects of release. These debts mounted to astronomical levels. In essence the debt becomes illegitimate because of its socio-political-economic repercussions on the debtor state insofar as the loan cannot be serviced without depriving the borrowing state the means to advance the development needs of its population and mortgaging the country for an indeterminate period in an indeterminate amount at usurious rates of interest. They are illegitimate because the debtor country does not have the capacity to finance its debts. In other words its revenue is far exceeded by its obligations.

Nigeria is one such case where it contracted debts during the reign of military dictatorships which debts rose to astronomical levels in the face of usurious lending rates and a failure on the part of the government to pay the debts without compromising the development needs of her people. The military rule of Generals Ibrahim Babangida and Sani Abacha stand out as ready examples of corrupt administrations which looted state coffers at the expense of the nation and entangled the country into debt which threatens the development needs of the people and future generations. Nigeria's former finance minister noted that *"Nigeria owes \$34 million, much of it in penalties and compound interest imposed on debts that were not paid by the military dictatorships of the 1980s and early 1990s. We make annual debt repayments of more than \$1.7 billion, three times our education budgets and nine times our health budget. We have every intention of continuing to fulfill our obligations to creditors but this debt is unsustainable. Nigeria cannot meet the MDGs without debt cancellation"*¹.

Much the same relates to the Indonesian debt where loans were purportedly contracted for development projects when in actual fact they were meant to enrich the ruling elite at the expense of the development

¹ Nigeria: *Foreign Debts, Stolen Wealth, IFIs and the West, A Case Study*, p25

needs of the country. These projects pertain to the purchase of warships from Germany which ships were in a deplorable state and only meant to allow Germany to dump the ships and buttress the rule of an unpopular government. The ADB loan for tree crops which failed to achieve the set objective of improving the livelihood of the farmers as production failed and the farmers lost title to their lands as they could not pay the debts secured by their land certificates. Moreover the loans violated the 1986 Vienna Convention, "particularly Article 48 on Error and Article 50 on Corruption" as the funds were corrupted with both the ADB and the government of Indonesia recognizing this corruption. To this end such debts cannot be made to attach to the people of Indonesia as the lending country committed a wrong by advancing these loans without a proper appraisal of same. Other projects relate to the dam projects funded by Japan which not only failed to deliver the set objectives but actually brought suffering to the people of Indonesia. It is noted that the dams "fail to bring benefit to the people of Indonesia, but even threaten the livelihood of the local communities and contribute to the degradation of the environment in the locations of the projects. Japan has to be also responsible for the wrongful acts, since the designs of the projects were made by Japanese experts, the construction works were conducted by Japanese companies, the main equipments are supplied from Japan and some of the utilization of the final products of the projects are for the Japanese corporations".

The Democratic Republic of Congo represents another instance of an illegitimate debt case. Loans were contracted for projects which were never meant for the people but the personal needs of the ruling elite. This was mainly due to the corruption attendant upon the loans as Mobutu and his government officials looted the funds. This will be seen from the numerous failed projects which never transpired or failed to produce the desired results. It has been noted that "a number of projects the Mobutu regime built did not accommodate the needs of the local population. This was due to the fact that the regime put its personal desires and gains first as well as believed that it knew what the people wanted and that what was good for the ruling elite should be good for everyone. The absence of proper assessment of the country's needs resulted in loans being used to construct white elephant projects which made it impossible to repay loans". Such

¹ *The Case of Illegitimate Debt in Indonesia*, p10

² *The Illegitimacy of External Debts, The Case of the Democratic Republic of Congo*, p18



projects included the Cite de la voix du Zaire, Project Maluka Steel, Domaine presidential de la Nsele. The Hydro-electric Projects at Inga and the Sozacom tower project. All these projects turned into white elephants due to failed planning and corruption which the lending countries and institutions knew and/or ought to have known. As noted 'the creditors mostly the US, France, Belgium and others did not bother whether the loans were (sic) put to proper use or not and thus continued to push loans to Mobutu's government without questioning such failures. It is therefore fitting for one to argue that debts contracted and used for improperly designed projects and programs are illegitimate and should not be repaid.

