finance & bien commun
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OBSERVATOIRE DE LA FINANCE
SUPPLEMENT N° 2

# Debt Beyond Contract

# La dette au delà du contrat

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SUPPLEMENT is a series that occasionally accompanies the quarterly review ***Finance & the Common Good/Bien Commun***. The purpose of the series is to provide in-depth insights into issues relevant to the contemporary debate on finance, ethics and the common good.

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***Finance & the Common Good/Bien Commun*** is a quarterly publication of
Observatoire de la Finance, 32 rue de l'Athenée, CH – 1206 Geneve, Switzerland.
Telephone + 41 (0) 22 346 30 35 – Fax + 41 (0) 22 789 14 60
Email office@obsfin.ch – website: http://www.obsfin.ch





ISSN 14 24 - 54 18

ISBN 2-9700232-1-0

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# Debt Beyond Contract

# La dette au delà du contrat

Observatoire de la Finance

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# Introduction

L'annulation de la dette du tiers monde est une cause qui mobilise actuellement un vaste public. Face aux pressions, les institutions financières internationales apportent des arguments qui défendent le respect des contrats et la rigueur qui en découle [1]. Dans le contexte de ce débat, la Commission tiers monde de l'Église catholique à Genève (COTMEC) s'est dit qu'il serait utile aux organisations militantes d'avoir à disposition un argumentaire objectif qui expliquerait les conditions sous lesquelles il est admissible pour un débiteur de refuser de rembourser sa dette comme prévu ou pour un créancier d'en faire remise. Ainsi pourvus, ces mouvements sauraient de quels arguments ils peuvent se prévaloir pour leur cause, ou inversement contre lesquels il leur faut élaborer une réponse convaincante.

La COTMEC se tourna donc vers l'Observatoire de la finance pour lui demander s'il serait disposée à organiser un colloque à ce propos. Il s'agirait d'y réunir des experts de différents métiers, qui présenteraient chacun leur avis professionnel. Le professeur Paul Dembinski, secrétaire exécutif de l'Observatoire, releva le défi avec enthousiasme. Il proposa que tous les participants soient invités à répondre à la même question, qu'il formula à l'inverse de celle que la COTMEC envisageait, soit «Sous quelles conditions est-il légitime d'exiger le remboursement d'une dette?»

Ainsi 14 participants se réunirent du 24 au 26 septembre 1999 près de Genève, au Château de Bossey, centre de formation et de conférences du Conseil œcuménique des Églises. Parmi eux figuraient des juristes, des économistes, des éthiciens, des hauts fonctionnaires de gouvernements ou d'institutions internationales, un expert-comptable et un arbitre spécialiste des arbitrages commerciaux internationaux. Ils sont divers non seulement par leur métier mais aussi par leur milieu professionnel. Certains sont enseignants universitaires, mais pas tous. Ils ont donc des styles différents. Il nous a paru que cela conférait à ce recueil une vivacité propre; par conséquent le rédacteur n'a pas cherché à gommer la variété des styles mais au contraire à la conserver.

Cet ouvrage est le fruit du colloque, mais il constitue davantage que ses simples actes. D'abord, les auteurs avaient l'occasion de rédiger leur contribution après coup; ils ont ainsi pu tenir compte des échanges auxquels ils avaient participé. Ensuite, toutes les contributions au colloque ne figurent pas dans ce recueil. Enfin, il contient un certain nombre de contributions d'auteurs qui n'ont pas pu y participer mais dont l'apport contribue sensiblement à l'objectif du projet.

Rappelons que cet ouvrage se veut impartial et intellectuellement rigoureux, mais qu'il est censé servir de source pour les organisations qui militent pour l'allègement du fardeau de la dette. La question ne se cantonne d'ailleurs pas à la dette du tiers monde; elle concerne la dette sous toutes ces formes.

1. Le glossaire de la Banque mondiale, *Terminologie des emprunts et des prêts*, ne contient même pas le mot 'forgive'.

Le recueil se divise en deux parties. La première regroupe les chapitres qui traitent directement de la question de départ, «sous quelles conditions est-il légitime d'exiger le remboursement d'une dette?». Édouard Dommen y présente dans une perspective éthique une taxinomie des dettes en fonction de leur incidence. James Gordley analyse la question du point de vue juridique. A.W Travis apporte celui d'un expert comptable fort d'une expérience pratique de la réalité dans toute sa complexité touffue. Hans Blommestein est haut fonctionnaire d'une organisation internationale qui regroupe plutôt les pays créanciers. À partir d'arguments explicitement éthiques il propose des méthodes pour répartir plus équitablement entre les créanciers et les débiteurs le fardeau de la dette, et notamment celui du risque. Dale Hildebrand explique et analyse la catégorie de la dette odieuse, que l'on tend trop souvent à cantonner au seul cas de l'Afrique du Sud mais dont la portée est bien plus large. Enfin, Bertrand Legendre décrit comment le passage des pays socialistes à l'économie de marché a charrié avec lui une répartition inadéquate – voire illégitime – des dettes héritées de structures juridiques conçues dans le cadre d'un système totalement différent.

La seconde partie – «au moyen de quels mécanismes est-il légitime d'exiger le remboursement d'une dette?» - propose un certain nombre de techniques et d'instruments susceptibles de contribuer au règlement des dettes internationales insupportables. Jean-Loup Dherse, président de l'Observatoire de la finance, présente une proposition qui, grâce à une modification des rapports de force, ouvrirait de meilleures possibilités aux pays spoliés par des dirigeants corrompus de récupérer leur avoir afin de rembourser leurs dettes. Kunibert Raffer est une personnalité incontournable dans ce domaine. Il défend depuis de nombreuses années l'extension des principes du chapitre 9 de la loi des États-Unis sur les faillites à la dette publique internationale (la loi s'applique aux collectivités publiques à l'intérieur des États-Unis). Ce recueil contient une nouvelle présentation de ses arguments. Alice de Jonge part du même point que Raffer, mais par souci de répondre plus vite aux urgences des pays endettés en ménageant les préoccupations des créanciers, elle y ajoute des propositions concernant des procédures de conciliation, voire d'arbitrage exécutoire selon le modèle de l'Organisation mondiale du commerce. Bertrand Legendre évoque une particularité du droit français selon laquelle un prêteur téméraire peut être appelé, au-delà de sa perte sur les concours financiers non remboursés, à verser des dommages et intérêts non seulement à des tiers créanciers mais à l'emprunteur lui-même; il invite à réfléchir sur l'opportunité d'étendre ce genre de mesure aux dettes internationales. Yilmaz Akyüz et Andrew Cornford insistent avant tout sur le caractère systémique du surendettement international. Ils en concluent d'une part à l'importance de réhabiliter des mesures de contrôle des mouvements de capitaux qui brideraient les excès du marché libre et d'autre part à l'utilité d'instituer un nouveau prêteur de dernier recours. Ils expliquent que le Fonds monétaire international ne correspond pas au profil souhaité pour une telle instance.

En 1998 l'Observatoire de la finance organisa un colloque entre chrétiens et juifs, à Jérusalem, sur le thème «Le jubilé et ses implications économiques et sociales», dont un ouvrage résulta (Bonvin 1999). Le présent ouvrage est le fruit d'un colloque qui réunissait des personnes de professions plutôt que de confessions différentes. Une série semble néanmoins s'ébaucher, car l'Observatoire de la finance envisage de réunir à présent des musulmans et des chrétiens autour du thème de la rémunération du capital.

## Références

Bonvin, Jean-Michel 1999, *Dette et Jubilé, Imprimer un rythme à l'économie; Debt and the Jubilee: Pacing the Economy*, Genève, Observatoire de la Finance

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**Under what conditions is it legitimate to demand the repayment of a money debt?**

***Sous quelles conditions est-il légitime d'exiger le remboursement d'une dette?***

Édouard Dommen

est professeur invité à la faculté des humanités et des sciences sociales à l'Université de Sunderland

# Sous quelles conditions est-il légitime d'exiger le remboursement d'une dette? Une perspective éthique

*Prêtez sans rien espérer en retour.*

- Luc 6.35

*The author explores the broad issue of the conditions under which it is legitimate to demand the repayment of a debt from an ethical point of view.*

*He points out that apart from demanding repayment as originally contracted, there are two possibilities: to cancel the debt or to reschedule it according to a fixed or flexible calendar. Next he opens the question whether the debtor's obligation is to repay the original lender or to pass the funds on to those whose need is greatest at the time of repayment. He provides a classification of types of debt and explains how the conditions under which it is legitimate to demand repayment depends on the type. Lastly, he examines the implications for the question when one or both of the parties to the debt are collective rather than individuals; in these circumstances the question of who benefited from the debt and on whom exactly the burden of the debt and its repayment or non-repayment should fall needs to be faced. The inheritance of debt by new generations or regimes is one aspect of this question.*

*In all events, the two ultimate objectives to be served in considering the problem of repayment are to ensure that the needs of the resourceless are given priority (the preferential option for the poor) and that the cohesion of society is preserved.*

LA DETTE financière, telle qu'elle nous concerne ici, est un engagement entre un créancier et un débiteur. Elle peut se définir comme un transfert non définitif de ressources fournies par le créancier au débiteur. Ce transfert est dit «non définitif» parce qu'il donnera lieu plus tard, selon les termes de l'engagement, à un transfert ou à une succession de transferts dans le sens inverse qui éteindront la dette [1]. Ces transferts se composent d'une part des intérêts et d'autre part de l'amortissement du capital. L'engagement fixe normalement le calendrier de ces paiements.

## 1. Que peut-on faire d'autre que d'exiger le remboursement dû?

Tout contrat peut se modifier, voire se rompre. À défaut de respecter l'engagement d'origine, on peut imaginer deux grandes catégories de choix par rapport à la dette.

1. Définition basée sur celle de l'*Encyclopédie Hachette multimédia* 99.

### *1.1 Annuler la dette*

Le plus simple, mais aussi le plus radical, est de l'annuler. Le débiteur est définitivement libéré de toute obligation. Il est ainsi soulagé une fois pour toutes de tout fardeau; ses créanciers le porteront à sa place, quelle que soit l'évolution future de ses circonstances.

Cette façon de faire s'exprime dans le droit des faillites de certains pays, notamment anglo-saxons. En cela elle fausse compagnie aux traditions éthiques chrétiennes. Selon la doctrine sociale de l'Église catholique, le besoin, même extrême, ne libère pas de l'obligation de rembourser sauf s'il n'y a aucun espoir raisonnable de sortir de cet état. L'état de besoin ne fait que remettre l'obligation à plus tard (Toner 1999). La tradition réformée va dans le même sens.

Reste cependant l'annulation des dettes dans le cadre du jubilé. Nous en traitons au 6.1 ci-dessous.

### *1.2 Remettre le remboursement à plus tard*

L'autre catégorie de possibilités est de remettre le remboursement à plus tard. Celle-ci se divise à son tour en deux sous-catégories.

#### *1.2.1 selon un calendrier fixé d'avance*

On peut d'une part rééchelonner la dette selon un nouveau calendrier déterminé d'avance. Ce calendrier peut être fixé d'office ou bien dépendre de nouvelles prévisions de l'évolution des circonstances du débiteur. Dans un cas comme dans l'autre rien ne garantit que le débiteur sera dans les faits mieux à même de supporter les nouvelles échéances, l'avenir n'étant jamais certain. Autrement dit, ce genre de rééchelonnement laisse entière la question de fond : est-il légitime à tel moment donné d'exiger le remboursement de la dette en question ?

Le rééchelonnement redistribue par définition le fardeau de la dette dans le temps. On peut l'assortir en outre d'une modification du fardeau total, soit en l'allégeant soit en l'alourdissant [2].

Grosso modo, l'allégement reconnaît que le débiteur est durablement incapable d'honorer l'entier des obligations qu'il avait acceptées. Prenant le parti du réalisme, un niveau de service de la dette qui risque mieux d'être respecté se fixe, de préférence d'entente entre le créancier et le débiteur. L'alourdissement est censé servir soit à ajuster la rémunération du créancier au risque qui s'avère plus élevé que prévu à l'origine, soit à diminuer l'aléa moral en pénalisant le débiteur rétif. Calvin avait fait un petit pas dans ce sens lorsqu'il dit *Si une mauvaise paye tergiverse et prolonge le terme avec le dommage de son créancier, serait-il convenable que sa malice et sa mauvaise foi lui profite pour avoir frustré?* (Calvin 1564, Exode 22.25). Le pas n'est que petit parce que Calvin ne traite ici que d'un retard de paiement malveillant et volontaire.

#### *1.2.2 lorsque les conditions l'autorisent*

> *Il y a pour chaque chose un temps et un jugement, mais il y a un grand malheur pour l'homme: il ne sait pas ce qui arrivera, qui lui indiquera quand cela arrivera?*
>
> -Qohéleth 8.6-7

D'autre part, on peut remettre le remboursement à des temps meilleurs. Aucun calendrier n'est fixé, mais le débiteur reconnaît une obligation de rembourser dès qu'il sera en mesure de le faire, si jamais cette condition se réalise.

D'autres auteurs dans ce volume relèvent que dans plusieurs systèmes juridiques la faillite prend essentiellement cette forme : le failli est tenu de

2. Pour une illustration des différentes variantes pratiquées par rapport aux dettes d'État au cours de l'histoire, voir Dommen 1989b, pp.75-82.

rembourser si par la suite il se trouve en mesure de le faire.

De même, jusqu'à récemment l'assistance publique à Genève prenait la forme d'un prêt. Dans ce genre de cas, la souplesse entière des perspectives de remboursement est reconnue dès la conclusion du prêt, tandis que dans le cas de la faillite il s'agit de reconnaître une situation nouvelle d'insolvabilité qui n'existait sans doute pas au moment où le prêt fut accordé, ou qui était en tout cas inconnue du créancier.

Quelques prêts interétatiques - rares mais marquants - ont contenu un article appelé bisque, selon lequel le débiteur avait le droit de reporter, voire de supprimer, unilatéralement des versements au titre du service de la dette dans le cadre d'un règlement convenu d'avance entre les parties. L'accord réglant la dette anglaise encourue envers les États Unis pendant la seconde guerre mondiale contenait une telle clause, ainsi que l'accord sur le rééchelonnement de la dette indonésienne de 1970 (Hardy 1982, p.74).

