Legal principles to cancel illegitimate and odious debts

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Introduction:
This presentation will focus on some legal arguments based on public international law. Indeed we can not give all the legal arguments to cancel illegitimate and odious debts since the nature of law applicable depend on the loan contracts. However some arguments based on public international law must be respected by all subjects of law (States, IFI, private creditors). It's also important to emphasize that the agreements between Sates and IFI are governed by Treaty law (Geneva Convention). For questions of time, I will not debate on the odious debt doctrine and the differences between odious and illegitimate debts. But you can find the position paper of CADTM on illegitimate debt which on this link http://www.cadtm.org/IMG/article_PDF/article_3618.pdf for the long version and http://www.cadtm.org/IMG/article_PDF/article_3614.pdf for the short one.
Finally what is important to underline is the right of States to take unilaterally actions to declare the debt void. I will develop this fundamental point at the end.

I) The sources of international law laid down in the article 38 of the Statute of ICJ

A) The international Treaties

- **Vienna Convention on the Law of Treaties (1969)** contains several measures which could be called upon to prove that some debts, agreed between States, were in fact illegal. Thus Article 46 concerns the competence to conclude treaties, Article 49 concerns fraud, Article 51 the coercion of a representative of a State, and Article 52 the coercion of a State by the threat or use of force.

- **Versailles Treaty (1919)** bans the transfer on colonial debts to newly independent States. Article 255 of the Versailles Treaty releases Poland of paying *that portion of the debt which, in the opinion of the Reparation Commission, is attributable to the measures taken by the German and Prussian Governments for the German colonisation of Poland*. Similarly, after the Second World War the 1947 peace treaty between France and Italy states that it is *unthinkable that Ethiopia should bear the burden of debts contracted by Italy in order to ensure its domination on Ethiopian territory*. It should be kept in mind that the World Bank is directly involved in some colonial debts since in the 1950s and 1960s it generously loaned money to colonial countries for them to maximise the profits they derived from colonial exploitation. It must also be noted that the debts granted by the World Bank to the Belgian, French and English authorities within their colonial policies were later transferred to the newly independent states without their consent.

- **Charter of the United Nations**. According the definition of odious debts given by Mohammed Bedjaoui in the report on the succession of State debts to the 1983 Vienna Convention, "odious debt is understood as any debt incurred for uses that contradict contemporary international law, particularly the principles of international law incorporated in

[1] CADTM means Committee for the Abolition of the Third World Debt (www.cadtm.org).

the UN Charter[2]." Those principles of international law are such as those included in the Charter of the United Nations, the Universal Declaration of Human Rights, and the two complementing covenants on civil and political rights and economic, social and cultural rights of 1966, as well the peremptory norms of international law (*jus cogens*). It is thus necessary to analyse the democratic character of a debtor State beyond its appellation: any loan must be considered odious, if a regime, democratically elected or not, does not respect the fundamental principles of international law such as the fundamental human rights, the sovereignty of States, or the absence of the use of force. The creditors, in the case of notorious dictators, cannot plead their innocence and demand to be repaid. In this case, the use of the loans is not fundamental for the categorisation of the debt. In fact, financially supporting a criminal regime, even for hospitals and schools, is tantamount to helping the regime's consolidation and self-preservation. Firstly, some useful investments (roads, hospitals...) can later be used to odious ends, for example, to sustain war efforts. Secondly, the fungibility of funds makes it possible for a government that borrows to serve the population or the State - which, officially, is always the case - to generate other funds for less noble goals. Thus, all debts incurred by the apartheid regime in South Africa are odious, since this regime violated the UN Charter, which defines the legal framework of international relations. In a resolution adopted in 1964, the UN had asked its specialised agencies, including the World Bank, to cease financial support of South Africa. In contempt of international law, the World Bank ignored this resolution and continued to lend to the Apartheid regime.