3. Odious debt cases to arbitration

The classical exposition on odious debts is that formulated by Alexander Sacks where he explained that *"if a despotic power incurs debts not for the needs or in the interest of the state, but to strengthen its despotic regime, to repress the population that fights against it, or to colonize its [territories] with members of a dominant nationality, etc. These debts are odious to the indigenous population. This debt is not an obligation for the nation; it is a regime's debt, a personal debt of the power that has incurred it"*. In other words, the doctrine provides an exception to the international law concept of state succession in terms whereof a succeeding government incurs the obligations of its predecessor. The debt *"consequently...falls with the fall of this power"*. The main features of an odious debt therefore pertain to the nature of government which contracted them, how it came into being and its manner of governance. Essentially, these debts are contracted by despotic and undemocratic governments lacking the mandate of the people to govern.

An analysis of many debts in Africa and Latin America shows that these debts are odious as contemplated by Sacks and should therefore be cancelled. For instance, the huge debt incurred by the Democratic Republic of the Congo, Argentina, Philippines and also Nigeria aptly demonstrates odious debts.

These debts should of necessity be presented up for arbitration in view of the fact that they are a continual burden on the very people who struggled to remove the despotic power which contracted them. The most appropriate reason for their unforceability resides in their anti-people nature. As noted by Sack, *"the reason why these odious debts cannot attach to the territory of the state is that they do not fulfill one of the conditions determining the lawfulness of state debts: that state debts must be incurred, and the proceeds used, for the needs and in the interest of the state."* It is to be noted that the concept of odious debts is yet to gain strength under customary international law as it has not been so recognized neither by state practice nor judicial bodies. However, it is humbly submitted that the seeds for its recognition and eventual acceptance were sown in the seminal Tinoco case. While accepting that the decision did not positively

¹ *The Illegitimacy of External Debts, The Case of The Democratic Republic of Congo*, p8



accept the concept as a cause of action the pronouncements made therein lend support to the concept. Justice Taft, in refusing Great Britain's claim to enforce obligations against Costa Rica and the Internacional de Costa Rica towards the Royal Bank, noted that *"the debt in question had been incurred for personal and not for legitimate government purposes; that the transactions were full of irregularities; that they were made when the popularity of the regime had already faded away and its fall imminent; and that the bank must have been aware of these facts"*.¹ In essence, therefore, the debt was adjudged odious and therefore unenforceable. As highlighted earlier, this case did not delve into an incisive analysis of the concept as contemplated by the progressive movements for debt cancellation but it nonetheless recognized the fundamental principle that not all debts are legitimate and the debt must not be tainted by objectionable traits as to vitiate its acceptability such that it is proper at international law to challenge the legitimacy of a debt; with such an objection warranting an investigation into the debtor most appropriately through arbitration.

The most compelling argument on odious debts is the legitimacy of the government which contracted them, the use to which the money was put and the complicity of the lender to the wrongful transaction. A further rallying point on this aspect is the United States' repudiation of Cuba's debts with Spain in 1898 wherein *"the American Commissioner rejected the view that Cuba was obliged to repay loans that the Spanish state had taken out to finance its operations in Cuba and which Spain has secured with Cuban revenues"*.² The gravamen of his argument, which clearly lends support to the odious debt concept, was that *"Cuba had not had a voice in the taking up of these debts, and that they had been contracted by Spain for national purposes, which in some cases were alien and in others actually adverse to the interest of Cuba"*.³ In similar vein, loans to such countries as the Democratic Republic of Congo during the time of Mobutu Sese Seko, the Argentine debt during the time of the military dictatorship and the Nigerian debts during the military dictatorships can be properly presented for arbitration as odious debts warranting cancellation. They fall squarely into the mould of odious debts by Sack and even the Tinoco case and the Cuban debts to Spain. Much the same can be said about the Philippine debt as it was also contracted by dictatorships which brutally

¹ *How to Challenge Illegitimate Debt, Theory and Legal Case Studies*, p18

² *Ibid*, p17

³ *Ibid*, p17

suppressed opposition by extra-judicial killings, disappearances and assassination attempts. These pertain to both the Arroyo administration and the Marcos administration. These governments, in particular the former, borrowed billions of dollars in foreign loans which were used effectively for their repressive and violent rule with the complicity of US transnational corporations operating in the Philippines and the US government itself. In such circumstances, it is clear, therefore that these debts should be properly brought for arbitration to determine the actual legitimate indebtedness of the borrowing country.