## 2. A qui faut-il rembourser?

### 2.1 *Au créancier d'origine?*

En droit et selon la logique capitaliste de la propriété privée, il va de soi que toute dette doit se rembourser au propriétaire de la créance.

### 2.2 *À celui qui est dans le besoin au moment du remboursement?*

On peut cependant envisager une réponse différente qui donnerait davantage de poids aux exigences de l'éthique, et pas uniquement chrétienne.

Calvin explique que la phrase "Prêtez sans rien espérer en retour" (Luc 6.35) *nous commande de prêter principalement à ceux desquels il n'y a point d'espoir de recouvrer,* [soit] *les pauvres vers lesquels l'argent est en danger* (Calvin 1545). *Ce que l'homme possède, il le tient en vue du service de la communauté. Il n'a rien qui ne lui soit octroyé aussi pour le bien d'autrui. La Bible ... ne connaît pas d'autre conception que la propriété à fin de service* (Biéler 1961, p.353). C'est ce que la doctrine sociale de l'Église catholique appelle la destination universelle des biens.

Le père de l'Église Basile (329-379) avait déjà souligné que *le pain que tu gardes appartient à l'affamé.* Calvin développe la même idée lorsqu'il dit *...ne [pensons] pas que ce soit un moyen de croître, si regardant à notre profit pour de longues années, nous dénions à nos frères le secours et assistance que nous leur devons* (Calvin 1561, 2 Corinthiens 8.15). Les besoins des démunis sont immédiats, ils ne peuvent attendre.

Cette idée, que l'on retrouve dans toutes les grandes traditions éthiques du monde, fut réitérée avec force dans les années 1980 par une commission officielle, internationale et partant pluriculturelle, qui n'avait aucun prétention religieuse, la Commission mondiale sur l'environnement et le développement [3]. Sa définition du développement durable constitue un jalon majeur de l'éthique du 20e siècle [4]. Son élément charnière est une référence aux *besoins essentiels des plus démunis du monde, à qui il convient d'accorder la priorité absolue* [5].

Celui qui dispose d'un capital qu'il peut prêter à quelqu'un d'autre dispose de toute évidence à ce moment-là d'un surplus au-delà de ses propres besoins immédiats. Il peut s'en séparer sans se pri-

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3. présidée par Mme. Gro Harlem Brundtland, alors premier ministre de la Norvège et actuellement directrice-générale de l'Organisation mondiale de la santé.

4 qui - espérons-le - servira tout autant de repère au 21e.

5 Commission mondiale sur l'environnement et le développement 1987 (1988), p.53 (Traduction revue pour la rendre plus fidèle à l'original anglais).

ver. Si le débiteur est en mesure de rembourser au moment convenu, il dispose de même d'un surplus à ce moment-là. Or il existe à tout moment des démunis dans le besoin immédiat [6]. C'est à eux que revient prioritairement le montant remboursé.

Dans de nombreuses situations, le prêteur est un intermédiaire qui met précisément des moyens à la disposition des démunis. L'Hospice Général de Genève, à qui incombe la distribution de l'assistance publique, tombait dans cette catégorie dans la mesure où les assistés d'hier remboursaient l'assistance reçue. Dans tous les cas de ce genre, l'argent remboursé au créancier de départ est remis en circulation vers les pauvres.

Le fonds de désendettement que la Confédération suisse institua lors du jubilé de son 700e anniversaire en 1991 respectait la même logique. La Suisse annulait la dette de pays pauvres envers elle-même, mais en contrepartie elle exigeait que l'État débiteur consacrât des ressources correspondantes aux besoins sociaux chez lui.

L'aide d'organisations non-gouvernementales aux démunis inscrit parfois ce genre de transmission dans le contrat dès le départ. Ainsi, en Croatie comme en Ouganda des familles qui reçoivent une vache s'engagent à en offrir le premier veau à une autre famille pauvre du voisinage [7].

Évidemment, tout ce qui précède insiste sur le principe que tout débiteur est tenu de respecter les obligations de la dette et de la rembourser dans toute la mesure du possible.

## 3. La réponse adéquate face à l'incapacité de rembourser dépend entre autres du type de dette

On peut distinguer plusieurs sortes de dette. La réponse à la question des conditions sous lesquelles il est légitime d'en exiger le remboursement à un moment donné dépend en partie du type de dette dont il s'agit. Cependant, avant d'analyser ces cas on peut rappeler certains principes généraux qui s'appliquent à tous.

La citation en Luc 6.35 offre un bon point de départ: *Prêtez sans rien espérer en retour.* La note de la traduction œcuménique de la Bible (TOB) à propos de ce passage découvre des perspectives complémentaires: «Quelques témoins anciens lisent *sans désespérer personne* ou *de personne*».

Prise au sens premier, la phrase est déjà d'une richesse extraordinaire. Elle indique un ordre de priorité entre les différentes catégories de débiteur: il faut d'abord mettre les moyens à disposition des *pauvres vers lesquels l'argent est en danger* (Calvin 1545).

Prêter sans désespérer de personne rappelle non seulement que toute personne est digne de soutien mais encore qu'il vaut la peine d'essayer de repêcher quiconque est en difficulté. Inversement, on peut y déceler le sous-entendu que toute personne aimerait être digne de confiance, qu'elle rembourserait si elle le pouvait.

Cependant, la malhonnêteté étant une réalité, pour ne désespérer de personne on a meilleur temps de pouvoir au besoin appeler la collectivité en renfort aux contrats privés: *l'Etat doit aussi veiller à ce que le trafic ait lieu honnêtement entre les membres de la société, afin que l'échange qui est l'une des conditions premières de la vie sociale ... puisse être poursuivi sans fraude ni vol; il doit donc garantir les contrats* (Bieler 1961 p.383).

6 "Il ne cessera pas d'y avoir des pauvres au milieu du pays" (Dt. 15.11)

7 Ouganda: reportage à la télévision BBC World le 10 février 2000; Croatie, article de Harri Russell ("In Knin") dans *the Friend*, Londres, 4 février 2000, p. 5

Enfin, prêter sans désespérer personne reconnaît l'existence de limites au-delà desquelles il ne faut plus insister pour faire rembourser une dette. L'obligation ne doit d'abord pas ôter tout espoir au débiteur. Ainsi la tradition judéo-chrétienne interdit de priver un débiteur ni de ses outils de travail ni de tout ce qui est indispensable à sa survie - tel sa couverture ou son manteau: *on ne prendra pas en gage le moulin ni la meule, car ce serait prendre en gage la vie elle-même... Si c'est un malheureux, tu ... devras lui rapporter son gage au coucher du soleil; il se couchera dans son manteau et te bénira* (Deutéronome 24.6, 12-13). On s'abstiendra tout autant et pour la même raison de porter atteinte à sa dignité: *si tu fais à ton prochain un prêt quelconque, tu n'entreras pas dans sa maison pour lui prendre un gage. C'est dehors que tu te tiendras, et l'homme à qui tu fais le prêt t'apportera le gage dehors* (Deutéronome 24.10-11).

Inversement, il peut exister des situations où le non-respect du contrat réduise le créancier au désespoir. Une obligation, voire un compte en banque, peut constituer un avoir indispensable à une personne modeste. Pour cette raison de nombreux pays rendent obligatoire la protection des comptes des petits épargnants en cas de faillite d'une institution de dépôts. Ce fut dans cet esprit que, lorsque le gouvernement soviétique répudia la dette de l'État peu après la révolution d'Octobre, il respecta les engagements envers les petits rentiers retraités qui en dépendaient (Dommen 1989b p. 77). Ailleurs et à d'autres moments l'inflation galopante en supprimant la dette libellée en monnaie a du même coup fait disparaître l'épargne de ceux qui n'avaient plus la capacité de se reconstituer un revenu (notamment encore les vieux), les réduisant ainsi à la misère.

Un débiteur en difficulté peut avoir des dettes envers plusieurs créanciers. S'il n'est pas en mesure d'honorer tous ses engagements, on peut les classer par ordre de priorité. Pour ce faire, on peut partir du principe qu'il faut d'abord payer ceux qui n'ont pas les moyens d'attendre, les démunis. Une longue tradition veut ainsi que parmi les créances d'une entreprise défaillante, celles envers les travailleurs aient la priorité. Elle est inscrite dans la tradition biblique: *Tu n'exploiteras pas un salarié malheureux et pauvre... Le jour même, tu lui donneras son salaire ... car c'est un malheureux, et il l'attend impatiemment* (Deutéronome 24.14-15).

Ce principe est d'ailleurs inscrit dans le droit suisse. Selon la loi fédérale sur la poursuite pour dettes et la faillite, les droits des travailleurs, des retraités et des assurés sous l'assurance-accidents, ainsi que les obligations d'entretien dans le cadre du droit de la famille, constituent la première classe des créances, prioritaires (Article 219H). L'inclusion des obligations d'entretien dans le cadre de la famille souligne qu'il s'agit bien de reconnaître la priorité à ceux qui dépendent du failli et à ceux qui n'ont pas les moyens d'attendre.

Qu'il soit légitime d'exiger le remboursement de la dette lorsque les créanciers sont démunis semble particulièrement évident - à moins que les débiteurs soient aussi misérables que les créanciers.

### *3.1 Dette de détresse*

La dette de détresse est le cas d'espèce dans la Bible. On est confronté à une personne ou à une famille en état de dénuement. Il s'agit de répondre dans l'urgence à son besoin. *Tu ouvriras ta main toute grande à ton frère, au malheureux et au pauvre* (Deutéronome 15.11). Le secours peut cependant tout à fait prendre la forme d'un prêt.

### *3.2 Dette productive*

Si un prêt se destine à une activité productive, cette activité est censée dégager elle-même les moyens d'honorer le service de la dette sans entraver la rémunération des autres facteurs de production.

Toute activité productive comporte des risques. Certains des risques sont internes à l'entreprise : la gestion peut être défaillante. Cependant, une grande partie des aléas dépassent l'entreprise; ils dépendent de l'environnement : des conditions du marché et des conditions macro-économiques tant chez soi qu'ailleurs dans le monde, des taux de change, de l'ordre civil, des intempéries... Même le taux d'intérêt qui s'applique au prêt peut changer pour des raisons indépendantes du débiteur.

Il semble déraisonnable d'insister que le débiteur supporte seul tous ces risques. On fixe en effet des limites à sa responsabilité. Les procédures concordataires ou de faillite en fixent dans le système économique capitaliste [8]. Dans une perspective analogue, il ne faut pas qu'un débiteur aux abois perde la possibilité de gagner sa vie à l'avenir.

On reconnaît généralement une relation entre le droit de regard du bailleur de fonds et son droit d'exiger le remboursement de sa mise lorsque l'entreprise se trouve en difficulté. Dans la mesure où le débiteur refuse le regard du bailleur afin de conserver sa liberté, il assume en contrepartie l'obligation de rembourser selon les modalités fixées, quels que soient les résultats de son activité. Inversement, plus le bailleur de fonds participe activement au déroulement de l'activité productive, plus on s'attend à ce qu'il assume sa part de responsabilité.

La Banque mondiale ne partage pas cette attitude. Elle s'ingère largement dans la conception du projet et jusque dans le choix des experts et des fournisseurs, mais elle insiste pour se faire scrupuleusement rembourser même si le projet exécuté selon ses propres exigences s'avère déficitaire. D'ailleurs, la Banque mondiale est passée maître des techniques pour séparer les responsabilités débitrices de l'activité productive financée. Même si elle participe au financement d'un projet qui a tout d'une entreprise distincte - un barrage hydroélectrique par exemple - au lieu de le traiter comme telle, elle s'arrange pour que le prêt soit garanti par le gouvernement sur ses ressources générales.

Elle n'est certes pas seule à se conduire de la sorte. La plupart des banques exigent dans de nombreux cas des garanties en dehors de l'activité financée. Les marchés financiers ont la capacité de séparer la prise de risque du loyer de l'argent, chacun ayant son prix et ses fournisseurs. Des institutions existent en effet qui se spécialisent dans l'offre de garantie contre rémunération. Ce qui est répréhensible dans la conduite de la Banque mondiale n'est pas de demander une garantie en dehors de l'activité financée, mais de la chercher auprès du gouvernement dont ce n'est pas le métier plutôt qu'auprès d'instances adéquates.

### *3.3 Dette de consommation*

Il est courant d'emprunter afin de se procurer des biens de consommation. Dans ce genre de cas, la capacité de rembourser n'a par définition aucune relation avec l'usage du prêt. Le calendrier fixé d'avance constitue dans ces circonstances le moyen le plus logique de déterminer les conditions du remboursement.

Il peut bien sûr arriver que pour des raisons quelconques le débiteur ne soit pas en mesure de respecter le calendrier. C'est à ce moment-là que se pose la question des conditions sous lesquelles il est légitime d'exiger le remboursement.

Si l'on se pose la question dans la perspective de la dette particulière, de la relation entre un débiteur précis et son créancier, on peut proposer la répon-

8 Cet esprit s'exprime dans l'alinéa E de l'extrait du rapport des ministres des finances du G-7 que cite Blommestein en annexe à sa contribution à ce volume.

se suivante : il n'est pas dans l'intérêt du créancier de nuire à la capacité du débiteur défaillant de rebondir. C'est ainsi que l'on met le plus de chances de son côté de retrouver sa mise à la longue. Il faut donc d'une part éviter de nuire à la capacité du débiteur de se procurer un revenu: il est par exemple contre-productif de le jeter en prison, comme cela se faisait dans le temps en Europe. Il est tout aussi important de ménager la dignité du débiteur, pour des raisons pratiques autant que morales. Une personne qui traîne une casserole trop voyante aura plus de peine à trouver, voire à conserver, du travail; en outre une personne dont la dignité et l'amour-propre sont atteints est moins apte au travail. En Suisse romande les poursuites fonctionnent dans cet esprit.

Cependant, si l'on place la dette particulière dans un contexte où l'endettement est répandu, une démarche contraire peut s'avérer efficace. On a recours à la peur, en faisant un exemple du débiteur défaillant. Même si le procédé ne réussit pas dans le cas particulier à faire surgir des ressources dont le débiteur ne dispose pas, il peut pousser d'autres emprunteurs éventuels à réfléchir à deux fois. C'est la technique que décrivait Voltaire (1752): «tuer de temps en temps un amiral pour encourager les autres».

