



**PROCEDURE AND PROCESS TOWARDS INTERNATIONAL ARBITRATION  
ON DEBT  
November 2008**

The current African Debt Crisis is a development crisis in which the rich creditor nations and the multilateral financial institutions have absconded their responsibility and hidden behind the neo-liberal ideology which justifies power imbalances and accepts poverty as a natural phenomenon; blind to the fact that it is human beings that create and deepen poverty through their institutional policies. The governments of the rich nations in their pretence at democracy totally ignored the 24 million signatures collected through the Jubilee movement and submitted to the G7 in Cologne in 1999 calling total debt cancellation by December 2000. It is now 2008. The people of the Debtor nations must now directly challenge the governments of the creditor nations and the multilateral financial institutions to respond to the illegitimate and odious debt which forms a larger part of the current debt crisis of developing crisis especially HIPC's.

The United Nations should take steps to establish the International Court of Arbitration on Debt to enable the African Union to demonstrate that it represents the interest of the African peoples by presenting their case to the Court. The Arbitration Court is a sustainable way of not only resolving the current crisis but a place where Creditors and Debtors will have to learn to secure that development must be about increasing the welfare of the people and that financial resources must be directed accordingly.

**Failure to have an international Arbitration Court on Debt will inevitably have to lead to a Call for Repudiation of the Debt.**

This discussion of arbitration has been debated in various fora at different levels in Africa and elsewhere including the African Social Forum and the World Social Forum etc. In all cases there has been a mix of reactions including the fear that negative verdicts of the Arbitration could do damage to the campaign for debt cancellation. It is our considered opinion that this fear is baseless and not useful because it makes people take a safe stand on the issue. In all areas of human endeavor, there are risks that must be taken in order to succeed. There has been adequate evidence to prove that the current relationship between the rich creditor governments and institutions in the area of debt has not been healthy. It is inevitable therefore that there should be a change. Such change cannot take place without being proactive.

The people of the south recognize that there is enough evidence to show that the Debt issue goes beyond financial resources and filling the gap between domestic resource mobilization and government expenditures; rather it is a system of domination by the rich countries. All are linked: the debt problem and the inability to repay has ushered in the conditionality that continue to dominate the scene. This has been declared unacceptable and will only be addressed through two ways:

- securing that there global governance structures and systems that protect the interests of the poor and weaker nations in this global village just like at any microcosmic level there has to be a system of harmony between the strong and the more weak and vulnerable members of society (Arbitration under the United Nations system)<sup>1</sup>
- To take power in their own hands and not have to wait to be told by the same creditors that exploit them (Repudiation).

If the Social Forum has anything to offer then the least that can happen is that it moves beyond the solutions which do not have a binding verdict to those that can really change the world. Another world is only possible if change towards it is deliberately built by those that want to see a new world. Another world is not possible if people have to wait for others to change it while they sit there and wait! The Arbitration Court under the United nations will be backed up by The Convention on Execution of Foreign Arbitral Awards of 1927. This convention is for example, incorporated in the Zambian Arbitration Act No. 19 of 2000. Others include the United nations Convention on Recognition of Arbitral Awards of 1958 of which many African countries are signatories<sup>2</sup>.

### **Why arbitration?**

In 2001 AFRODAD brought together a group of lawyers to provide ground for the establishment of an International Court of Arbitration on Debt. This was a direct response to the need for a new strategy on Debt given that the immediate strategy of Calling for Debt cancellation backed by more than 24 million signatures handed over to the G7 in June 1999 in Cologne with deadline of December 2000 for unconditional 100% Debt cancellation had shown its result. The G7 had responded to the strategy by ignoring the Call and instead enhancing of the HIPC Initiative. The G7 response fell far short of global civil society demands. Aside learning from mistakes of the Jubilee movement, it was inevitable that new strategies at different levels had to be taken on to move the agenda of a sustainable end to the debt crisis. Sustainable because 100% debt cancellation without addressing both the internal and external factors underlying the crisis would only fulfill a part of the lobby and advocacy agenda. The need for a sustainable solution remains valid in order to secure that the current debt crisis does not repeat itself. If it does, as is already being anticipated<sup>3</sup>, it should be of a qualitatively different nature and that it would also be more manageable than the current one.