The debt incurred by the Democratic Republic of Congo is one which cannot be sustained as legitimate on a proper and reasonable assessment in view of the nature of the government which incurred them and the use to which it was put. Mobutu Sese Seko presided over a regime which was aptly described as kleptocratic due to the manner in which he appropriated state coffers for his own gain. *"He was said to have been richer than his country and estimated to have stolen more than US\$10 billion to the prejudice of his people, which appropriations now stand in the way of the development of the country as these monies are now being paid for as debts from state coffers"*. Zaire's USD13 billion debt is actually attributed to Mobutu. The debt cannot be attributed to the state today when in actual fact the lending countries (US and EU) actually deliberately advanced these loans as a measure to further their political agenda of fighting communism through Mobutu, without regard to his manner of governance. It is observed that *"despite widespread knowledge about his corruption, the IMF lent Mobutu over US\$600m in the early 1980s while the World Bank provided US\$650m. Western governments lent over US\$3 billion during the same period"*.¹ These are instances where the creditors actually participated in the deprivation of the people and, as such, they cannot be seen calling for the debt which they actually authored.

¹ *The Illegitimacy of External Debts, The Case of the Democratic Republic of The Congo, p24*



4. International Financial Institutions (IFIs) Bad/wrong policy advice cases for conditionality

International Financial Institutions (IFIs) claim to know what is best for borrowing states. In this vein, whenever a state requests a loan for development projects these IFIs attach conditions to the loan which, in their perception, will ensure that the funds achieve the perceived objectives for the borrowing state-growth and development. Structural Adjustment Programmes (SAPs) emerge as ready examples of such conditionalities which usually prescribe privatization, currency devaluation, budgetary cuts on social services and the civil service, etc. In many, if not all, instances these policies do not achieve their projected goals as the policies are not home-grown; the lending country does not, for all intents and purposes, participate in the formulation of these policies. Essentially, therefore, the IFIs policy dictation is misconceived insofar as it is not founded upon the needs of the recipient state and does not take into cognizance the opinions of the affected state. These conditionalities are applied with harshness on states that are in dire financial circumstances as the bargaining plane is uneven in such circumstances.

Zambia is a case in point where IFIs brought in financial assistance attendant with conditionalities meant to promote growth and development. Between 1978 and 1986 Zambia went through a declining scale in the economic performance of the nation which saw the government entering into negotiations with the World Bank and IMF for SDRs meant to address the harsh economic environment obtaining. These conditionalities were minimal with the initial transactions as the country's fortunes were not dire meaning they could bargain for better business terms. These conditions included the devaluation of the national currency and the raising of agricultural products. However, when the economic situation worsened between 1984-1992 the SDRs came with harsher conditions like the substantial devaluation of the national currency which culminated in the so-called SAPs which were basically policy directives on how to manage the economic problems faced by Zambia. It is the 1992 SAP which assumed notoriety in view of the suffering it brought to Zambians as it introduced radical policy measures

which were misconceived. It is noted that the main conditionalities of the 1992 SAP were privatization of state enterprises, liberalization of the economy, removal of subsidies, restructuring of the civil service, decontrol of prices and the introduction of cost sharing for social services, macro-economic reforms and monetary and fiscal reforms. Zambia has been aptly noted as a demonstration of IFIs predatory practices as they took *"advantage of the dire economic conditions in the country and a weak and inexperienced government to impose and implement conditionalities that are now credited with the severe poverty that has spawned unprecedented corruption, malnutrition, disease, death and illiteracy."* Indeed these policy measures saw state corporations being sold at concessionary rates to the ruling elite and its cronies, the education system suffered as there was low remuneration, inflation rose with the fall of the national currency etc. These adverse consequences of SAPs have led some to correctly observe that *"the designers and proponents of SAPs... are primarily the victims of their lack of proper understanding of the nature of underdevelopment in general and African political economy in particular. This superficial understanding has led them to the error of extrapolating, globalizing and universalizing the experiences of their own societies and economies..."*¹