C'est une méthode que pratique la mafia, mais d'autres aussi : il y a quelques mois un haut fonctionnaire de la Banque mondiale, s'adressant à un public de gouvernements en premier lieu africains, a dit que le moment était venu où les pays en développement débiteurs «feraient bien d'avoir peur» [9].

La moralité des punitions exemplaires est bien sûr discutable. Quoi qu'il en soit, ce genre de procédé met de nouveau en lumière la constatation que la dette n'est pas uniquement une affaire privée entre deux parties: l'intimidation est efficace pour autant que chaque dette fonctionne comme élément d'un ensemble de dettes semblables.

### *3.4 Dette financière*

On encourt une dette financière lorsque l'on emprunte ou prête dans le cadre d'une opération où n'interviennent que des objets financiers. Les emprunts qui servent à financer des opérations en bourse en constituent le cas d'espèce. Des prêts hypothécaires destinés à financer une spéculation immobilière ainsi que des prêts destinés à financer le négoce de marchandises à des fins spéculatives en constituent des cas plus limites.

#### *3.4.1 Dette de jeu*

Les dettes de jeu font partie des dettes financières. Elles font l'objet de nombreuses œuvres littéraires. On y constate que les joueurs - tant perdants que gagnants - insistent scrupuleusement sur le remboursement de ces dettes. A cela l'on peut évoquer plusieurs raisons. D'abord, en littérature en tout cas, les joueurs sont membres des classes fortunées et aristocratiques. L'honneur joue un rôle important dans ces milieux, et le respect des dettes de jeu fait partie intégrante de leur conception de l'honneur.

Dans un registre tout différent, les lieux et autres instruments de jeux appartiennent souvent à des milieux mafieux. Les méthodes musclées de recouvrement que nous avons évoquées au 3.3 sont tout aussi convaincantes lorsqu'on les applique aux dettes de jeu.

Un troisième argument milite en faveur du respect scrupuleux des dettes de jeu. Les jeux de hasard se fondent sur des probabilités que l'on peut calculer avec précision. Une partie importante des habitués des jeux les connaissent parfaitement et font leurs

9 *NGLS Roundup* No. 39, July 1999, p. 3

calculs en conséquence. L'aléa supplémentaire d'un risque de défaut rend ces calculs inopérants, faussant ainsi la rationalité de l'activité.

Ceci dit, les casinos font des arrangements avec les débiteurs défaillants. Cependant ces arrangements se paient sur la marge du casino lui-même. Les probabilités auxquelles se confrontent les joueurs n'en sont pas modifiées.

*3.4.2 La finance proprement dite*

Le secteur de la finance se compose d'une longue filière d'acteurs, pour ne pas dire un enchevêtrement. La pelote se compose d'intermédiaires qui sont débiteurs et créanciers à la fois. On peut cependant distinguer le bout du fil qui entre dans la pelote et l'autre bout qui en sort.

Au départ se trouvent des créanciers, au sens strict ou au sens large. Au sens strict, ce sont des épargnants qui ont placé leur épargne dans des obligations ou des bons de caisse ou instruments analogues et des clients qui détiennent un compte en banque. Au sens large, ce sont des épargnants qui confient leur épargne à des intermédiaires pour la faire fructifier.

Ceux qui achètent des parts de fonds de placement ou titres analogues savent en principe qu'ils prennent des risques: c'est écrit en toutes lettres dans la publicité correspondante. Certains épargnants ont moins de choix bien que leurs affaires soient confiées à des intermédiaires, et ce ne sont pas les moins nombreux: il s'agit des cotisants aux caisses de retraite. Ces personnes comptent sur la rente qui en découlera; dans la plupart des cas elle leur sera indispensable pour vivre une fois la retraite venue.

Entre les futurs retraités et ceux qui se risquent à fructifier leur épargne se situent les détenteurs d'assurances-vie. Par le passé ces personnes étaient des épargnants qui tenaient à s'assurer contre un aléa du cycle de la vie: elles étaient prudentes plutôt que spéculatrices. Cependant la gamme de produits à disposition sous la rubrique «assurance-vie» englobe maintenant tout un éventail dont certains sont plutôt spéculatifs que prudents.

En somme, pour répondre à la question «sous quelles conditions est-il légitime d'exiger le remboursement d'une dette ?», il est utile non seulement de distinguer entre les détenteurs de créances et les propriétaires d'autres formes de titre, mais surtout de distinguer entre ceux qui jouent sur les marchés financiers en connaissance de cause et ceux qui comptent sur leurs placements pour passer les moments de la vie où l'on sera bien obligé de remplacer ou de compléter le revenu du travail par un autre revenu. Dans la vie d'une personne ou d'un ménage bourgeois, l'alternance de périodes où l'on peut gagner un revenu suffisant ou plus que suffisant et d'autres où le revenu du travail ne suffit pas fait partie des rythmes de l'économie [10]. Une certaine décence voudrait que les obligations envers ces derniers soient plus scrupuleusement respectées que celles envers les créanciers qui ont fait le choix conscient de spéculer [11].

Or actuellement le jeu financier rapporte plus que le capital investi directement dans un appareil de production. Des jeux complexes de leviers financiers permettent aux grandes entreprises d'amplifier le rendement de leurs fonds propres bien au-delà de ce que peuvent atteindre des P.M.E. aux structures simples. Ainsi même l'épargnant prudent aurait bien de la peine aujourd'hui à échapper à l'engrenage du jeu. Comment distinguer l'épar-

10 Cf. Le titre de l'ouvrage précédent dans cette série, *Dette et Jubilé, Imprimer un rythme à l'économie* (Bonvin 1999)

11 Cette question a déjà été évoquée au début de la section 3 ci-dessus.

gnant âpre au gain de celui qui, faute de choix, s'est embarqué dans le même navire?

Au bout du fil qui sort de la pelote on trouve parfois des investissements dans des entreprises qui produisent des biens et des services palpables, utiles à la communauté, qui renforcent le tissu économique de la société et qui assurent notamment de l'emploi. Or les ennuis que les spéculations qui tournent mal provoquent chez les intermédiaires financiers peuvent tarir le flot de crédits vers ces entreprises, soit directement, soit par la voie macro-économique. Comme exemple du premier, l'ardoise [12] que les banques suisses ont essuyée à cause de leur participation active dans la spéculation immobilière des années 1980 a eu pour conséquence de restreindre le crédit mis à disposition des P.M.E. dans les années 1990. Quant à l'engrenage macro-économique, lorsque des créanciers étrangers, Fonds monétaire international en tête, exigent que la priorité soit accordée au remboursement des dettes étrangères lorsque des pays sont la proie de mouvements internationaux intempestifs de capital, le fonctionnement keynésien de l'économie assèche non seulement le crédit à disposition des entreprises locales mais plus largement la demande effective de l'économie nationale tout entière. La crise financière asiatique de 1997-98 constitue un cas d'espèce de ce mécanisme.

L'intérieur de la pelote grouille d'activité. On s'achète et on se vend des titres et des dérivés de titres, et surtout pour notre propos on se prête et on s'emprunte de sorte que le volume des transactions gonfle. On est en droit d'affirmer que leur volatilité augmente par la même occasion.

On traite parfois la pelote d'«économie de casino»[13]. Une différence fondamentale distingue cependant l'économie de casino de la spéculation boursière: dans le premier cas, les probabilités sont connues et certaines (cf. 3.4.1 ci-dessus). On joue le hasard du cas particulier dans un contexte sûr. Les jeux sont essentiellement à somme nulle : ce que gagnent les uns correspond précisément à ce que les autres perdent, déduction faite de "la part de la maison" que prélève le fournisseur des jeux. La spéculation boursière en revanche est sujette à des mouvements de foule. La valeur de l'ensemble des titres peut se déplacer dans le même sens, de sorte que tous les joueurs peuvent être gagnants ou perdants en même temps. On ne joue plus parmi des certitudes statistiques, on flotte sur des courants et des marées changeants. L'absence de probabilités provoque *l'hubris*: chacun se convainc qu'il peut faire mieux que la moyenne.

Dans un tel contexte fluide, il est d'autant plus facile de manipuler le marché. Un mot bien placé suffit pour dévier le courant dans le sens voulu. La réalité dont dépend les cours est celle des opinions et des ragots; elle est au mieux dérivée par rapport aux relations de production et de distribution de l'«économie réelle».

Il n'y a pas grand mal tant que le grouillement interne de la pelote reste l'affaire privée des grouillots, même si leur activité contribue peu au bien commun. Il faut cependant veiller à contenir leur activité pour éviter d'une part le report des dettes non remboursées sur l'un ou l'autre des bouts du fil et d'autre part d'aspirer dans la pelote ceux qui ne souhaitent pas y entrer sans avoir donné leur consentement éclairé. Les dettes générées dans la pelote ne doivent pas se reporter sur des tiers extérieurs (voir section 4 ci-dessous).

Dans cette perspective on peut évaluer certaines phrases qui ont cours dans ces milieux. Prenons

12 de quelques cinquante milliards de francs suisses (*Domaine Public* no. 1414, 14 janvier 2000, p. 2.).

13 L'auteur figure parmi les coupables: voir Dommen 1989a

par exemple «too big to fail» [14]. On prétend que certaines institutions financières sont si grandes que leur chute entraînerait celles d'autres qui sont saines par ailleurs. Si l'une de ces grandes institutions se trouve en difficulté, on sort de la pelote pour appeler les autorités publiques au secours. En cas de réponse positive, ce sont les contribuables qui sont mis à contribution [15] - ou pire encore ceux qui sont si démunis qu'ils ne paient même pas d'impôts, ceux que les mesures d'ajustement structurel renvoient vers l'exclusion. En outre, que les autorités se tiennent ainsi en réserve constitue un aléa moral certain, incitant les spéculateurs à risquer leur mise d'autant plus volontiers qu'ils peuvent compter sur des tiers pour les défrayer [16].

Le «risque systémique» ressort du même genre de manipulation. Le système en question est la pelote tout entière plutôt que l'une ou l'autre des institutions qui la composent; le risque est qu'elle se dégonfle. Ce risque est le propre de ses acteurs. Pour eux il peut être effrayant sans doute, mais il n'y a pas de raison que cela concerne le reste de la société. Or, en ne précisant pas de quel système il s'agit, les financiers essaient de faire accroire qu'il s'agit de l'ensemble de l'économie. Et le comble est que si l'on se laisse convaincre cela devient vrai!

Pour terminer, il faut rendre explicite la proposition implicite dans l'analyse de toute cette section 3.4: le jeu et la finance sont des systèmes innocents pour autant qu'ils restent cloisonnés par rapport à l'économie ambiante [17]. Il est tout à fait normal que ces mondes clos s'attribuent des règles de bonnes manières, pour ne pas dire de bonne conduite. Il faut cependant éviter que les dettes encourues à l'intérieur de ces systèmes en débordent pour retomber sur ceux qui n'avaient pas choisi d'y jouer. Bref, les dettes de cette catégorie ne doivent pas être exigibles, sauf dans le cadre d'ententes privées. D'ailleurs jusqu'à tout récemment le droit suisse allait dans ce sens. Selon l'article 513 du code des obligations,

> 1 Le jeu et le pari ne donnent aucun droit de créance
>
> 2 Il en est de même des avances ou prêts faits sciemment en vue d'un jeu ou d'un pari, ainsi que des marchés différentiels et autres marchés à terme sur des marchandises ou valeurs de bourse quand ils offrent les caractères du jeu ou du pari.

Depuis le 1er avril 2000 cependant, la loi a été modifiée pour aller dans le sens directement contraire : les jeux de hasard donnent un droit de créance s'ils se sont déroulés dans une maison de jeux autorisée. «Les dettes de jeu ont perdu leur parfum sulfureux», dit la Tribune de Genève à ce propos [18]; disons plutôt que leur odeur ne se remarque plus, tellement elle est répandue avec la banalisation de la spéculation financière.

### *3.5 Dette politique*

On souhaite mettre des fonds à disposition. Pour faire sérieux, pour ménager l'amour-propre de celui qui les reçoit ou pour cacher au public la nature réelle des relations entre les deux partenaires, on appelle 'dette' cette mise à disposition. Travis cite dans sa contribution à cet ouvrage un exemple de ce genre de dette. Les prêts généreusement consentis actuellement à la Russie par le Fonds monétaire international ou d'autres instances officielles tombent sans doute dans cette catégorie. On découvre

14 "[Institution] trop grande pour faire faillite" - Eurodic <http://eurodic.ip.lu>

15 cf. le chapitre de Hans Blommestein.

16 cf Cassaigne 1999, pp. 122-123 ("L'empire du risque")

17 Sans nier que la spéculation financière peut être d'utilité sociale, on peut discuter de la portée de cette utilité. On aurait cependant de la peine à attribuer une quelconque utilité sociale aux jeux de hasard.

18 2-3 décembre 2000, p.24

dans les milieux politiques à l'intérieur de différents pays des versements analogues auxquels on prête la forme de dette. Les médias ont largement répercuté des cas en France et en Grande-Bretagne, pour ne citer que deux pays.

Le caractère qui distingue la dette politique par rapport au propos de cet ouvrage est que l'on ne s'attend pas, ni d'une part ni de l'autre, à ce que le montant transféré soit remboursé. La contrepartie est d'une autre nature : si les événements suivent normalement leur cours il s'agit du paiement de services à rendre. Si cependant le débiteur ne fournit pas les services que l'on attend de lui, le créancier peut alors exiger le remboursement de la dette en guise de rétorsion.

### *3.6 Dette d'allégeance*

La dette peut servir de lien entre protecteur et protégé, créer ou marquer des relations de clientélisme[19]. La dette monétaire dans ce contexte n'est qu'une forme de la relation qui se décrit par des phrases du genre «je suis endetté à untel», ou «je suis son obligé».

Il se peut que ce soit le patron qui prête à ses clients, mais le contraire peut avoir le même effet. À propos précisément de la dette, Calvin tance ceux qui s'efforcent *d'acquérir faveur envers les riches, afin d'en mieux valoir* en leur consentant des prêts (Calvin 1564, Exode 22.25).

Ce genre de relation dérape dans bien des cas vers la servitude pour dette. Des propriétaires terriens dans certaines sociétés traditionnelles, ou bien des mafieux ou certains employeurs de travailleurs immigrés dans les sociétés modernes, s'appuient sur le fardeau d'une dette impayable pour assujettir le débiteur. Dans certains contextes traditionnels, l'esclavage pour dette peut se perpétuer de génération en génération.