**The case for Arbitration Court on Debt was made on the following grounds:**

a). There is a dispute around the debt crisis; Debtors and Creditors have different opinions, approaches, views on the debt crisis as well as perceptions on the underlying causes of the crisis and therefore how it should be resolved. The two positions are essentially not reconcilable as exhibited by the fact that hitherto all debt relief mechanisms have been designed by the Creditors and Debtors do not see such solutions as having been designed to meet their development needs.

b). There is a conflict between the Creditors and Debtors around the debt crisis. It is a low intensity conflict that is exhibited only through frustrations especially on the part of the Debtors. It is manifested by the obvious power imbalance in which the rich creditor nations and the international Financial Institutions have the financial muscle to leverage their power and decision making and imposition of a development paradigm. This conflict has a potential to boil over. Such conflict undermines the nature of international relations.

c). Arbitration is one of the last stages in conflict resolution process; being preceded principally by negotiations and mediation. In the case of the Debt crisis there has been many negotiations under the Paris Club, The London Club and Consultative Group Meetings to mention a few around various Debt relief initiatives including the Brady Plan, Toronto and enhanced Toronto, Naples terms, HIPC and enhanced HIPC etc.all of which have failed to secure exit out of the Debt crisis. The United Nations has over the past twenty years now mediated in the Debt crisis by providing the place and framework for negotiations to find a solution to the debt crisis: these include UN-NADF, LDC I, II and III Conferences and others; the last one being the UN Financing for Development High Level Meeting in Monterrey, Mexico in 2002, where the issue of Debt and the need for solutions have featured. Mediation processes have obviously failed to yield results.

d). As already noted above and will be seen below, civil society and civil society organizations gave a deadline of December 31 2000 for the Call for 100% unconditional Debt cancellation to be fulfilled. Having been ignored by the rich creditor nations, it became inevitable that the anticipated strategy of Arbitration be implemented.

This Brochure is a renewed call for the establishment of an Arbitration Court on Debt under the United Nations. We raise the old arguments and supplement them with current thinking. We also place the discussion in the context of the overall political framework of legitimacy of Debt and the ultimate RIGHT of the people of the indebted countries to repudiate all the debt as well as take to task the International Financial Institutions, notably the International Monetary Fund and the World Bank to account for the suffering they have caused the people of the indebted countries through their policy advice and conditionalities.

Arbitration is therefore shown to be a means to debt cancellation, repudiation of illegitimate and odious debts as well as reparations. It is our strong belief that this process will provide an opportunity for a learning process and therefore for building a healthy future in the 21<sup>st</sup>. century for all nations and peoples of this global village.

### **The Consensus on Debt Crisis:**

While there will be Debt Relief, it is nowhere near to debt cancellation and addressing the issues underpinning the whole debt crisis as demanded by the global south<sup>4</sup>. The following excerpts from some of the Declarations around the debt crisis are a reminder of the fundamental issues surrounding the debt crisis that remain to be addressed. These relate to issues power, domination, usury, odious and illegitimate character of the current debt crisis. They are a reminder that the world needs a workable and feasible mechanism for resolving the crisis. A mechanism in which there will be a learning process to provide for non-repeat, break the underlying power imbalance defined by debt and therefore a sustainable solution. Our choice is the Arbitration Court as a means of the peoples of the debtor nations confronting the Creditors directly to resolve, within the context of the Debt crisis, some of the key issues that have been raised.

### **The following issues need to be addressed somewhat:**

- a). The current framework of debt repayment is unjustifiable instrument of control and power imbalance in favour of the rich creditor countries
- b). Amounts repaid in loans already far exceed amounts borrowed. Is this justifiable beyond the rationality of the development paradigm that justifies it?
- c). The International Financial Institutions (IMF and World Bank) are not accountable, transparent and democratic. Do they have the right to make decisions on the lives of people?
- d). Ordinary citizens should be involved in loan transactions; Parliaments should approve the loans and there should be transparent disclosure of information associated with debt burden. Disclosure should be policy and law.
- f). Impact of debt manifests itself in denial of education opportunities, health services and genuine public sector development. This must be redressed immediately
- h). Unpayable debt, which debt cannot be serviced, without placing a burden on impoverished people
- i). Debt that in real terms has already been paid
- j). Debt for improperly designed policies and projects