Malawi also provides an example of bad and/or wrong policy advice by the IFIs which generated debts which should, in principle, be deemed illegitimate. It will be noted that Malawi enjoyed general stability and growth from the 1960s until around 1979 when the economic environment changed which necessitated the country borrowing to improve its economic performance. Malawi resorted to an assortment of short-medium-long term economic programs which, on the advice of the IMF, were meant to achieve reduced internal financial imbalances, promoting economic growth and reducing the rate of inflation. It is noted that *"none of the measures adopted aimed at expanding the stock of capital, which is a key determinant of economic growth in Malawi, or at improving total factor productivity, which is another important determinant of economic growth, or at increasing the number of years spent in school by the population, which is yet again an important determinant of economic growth"*². Put differently, the measures for which Malawi was prescribed and funded were not meant, and could not address the needs of the people

¹ *The Impact of Structural Adjustment Programmes in Zambia*, p10

² *The Illegitimacy of External Debts, The Case of Malawi*, p17



for whose benefit the funds were provided in the first place. The performance of the policy measures have been condemned because *"there was incompatibility among the policy objectives and lack of coordination among the policies. Another weakness is that the sequencing of economic reforms was not optimal .The country did not achieve macroeconomic stability before embarking on domestic financial sector reforms. The goods market was liberalized before financial and factor markets were liberalized, which was wrong sequencing. Foreign trade was also liberalized before liberalization of the domestic financial sector, which was also wrong. Liberalisation of the capital account started before everything else, which again was not right sequencing..."*¹

Similar failed projects occurred also in the agricultural sector where the implemented policy measures could not address the important issue of food security such that these cannot be made to bear upon the country but rather be reviewed and repudiated under a fair and transparent arbitration process.

The IFIs are not simply meant to disburse huge sums of money to borrowing nations as and when they need it. They also play an advisory role to those debtors with a view to ensuring that the money is used for the benefit of the people. To this end they ought to work closely with the lender, scrutinizing each proposal for viability and where necessary proffering alternatives. In other words, the IFIs clearly owe a duty of care to the borrowing nation when they make recommendations on the use of the money and the conditions that come with the grant/loan. It cannot be discounted that by virtue of prescribing what they perceive to be the appropriate policies for development, the IFIs have fundamentally put themselves in a position of trust in terms whereof they are to ensure that their policy advice is compatible with the borrowing state. It is a basic principle of law and it cannot be suspended merely because we are dealing with IFIs and States.

The Chad-Cameroon Oil Pipeline Project is also an instance of failed policies on the part of IFIs. Like the many other failed policies, it was funded for the benefit of the two countries, it being asserted that it would bring development and allow the countries to meet their obligations to

¹ *The Illegitimacy of External Debts, The Case of Malawi*, p19

the people and creditors. The project is noted as *"the single largest private investment in Sub-Saharan Africa"* and meant to demonstrate *"how oil exploitation could lead to development, enhanced transparency and public participation. The Bank's consistent rationale for its involvement in this gigantic project and in other oil or resource extraction in developing countries is that it can contribute to poverty reduction by generating economic growth¹."* However, the project was not properly planned insofar as its environmental impact was inaccurate and it disrupted the lives of the indigenous pygmy communities of Cameroon and destroyed rare plant and wildlife species as it traversed Cameroon's tropical rainforest. The project was also marred by human rights abuses which were brought to the attention of the World Bank. For instance, the *"none or insufficient compensation for the expropriation of land on which the local communities or individuals hold customary rights and registered land deeds, remains a problem which years after completion of the construction phase of the project still is unsettled²."* There was abuse of workers' rights as workers were denied contracts, equipment and trade union activity. The asserted benefits of the project therefore never materialised but still the debt will burden the people whose lives were disrupted by same.

¹ *The Contribution of Oil to Debt and Under-Development in Africa: The Case of the Chad-Cameroon Oil Pipeline Project*,p15

² *Ibid*,p20



5. Suitable cases for arbitration

The proposed debt arbitration mechanism will no doubt meet with opposition from some creditor countries and the donor community in general as it poses a threat to their financial interests in the Bretton Woods Institutions (BWIs). It is obvious, therefore, that even some of the proposed arbitrators are of the same thinking on this question. To this end it is most prudent to pick the appropriate complainants on the subject; those whose cases cannot be set aside as mere vexatious antics of a wayward debtor. To begin with the most appropriate candidates can be sought with reference to what has so far been decided on the international plane on this subject. That is to say, previous cases which have been decided on this aspect which might carry weight in the arbitration process must be sought for guidance. Therefore, cases such as the Tinoco case and the Cuban cancellation of Spanish debts must be analyzed along these lines. However, at all times it has to be emphasized that these concepts are yet to get acceptance or recognition under customary international law such that their cogency is in contests.