Le remboursement n'est pas indispensable; au contraire dans de nombreux cas il n'est pas souhaité car il romprait la relation. Dans les cas où les deux parties sont contentes de la relation clientéliste, que l'une ou l'autre exige le remboursement peut se ressentir comme un affront, une volonté de mettre fin à une relation sociale dont la dette n'est qu'un symbole. Dans le cas de la servitude mal vécue, c'est le débiteur qui peut vouloir exiger de rembourser afin de se libérer. Or c'est justement dans ce genre de situation qu'une opinion répandue dans de nombreuses cultures prétend que la libération est prioritaire, et que l'annulation de la dette doit l'accompagner. Le jubilé judéo-chrétien en offre un exemple.

### *3.7 Où classer la dette d'État?*

La dette d'État peut prendre plus ou moins toutes les formes décrites ci-dessus : il peut s'agir de dette de détresse, de consommation, de dette productive ou encore financière, voire de dette politique. L'idéal serait de pouvoir distinguer les composantes de la dette qui correspondent à chaque catégorie pour les traiter en conséquence. Cependant soit le débiteur soit le créancier peuvent avoir intérêt au contraire à les confondre.

Des États du tiers monde plaident que leur dette est une dette de détresse dont l'intention était d'alléger les privations de leur population démunie, quand bien même elle a servi plutôt à financer la consommation de ses élites, si ce n'est l'accumulation stérile d'une fortune privée dépassant les bornes de toute consommation imaginable. Ce genre de confusion sert d'argument contre l'annulation de la dette de pays pauvres et justifie la proposition de Dherse dans ce volume.

19 La seconde catégorie de dettes politiques décrite dans la section précédente s'insère d'ailleurs dans le cadre des dettes d'allégeance.

Nous avons vu que certains créanciers, comme la Banque mondiale, prétendent qu'ils prêtent à des fins productives, mais au lieu de prêter à une entreprise précise ils prêtent à l'État.

En Europe au 17e ou au 18e siècle entre autres, les emprunts d'État étaient souvent destinés à couvrir des dépenses militaires. Le phénomène n'a pas disparu. Si les activités militaires ainsi soutenues servent à s'assurer la mainmise sur des ressources économiques ou tout simplement à s'approprier les richesses de pays conquis, la dette ressemble fort à une dette productive - pas nécessairement dans le sens d'une augmentation du produit économique total, mais dans celui de l'augmentation du revenu ou de la fortune de l'État emprunteur en cas de succès de son entreprise. Dans d'autres cas, les emprunts à fins militaires s'apparentent d'avantage à des emprunts de consommation. Enfin, dans de nombreux cas les prêts militaires ont le caractère d'une dette politique.

## 4. Les parties à la dette : qui profite, qui rembourse ?

C'est à celui qui a joui du crédit qu'il incombe de le rembourser. Cette proposition éthique semble difficilement contestable. On peut normalement identifier le bénéficiaire s'il s'agit d'une personne.

De même, toute société commerciale est censée conserver une identité stable; elle dispose cependant de nombreux moyens pour brouiller les pistes et frustrer ainsi les prétentions des créanciers. Les procédés de ce genre ne remettent pas en cause la légitimité de l'exigence de rembourser, ils ne font qu'entraver son application pratique. Au contraire, on perçoit de telles méthodes comme douteuses.

### *4.1 Collectivité politique*

Une collectivité politique n'est pas une société commerciale, notamment pour notre propos parce que les membres de la collectivité politique ne sont pas des volontaires au même titre que les associés d'une entreprise : la collectivité politique comporte un caractère plus inéluctable et contraignant. Si l'État conclut un contrat de dette, engageant ainsi la collectivité, la légitimité du contrat peut poser la question de la légitimité du régime. *A contrario*, et à titre d'exemple, on pourrait émettre l'hypothèse que si:

- l'emprunt découle d'un processus démocratique et que la collectivité est par conséquent partie prenante,
- la répartition des charges au sein de la collectivité découle de même d'un processus démocratique

il est légitime d'exiger que la collectivité le rembourse, pour autant que l'économie soit en mesure d'en supporter la charge.

L'économiste Jeffrey Sachs situe ce genre d'argument dans un contexte politique lorsqu'il écrit:

*Lorsque des pays pauvres et lourdement endettés se battent pour tourner le dos à la dictature et se frayer un chemin vers la démocratie, l'attitude des pays riches peut être décisive. Si les pays riches insistent sur le remboursement de la dette et les mesures d'austérité, ils sont susceptibles de détruire la stabilité sociale nécessaire à l'enracinement d'une nouvelle démocratie* (in *Le Temps*, 3 mars 2000).

### *4.2 La succession*

#### *4.2.1 publique*

Dans quelle mesure une collectivité qui récuse le régime précédent est-elle en droit de récuser les dettes de son prédécesseur ?

La décision de répudier une dette ressentie comme illégitime incombe normalement à un régime qui vient après celui qui l'a encourue. La succession des États est un vaste domaine qui fait l'objet d'une littérature étendue. Nous n'allons pas y pénétrer sauf pour observer que des situations sont recon-

nues où un régime est en droit de refuser tout ou partie de la succession que lui laisse son prédécesseur. Il semble en particulier injustifiable d'exiger qu'un peuple qui vient de se libérer de l'oppression rembourse une dette contractée afin de financer précisément l'oppression qu'il subissait [20]. D'ailleurs le gouvernement sud-africain donne l'exemple à cet égard; il a annulé les dettes de la Namibie et du Mozambique envers lui, puisque le régime de l'apartheid les avaient accordées alors que sa politique visait à déstabiliser ces pays.

*4.2.2 individuelle*

Le droit suisse prévoit la répudiation d'une succession, mais il faut la répudier tout entière (le positif comme le négatif) (Code civil suisse, article 566). L'esprit de la loi est jubilaire : elle permet aux héritiers de se libérer d'un héritage négatif, de refuser d'hériter de dettes qui ne soient pas accompagnées des moyens de les régler, et ainsi de rompre la transmission de dettes de génération en génération.

## 5. L'opportunité du remboursement

Déterminer si le débiteur est en mesure de rembourser relève souvent de l'appréciation. La réponse dépend non seulement de l'estimation de ses avoirs et de ses revenus actuels, mais encore de leurs perspectives pour l'avenir. Celles-ci peuvent dépendre à leur tour du montant de la dette et du calendrier fixé pour son remboursement. Il faut estimer à quel moment et avec combien d'insistance réclamer le remboursement. En outre, la réponse ne concerne pas seulement cette dette, ce débiteur et ce créancier; elle a des incidences plus étendues.

### *5.1 Interférence entre les dettes*

L'aléa moral entre dans l'appréciation : la mansuétude à cette occasion va-t-elle susciter des attentes non seulement chez le même débiteur à d'autres occasions, mais en outre chez d'autres débiteurs ? L'inverse est non moins important. La décision du débiteur influencera l'attitude du créancier, l'incitant par exemple à plus ou moins de réticence non seulement envers le débiteur en question mais encore envers d'autres débiteurs qui pourraient le solliciter par la suite.

Lorsqu'on évalue l'opportunité de rembourser, on peut utilement tenir compte de l'usage des fonds que feraient respectivement le créancier et le débiteur. Si le créancier compte retirer à l'économie locale le montant rendu, la privant ainsi de moyens de fonctionner, la communauté en question souhaitera peut-être que la somme reste chez le débiteur et donc chez elle. Si en revanche le créancier a besoin de ces fonds pour les réinjecter dans l'économie de façon productive, le poids des arguments en faveur du remboursement est d'autant plus convaincant.

*On est dans une situation où quelqu'un qui a sa bonne foi, sa capacité de travail et son envie d'en mettre un coup est empêché d'être à son compte. Parce que des millions ont été prêtés à la légère voici quelques années, des secteurs d'activité entiers se retrouvent pénalisés* (Le municipal des finances de la commune de Corseaux VD [21]).

Cette citation résume les arguments qui précèdent : elle sous-entend non seulement que la défaillance des uns retombe sur ceux qui veulent emprunter par la suite, mais encore que l'échec des crédits financiers que les banques avaient consentis à la spéculation immobilière a privé ces mêmes banques de ressources qu'elles auraient pu prêter par la suite de façon productive à d'autres secteurs de l'économie.

20 Voir le chapitre de Hildebrand.

21 cité dans *le Courrier* du 10 septembre 1999

### *5.2 Les rapports de force*

Voici encore une relation dont les défis éthiques dépassent de loin la seule question de la dette. Les rapports de force sont omniprésents; il serait absurde d'imaginer que l'on pourrait les supprimer. Le problème est de les reconnaître, de les encadrer, d'en faire bon usage et de ne pas en abuser.

Au moment de rembourser une dette, les rapports de force influencent l'évaluation de la capacité du débiteur – dans un sens ou dans l'autre selon la boutade «Si vous devez mille francs à la banque vous avez un problème; si vous lui devez un million, c'est la banque qui a un problème.»

*Personne ne doit être réduit à se ruiner pour rembourser les créditeurs riches, surtout quand les contrats sont effectivement conclus sous contrainte.* (Appel des jésuites aux pays du G7 à annuler la dette impayable du tiers monde, signé par le Supérieur général et 66 provinciaux, 1999 [22]). Cette citation marque la charnière entre le rôle des rapports de force lors du remboursement et son rôle lors de la constitution d'une dette. Car l'on peut se servir de sa position de force pour imposer une dette à plus faible que soi. La dette odieuse se situe dans ce cadre.

### *5.3 La transaction et la relation*

Certains réduisent le besoin de rembourser à une estimation d'opportunité : on prétend que celui qui honore mal ses engagements risque de ne plus se voir confier de nouveaux prêts. Ce genre de configuration existe certes mais il est loin de constituer la règle générale. On prête si les perspectives d'avenir sont bonnes; les défauts antérieurs de remboursement n'engendrent le plus souvent qu'une pause de la part des créanciers éventuels. Ce n'est pas seulement pour des raisons d'opportunité qu'il faut peser l'importance de conserver le réseau de relations durables d'une part et la souffrance ou l'injustice que pourrait causer une transaction particulière d'autre part. *Une société fondée sur la transaction mine les valeurs sociales et défait les contraintes morales*, car chaque transaction s'insère dans le cadre d'une relation (Soros 1998, pp. 73-75).

Il faut maintenir la société, et partant l'économie, en bon état de fonctionnement, et pour cela le respect des engagements est indispensable. *Il est requis pour nourrir les hommes en amitié et paix que chacun possède le sien, qu'il se fasse ventes et achats, que les héritiers succèdent à ceux qu'ils doivent... En somme la police requiert, que chacun jouisse de ce qui lui appartient* (Calvin 1564, Exode 16.13-18). *Si les hommes tâchent de s'enrichir par mauvais moyen et illicite ... il n'y aura plus de communication entre les hommes, s'il n'y a quelque fidélité en cela* (Calvin, *Sermon 114 sur le Deutéronome*, 19.14-15).

## 6. Le contexte

La dette n'est pas toujours une affaire privée entre le créancier et le débiteur; l'est-elle jamais? Elle a une dimension sociale qui les dépasse, mais qui engage toute la société. Des situations existent qui peuvent mettre en question la légitimité du remboursement d'une dette même si le débiteur est en mesure de la rembourser et souhaite le faire. Adam Smith, le grand-père des sciences économiques contemporaines, imaginait une main invisible grâce à laquelle chacun, en poursuivant son propre intérêt, avance celui de la société sans qu'il le veuille, sans qu'il le sache (Smith 1759). Or cette main n'est pas toujours à l'œuvre : parfois les actions individuelles additionnées, même les plus louables, mènent au contraire à l'injustice. On peut imaginer non pas une main mais un pied invisible qui écrase et piétine les victimes d'une organisation sociale, laquelle dépasse les actions isolées des uns et des autres. La société peut se trouver face à des

22 viz. www.jesuit.ie/jdrad

conflits structurels, à des structures de péché [23]. Nous évoquerons deux analyses du fonctionnement de l'économie qui vont dans ce sens.

### *6.1 le jubilé*

Le modèle du jubilé biblique décrit une économie dont le fonctionnement se fonde sur des spirales qui tournent de telle façon qu'*à tout homme qui a, il sera donné et il sera dans la surabondance, mais à celui qui n'a pas, même ce qu'il a lui sera retiré* (Matthieu 25.29). «Un marché libéré de toute obligation sociale ne peut assurer par lui-même une répartition de la richesse 'socialement supportable', mais ... il aboutit à la concentration de la fortune dans les mains de quelques uns» (Kissling 1997, p. 31). Rembourser une dette dans ces conditions n'est plus seulement une transaction isolée, mais une impulsion communiquée à l'engrenage social de l'appauvrissement et de l'exclusion [24].

Afin de contrer ce genre de mouvement, la Bible préconise la remise périodique de toutes les dettes. *Au bout de sept ans, tu feras la remise des dettes. Et voici ce qu'est cette remise: tout homme qui a fait un prêt à son prochain, sa main remettra ses droits* [25] (Deutéronome 15.1-2). Dans une telle dynamique, la remise se justifie même si les débiteurs individuellement sont en mesure de rembourser et disposés à le faire.

### *6.2 Keynes*

Le modèle keynésien du fonctionnement de l'économie présente d'autres conditions susceptibles de justifier le refus du remboursement même si le débiteur et le créancier le souhaitent. Selon ce modèle, l'économie peut trouver l'équilibre entre l'offre et la demande à n'importe quel niveau, y compris un niveau qui laisse une partie de la population sans emploi. Inversement elle peut tendre vers un équilibre inatteignable à un point où la demande dépasse les capacités productives: il débouche alors sur l'inflation (Keynes 1936). Dans le premier cas, il faut augmenter la propension de la société à consommer, la «demande effective» de l'ensemble de la communauté. Il faut dans ces conditions augmenter les ressources à disposition de ceux qui les dépenseront. Ainsi, avant de décider s'il est dans l'intérêt de la communauté d'exiger le remboursement d'une dette, il est utile de déterminer lequel du débiteur ou du créancier a la plus forte propension à consommer. Dans le second cas il faut au contraire refréner la demande effective. La même question se pose à l'inverse, mais dans les deux cas la société peut se trouver dans des conditions où elle gagnerait à empêcher l'exécution de contrats même librement consentis et exécutables.