- k). Odious and illegitimate debts incurred by repressive regimes: clear cases of the Democratic Republic of the Congo (DRC) and the South African Apartheid Debt and Apartheid caused Debt in Southern Africa
- m). Conditions for Debt relief and cancellation are unacceptable
- n). Debt relief proposals by creditors offer too little, too late and to few countries
- o). Debt relief proposals (including refinancing) are designed to secure that Debtor countries repay their loans and borrow more;
- p). No mechanism exists where Debtor countries can appeal against Creditor decisions
- q). Current international financial system does not serve human beings; it should be transformed to be based on justice, equity and solidarity
- r). Conditionality to get loans to repay debt cause a deepening spiral of indebtedness
- s). Domination of the North over the South has exacerbated the levels of poverty, human suffering and debt bondage
- t). There must be 100% debt cancellation
- u). Debt should be repudiated in the absence of failure to secure 100% Debt cancellation
- v). Disengagement from international forces which continue to chain the people of the poor indebted countries.

### General Principles and Characteristics of Arbitration<sup>5</sup>:

**Arbitration** is a procedure for the settlement of **disputes**, under which the parties agree to be bound by the decision of an arbitrator, whose decision is in general final and legally binding on both parties.

**Arbitration** is a process where, by agreement, parties to a contract submit their **differences** or disputes to the consideration and decision of one or more independent persons. Arbitration has the force of law and generally an arbitrator's decision, called an award, can be enforced in the courts just as a judgment of the court.

**Arbitration** is a device whereby the settlement of **a question**, which is of interest for two or more persons, is entrusted to one or more other persons – the arbitrator or arbitrators – who derive their powers from a private agreement, not from authorities of a state, and who are to proceed and decide the case on the basis of such an agreement.

Other dispute resolution methods include **negotiation, Conciliation, Mediation and litigation.**

The dispute resolution continuum starts with negotiation, where a party has the most power and decision making authority with regard to the terms on which the dispute is resolved to litigation where a party has least power and control.

Arbitration is similar to mediation in the sense that it is consensual: both parties have to agree to participate in the process and they appoint a neutral arbiter. Arbitration is similar to litigation where one party sues the other only in the *adjudicatory*, that the third party makes a final decision.

**Fundamental features of arbitration include:** alternative to litigation, Party autonomy, Agreement to arbitrate, Privacy and confidentiality, Arbitral tribunal, Finality.

**What is a dispute?** It is a specific disagreement on rights or interests; a disagreement on a point of law or **fact**; a claim by one party opposed by the other; a disagreement on issues capable of resolution by negotiation, mediation and 3rd party adjudication (i.e. arbitration and litigation).

**An Arbitral Tribunal** consists of one or more persons appointed by the parties or an institution according to Arbitration Agreement

**The decision of the Arbitration is Final and Binding** on the parties. There is no right of appeal in most jurisdictions.

**Object of Arbitration is** a fair resolution of disputes by an impartial tribunal or persons without unnecessary delay. The parties are free to agree to the manner of resolution subject only to safeguards necessary public interest. Intervention by the legal Courts is restricted.

#### **Main stages in an arbitration process**

- Agreement to submit to arbitration by both the Creditors and Debtors
- Appointment of tribunal
- Hearings
- Binding Arbitral award

### **Application to the Debt crisis:**

As a starting point, **it is easy to agree that the real object of the arbitration process** will be to resolve the current debt crisis, the dispute and conflict between the creditor governments and institutions on the one hand and the debtor nations and their peoples on the other. The crisis is about the debt itself and the relationship defined and leveraged by the debt. It is also expected to untie the power imbalance create a semblance of sanity and responsibility for harmonious development.

Ultimately the object is to secure grounds for debt cancellation and repudiation.

### **Dispute and Conflict:**

The dispute on the debt crisis revolves around the difference of opinion between the Creditors and the debtors on their understanding of the following:

- The nature and structure of the debt crisis and its impact
- The illegitimacy of debts
- The existence of odious debts
- Wrong policy advice with negative consequences (including increasing debt stock)
- The existence of usury
- Debt as a tool of domination
- Development aid is used as a leverage to maintain the indebtedness
- All the issues included in consensus above
- Any other issues so far not noted anywhere but are a reality in various communities of the debtor nations
- How to resolve the debt crisis

The Debt crisis is **a conflict** issue in so far as the people of the Debtor nations see the Debt as illegitimate, it has become an instrument of primitive accumulation on the part of the Creditor nations, an instrument of domination and manipulation, and in many cases mention of debt slavery is made within the Jubilee movement. It is truly a conflict issue and ways of resolving it must be found in a structural way that does not re-enforce the current power imbalance. The optimal on the part of the Creditors is a Debt cancellation which gives them the power of leniency and so called forgiveness. This however, assumes total responsibility of the debt burden to be on the shoulders of the Debtor nations. This is strongly **disputed** by Debtor nations and peoples. The optimal on the part of the Debtors is to **repudiate** the whole debt on the basis of illegitimacy of the debts. This conflict is also a reflection of a disputed view of the world and legitimacy of the crisis.