- **Jus cogens** : article 53 of the Vienna Convention on the law of Treaty allows for the cancellation of acts which conflict with jus cogens and which also accounts for the following norms: prohibition of wars of aggression, prohibition of torture, prohibition to commit crimes against humanity and the right of peoples to self-determination. Contracts signed by a regime whose acts violate *jus cogens* are null and void. Thus, *jus cogens* implies that not only the initial debt but also the subsequent loans incurred to reimburse should be cancelled. A complete audit of the debt would make it possible to identify which debts have been contracted to repay debts which were originally illegal. In order to repudiate a debt on the basis of jus cogens norms, it would be sufficient for the present government to prove that, when the loan was granted, the creditors were aware that the state or the government of the time was violating *jus cogens*. It would not be necessary to prove that it was actually the intention of the creditors to violate this peremptory norm of international law. For instance, it is the case of Apartheid since it is the crime against humanity.

B) Customary rules

Such as the principle of non-interference in the internal affairs of States. Structural adjustment policies imposed by IMF and the WB clearly violate this rule.

C) General Principles of law

Equity, fraud, fundamental change in circumstances, bad faith, the competence of the signatory, etc.. It has to be said that it is imperative that all the donors (States, private banks, IMF, the World bank) respect GPLs. Is was clearly affirmed concerning commercial debts by the judge Taft in the Arbitration between Britain and Costa Rica, 1923 : *The case of the Royal Bank depends not on the mere form of the transaction but upon the good faith of the bank in*

[2] Mohammed Bedjaoui, "Ninth report on succession on States on matters other than treaties" A/CN.4/301et Add.l, p. 73.

the payment of money for the real use of the Costa Rican Government under the Tinoco regime. It must make out its case of actual furnishing of money to the government for its legitimate use. It has not done so.

D) Doctrine

such as the odious doctrine

E) Judgments

such as the award of the International Permanent arbitration Court the 11th Novembrer1912 between the Russian and Ottoman Empire . This judgment declares the force majeure which can be opposed to any creditors.

All those sources must be applied by the arbitrators and also by all national courts, in virtue of Doctrine Calvo. Indeed, national courts have the right to judge the legality and the constitutionality of debts, as the Argentine Federal Court did in the *Olmos v/s the Federal Government and Others case* in the year 2000, which declared illegal the debt contracted by the military dictatorship.

II) The right to States to declare the nullity of debts

A) No obligation for Sates to repay debts

As Robert Howse reminds us in the UNCTAD document "The concept of odious debt in public international law (September 2007)", the international law obligation to repay debt has never been accepted as absolute.
This principle "*Pacta sunt servanda*" is limited by all legal arguments cited below. In his document, Howse insist on the equity as limit to the principle Pacta sunt servanda.

B) Obligation for States to fulfil human rights

Although the *pacta sunt servanda* obligation for states to pay existing debts is not absolute, there is a hierarchy of norms which impose constraints on State actions. Thus human rights, as universally accepted in international conventions, rank above the rights guaranteed by a loan contract. Fundamental human rights have been defined in documents such as the Universal Declaration of Human Rights (UDHR). This Declaration, which formalises individual right such as medical care, education, housing, social services, work and leisure, also says in Article 28 that "*Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized*."
Therefore, States must immediately suspend the debt payments. This measure founded in international law is urgent today with the crisis.

C) Legality of the unilateral action of governments based on national and international law

Unilateral actions are founded in international law even they are not formally cited by the article 38. Indeed, unilateral action of States is based on sovereignty which is the essence of international law. Therefore, States are legally founded to suspend debt payments, launch debt audit and declare the nullity of all illegitimate and odious debts.

The legality of such actions was lately affirmed by Declaration of Jurist during the international meeting in Quito (8-9 July 2008)[3].

International law allows also unilateral actions as counter-measures against illegal actions which violates human rights obligations (like International Covenants of 1966 on social, economic and cultural rights). We must emphasize out again the violations of those rights by IFI, through their Washington Consensus which is still applied today.
Repudiation acts like reparation which is another key-principle of international law.

Advantages of unilateral actions: It create immediate effect opposable to others (4th report of the UN commission on international law) and contribute to create international rules such as customs or general principles of law. They don't have to be accepted by others to be binding. Its is stated by several international judgements like the judgement made by the International Court of Justice ("*des Intérêts allemands en Haute Silésie Polonaise*")[4].