## 7. Conclusion

Les recommandations éparpillées à travers l'analyse qui précède se fondent sur deux principes moraux, la priorité au pauvres et le maintien de la communauté.

### *7.1 La priorité aux pauvres*

La priorité aux pauvres se trouve au cœur de plus ou moins toutes les grandes traditions éthiques du monde. Entre autres, c'est une constante des deux testaments de la Bible. On peut notamment citer Matthieu 25.31-46 à cet égard: «chaque fois que vous l'avez fait à l'un de ces plus petits, qui sont mes frères, c'est à moi que vous l'avez fait» (Mt. 25.40). La Commission mondiale sur l'environnement et le développement [26] exprime ce principe d'une façon

23 Gutierrez 1982, III.II.A.2

24 Dommen 1999a décrit ce mécanisme de manière circonstanciée.

25 Ce n'est de toute évidence pas la main invisible d'Adam Smith!

26 Ou Commission Brundtland, selon le nom de sa présidente.

particulièrement percutante lorsqu'elle parle ... *des besoins essentiels des plus démunis du monde, à qui il convient d'accorder la priorité absolue* (p.53).

D'abord, elle parle non pas simplement de pauvres, mais de démunis. L'idée est plus précise en ce que le démuni a été privé de quelque chose [27]: décrire quelqu'un comme démuni, c'est dresser non pas un constat, mais une accusation. Nous entendons grincer les engrenages que nous avons évoqués dans la section 6.

Ensuite, elle insiste sur la priorité. Le mot a deux sens, et les deux s'appliquent dans le cas présent. D'une part, il signifie la primauté, l'importance. Mais le Petit Robert traite ce sens de figuratif et rare. Il le définit surtout comme la «qualité de ce qui vient, passe en premier dans le temps». Pour la Commission Brundtland il s'agit surtout de s'occuper des besoins des pauvres avant toute autre chose. Plus on est démuni, plus on est astreint à satisfaire ses besoins immédiats. La capacité d'attendre est un privilège de nantis.

Amédée Grab, évêque catholique de Coire, résume ainsi cet argument: *Le véritable critère moral, c'est le bien commun. Qui, comme chacun le sait, est le bien de tout le monde, à commencer par le plus faible* (in L'Hebdo, 29 juin 2000, p.19).

La priorité aux pauvres ne veut cependant pas dire qu'il faille en toutes circonstances prendre aux nantis pour donner aux démunis. Une des trouvailles de Rawls fut de démontrer que l'inégalité se justifie pour autant que le plus démuni s'en trouve mieux (Rawls 1971). Cela souligne encore une fois que la condition des démunis dépend des structures sociales qui l'entourent, ce qui nous ramène au second principe moral qui sous-tend ce chapitre.

### *7.2 Préserver la cohésion sociale*

Lorsqu'il distingue entre la transaction et la relation, Soros souligne le rôle essentiel des valeurs sociales dans le maintien de la relation durable : «Les valeurs sociales expriment le souci de l'autre. Elles impliquent que l'individu appartient à une communauté ... dont les intérêts prennent le pas sur ses intérêts propres. Mais une économie de transactions est tout sauf une communauté. Chacun doit veiller à ses propres intérêts et les considérations morales peuvent se transformer en entraves dans un monde où les loups se mangent entre eux» (Soros 1998 p.75).

En cohérence avec ce que nous venons de dire au sujet de la priorité due aux pauvres, le genre de société qu'il s'agit de maintenir n'est pas une communauté fermée qui exclut les membres non-conformes. Il s'agit au contraire d'une société non seulement ouverte, mais qui s'efforce de repêcher les marginalisés et les exclus, une société qui part à la rescousse des démunis.

Il ne s'agit pas de défendre tel système économique ou politique particulier. Rien ne restreint la diversité des formes à part l'exigence d'ouverture et de compassion. Il s'agit encore moins de défendre tel système partiel, sous-système ou intérêt corporatif - le système financier par exemple.

### *7.3 En tout cas il ne s'agit pas simplement d'appliquer des formules toutes faites*

*La juste mesure n'est pas ... dans une règle ou une norme dictée de l'extérieur ou venant d'une morale générale, mais elle est donnée par la relation d'amour ..., établie entre les hommes* (Bièler *La pensée économique et sociale de Calvin* p.452). Ce sera le mot de la fin.

27 "Démunir: priver d'une chose essentielle" (Petit Robert)

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# When would private law excuse payment of a money debt?

*L'auteur examine les conditions de légitimité du refus de rembourser une dette dans le cadre défini par le droit privé. Deux cas sont évoqués : la nécessité et les circonstances changeantes. Dans le premier cas, une personne dans une situation de besoin extrême se voit accorder le droit d'utiliser la propriété d'un autre. Toutefois, à l'échelon des nations surendettées, cette doctrine qui préconiserait l'expropriation sans compensation de biens étrangers ne pourrait pas être appliquée. Le deuxième cas autorise un débiteur à ne pas rembourser son dû, en cas de changement imprévisible des circonstances affectant l'équilibre posé par le contrat initial. En droit privé, la faillite et la responsabilité limitée fournissent ici un cadre de protection approprié, lequel n'existe toutefois pas pour les nations endettées. Il conviendrait donc d'introduire, à ce niveau aussi, de tels dispositifs pour les occurrences où les circonstances changeraient de manière imprévisible.*

## 1. Introduction

As a matter of private law, are there any circumstances in which it is legitimate to refuse to repay a money debt? If so, these circumstances must surely arise very rarely. But they may, and then perhaps the principles of private law can shed light on when debtor nations should not be bound to repay a loan.

I will be concerned only with private law: the law that normally governs relations among private citizens. I will not be concerned with international law which governs the relations among States or States and foreign citizens. Nor will I be concerned with the private law of any one State. The principles I will discuss are those accepted by most legal systems, whether civil law or common law. I will assume that the promise to pay the debt was valid initially and binding on the debtor. Promises given through fraud, duress or mistake are not binding. Some legal systems will not enforce promises that were extremely unfair at the time they were made. For example, American courts hold such promises to be "unconscionable" and German courts give relief under the doctrines of *Wucher* and *Treu und Glauben*. I will assume that the promise is not invalid for any of these reasons. Finally, I will assume that the debtor either made the promise himself or that he stands in the shoes of the person

who did, so that it is as legitimate to demand that he pay as to make that demand of the original promisor.

On these assumptions, when could it ever be legitimate, under widely accepted doctrines of private law, to refuse to pay a money debt? Certainly, not under any normal circumstances. Nevertheless, there are two doctrines of private law that operate like wild cards in a poker game: when you play them, the normal rules cease to apply. These are the doctrines of necessity and changed and unforeseen circumstances. We will consider whether either of these doctrines, as they are generally understood, could excuse the debtor.

## 2. Necessity

As it happens, both of these doctrines were creations of the medieval canon lawyers. Both passed into civil law and were popular with the jurists of the natural law schools which flourished from the 16th through the 18th centuries. They both fell from favor in the 19th century but became widely accepted again in the 20th.

The canon lawyers had been concerned about the extent of people's moral obligations. One of their authoritative texts was an excerpt from a sermon of St. Ambrose on the duties that the rich owed to the poor. It had been included by the jurist Gratian in a collection of texts - the *Decretum* or *Concordance of Discordant Canons* (c. 1140) - which became one of the canonists' primary authorities. In this text, Saint Ambrose told rich people who failed help the poor: "Let no one call his own what is common."[1] The *Ordinary Gloss* to this text, ascribed to the canon lawyer Johannes Teutonicus, suggested that this maxim applied literally in a state of necessity [2]. It cited a Roman legal text that said all the passengers on a ship had a right to share the provisions if food ran short during a voyage [3].

In the following century, Thomas Aquinas explained this doctrine by drawing on Aristotle. In the *Politics*, Aristotle criticized the theory of his teacher Plato that all property should be held in common. If it were, Aristotle argued, there will be perpetual quarrels, and those who labor much and get little will complain of those who labor little and get much [4]. Thomas Aquinas argued that by natural law, all external things were to be used to meet the needs of everyone. Private property, however, is not contrary to natural law. It is a human institution modifying natural law to eliminate the disadvantages that would arise if all things were held in common: for example, people would quarrel, and some would not work [5]. The primary end of property is, nevertheless, to meet human needs. Aquinas concluded that, therefore, a person in urgent need who has no other recourse may lawfully take another's property. A man who is starving can take the bread he needs to survive [6].

In the 16th century, a group of jurists known to historians as the late scholastics self-consciously tried to synthesize Roman law and canon law with the principles of their intellectual heroes, Thomas Aquinas and Aristotle. They explained the doctrine of necessity in the same way. In the 17th century,

1 Gratian, Decretum D. 47 c. 8.

2 Gloss to Gratian, Decretum D. 47 c. 8 to *commune*. Similarly, Gloss to ibid. D. 1 c. 7, to *communis omnium*; Gloss to Decretales (*Liber Extra*) 5.18.3 to *poenitaet*.

3 Dig. 14.2.2.2.

4 Politics II.v.

5 Thomas Aquinas, Summa theologiae II-II, q. 66, a. 2 (Biblioteca de autores cristianos, 3rd ed., 1963)(Leonine text).

6 Ibid. II-II, q. 66, a. 7.

their conclusions were borrowed by Grotius and Pufendorf, the founders of the northern natural law school. While these authors developed these ideas in different ways, they all said that by nature or originally, all things belong to everyone. They all described private ownership as instituted to overcome the disadvantages of common ownership, usually the ones mentioned by Aristotle and Thomas [7]. They all concluded that the rights of a private owner are therefore qualified, and must yield in certain cases to the needs of another. The standard example is necessity [8].

This doctrine puzzled 19th century jurists, particularly in Germany. Aristotelian philosophy had fallen from favor. The 19th century jurists were trying to explain as much of private law as possible in terms of the concept of will. For example, contract was defined in terms of the will of the parties[9]. Property meant that how a thing was to be used was determined by the will of its owner [10]. To say that someone else had the legal right to use another's property seemed like a logical contradiction.

In the 20th century, the doctrine is back. A version of it was included in the German Civil Code which came into force in 1900. Article 904 of the German Civil Code allows use of a thing against the will of the owner when "necessary to avoid a present danger and the damage threatened by it is unreasonably large compared to the damage arising to the owner" although "the owner may demand compensation." Absent the doctrine, the drafting committee noted, the law would contradict common sense. It would be "against the law for a drowning man to pull himself onto another's boat to rescue himself" or for a person "to tear down another's fence during a conflagration to permit the entry of fire-fighting equipment." [11] Later, when the Italians revised their civil code, they included a provision modelled on the German one [12]. Early in the 20th century, a similar doctrine was recognized in the United States. It was held that a person has the right to dock at another's pier to save a boat in a storm although he must pay for damage to the pier [13]. More recently, French jurists have concluded that such a doctrine would be followed in

7 Domenicus Soto, *De iustitia et iure libri decem* (1553) lib. 4, q. 3, a. 1; Lodovicus Molina, *De iustitia et iure tractatus* (1614) disp. 20; Leonardus Lessius, *De iustitia et iure, ceterisque virtutibus cardinalis libri quatuor* (1628) lib. 2, cap. 5, dubs. 1-2; Hugo Grotius, *De iure belli ac pacis libri tres* (de Kanter-van Hetting Tromp ed., 1939) II.ii.2; Samuel Pufendorf, *De iure naturae et gentium libri octo* (1688) II.vi.5; IV.iv.4-7.

8 Soto, *De iustitia et iure* lib. 5, q. 3, a. 4; Molina, De *iustitia et iure* disp. 20; Lessius, *De iustitia et iure* lib. 2, cap. 12, dub. 12; Grotius, *De iure belli ac pacis* II.ii.6-7; Pufendorf, *De iure naturae ac gentium* II.vi.5.

9 E.g., Christopher C. Langdell, *A Summary of the Law of Contracts* (2nd ed., 1880), 1-21; Stephen Leake, *Elements of the Law of Contracts* (1867), 7-8; Frederick Pollock, *Principles of Contract* (1885), 1-9; Charles Demolombe, *Cours de Code Napoleon* 24 (3rd ed., 1882), § 12 ; Léon Larombière, *Théorie et pratique des obligations* 1 (1857), § 41; François Laurent, *Principes de droit civil français* 15 (3rd ed., 1875), §§ 424-27; Georg Friedrich Puchta, *Pandekten* (1844), §§ 49, 54; Friedrich Carl von Savigny, *System des heutigen römischen Rechts* 3 (1840), § 134; Bernhard Windscheid, *Lehrbuch des Pandektenrechts* 1 (1891), § 69. *See generally* James Gordley, *Philosophical Origins of Modern Contract Doctrine*, (1991), 161-213.

10 E.g., Christopher Columbus Langdell, "Classification of Rights and Wrongs," pt. 1, *Harvard Law Review* 13 (1900), 537 at 537-38; Frederick Pollock, *A First Book of Jurisprudence for Students of the Common Law* (1896), 160; Charles Aubry & Charles Rau, *Cours de droit civil français d'après la méthode de Zachariae*, 4th ed., 2 (4th ed., 1869), § 190; Laurent, *Principes* 6, § 101; Demolombe, *Cours* 9, § 543; Windscheid, *Lehrbuch* 3, § 167.

11 *Protokolle der Kommission für die zweite Lesung des Bürgerlichen Gesetzbuchs* 6 (1899), § 419, p. 214.

12 *See* Codice civile § 2045.

13 Ploof v. Putnam, 71 A. 188 (Vt. 1908); Vincent v. Lake Erie Transportation Co., 124 N.W. 221 (Minn. 1910).

France even though it is not mentioned in the French Civil Code of 1804 [14].

By adopting this doctrine, modern legal systems have recognized that, in cases of extreme need, the ordinary rules of private law no longer apply. The person in need has the right to use another's property. Might one be able to draw an analogy to the situation of a debtor nation? Would not the same principle entitle it to refuse to repay a debt if its need were sufficiently great: for example, if the consequence would be mass starvation among its citizens? Perhaps so, if the need were great enough. Nevertheless, using the doctrine of necessity, even by analogy, does not seem to me to be helpful in understanding what the current obligations of debtor nations should be. It is too extreme a doctrine. It allows one who is in extreme need, not merely to escape his creditors, but to escape the law of private property. A man who otherwise will starve can not only refuse to repay a loan but take bread from anyone who will not himself starve as a consequence. Apply the doctrine by analogy, and a debtor nation would have the same right to expropriate foreign property without compensation as to repudiate its debts. Even people who are quite sympathetic with the plight of debtor nations would not go that far.