There are clear **differences** of opinion between the Creditors and Debtors. This is exhibited by their non response of the Creditor governments and institutions to the 100% debt cancellation call deadline of December 2000. Among their many arguments are that there would be a moral hazard to outright debt cancellation and that fundamentally, the

debtor nations signed for the loans and that they are therefore obliged to repay, at whatever cost. Some of the arguments raised by Debtor nations at this level are that this is a development crisis not a commercial one and that in any case, there is a huge responsibility of the Creditors in this crisis, which responsibility the Creditors seem to want to abscond from all the time by using development aid as a leverage.

*Dispute, conflict and differences* are exemplified by the fact that since the beginning of the debt crisis in the late 1980s the Creditors have not responded to the needs of the Debtor nations. Their debt Relief initiatives, namely Brady Plan, Toronto Terms, Enhanced Toronto, Naples terms, HIPC, enhanced HIPC, extended HIPC<sup>6</sup> to mention a few have been designed by them without taking into account the interests of the Debtor nations. The primary concern of the Creditors has been to secure that their loans are repaid, irrespective of the development consequences. The more recent approaches of debt relief are designed to make the debt books of countries like Tanzania and Mozambique and others to follow to look clean so that these countries can borrow onto the international capital markets, guaranteed by the rich nations!<sup>7</sup> This does not solve the underlying debt crisis and its consequences. In essence the conflict remains.

As regards **Negotiations**, it can be said that the whole process of debt relief has been one of “negotiation”. This has happened in various forum including the Paris Club, the London Club and the on-going discussions between the International Financial institutions and the debtor countries. So far these have not resolved the problem. The HIPC process remains a contentious issue regarding conditionalities<sup>8</sup>. Thus it is easy to see why the next stages of conflict and dispute resolution, Arbitration, should be adopted.

**Conciliation and Mediation** around the debt crisis has largely taken place under the United Nations which has provided space and opportunity for the Creditors and the debtors to find sustainable solutions to the debt crisis. There has been a series of Conferences including the following: UN-NADAF, UN-PEAERD, all the UNCTAD series of Meetings, all the LDC series I, II, III<sup>9</sup>. At the United Nations LDC III Conference the Call by Debtors for debt cancellation was answered by Creditors offering more development aid money to enable the Debtors to repay their loan! The last major one in this process was the High Level Meeting on Financing for development which took place in Monterrey, Mexico in 2002 and had similar response of not canceling the debt but offering more money. These mediations by the United Nations have yielded little to address the issues raised by the Debtor nations

As a development issue, it is easy to agree that the debt crisis should not be subjected to **litigation**. This leaves the Arbitration process as the most appropriate and optimal; having exhausted all the processes.

The United Nations remains the legitimate instrument to secure good global governance that secures that disputes and conflicts between groups of nations be resolved.



## **Arbitration process**

### **Arbitral Tribunal or Court<sup>10</sup>:**

There has to be an Arbitral Tribunal or Court to hear the cases and make a decision. The Tribunal or Court will be made up of five Arbiters: two chosen by debtors, two chosen by Creditors and the fifth co-opted by the four members to provide for an odd number.

Civil society organisations have had the experiences of Peoples' Tribunals. One of them was that held in February 2002 in Porto Allegre, Brazil. Although that Tribunal passed its verdict in March the same year, its verdict was not binding.

The proposed Tribunal or Court would have a binding verdict to those that have signed the New York Convention on Arbitral Awards.

### **The parties to the Arbitration process:**

It is accepted that it is the governments that sign the loan and credit agreements on behalf of their peoples as debtors or creditors. The underlying assumption here (and the assumption has to be verified) is that the governments represent the interests of their peoples. Everybody knows too that it is not always true that governments, especially in least developed countries actually represent the interests of their people. And there could be many reasons for this, including the fact that the so called democracy is not mature for various reasons including the construct that is a result of historical and other conjuncture which defines the LDCs in a somewhat less powerful position than the developed countries.