D) Recent examples of unilateral actions by States

Paraguay : In a decree of August 2005, the government of Paraguay has repudiated an illegal debt of USD 85 million owed to the Overland Trust Bank, based in Geneva. This political action is significant for two main reasons. First, it shows that public authorities have the right to determine a debt's illicit nature once the debt has been audited. And secondly, the decree demonstrates that a government's repudiation of a debt is a unilateral sovereign decision which must be accepted by the government's creditors if the repudiation has a legal basis. Paraguay has now the intention to put the case in the ICJ.

Norway is a good example for States and social movements to follow. In October 2006, after a civil society campaign organised in particular by SLUG and by citizens' rights movements in Ecuador, Norway accepted its responsibility in the illegitimate debts of 5 countries – Ecuador, Egypt, Jamaica, Peru and Sierra Leone – and decided unilaterally to cancel part of the debt due by these countries – to the tune of 62 million euros.

Ecuador : Rafael Correa took a decree the 5th July 2007 which creates the Commission of audit on public debt (external and internal)[5]. This is an a unilateral act of a sovereign State.
Audit is an important tool for democracy. It must be transparent and open to public. Indeed, people have the right to be associated to the auditing process according to article 21 in the Universal Declaration of Human Rights and to articles 19 and 25 of the International Covenant on Civil and Political Rights of 1966. Thus, the Commission for the complete audit of domestic and external debt (CAIC) established by President Rafael Correa brings together delegates of State authorities as well as representatives of social and civic organisations in Ecuador and also delegates from North/South solidarity organisations who have demonstrated their expertise in issues concerning debt. Having carried out the debt audit, public authorities will be able to use both domestic and international law to repudiate all illegal and illegitimate debts.

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[3] http://www.cadtm.org/IMG/article_PDF/article_3622.pdf
[4] http://www.cadtm.org/IMG/article_PDF/article_3658.pdf
[5] ***Art. Of the decree.-*** *A comprehensive audit is defined as the actions undertaken to examine and evaluate the process of loan contraction and renegotiation of the public debt, the origin and final use of funds and the execution of programmes and projects which are financed through domestic and external debt. The objective is to determine its legitimacy, legality, transparency, quality, efficiency and effectiveness, considering legal and financial aspects, economic, social and gender impacts, regional and ecological impacts and impacts on the people*.

South Africa could and should have done this : this case which is constantly put forward in the Howse's report, shows that Mandela's post-apartheid government should have repudiated debts contracted by the criminal apartheid government instead of negotiating with creditors as it did under the pressure of external creditors. Indeed the UNCTAD report on the odious debt doctrine states that if South Africa had simply set up a ten year moratorium on the payment of debt accumulated by the apartheid regime, the government would have 'saved' USD 10 billion. Instead, it yielded to its creditors and paid the criminal debt of apartheid. As a counterpart it received a meagre USD 1.1 billion as foreign aid over the ten years that followed Mandela's election.

Conclusion :

Repudiating illegal debts is founded in international law and economically reasonable.

Arbitration and debt audits are compatible and enhance each other. For example, audit helps for a judicial action by giving evidences and the judicial action can lead to reparations. Audit and arbitration are also tools for responsible lending.

But what is urgent now is to suspend debt payments. As the repudiation of illegitimate and odious debts, a democratic government is totally within its rights in unilaterally and immediately suspending those payments.

In parallel, Southern States should make a common front against the debt payment. In North, social movement would support this position. In Belgium, CADTM is trying to push the government to apply the Senate resolution cancelling the debt of developing countries[6].

States could also introduce an action inside the Council of Human rights and request for a ruling by the International Court of Justice on the consistency between the international regulations governing developing countries' foreign debt and the general framework of legal principles and human and people's rights. For instance, in 2000, Italy's Parliament passed a law asking the Italian government to do this.

[6] http://www.cadtm.org/imprimer.php3?id_article=2562