## 3. Changed and unforeseen circumstances

Let us turn, then, to the second doctrinal wild card of modern private law: the doctrine of changed and unforeseen circumstances. This doctrine also was first formulated by the Canon lawyers. Gratian's *Decretum* contained a passage in which St. Augustine, following Cicero, said that one need not keep a promise to return a sword to a person who has become insane [15]. A gloss to the *Decretum* explained that "this condition is always understood: if matters remain in the same state." [16] The great medieval lawyer Baldus degli Ubaldi then read the doctrine into civil law. All promises were subject to such a condition [17].

Again, Thomas Aquinas found an Aristotelian explanation for this doctrine. Aristotle had explained "equity" by saying that since laws are made for a purpose, circumstances could always arise in which the lawmaker himself would not want his law to be applied. Aquinas explained that promises are like laws that one gives to oneself: therefore, like laws, they should not be binding under circumstances in which the promisor would not have wished to be bound had he anticipated them [18]. Once again, some of the late scholastics adopted this explanation, and the northern natural lawyers followed them [19], although one cannot be sure of how much of the original Aristotelian explanation they understood.

This doctrine also went into an eclipse in the 19th century with the rise of will theories of contract. If the parties were bound by what they had consciously willed, then there seemed no way to read implicit reservations or conditions into their con-

14 Boris Starck, Henri Roland & Laurent Boyer, *Obligations 1. Responsabilite delictuelle* (4th ed., 1991), nos. 00-01; François Terre, Philippe Simler & Yves Lequette, *Droit civil Les obligations* (5th ed., 1993), no. 704.

15 Gratian, *Decretum* C. 22, q. 2, c. 14.

16 Gloss to Gratian, *Decretum* to C. 22, q. 2, c. 14 to *furens*.

17 Baldus de Ubaldis, *Commentaria Corpus iuris civilis* (1577), to Dig. 12.4.8.

18 *Summa theologiae* II-II, q. 88, a. 10; q. 89, a. 9.

19 E.g., Lessius, *De iustitia et iure* lib. 2, cap. 17, dub. 5.

20 E.g., Grotius, *De iure belli ac pacis* II.xvi.25.2; Pufendorf, *De iure naturae ac gentium* III.vi.6.

tracts. The few jurists who defended such an idea were exceptions: for example, in France, Larombière thought relief should be given if circumstances affected the "determining reason" a party contracted [21]; in Germany, Windscheid thought it should be given if the absence of a change in circumstances was a tacit thought "undeveloped" condition of a contract [22].

In the 20th century, however, many major legal systems have accepted some form of the doctrine. The German courts have held that if conditions have changed sufficiently, to require the other contracting party to perform may be a violation of good faith (*Treu und Glauben*) [23]. In England, the seminal case was *Krell v. Henry*. The court relieved a party from a contract to rent a flat at a suitably enhanced price to view the coronation procession of King Edward VII when the procession was cancelled because the king became sick [24]. Today, most modern legal systems recognize such a doctrine with the notable exception of France. A version of it appears in art. 6.2.2 of the Unidroit Principles of International Commercial Contracts and art. 2.117 of the Principles of European Contract Law of the Commission on European Contract Law. According to the Unidroit Principles, relief is given "where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of the party's performance has increased or because the value of the performance the party receives has decreased" provided that "the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract." That is a good general statement of the doctrine as most modern legal systems conceive it.

Nevertheless, it is not clear how this doctrine would apply to the obligation to pay a money debt. The performance certainly has not become valueless to the creditor. Moreover, because it is a generic obligation - an obligation to give so much money or so much of something else rather than to give particular coins or a particular thing - the performance cannot have become physically more onerous for the debtor. It could have become more onerous only because the party to perform finds himself in straightened circumstances or because the market value of what he is obligated to give has changed.

In the United States, it is not at all clear that such a party can obtain relief from a promise. American courts will give relief when a performance has become so onerous as to be impracticable, but so far they have done so only when the performance is physically more difficult. For example, in the seminal case of *Mineral Park Land v. Howard*, the California Supreme Court excused a party from an obligation to excavate gravel when it had been discovered after the contract was made that the gravel was under water and would cost much more than anticipated to excavate [25]. The question of whether relief could be given when the performance was not physically more difficult was raised by the Westinghouse litigation [26]. Westinghouse had contracted to sell uranium at a fixed price to customers for whom it had built nuclear generat-

21 Larombière, *Obligations* I, 282-83 ("raison determinante").

22 Windscheid, *Lehrbuch* I, § 97 ("unentwickelte Bedingung").

23 *See generally* Konrad Zweigert & Hein Kötz, *Einführung in die Rechtsvergleichung* (3rd ed., 1996), § 37 II.

24 [1903] 2 K.B. 740.

25 156 P. 458 (Cal. 1916).

26 *See generally* Paul L. Joskow, "Commercial Impossibility, the Uranium Market and the Westinghouse Case," 6 *Journal of Legal Studies* 119 (1977).

ing plants. These contracts became ruinously expensive when the price of uranium skyrocketed during the Arab oil crisis. Unfortunately, we do not know what an American appellate court would have done since the case was settled before appeal.

In Germany, it is clear that relief would be given in a case of this type if the circumstances were truly unanticipated and the consequences were onerous enough. Indeed, some of the first cases in which German courts gave relief were those in which sellers of generic goods found it difficult to perform because of a large and unexpected jump in prices [27]. During the German hyperinflation, German courts applied the doctrine to promises to pay a money debt. They gave relief to creditors who would otherwise be repaid an amount that represented a fraction of the value of what they had loaned [28].

It does seem to me that the German approach is correct and that the American courts should follow it. Admittedly, fluctuations in market prices or the value of money are usually to be expected. Contracts for advance delivery of goods are made, and interest rates are set, to allocate the risk of such a change. Nevertheless, such a change may be so unforeseeable and so extreme that it was not one of the risks that the parties were trying to allocate. If so, there is no more reason for allowing their contract to allocate this risk than the risk that gravel will be under water or that a flat may be useless for seeing a procession.

Even if parties in the situation of Westinghouse or the creditors in the German hyperinflation could obtain relief, however, it is still not clear that a debtor could do so who finds it hard to perform, not because the value of money has changed, but because he is now in straightened circumstances. Suppose a private person borrowed money to start a business and then sought to be excused because his business failed or proved less profitable because of circumstances he did not anticipate and could not control. So far as I know, no court has ever given such a person relief under the doctrine of changed circumstances. Yet his situation seems like that of many debtor nations who borrowed to help their economies grow and now find their economies in trouble.

### *Allocating risks and burdens*

Nevertheless, if we reflect upon the considerations that underlie the doctrine, we can see that applying it in such a situation is not as far-fetched as one might think. The language of a contract allocates risks and burdens among the parties. Presumably, the parties allocate each risk or burden to whomever can bear it most easily and make sure that the contract compensates him for bearing it. If the parties did not expressly allocate a risk or burden, then the law must do so for them, placing the risk or burden where they would have put it had they considered the matter: on the party that can bear it most easily [29]. If the parties did not anticipate a risk or burden, then the language of their contract was not chosen to allocate it, even though, read literally, the contract might place it on one party or the other. If so, a court should not read the contract literally if the result will be to place a risk or burden that the parties did not try to allocate on the party

27 E.g., Reichsgericht, 3rd Civil Senate, Decision of 21 Sept. 1920, ERGZ 100, 129 (increase in the cost of providing steam because of increase in the market price of coal).

28 Reichsgericht, 5th Civil Senate, Decision of 28 Nov. 1923, ERGZ 107, 78.

29 This explanation is developed more fully in James Gordley, "Contract Law in the Aristotelian Tradition," in *The Philosophy of Contract Law* (ed. Peter Benson), forthcoming Cambridge University Press.

who is least able to bear it. That is not what the parties would have done had they considered the matter for themselves. The doctrine of changed circumstances allows a court to escape this literal reading.

If that is its underlying rationale, then there is no reason in principle why the doctrine could not apply to a debtor who finds himself in straightened circumstances because of business difficulties. Admittedly, most of the time the doctrine should not allow him relief because the debtor will be the party best able to bear the risk. Typically, the party who is best able to bear a risk is the one who can best judge its size or do the most to minimize it. Because risk is uncertainty, a risk is smaller when one can estimate it more accurately. Moreover, unless the risk is placed on the party who can best reduce it, the risk is likely to be greater because that party will have less incentive to do so. For both reasons, people or nations who borrow money to invest in their businesses or economies should usually bear the risk that the money will be invested unwisely or that the businesses or economies will not grow as much as they expect.

Suppose, however, that circumstances arise such as a severe economic crisis which neither party was better able to foresee and which would be catastrophic for the debtor no matter what efforts he made to minimize the harm. In that event, neither of the reasons just mentioned for placing the risk on the debtor still applies. Moreover, there may be a reason for placing the risk on the creditor. Whether a party can bear a risk most easily depends not only on whether he can best foresee it or reduce it but on whether he can best insure or self-insure against it. Whether one can self-insure depends on whether one will face the same risk over and over, bearing the losses that come in the short run. For a well financed casino, roulette is not a risky game. For the same reason, it may be that a well-financed creditor is better able than the debtor to bear catastrophic losses caused by short term economic conditions. If so, rational parties would want to put this risk on the lender, adjusting the interest rate so that he will be compensated for doing so. If the parties did not do so expressly, the reason may be that they have drafted their contract with an eye to the normal situation in which the debtor can most easily bear the risk. If so, then the underlying rationale of the doctrine of changed circumstances would be as applicable here as in the situations in which that doctrine is typically applied. It would support disregarding the language of the contract and placing the risk where it can best be born.

### *Bankruptcy and limited liability*

Consequently, one might wonder why, as mentioned earlier, courts do not use the doctrine to help debtors who face catastrophic losses due to economic circumstances that are beyond their power to control. The answer, I believe, is that they do not need to do so because, in private law, debtors in this situation are already protected by other legal institutions. The two most important are bankruptcy and limited liability. Both limit the amount that the debtor can lose. The bankrupt may lose everything he has, or almost everything, but his debts are discharged so that he cannot lose everything he may have someday. A shareholder in a corporation or partnership with limited liability can lose only the amount of his investment. Both institutions create exceptions to the normal rule that losses are born by the borrower, not by the creditor. These exceptions make sense, I believe, because of the considerations just discussed. Normally, the risk should be on the borrower because he can best foresee and reduce the chance that he will find himself in straightened circumstances. But bankruptcy has such severe consequences that the risk that produced it is likely to be

one that the debtor did not foresee or could not control. Limited liability is typically conferred, not on those who actively manage a business and can foresee or control its risks, but on passive investors such as shareholders and limited partners who are much less able to do so. Moreover, both bankruptcy and limited liability protect against losses of a catastrophic kind from which a person might never recover. Such losses may best be born by a creditor who lends to many debtors, not all of whom will fail.

If that is so, then we should see the problems of debtor nations in a different light. We should not think it is an axiom of private law that debtors in straightened circumstances must always pay, and therefore that debtor nations should do so as well. In private law, parties are excused from their contractual obligations when, because of changed and unforeseen circumstances, the party who typically would be best able to bear a risk or burden is no longer best able. Courts do not apply the doctrine of changed circumstances to a debtor in straightened circumstances but, if I am right, that is because he is usually protected by bankruptcy and limited liability. Moreover, if I am right, he is given this protection for the same reason that parties in other situations are protected by the doctrine of changed circumstances: although he is best able under normal circumstances to bear a risk, he is not best able under the circumstances which have arisen.

Debtor nations are not protected by bankruptcy or limited liability. But the considerations we have described seem as applicable to them as to other debtors. Are their straightened circumstances due to conditions which they could best foresee and control? Is the loss one against which they or their creditors can best insure or self-insure? Depending on the answers to these questions, it may be that the risk of loss is best born by their creditors, even though, under normal circumstances, it is best born by them. In that event, language drafted with the normal circumstances in mind should not govern what is to be done when circumstances have changed. That was not what the language was intended to do. It may not have been what the parties themselves expected. Perhaps some creditors are so naive as to expect a debtor nation to repay them no matter what the human cost of the services it no longer can offer and no matter what the effect on its economic future. Those in charge of floating large international loans are likely to be less naive people who have already insisted on a somewhat higher interest rate to compensate them for the risk that the borrower may find itself too desperate to repay them.

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# Monetary debt and the legitimacy of demands for its recovery

*Le rôle du comptable a considérablement évolué tout au long de l'histoire. Au début du XIXe siècle, sa fonction consistait principalement à déclarer l'insolvabilité de certains débiteurs, ce qui entraînait alors leur emprisonnement pour dette. Aujourd'hui, le comptable est devenu un expert sollicité par les institutions financières afin d'évaluer avec précision le montant de leurs actifs et leurs passifs. Ainsi, c'est lui qui est appelé à estimer les probabilités de remboursement des dettes et à déterminer comment elles doivent être classées dans le bilan financier de l'institution concernée. Avec le développement des produits dérivés, le comptable est désormais chargé d'évaluer la probabilité d'occurrence de certains événements ou risques dans le futur. A cette fin, il mobilise diverses procédures fondées sur la connaissance des résultats passés et les informations actuelles à sa disposition. Il constitue donc un acteur central de la gestion du risque, qui est devenue l'activité principale des institutions financières contemporaines.*

*Neither a borrower, nor a lender be;*
*For loan oft loses both itself and friend.*
*And borrowing dulls the edge of husbandry...*
– William Shakespeare, *Hamlet* (1601) act I, scene 3, l.68

And, he (John Dickens, Charles Dickens' father) *told me, I remember, to take warning by the Marshalsea, and to observe that if a man had twenty pounds a year, and spent nineteen pounds nineteen shillings and sixpence, he would be happy; but that a shilling spent the other way would make him wretched.*
- Charles Dickens on his father's incarceration in 1824 in the Marshalsea Prison as an insolvent debtor.