In terms of the African Charter on Human and People's Rights, the Universal Charter on Human Rights and indeed the Arusha Charter on Popular Participation in Development and Transformation, the African Charter on Human and People's Rights, a people, any people have the right to be themselves and to secure their rights. Violation of Rights arise out of the inability of the State or government to promote and protect the basic human rights (economic, cultural, civic, political and civil rights) of the people. Thus fundamentally, the state, as a delegated authority will either represent the interests of the people or not. Where it is not able to do so for whatever reason, it is the obligation of the people to protect their interests at large. From a Human rights approach perspective therefore, the Parties involved in the Arbitration process can take three forms:

- a). On the part of the Debtor nations the State or any form of legitimate representation (which in essence the state is, in any case), and this means at the village, ward, district, provincial, national, sub-regional, regional and even global level can stand to represent the interests of the people as a party to the arbitration process.
- b). Civil society and people therein, being directly affected could represent themselves in the absence of a conventional state. The peoples and their leaders can make representation.

The ground has been laid by the fact that the current United Nations Charter of Human Rights was an adoption of the Charter of the “united nations”, people themselves, not the institution. So, while there might be disagreement about what the United Nations is all about, it is essential to note that the essence of the United Nations is the gathering of the peoples of this world.

c). The other parties to the Arbitration process will therefore be Creditor government representatives and representatives of the creditor institutions.

### **Final decision:**

We expect the verdict on a wide range of issues including Debt cancellation, right to repudiate if that is what will be sought. Reparations will be secured if that is what will be sought for whatever reasons that might include results of wrong policy advice.

It might be useful to mention at this point that in attempting to shield itself from being summoned to the Arbitration Court the IMF drew up the so called Sovereign Debt Restructuring Mechanism (SDRM). Very briefly this was no more than the IMF wanting to set up a Kangaroo Court in which they would be the Jury and Judge on debt issues; and yet they are one of the institutions that has played a role in the debt crisis for which they have to answer for their responsibility. The IMF must be brought to the Arbitration Court for them to learn to take responsibility for negative consequences of their policy advices and conditionality.

### **A Note on Repudiation and Debt cancellation:**

Repudiation is a situation in which the Debtor refuses to repay a loan for reasons justifiable to themselves. Debt cancellation is an action by the Creditor on a loan advanced to a Debtor for reasons that is justifiable to themselves.

In the Debt campaign, the argument has been around debt cancellation rather than repudiation. This is not surprising, because the debt cancellation campaign was based on the Jubilee philosophy which puts the Debtor in an inferior begging position and assumes the superiority of the lender; for the lender to have mercy and forgive the debtor. There was an assumption that there moral and religious fabric in the heart of international finance. Clearly, and as we know, this is not the case. The other reason for this is that the overall ideology of borrowing and lending somewhat puts the lender in a stronger position than the Debtor.

The campaign for Debt cancellation has therefore reinforced, unnecessarily the position of the Creditors.

We have to take this as a historical lesson and therefore, a fact. Now that we know that this reality has not achieved what was expected, a new strategy has, rightly, to be put in place, one where the Debtors assume their “power” and demand for themselves, their

own right; the right not to be dominated where they are clear of infringements: Repudiation must, of necessity, take the center stage now.

In general Repudiation is a complicated issue purely from a realistic view point. There are preconditions to repudiation and these include the existence of a Debtor cartel or simply having one common voice among the Debtor nations. We are all aware that the current international order has always divided the debtor nations through various means one of which is financial resources. This is a fact and reality that will have to be overcome. However, we also know that the ordinary peoples of the Debtor nations are united around these issues even if their government representatives, attempting to serve their (the peoples') interests may not necessarily agree with them. It is a structural problem that must be overcome: that of having governments represent the interests of their people in a true sense. These issues, which relate to the nature of a neo-colonial state could be discussed further.

But there also institutions and processes that could lend and support the enhancement of people's power. There is the Africa Caribbean Grouping, the African Union and others that could speak and negotiate on behalf of the people.