A look at the case studies undertaken shows that countries like Nigeria, Argentina, Zambia, Indonesia, Ecuador, Philippines and the Democratic Republic of Congo offer appropriate test cases for arbitration on the subject of illegitimate and odious debts.

Nigeria was ruled by military dictatorships whose notoriety is beyond question. The country suffered under the hands of Army Generals who not only plunged the nation into turmoil by irresponsible borrowing but also stole much from the national coffers at the expense of the population. Nigeria's indebtedness and grave consequences on her development are well documented such that it does not take much persuasion to bring one to accept that her debts were not only odious but also illegitimate. An analysis provided in her case of her annual expenditure on debts and her annual needs for development programs like health, education, and infrastructure development clearly shows that she is only generating income to pay debts without taking account of the needs of her population. This is, in any case, one of the primary objectives of the arbitral process envisaged, that is, *"debt sustainability within the*

development context of each debtor country, whereby government revenues are balanced against the need to finance poverty reduction programs” and the formulation of “a framework determining the level of debt that a given country is liable to repay would be linked to human development indices and human rights rather than arbitrary debt service/export ratios”. Nigeria is a prime example of a state which is failing to meet its MDGs owing to the servicing of debts, which situation is unacceptable in a world which propounds the fundamental rights of people as immutable and universal.

Another important candidate for the arbitration process is Indonesia. Indonesia contracted significant debts from Germany, Japan and the Asian Development Bank which are tainted with illegality at both the international level and the domestic level which warrants the attention of an independent tribunal to properly investigate and determine the country's actual liability. As noted earlier, these loans were never contracted for the people like the purchase of warships and in cases where these were contracted for the people the projects so funded were a failure in terms of achieving the set objectives that these same people cannot be saddled with the burden of paying a loan that actually destroyed their lives. Such was the case of the agricultural loan from the ADB where the affected farmers actually staged a demonstration in front of the office of the Ministry of Finance in Jakarta demanding that the credit payment they were forced to pay as part of the Tree Crop Small-holder Sector Project (TCSSP) be cancelled because of its failure and its attendant misery. It will be noted that the ADB had actually produced a report in terms whereof the project was described as a success whereas an independent enquiry by an NGO in one of the affected areas, Bengkulu, actually showed that the project had failed *“because the fund was highly corrupted, the seedlings provided were bad seeds...and until present, the farmers cannot get back their land certificates which were kept by the authorities as collateral”*. The loans are in violation of the 1986 Vienna Convention on Error and Corruption and *“since the funds for the project were corrupted...and both ADB and the government of Indonesia recognized this corruption, then it's against the law and above international conventions if the people of Indonesia have to be burdened to repay the debts”*. The loan agreements for the construction of Dams are also equally objectionable seeing that they brought misery to the people

¹ *How to Challenge Illegitimate Debt, Theory and Legal Case Studies*, p44

² *The Case of Illegitimate Debt in Indonesia, A Case Study*, p10

³ *The Case of Illegitimate Debt in Indonesia, A Case Study*, p10



they were meant to serve as they brought in environmental degradation. The loans which form the subject of Indonesia's debt are patently objectionable, well documented and lay a proper ground for an arbitral enquiry into the legitimacy thereof.

Argentina also presents an appropriate case for debt arbitration as it basically incorporates all the objectionable characteristics of illegitimate and odious debts. For instance, the debts that were contracted are clearly and indisputably attributed to the de facto government which lacked the mandate of the people and actually carried acts of repression against the very people it alleged to represent. The borrowed funds were used primarily to buttress the illegal regime and not the needs of the people. The debt crisis faced by the country is also attributable to the credit arrangements which saw new loans being advanced to ensure that the country paid its debt thereby benefiting the creditors and not the country. These arrangements also saw the charging of usurious interests and the capitalization of the interests which meant that the country was, in effect, paying its debts over and over. The debts are therefore unfair and objectionable. All these financial arrangements were sanctioned by the IFIs on the advice that they were desirable and ensured that the country met and addressed its development needs and as such they offer instances of bad policy advice by an institution not only occupying a position of trust but positively mandated to ensure that it offers sound policy advice to debtors.