## Lending to Zaïre

In early 1975 I was working on a prolonged assignment with the State Electricity Board of Zaire. My employers at that time were Price Waterhouse, a well known international firm of accountants. Price Waterhouse had been mandated in 1973 to assist the State Electricity Board in its accounting for the funds it had drawn down under a one billion US dollar syndicated loan agreement arranged by the Republic of Zaire with a group of about twenty large US banks led by First National City Bank. The repayment of the

loans was guaranteed by the US Eximbank and was subject to a series of complex terms and conditions including quarterly interest payments at LIBOR plus a relatively small percentage and penalty clauses for late payment. The loans were entirely denominated in US dollars. The purpose of the loan facility was to finance the construction of a 1,000 kilometre power line extending from the Inga Dam in the west to Kolwezi in the east of Zaire in a region known as Shaba Province which had previously been known as Katanga. At the time it was the largest such construction project of its type ever undertaken and involved thousands of people both locally and from overseas. Because of the Eximbank guarantee the vast majority of the imported labour and the supplies for the construction were required to be from the United States. The project was expected to take about five years (in fact it took much longer) to complete and it was already falling behind schedule at an early stage.

One of the activities I was required to handle was the computation each quarter of the precise amount of interest due on the loans and to issue instructions on behalf of the State Electricity Board to the Central Bank of Zaire for their payment on their due dates. Another of my tasks was to train some twenty young Zairian accountants in how to keep accounts for the project and to prepare the interest payment calculations and instructions.

In late 1973, as a result of the Arab-Israeli conflict the members of OPEC succeeded in increasing the price of oil by a substantial margin. The effects of this increase on the world economy and on trade were very significant and fell most heavily on those less developed countries which were not oil producers. The Republic of Zaire was in the category of the less fortunate. It found that the cost of its oil imports increased materially and because of the world wide recession prompted by the rise in the price of oil the demand for its US dollar earning exports of copper and other raw materials decreased substantially and to such an extent that its reserves of US dollars were rapidly depleted.

In early 1975 the Central Bank of Zaire failed to make the US dollar transfers to the US banks even though I had sent the instructions for their payment.

The reaction from the US banks was fast and very critical of my apparent failure to perform my duties and a number of rather "hot" telexes came to my office from New York asking for an explanation. My first reaction was to respond to the effect that I had sent the Central Bank the instructions in good time and that I would look into the matter promptly.

It was not to be a simple matter.

Perhaps you are wondering, as I did at the time, why the US government felt it was in its interests and necessary to extend to Zaire a one billion dollar guaranteed loan for a power line project. I recall asking the same question at the time simply because I saw no apparent prospect of Zaire having the economic means of repaying the loans in any way close to their terms and conditions. It happened that in 1974 a couple of the US government's Department of the Interior employees were working in an office at the State Electricity Board next door to my own office. We got to know each other pretty well and, in our many discussions, one of them was kind enough to partially enlighten me on his government's interest in Zaire. Put simply, he said, the Zaire copper belt in Shaba was one of the largest sources of rare earths outside the Soviet Union. At the time this meant little to me but I was later to realise that the rare earths he was referring to were vital ingredients to the United States's nuclear weapons' development programme and that Zaire was considered by the United States as a vital partner in the strategic arms race. The tying of Shaba to the west of Zaire through making Shaba

dependent for its energy supply on the west was one way that the US worked to keep Shaba and its vital minerals in the western camp. The one billion dollar price tag was perhaps very minor in relation to the overall defence budget. The financing in the form of loans was perhaps a cloak to hide true intentions. In any case without the guarantee I think it is doubtful whether the US banks would have granted the credits they did.

So my small problem with the late payment of interest turned out to be a rather larger issue and eventually led to a complete re-negotiation and rescheduling of the entire debt package. The news of Zaire's default hit the world's media about mid-1975 and was one of the first of many so-called sovereign debt problems that followed the oil crisis. The debt re-scheduling was finally agreed and as far as I can tell was respected at least for a while. I do not know what happened subsequently and suspect that much of the debt was never repaid. It is perhaps interesting to reflect upon the apparent reduction of the importance of Zaire in the eyes of the United States following the collapse of the Soviet Union and the end of the cold war. It seems unlikely that the Congo would today be the beneficiary of the kind of external financial support it received in the past.

## Accountants– "An ignorant set of men"

The effects on the young Charles Dickens of his father's incarceration in the Marshalsea debtors' prison in 1824 are well documented in literary history and there is no doubt that Dickens' writings and appeals to the Victorian social conscience owed much to that terrible childhood experience.

To take a passage from one of Dickens' more recent biographies:

*It* (insolvency) *was a common offence in this period* (1824) *and for some years after- it has been estimated, for example, that in 1837 there were between thirty thousand and forty thousand arrests for debt – but nevertheless the insolvent debtor was classed as a quasi – criminal and kept in prison until he could pay or could claim release under the Insolvent Debtor's Act* (Ackroyd 1990, page 74).

Small wonder then that accountants of that time were very poorly regarded. After all, the main business of accountants at that time was to handle the affairs of insolvent debtors and to ensure that they were pursued for the funds they owed. It was indeed a terrible time for people who could not pay their debts and accountants played a significant role in adding to the misery.

To quote from my own firm's history in that era gives a clear picture of this.

*The low standing of the accountant derived from his traditional role. Most were viewed as mere book-keepers, those who maintained a record of what others had made, sold or collected. Yet from the mid-nineteenth century increasing numbers were able to earn a lucrative income from insolvency assignments – winding up the growing numbers of limited liability companies that had fallen into liquidation. That they were able to profit from the misfortunes of others however, brought further opprobrium upon their heads. Mr Justice Quain, for example, complained in 1875 that "the whole affairs in bankruptcy had been handed over to an ignorant set of men called accountants* (Jones 1995).

*The (UK) Bankruptcy Act of 1831 had provided for the employment of officers, designated "official assignees" to liquidate estates on behalf of creditors. Some were accountants* (Ibid, page 45).

Things did change with the passage of time as other more positive areas of activity opened up for accountants:

*The second half of the nineteenth century saw accountants formally recognised as a profession (in the United Kingdom) and a leading number of City firms establish themselves as auditors of important corporations and institutions. Until this time their principal activity had been that of liquidator* (Ibid, page 44).

But the taint of profiting from other's financial misfortunes remained and may even exist to this day:

*The (UK) Companies Act of 1862 established the position of "official liquidator" and was misnamed by a professional grateful for the additional opportunities it granted, "the accountant's friend* (Ibid, page 45).

And the law developed too in a way that provided at least a little mitigation to the stain of criminality deriving from indebtedness. The notion of the debtor voluntarily filing for protection from his creditors is not new.

*The (UK) Bankruptcy Act of 1861 permitted all debtors, including those who formerly would have been considered insolvent, to absolve themselves from their liabilities by becoming voluntarily bankrupt* (Ibid, page 45).

## Debt: the role of accountants today

Today the role of the accountant in the areas of debt, insolvency and bankruptcy remain substantially similar to what it was 150 years ago. The laws and the penalties have changed but woe betide a debtor who continues to exercise his business when he knows he cannot pay his debts. Expressions such as "fraudulent preference" continue to exist in the law books and accountants are often asked to make audits and express expert opinions for the courts on such matters. Imprisonment for fraud arising from the deliberate running up of debt with no intention to repay is still a common event. I see no reason why this should not continue to be the case for so long as the opportunity, the means and the motive exist.

Before moving on, it must be said that for highly liquid lenders to actively encourage people to contract substantial debts is a practice which continues and, quite apart from high inflation, has caused very serious social and economic disruption in recent times. The problems associated with negative equity in private housing markets and unpaid credit card debts are examples of a few such problems. Their effects have overhung the markets for the most part of this decade.

So far I have dwelt on some of the darker sides of debt. There is a lighter, positive and vitally creative side to the subject and the accountant plays a very important and more positive role in this too. Where business transacted between parties is based on payment terms other than cash the extension of credit by seller to buyer in exchange for some form of promise to pay is the inevitable result. Through the judicious management by buyer and seller of the terms and conditions of credit granted and received businesses and markets accelerate their rates of growth as the supply of credit expands.

Credit granted for the purposes of expanding and accelerating the capacity of a business to invest, grow and improve productivity should result in a general improvement in standards of living By converting funds into needed investment, credit creates opportunities to meet increasing market demands. The creation of credit is based on confidence and trust, manifested by an agreement between willing parties to lend and borrow for defined periods of time at defined rates of return. Confidence is in turn based on the lender's knowledge and experience of the market and the borrower as well as trust in the effectiveness of the rule of law when overdue debt needs to be recovered.

The creation of credit is a cornerstone of the banking business. It involves leveraging a bank's own

resources thanks to the liquidity which depositors, other banks and financial institutions have placed with it in exchange for a low risk return.

A deposit taking, commercial lending bank is largely comprised of a series of promises to pay existing between it,its customers and counter-parties, booked by accountants in ledgers and journals ( or nowadays electronically).The bank takes its margin on the spread between borrowing and lending rates contracted between the parties, which are in turn based on market interest rates. A bank without a set of books recording the promises to pay would effectively cease to exist.

The keeping and checking of a bank's books and records largely falls to the accountant either as a record keeper or as an auditor. Over time these have become skilled and specialised tasks demanding a detailed knowledge of the laws and regulations applied to the banking industry both locally and generally and a good understanding of the markets and products the bank operates. The role of the senior accountant within the bank has developed from chief accountant or head of logistics through chief financial officer to chief information officer or chief risk officer. The role of the auditor has developed well beyond the statutory audit according to company law to acting as a leading expert and advisor on the legal and regulatory rules applicable to the industry.

From an accounting viewpoint, at its most basic level debt is an asset and a liability. First let us examine the underlying accounting rules used for their recognition. The term "recognition" is used here as an accounting term to describe the act of recording an item as an element of the accounts. Elements directly related to the measurement of financial position are assets, liabilities and equity. Movements in equity include the accumulated year on year effects of net profits and losses and distributions and allocations of profits and reserves. Each country has developed its own laws and principles in relation to the uses to which accumulated profits can be put. As a general rule companies may not make distributions to shareholders in excess of legally recognised profits.

International Accounting Standards (IAS) discuss the topic of recognition at some length and address such matters as the elements of financial statements or accounts (being the balance sheet, the profit and loss account and the other supporting statements and disclosures). Put simply IAS tells us that an item should be recognised if it is probable that any future economic benefit associated with the item will flow to or from the business or enterprise; and the item has a cost or value that can be measured with reliability. Assessments of probability require judgement as to degrees of uncertainty that future economic benefit will flow to the business. Assessments of the degree of uncertainty attaching to the flow of future economic benefits are made on the basis of the evidence available when the business' accounts are prepared. So if it is considered probable that a debt owed to the business will be paid, it is then justified, in the absence of any evidence to the contrary, to recognise the debt as an asset. In the absence of the capacity to make a reasonable estimate of value or cost it should not be recognised in the balance sheet or profit and loss account. In the case of a lawsuit brought against an enterprise, which cannot be estimated reliably, the existence of the claim would be disclosed in the notes to the accounts with appropriate explanations. For a large population of debts, some degree of non-payment is normally considered probable; hence an expense representing the expected reduction in economic benefits is recognised.

A liability is recognised in the balance sheet when it is probable that an outflow of resources embodying

economic benefits will result from the settlement of a present obligation and the amount at which the settlement will take place can be measured reliably.

Measurement may be made on a number of different bases. These are:

- Historical cost
- Current cost
- Realisable (settlement) value
- Present value

Debt is usually recognised at settlement value and, in the case of an asset may be adjusted to realisable value where this is lower.

Debt takes many and highly varied forms in today's complex business environment. They range from simple overdrafts, current accounts, deposit accounts and thirty day commercial credits to savings accounts, leases, loans, lease purchase contracts, debentures, convertible bonds, project financings, commercial letters of credits, margin calls, swaps, mortgages, performance bonds and all sorts of contingency based commitments to pay in the case of specified future events.

## Contingencies and credit risks

The notion of contingency introduces one trend that is perhaps of particular interest and worth discussing. This is the relatively recent trend of financial institutions engaging in so called derivative products. The products themselves are not new. Futures and options have existed and been traded extensively in commodity exchanges for at least the last 150 years. Their trade was limited however to a relatively few expert operators who were authorised to do such business on recognised and supervised exchanges such as the Chicago Board of Trade and the Liverpool Cotton Exchange. The main purpose of the transactions was to invest in the market in the form of a margin to hedge positions and fix market prices for future delivery of marketable commodities. The markets recognised the fragility of the conditions in which commodities were brought to market and which lead to what we today call volatility. Through the futures markets farmers and bread producers were able to fix their sales and purchase prices and the price of a loaf of bread was protected from sudden and unexpected fluctuations except in the most disastrous circumstances such as the outbreak of war or very adverse climatic conditions. In the last twenty years the extension of futures and options into the money markets has lead to a far greater offering of such products or contracts to the general public. The result has been a massive increase in the trading of debt and securities in the capital markets and occasional massive and well publicised losses of sufficient size to sink the corporate boat required to cover the loss making positions. It is interesting to recall that the event that finally brought to light Baring's exposure to losses derived from the effects on Asian money markets of the Kyoto earthquake. Back in the late seventies I observed a similar such event, similar in the sense that it was unexpected, when the Soviet Union invaded Afghanistan. The invasion caused the immediate introduction by the Carter Administration of a trade embargo against the Soviet Union. The sanctions included a ban on the export of US grain to Russia. The effects on the price of cereals was enormous and caused massive losses for all holders of long positions in those commodities. The liquidity required by the commodity markets to cover immediately their loss positions in the futures markets went well beyond the credit lines extended to the grain traders operating in those markets. The banks stepped in and granted the credits needed thereby saving their customers and world commodity markets from a further major collapse.