Thus indeed we should be directing our energies towards Repudiation and strengthening the position of the Debtor nations to be strong enough to reject repayment of loans when they are seen to be odious and illegitimate or will have failed to achieve the desired goals which raises the other issue of a bad loan.

The shift to repudiation is essential as a new strategy given that the campaign for Debt cancellation did not materialize. Furthermore, the campaign for debt cancellation was directed at Creditors. This time the campaign must be directed at Debtors; the debtor governments, their intergovernmental and regional institutions such as the African Union and the United Nations

Thus we take the step that Arbitration is essential for the repudiation of the loans that debtor nations do not see as being legitimate or to secure that the whole debt regime is illegitimate and therefore will repudiate all loan repayments: the same argument as total cancellation.

It is also an important caution that borrowing and lending are something normal in any society and between nations. Borrowing and lending will continue as a practical way of resource gap filling; be this in a socialist or capitalist economy. Thus the approach to sustainable solution to the Debt crisis is to secure that lenders and borrowers behave in a way that has a positive impact on the welfare of the people.

In this regard, debt cancellation without firm lessons is not sustainable. Already even post the HIPC completion points, countries in Africa are already borrowing to the extent that by 2017, their Debt service might be sustainable. What then should be learnt from the current crisis? The following are pointers:

- a). Secure that the assumptions on the basis of which loans are made are tested rigorously. Examples are over optimistic growth rate assumptions by the IMF which have misled nations into heavy borrowing<sup>11</sup>.
- b). Both Creditors and Debtors should respect the legal limits set on borrowing;
- c). Borrowing must be directed at wealth creation and ability to generate resources for loan repayment
- d). The activities financed by loans should have the positive impact of improvements in people's welfare and well being
- e). The Loan registers should be open and transparent to secure general accountability

### **CASES FOR ARBITRATION**

There are clearly many cases that could be presented to the Arbitration Tribunal or Court for hearing and remedy. The following are examples:

#### **On Odious debt:**

There are many cases of odious debt; debt assumed by one regime and which cannot be passed on to the other for objectionable reasons. In his article on Odious Debt Revisited Jeffe Rudin moves us forward by noting that we do not need to point to the historical examples such as how in 1898 the United States government repudiated Cuba's Spanish debt because research undertaken by Charles Abrahams elaborates on the South African apartheid debts which the current regime does not have to repay. It is estimated that apartheid's foreign debt is estimated at some US\$ 25 billion. Although it is not clear how much of this still has to be repaid, there is a genuine case for it to be repudiated on the grounds that apartheid policies violated most of the rights in the 1948 Universal Declaration of Human Rights and other covenants and that a people who suffered such policies cannot morally be expected to repay loans which helped oppress them.

As concluded by Rudin, if fairness and justice settled disputes, the international community would have cancelled apartheid's debt a long time ago. Indeed the reality of this world is that we need to have institutions and mechanisms that will enable us to take these cases and have the men of wisdom, fairness and justice settle these issues.

The onus is clearly on civil society organizations to secure that these institutions must exist and not assume that they will take up the matter. We must turn the anger that people feel into pragmatic action<sup>12</sup>.

There are no doubt many cases of odious debt that could be elaborated on and we can be sure that in an environment of fairness, justice men of honour would judge for repudiation of such debt. It would then be left to the people to decide further whether to

go ahead with repudiation or not. But securing a judgement that is binding is going to be essential. If we are sure about the fact that they are odious, then we should certainly not be afraid to challenge it.

And indeed the case of the debt to Mobuto's Zaire and why such debt should be repudiated by the people of the Democratic republic of the Congo (DRC).

### **Illegitimate Debt:**

There are many examples of illegitimate debt that can be brought forward into the Arbitration process. Broadly, illegitimate debt is one which satisfies one of the following conditions:

- against the law or constitution or not sanctioned by law
- is unfair, improper or objectionable
- infringes people's rights
- undermines sovereignty

Again here the list could go on. The most important aspect of illegitimacy is that a Court can determine that a contract is void or unenforceable or can be repudiated for public interest reasons. In reality, illegitimacy is a safe arena and we can work with it. One can immediately point to the various cases in the case of the democratic Republic of the Congo, and Malawi.