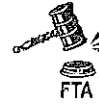
Ecuador has proven to be a proven case for debt arbitration. The country's President has embarked upon an audit of the country's debt with a view to determining the country's actual debt. The primary objective of this audit, as anticipated by all the proposed audits of the South's debts, is to remove the country from a dependency of the nation on foreigners and eliminate the vicious circle of cumulative poverty entrenched by debt servicing. The country has adopted a radical position premised on the audit as an indicator of the country's actual obligations. It was noted that the *"Correa government intends to push investigations further and identify illegitimate debts, whether to multilateral creditors such as the WB, the IMF, or the IDB, or to bilateral creditors. On the basis of what the audit will show, Ecuador will renegotiate the payment of its external debt, refusing to pay any debts*

that did not benefit its population...". The country's stance is further given credibility by the recognition by Norway of debts incurred by Ecuador under the Ship Export Campaign Project as illegitimate. The project was basically an avenue by which Norway sold ships as a means of protecting its shipping industry without regard to the propriety of the transaction for Ecuador. It is noted that *"under pressure from debt-cancellation activists both in Norway and Ecuador, the Norwegian Parliament and government eventually realized that such actions were unacceptable..."*¹ and proceeded to cancel the respective debts owed.

Zambia also represents a case of a failed Structural Adjustment Programme imposed by the IFIs which should be submitted for arbitration. As has already been highlighted, calls for arbitration on this aspect are premised on the failure of economic programmes forced upon the borrowing state in circumstances where the IFIs ought to have practices due care in making recommendations and implementing them. In 1992, the new government of Zambia from the Movement for Multi-Party Democracy negotiated an economic revival package from the IMF and the World Bank which saw a radical departure from the policies of the previous socialist oriented government to a more liberal approach which accepted the conditionalities of market liberalization and privatization as cornerstones of the grant. For the most part this meant that the country had to adopt robust measures to achieve the set conditions in circumstances that were gravely adverse to the Zambian economy. It is noted that *"high poverty levels in Zambia during the 1990s were directly linked to the structural adjustment programmes that was responsible for massive joblessness as a result of privatization, downsizing of public services and liquidations of enterprises; high cost of goods and services due to liberalization and cost-sharing and lack of markets and poor prices for agricultural produce of small scale farmers due to trade liberalization..."*². The privatization of state enterprises did not yield the perceived results of employment creation as it resulted in job losses following the liquidations and closures. This in turn meant that parents could not afford basic necessities for their children like education, clothing and shelter which saw a drop in enrolment at government institutions which were more expensive to community schools which were cheaper as there were lower standards with no demands on school uniforms and teaching facilities

¹ *Ecuador at the Cross-roads: An Integral Audit of the Public Debt, A Case Study*, p41

² *The Impact of Structural Adjustment Programmes in Zambia*, p27



and aids. The government was also forced to embark upon a freeze of review of conditions of service for civil servants which saw the departure of many teachers from Zambia. In sum, therefore, the implementation of the recommendations of the IFIs in Zambia fits the often voiced concern of the imposition of policies without a proper assessment of the contextual needs of the receiving or borrowing state which amounts to a breach of the duty of care by their institutions such that the debt occasioned by such conduct should not be honoured at law.

The Democratic Republic of Congo is also another self-evident case for arbitration. It is accepted internationally that the government of Mobutu was founded on tyranny, patronage and corruption and yet it was a favourite recipient of funding from the multilateral institutions. It is aptly noted that *"despite widespread knowledge about his corruption, the IMF lent Mobutu over US \$600m in the early 1980s while the World Bank provided US\$ 650m..."* and also that *"the role of the IMF and the Bank in supporting Mobutu has, like the detailing of Mobutu's violations of human rights, often been reported on before. These two Bretton Woods institutions became accomplices of extortion against human, social and cultural right by sponsoring a tyrannical regime that was sustained by the capitalist world against the people's will. Despite the Blumenthal report of 1982 that exposed how the two institutions' loans were looted by Mobutu and his cronies, they continued to lend money to Mobutu's regime, a practice that is contrary to the strictness they observe elsewhere in issuing out loans".* These alone, without the need to go into the many failed projects undertaken under the sponsorship of the IFIs, demonstrate the need to review the country's debts with a view to establishing their legitimacy. In the circumstances, the country is a proper candidate for a transparent arbitration process on debt cancellation.