### **Some examples are as follows:**

a). There has not really been any recent calculation of total debt stock rise due to accumulated interest and re-capitalized interest and arrears as a result of debt rescheduling<sup>13</sup>. These figures could be obtained at the country level. Whatever the levels are, these figures account for what is generally referred as the debt having been repaid over and over and is generally considered illegitimate in the wake of existing levels of poverty. In this category is added the to the debt stock that has arisen from devaluations and privatization policies.

b). Projects which have involved Creditors in design and have exaggerated the expected rates of return just to get the loans moving can be considered illegitimate especially if, finally they are abandoned and do not benefit the people.

c). Then there specific projects which have simply failed but governments have to continue repaying loans. The Creditors were only interested in pushing the loan.

### **Policy Advice cases:**

There are numerous cases of wrong policy advice by the IMF, the World Bank and even the European Union. These can easily be concretized, more evidence collected and presented to an Arbitration process without difficulty. Here are some examples:

Surely these are cases that need to be taken to Arbitration Court. It will be up to the Arbiters to judge whether people's lives and well being is better than economic policy espoused by the World Bank. If the people win, then the bank will have something to learn and if the people lose, then the Senegalese will have something to learn too.

### **Creditor/Debtor Responsibility:**

This is just to note that the main purpose of Arbitration is to secure that both the Creditors and the Debtors will take more responsibility for the use of financial resources. Debtors have an equal responsibility for the Debt crisis. AFRODAD studies have shown that internal mechanisms have also contributed to the debt crisis. Apart from a lack of management capacity and sheer theft and corruption, there is evidence of misuse of financial resources obtained through loans.

The point to be made is that Debtor cannot run away from their share of responsibility as well. What the Arbitration process will do is to secure that responsibility is taken as well by creditors; debtors already taking their responsibility for repayment of debts which they do not consider to illegitimate or which they have misused. In a way, the Arbitration process will hopefully create a level playing field and instill responsibility for both parties. This would be a good end to the crisis.

## **Main stages in an arbitration process**

**In summary the main stages in an arbitration process would be as follows:**

- Filing of request for arbitration hearings with the UN Secretary General
- Agreement by Creditors to submit to arbitration
- Appointment of Tribunal or Court
- Hearings
- Arbitral awards

**The process could move along the following lines:**

In the case of Africa, The African Union, or another body would file a demand with the Secretary General of the United Nations a request for a series of Arbitration hearings for debt cancellation or **repudiation** of loan repayments on behalf of African HIPC countries. It is our strong belief that the Secretary General and the whole UN Secretariat is currently ready to receive a demand given the history of debate on debt issues in the United Nations. In earlier debates it had been suggested that there be a whole Conference on Debt. This so far has been avoided, mainly by the Creditor nations. During the Financing for Development process, the United Nations Secretariat was open to the suggestion as contained in the Secretary General's Report to the High Level Preparatory Meetings on Financing for Development in December, 2000.

The Secretary General will make the demand publicly known securing that all the Creditors are aware of the impending arbitration process and have them politically obliged to render themselves to the process. This would be difficult somewhat but civil society organisations would then have a campaign to shame Creditors who would show unwillingness to submit to the process.

Creditors and the African Union nominate two persons each as Arbiters. The Arbiters would then nominate another person to secure an odd number of five. The UN would have to provide a Secretariat to the Panel. This would constitute the Tribunal or Court. The people to be nominated would be people of integrity and with the courage to face the challenges that they would have to face given the nature and intensity of the conflict in the issues.

The independent panel would start work and hear evidence on the whole crisis, why particular loans should be repudiated or simply cancelled, cases of wrong policy advice, consequences of such policy advice and the reparations or other forms of remedy to be provided and any other issues related to conditionalities and their impact. NGOs, CBOs and other forms of organisations would be given status in order to represent the population interests.

The Arbiters will make decisions which are binding. In doing so, they will have to find the basis for their decisions and decision making processes. There are various options

which include a human rights approach to the debt crisis and the insolvency approach. Although politically we do not agree with the notions of insolvency it is feasible within the current international financial architecture to use the arguments.

In this regard, the African Union will represent the body politic of the African people and represent the African governments since this issue should be dealt with in a multilateral way rather than on a case by case basis even if particular cases will be drawn from the different countries. But the overall scenario would have to be done in a spirit of multilateralism. There are many reasons for this:

- a) the individual African countries would not be able to have the courage to face and challenge their Creditors;
- b) It is not a case for the governments by the African people using the African Union and the United Nations as a platform to secure their rights.
- c) The Creditor governments and institutions could easily blackmail the particular countries into not submitting to the Court.

Perhaps the most difficult aspect of all this is whether or not the Debtors and the Creditors agree to subject themselves to the arbitration process as is the requirement of this process. In some ways the system may have to be kick-started by the Social Forum.

### **Conclusions :**

A sustainable solution should to the crisis must constitute a system which secure that this crisis will not occur and the basic aspects of the lesson are as follows:

- borrowing must fulfill a specific function of creating tangible change towards wealth creation. If and when this does not happen, those responsible bear the consequences of failure;
- in general borrowing is supposed to benefit people directly; those that are supposed to benefit are expected to be aware of the existence of the loans

Therefore if it is not that the International Arbitration Court on Debt will be provide a platform for the debtors to challenge the creditors, it will be for the Creditors to prove that the loans had benefited people and therefore must be repaid. Either way, the Court will be necessary for creating a fair and transparent mechanism in which both the Creditors and the debtors will need to prove themselves on the claims for loans repayments.

In the next years to come, the world must learn from the past mistakes and not have them repeated. The Court will be a ground where good practices will be delivered and learnt from harsh reality on the need to be more sensitive to how public financial resources must be procured and used: they must be used for the development of people.



Equally, policy advice emanating from whichever quarters must be cautioned not to mislead development and lead peoples into an under-development. The World Bank and the IMF must pay for their wrong policy advice.

The world needs to make “Poverty a History!” as well as domination of one people by the other a history!

We could take courage from what other people have done: The Norwegian government declared shipping export campaign loan to Ecuador “shameful” and agreed to cancel it because it was illegitimate. So, it is possible to achieve debt cancellation even if the case of Ecuador and Norway indicates that a lot of work needs to be done just on one loan to reach that point. Nonetheless, it might be really worthwhile. For sure Norway has pledged not to do anything like that again. It is a learning process contributing to sustainable end of the debt crisis.

## Footnotes

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<sup>1</sup> A note on the UN is in order at this point. While many people are skeptical about the role of the UN, we take the view that this is the only form of global governance that could be strengthened to undertake and protect the interests of the poor and vulnerable in a global world. The task at hand is to reduce the hegemonic power of the G8 countries and others and make for a place where the UN represents the interests of all nations. Thus the moves towards including Africa in the Security Council is at least a step forward towards reducing power imbalance.

<sup>2</sup> AFRODAD: The Efficacy of Establishing an International Arbitration Court for Debt, 2002

<sup>3</sup> Katerina Sehm Patomaki: Debt Arbitration from a global democratic point of view, 2004

<sup>4</sup> People of the indebted countries and their sympathizers in the rich creditor nations.

<sup>5</sup> These issues were elaborated on by Geoffrey Simukoko from the Zambia Center for Dispute Resolution Limited during the AFRODAD Experts Meeting in Lusaka in September, 2005..

<sup>6</sup> see for example TORONTO, NAPLES, LYON, COLOGNE AND LONDON: G7 LEADERS AND THE DEBT TRIP TO NOWHERE Demba Moussa Dembele in Pambazuka

<sup>7</sup> This is particularly so for the UK proposed International Financial Facility and the US proposals on Debt relief which will use the multilateral institutions, particularly the World Bank (mainly IDA).

<sup>8</sup> Zambia’s failure to reach the HIPC Completion Point and the anger in Zambia around the conditionality of privatization of the Zambia national Commercial Bank is a case in point.

<sup>9</sup> See United Nations General Assembly Doc. A. Conf.191/118: Programme of Action for the Least developed countries

<sup>10</sup> Our preference is for a Court although a Tribunal would serve the same purpose. The concept of Court is stronger in securing a redress even if the ultimate result would be the same. If using Tribunal will be less threatening, AFRODAD could shift to focus on tribunal rather than Court.

<sup>11</sup> See Kenneth Kaunda’s account of IMF misinformed advice on anticipated lowering of oil prices and higher copper prices in Zambia as a basis for more borrowing during his reign in Sunday Post 3 April, 2005

<sup>12</sup> Jubilee South Journal p. 21

<sup>13</sup> Susan George estimates that the debt of developing countries today is 2,5 times as much as it was in 1985 and that the amount has been paid six times over. Katarimna Sehm Patomaki, 2004

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Please email with any comments, contributions and questions.



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