¹ *The Illegitimacy of external Debts: The Case of the Democratic Republic of Congo, p24*

6

The question of debt cancellation

The question of debt cancellation is a sensitive subject especially viewed from the perspective of the debtors' interests. The issue raises two fundamentally opposed interests in that whereas the debtor needs to be released from the shackles of a burdensome debt to ensure its development and prosperity, the lending state or institution wants the return of funds advanced to not only ensure its viability and profitability but also its political interests. In the final analysis, the issue comes down to political and economic power. The lenders have high leverage against the borrowers. The borrowing nations cannot insist on unilateral debt cancellation while at the same time they need continual advances of loans to pursue their development agenda. At the same time, it is impossible for some leaders to pursue the debt arbitration route as they are also culprits who stand to be exposed in the investigation progress.

The question of debt cancellation requires a united approach which brings together all debtor countries under one banner to ensure a properly co-ordinated approach which ensures results. To this end it is suggested that the African Union, as a political body properly representative of the indebted countries of Africa, should actually play the leading role in pushing the agenda for a Fair and Transparent Arbitration process. However, though seemingly logical, this proposition is fraught with potential problems and set-backs. First and foremost is the fact that the AU is a political entity driven mostly by political interests. The question of debt cancellation brings to the fore political issues which the AU is not comfortable with because debt cancellation in large measure means the removal of the lending nations' political influence. It has been proven that debts have been employed to control indebted countries of the South. The African Union cannot be a ready agent for such a confrontational approach considering that much of the South needs the North as convenient political partners.

The question of debt cancellation also means that the West will view the proponents of such an agenda as not creditworthy so as to withhold future funding and this in itself is an eventuality most, if not all, member states are not ready to deal with at the moment. This necessarily means that not



all member states will push for such an agenda such that the AU cannot assume a representative role on the subject. Members will obviously seek a separate forum with the North to resolve the problem. This will obviously mean a reversion to the usual funding programs responsible for the current debt problem.

Debtor governments are generally afraid of the arbitration issue as this might have a negative impact on their relations with various donors. But the problem comes from lack of a collective or multilateral approach to the issues and that is why the Arbitration issue has to be started from above, the United Nations. The UN is there to shield debtor countries from the brutality of creditors.

7 The role of civil society

The question of debts between the North and the South ordinarily entails resolution at the international level. Of necessity this means that the proper participants in the process are the borrowing and lending states. Generally, Civil Society Organizations are not recognized participants at international law, as international law recognizes only States as subjects such that strictly speaking, CSOs cannot initiate such matters without the participation of the concerned states.

The best approach to be adopted by CSOs on this matter is to conduct awareness campaigns on the subject so that the citizenry is made aware of the critical issues surrounding debt and how this is affecting the lives of the ordinary people. This approach will ensure that citizens assume responsibility of their country's destiny by taking the government to task and ensure that the debt problem is brought up at the different political fora like the AU and UN. It is clear that the citizens of the South are not aware of the pertinent issues surrounding their quest for development. Very few citizens of the South make their governments account for their policies and measures such that they simply assume that the government is being run to their best interests when in actual fact development aid is being used for the personal gain of the ruling elite. To this end it is most suitable for CSOs to undertake a robust approach on the advocacy front as a measure to raise public awareness and debate on the debt problem and possible arbitration as a means of resolving the problem. In this case advocacy is being introduced as a measure to bring transparency on governance issues while at the same time making the government accountable on pertinent issues like the debt problem. This will force debate on the subject in Parliament to ensure that the debt problem finds its way in Cabinet for debate and an official government position.

Civil society is a major stakeholder when it comes to the issue of initiating requests for arbitration on sovereign debts. The need for mass mobilisation and conscientisation can, therefore, not be over-emphasised. It is a fact that the majority of citizens in developing countries are not very much aware of their rights and obligations in as far as the sovereign debts issue is concerned. Civil society is urged to adopt a



more combative and militant approach in sensitising citizens about the negativity that they suffer from as a result of illegitimate and odious debts. It is our view that the story of odious debts is yet to be told in most developing countries.

Whilst civil society is doing their best to agitate for a fair and transparent arbitration mechanism on sovereign debts, it is really a shame that the majority of parliamentarians in the countries covered in this study are not even aware of the dangers and risks posed by odious debts. Thus, civil society should embark upon capacity-building initiatives to empower parliamentarians with better skills for debating matters of public finance and sovereign debts. Civil society should be more involved in liaising with relevant parliamentary portfolio committees. This will empower legislators to be more informed when debating motions on sovereign debts issues in parliament. Put simply, civil society should help parliamentarians in playing a more effective oversight and representational role for their various constituents.

Civil Society needs to properly partner with both debtor and creditor governments in trying to resolve this problem because in the final analysis it is only the governments that have the *locus standi* to bring such matters in the various international institutions. Of importance is the effective lobbying necessary to bring the debt problem to the attention of the government and ensure that it is taken up through government structures and adopted as a government position and policy that all debts must be enquired into as a measure to bring them up for arbitration to determine their legitimacy. It is only then that the issue can proceed from the national level to the international level for a global consensus.

Civil society should be more pro-active by constantly engaging with the relevant arms of government, such as the ministries of finance and the central banks, to ensure more transparency and accountability on issues concerning loan contraction. Of course, it is important for civil society to deliberately avoid a confrontational and oppositional approach to government since this will have the effect of antagonising various State actors.

The concept of fair and transparent arbitration should be given more impetus; particularly in the developing countries under study in this report. It does not necessarily follow that all sovereign debts are odious. Developing countries should avoid adopting emotionally-charged and populist arguments when it comes to tackling issues of sovereign debts; even if those debts are odious. What is recommended is the development and nurturing of a holistic, scientific and objective fair and transparent arbitration mechanism. Naturally, this will invariably obtain a by-in from the lending countries and organizations. The argument is that, going forward, both lending and borrowing countries should adopt more responsible, transparent and accountable mechanisms in loan contraction.

Odious debts are a by-product of corruption by both the lenders and the borrowers. There is, therefore, a need for effective anti-corruption mechanisms to be promptly put in place particularly in poor borrowing nations. There can be no sustainable development in circumstances where corruption, in both the public and private sectors is rampant. Fair and transparent arbitration mechanisms can only be sustained in an environment where the looting of public resources and finances is always kept under check. If corruption is not eradicated or at the very least, mitigated, the concept of fair and transparent arbitration will remain but a pipe dream.

Creditors, particularly multilateral institutions, should be discouraged from exerting undue pressure on developing countries to take up loans for liberalising the economy as well as for structural adjustment programmes. Responsible lending practices ought to be encouraged by creditors if the concept of fair and transparent arbitration is to become effective. The United Nations, as the global voice of all nation states, should call upon the IMF, the World Bank and other donors to adopt more responsible lending practices since this will assist in eliminating the problem of odious and illegitimate debts. Civil society organisations should also agitate for the adoption of alternatives to structural adjustment programmes (SAPS). There is also a need for civil society to



embark on publicity campaigns demanding the publication of all relevant data relating to loan contraction. The average citizen in any country should be adequately conscientised and should be able to know, at any one time, the size and nature of his/her country's debt.

- AFRODAD 2007** - Juxta-posing Debt Relief and Arbitration
Policy paper No. 2/2007
- AFRODAD 2007** - The Case of Illegitimate Debt in Indonesia
- AFRODAD 2007** - The Impact of Economic Reform
Programmes on Social Services - The Case of Malawi
- AFRODAD 2007** - Illegitimate Debt & Underdevelopment in
the Phillipines
- AFRODAD 2007** - Ecuador at the Crossroad: An Intergal Audit
of the Public Debt
- AFRODAD 2007** - The Case of Illegitimate Debt in Argentine
- AFRODAD 2007** - Tanzania's Expeience with Privatization
Policies
- AFRODAD 2007** - Nigeria: Foreign Debts, Stolen Wealth, IFIs
and the West
- AFRODAD 2007** - An Analysis of the Socio-Economic and
Environmental Impact - The Chad-Cameroon Oil Pipeline
Project
- AFRODAD 2007** - The Impact of Structural Adjustment
Programmes in Zambia A case study
- Max Mader and Andre Rothenbuhler, Editors 2008:** How to
Challenge Illegitimate Debt - Theory and Legal Case Studies

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