In considering accounting for debt we have discussed the notions of uncertainty and measurement of value and realisation and have mentioned the need to make judgements about probabilities and contingencies based on past experience and the available evidence. The effects on markets of unexpected events such as the Kyoto earthquake and the Soviet invasion of Afghanistan have caused the markets to try to find ways of measuring their risks more accurately. As we have discussed, the recognition and evaluation of an asset or liability requires some degree of estimation of likely outcomes in respect of the timing and amount of the cash flows involved in payment. In 1975 the US Financial Accounting Standards Board (FASB) published its Statement number 5 "Accounting for Contingencies". This introduced into accounting on a formal basis the acceptance of such concepts as the balance of probabilities about future outcomes and their estimable values. The statement not only permitted but required accountants to make judgements and conclude on the reliability of estimates of the timing and value of future events such as product warranty costs, claims, guarantees and deferred income taxes. The computation of the provisions required in respect of such potential future expenses was based on past experience and so called best estimates. The world of accounting had entered into such modern day concepts as assessments of possible outcomes and estimations of future events and risks. It is interesting to note that the profession of auditing in the anglo-saxon world is presently renaming itself assurance. The boundaries between insurance products and assurance as practised by auditors are becoming merged. Both professions are in large measure engaged in making judgements about value at risk in relation to positions and events. Banks as lenders and as money and capital markets traders are today required to disclose in their accounts their policies and practices in respect of the risk management they exercise in their businesses. Concepts such as market risk, value at risk, scenario analysis, asset and liability management, credit risk, country risk and operational risk are addressed by banks and described in their published annual reports. Most of these risk management techniques relate to a bank's systems for making quantitative and qualitative assessments of the positions held in the various markets in which it operates. Many of these positions involve promises made to third parties to exchange, pay, deliver or take delivery of some form of security or value at some future date according to previously agreed conditions.

To take, as an example, Credit Suisse Group's published annual report for 1998 we can read that it considers credit risk as *the risk that a borrower (or counterparty) is unable to meet its financial obligations. In the event of a default, a bank generally incurs a loss equal to the amount owed by the borrower less a recovery amount resulting from foreclosure, liquidation or restructuring of the company.* The bank also defines its asset and liability management under which *the balance sheet interest rate risk is monitored and managed by the individual business units within specifically designated centres of competence...The management of interest rate risk is primarily based on mark-to market methods.* In both cases the bank uses either a percentage of confidence level of 95 per cent and a twenty day holding period for interest rate risk or a 99th percentile worst case default loss for credit risk resulting in its annual credit provisions (being equal to expected credit losses derived from actual historical average losses). The difference between the 99$^{th}$ percentile worst case default loss and the annual credit provisions reflects the unexpected loss level.

The assumptions underlying these computations are based on historical experience of the incidence and scale of losses arising in the past. Methods

known as "stress testing of risk positions" have been advocated by banks and regulators and are used to attempt to assess the degree of exposure to extreme volatility in markets. Assumptions of degrees of linearity of future events and cycles and steady state conditions are tested by the introduction of known past extremes. The assumptions underlying these risk models start to fail when multiple unrelated and sudden events arise. These create turbulence of a non-linear or chaotic nature the scale of which cannot be predicted mathematically.

It is perhaps interesting to draw an analogy to a totally different field of human endeavour where there is a long-standing and very dramatic history of using such risk management approaches. I am referring to the business of marine architecture and the practices used to design ships to withstand wave stress. An excellent description of this is to be found in Sebastian Junger's recent outstanding book "The Perfect Storm". In essence Junger 1997 describes the criteria used by marine architects to design ships and the thresholds they use for taking account of expected maximum wave stress. In the case of modern vessels this is known as twenty five year stress and is the most violent condition a ship is likely to experience in twenty five years. Junger goes on to state that North Sea oil platforms are built to accommodate a 111 foot wave (about 36 metres) beneath their decks, which is calculated to be one-hundred year stress. The point is that the twenty-five year stress is just a statistical concept that offers no guarantee about what will happen next year, or next week. A vessel could meet a number of twenty-five year waves in a year or never encounter any at all. What naval architects do is decide what level of stress a ship is likely to encounter in her lifetime and then hope for the best. From the business and structural points of view, it is impractical to construct every boat to one hundred year specifications.

Looking ahead and considering the immediate future I suggest that it is already plausible to contemplate electronic trade via the Internet as a significant element of international trade. By the nature of the medium I cannot see how so called E-business can be conducted by means other than through the running up of debt. The implications are many not only with regard to security over access to an individual's private property but also in respect of invasions of his or her privacy through data mining and other information techniques. One aspect of E-business that remains uncertain and is likely to require case law is the basis for deciding under which jurisdiction a contract entered into on the Internet can legitimately be judged and a related debt enforced. I suspect that we have many years of most interesting times as this new and revolutionary way of doing business develops.

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# Ethics and the repayment of money debt: the perspective of official creditors

*Pour les tenants de l'économie classique, la question de la légitimité de la dette ne se pose pas : le contrat de dette est censé tout prévoir et tout régler. Or, le respect d'un contrat dépend toujours de facteurs éthiques comme la confiance ou la qualité des relations personnelles entre parties contractantes, dont l'absence peut entraîner une augmentation considérable des coûts de transaction attachés à un contrat, notamment en cas d'attitude opportuniste ou frauduleuse d'une des parties contractantes. Les récentes crises financières (Mexique, Russie, Asie) ont montré le caractère crucial des aspects éthiques pour la bonne exécution du contrat de dette. Il convient donc d'instaurer un authentique esprit de collaboration entre les parties contractantes si l'on veut en arriver à une répartition plus équitable du fardeau de la dette entre les débiteurs et les créanciers privés et publics. Dans cet esprit, le G7 a récemment avancé plusieurs propositions, telles que l'introduction de clauses d'action collective ou l'utilisation de produits dérivés permettant une meilleure répartition du risque entre les créanciers et les débiteurs.*

## Introduction

Mainstream economics has not much to say about "ethics". Asymmetric information, moral hazard, (ir)responsibility, cheating and many other interesting behavioural concepts are treated as "ethically neutral" or, worse, fall outside the scope of the dominant analytical models. This is unfortunate because there are many interesting situations and problems which would require the inclusion of social norms, opportunism, personal values, and other moral standards and values that affect the behaviour of individuals and markets. For example, the behaviour of some venture capitalists, IPO[1] attorneys and entrepreneurs when bringing dot.com companies to the stock market has recently been questioned not only on the basis of accounting standards but also on ethical grounds (Holding 2000, Blommestein 2000). A central thesis in Max Weber's *The Protestant Ethic and the Spirit of Capitalism* is that ethical concepts such as hon-

* The opinions expressed in this article are personal and do not represent the views of the OECD or its Member Countries.

1 Initial Public Offering.

esty and thrift are key in explaining the creation of wealth (Weber 1930). Although Adam Smith highlighted the importance of self-interested behaviour in explaining the wealth of nations (Smith 1776/1981), he also noted that this behaviour is part of a complex social fabric based on social habits and moral standards and values (Smith 1759/1981).

The conditions under which it is legitimate to demand the repayment of a money debt is another example of the need for introducing ethical concepts in the analysis of the behaviour of individuals and markets. One can of course limit oneself to the purely legal dimension of a contract. Although this dimension is important it is too narrow for our purposes. We need a multi-dimensional framework for analysing debt repayment situations in so-called "imperfect" contract situations. It will be shown that the introduction of ethical considerations within this multi-dimensional framework is necessary for highlighting the moral dimension of "imperfect" contracts. It will further be argued that this wider framework is necessary for analysing recent official proposals for reducing net debt payments to the private sector. The background to our discussion are concerns about excessive debt, both from the perspective of households and enterprises and from an international financial system point-of-view. The related policy concern of (non)repayment of debt focuses on the consequences for the future behaviour of individuals and the functioning of the (international) financial system as a whole.

This brings us back into the field of economics. But for a discussion of repayment problems that is *both* rigorous *and* of interest from a policy perspective, we need to incorporate in our multi-dimensional framework economic, legal as well as ethical arguments. The resulting framework should enable us to analyse the consequences of "opportunistic" behaviour in imperfect contract situations. This means that the ethical dimension cannot and should not be neglected. I will outline some ideas that go some way in that direction. This will be done against the backdrop of the recent discussion by officials of the involvement of the private sector in the resolution of international debt crises (Mexico, Russia, Asia).

## Ethics and Economics

An important reason why many economists have had (or are having) difficulties incorporating ethical concepts into their analyses is an infatuation with "tidy", formal models that can be expressed in mathematical terms. This is a strength of economics but also a weakness. Neo-classical economic theory is a good example. The neo-classical framework is a powerful tool for analysing the efficient organisation of economic systems and situations. Within this framework two so-called welfare theorems are derived. Both theorems argue that the free enterprise system will produce an efficient allocation of resources. They act as a benchmark for an "ideal-type" economy without transaction cost, with perfect information, etc. Unfortunately, within this standard analytical framework there is no place for analysing the consequences of moral standards and values.

Uneasiness about the limitations of the neo-classical theory has inspired many authors. This has led to important extensions or modifications of the standard neo-classical framework. Sen's (1986) criticism of the implications of the assumption of "strong rationality" is an example. In fact, Sen calls this central neo-classical assumption "self-interested behaviour" - so as to emphasise the inability of the standard neo-classical framework to incorporate *any* form of *social* behaviour. A social behavioural context is a sine qua non for analysing

the consequences of moral standards and values. For example, it would be impossible to analyse the burden sharing and the ethical dimension of various approaches to the resolution of international debt problems when social behaviour is excluded via the implications of the assumption of "self-interested" behaviour. Sen distinguishes 3 dimensions to this *strong version* of self-interested behaviour :

1. Self-centred consumption (welfare of person *x* depends solely on *x*'s consumption).

2. Self-centred welfare objective ( *x* does *not* take the welfare of others into account).

3 Self-centred choice (the choice of each person *x* is completely determined by the pursuit of *x*'s objective function).

Ethical considerations can be introduced by replacing the strong version of self-interest by changing one or more of these dimensions. For example, Sen (1986, p.81) suggests to do so by maximising a personal welfare function that is not solely based on one's own consumption (as in dimension 1). In other words, the neo-classical framework can in principle be modified and used to analyse ethical behaviour by introducing a *weak version* of the self-interest assumption. Even so, an important limitation of Sen's ideas for analysing debt repayment problems is that this modified neo-classical framework also relies on the full or perfect information assumption.

Sen's framework can therefore not be used for analysing situations with asymmetric information or less than perfect information. This is problematic for our purposes as we are interested in analysing debtor-creditor situations with so-called "imperfect" or incomplete contracts. The New Institutional Economics (NIE) provides a more appropriate analytical framework for studying ethical behaviour in imperfect contract situations. The NIE framework focuses on the link between institutions and transaction costs. Transaction costs arise because of imperfect information. Williamson (1985) analyses contracts as means of limiting transaction costs. Contracts are institutions that shape human interactions using formal rules (e.g. constitutions, laws, property rights) and informal rules or arrangements (e.g. moral standards, business codes, habits) (Blommestein and Steunenberg 1994). Contracts are imperfect since *ex ante,* when the contract is being signed, not all present and future circumstances are known. Parties to the contract also usually rely a great deal on trust that moral codes will be honoured. This will limit the contract (or transaction) costs. Both the costs of arranging a contract *ex ante* , and the costs of monitoring and enforcing it *ex post,* will be lower when parties can rely on informal rules or arrangements based on moral standards and values such as honesty and trust. Thus, ethical standards are crucial facilitators for doing business, making them pillars of successful market economies. This point is not always understood, especially in formerly planned economies.

Contract problems may arise for a variety of reasons, ranging from honest, *ex post* disagreements about the interpretation of the terms of a contract to dishonest and criminal behaviour. The focus in this contribution is on incomplete contracts in which opportunism plays a central role. Opportunism is a moral concept that includes lying, cheating, stealing but also all kinds of subtle forms of deceit (cf. Williamson 1985, p. 47). Institutions – including contract design – may help to limit opportunist behaviour. Economic agents need to deal with incomplete information about opportunistic behaviour, thereby increasing transaction and contract costs. We shall illustrate these concepts and problems by analysing the repayment of money debt involving debtors and creditors in different jurisdictions.

## Ethics and International Finance: Resolution of International Debt Crises

As a consequence of the Mexican debt crisis of 1994-1995, and subsequent debt repayment problems in Asia and Russia, proposals have been discussed by policy makers to improve international debt rescheduling procedures. Debt repayment problems in financial crisis situations have prompted proposals how best to avoid these problems in the future (Blommestein 2000a) as well as suggestions that could contribute to a more orderly resolution of financial crises (G-22, 1998).

Some of these proposals have an explicit ethical dimension, whereas in others moral aspects are implicitly incorporated. An important motivation behind these proposals are the adverse consequences of providing massive official financial aid in resolving international debt crises or financial contagion situations. In particular, concerns have been expressed that by using public funds, private creditors would be bailed out. This could in turn encourage moral hazard and have a negative impact on the functioning of the international financial markets by encouraging excessive risk-taking.

As part of these proposals, policy makers have agreed on a number of principles for involving the private sector in resolving international debt crises. The five principles agreed by the G7 Finance Ministers (see annex) explicitly aim to improve the functioning of global financial markets by insisting in *normal* circumstances on the repayment of debts in *full* and on *time* , while acknowledging that there may be extreme, crisis circumstances that warrant reducing net debt payments to the private sector. The G7 report and other official documents clearly go beyond treating "moral hazard" and other moral categories as ethically neutral :

First, the G7 report emphasises reaching co-operative solutions between debtors and creditors by forming lasting relationships based on trust. It is argued that relationships based on *mutual trust* can help debtor countries and creditor (foreign) banks to create extra safeguards or buffers against financial crises by concluding contractual liquidity assistance arrangements.

Second, G7 policy makers stress the importance of an *equitable* distribution of burdens between official and private creditors. The officials are clearly trying to reduce opportunistic behaviour by private creditors. They expect that all groups of private creditors should be given equal treatment. Policy makers are also keen to reduce the opportunistic behaviour of debtors. Although officials acknowledge that under exceptional circumstances a debtor country may be forced to suspend the service of its international official debt and even to impose restrictions on capital movements (including payment to private creditors), the principle of contractual fidelity should not be called into question. For this reason, the Russian government's unilateral moratorium on payments of some categories of debt promulgated in the summer of 1998, was heavily criticised. Other governments and the markets interpreted this development as a breach of trust to honour the spirit of contractual relationships. Markets also feared that this Russian action might signal a more general deterioration in honouring the obligations of debt contracts, leading to a sharp increase in risk premiums embodied in arrangements for emerging markets. In other words, opportunistic behaviour in the form of abandoning the principles of loyalty and good faith embodied in standard commercial contracts by one debtor country may trigger financial contagion.

Third, as part of the aim to reduce opportunistic behaviour by some creditors and debtors proposals have been made to involve bondholders in debt

rescheduling operations. The background to this is the situation that claims of bonds were viewed as senior to claims of banks. The G7 report (see annex ) indicated that no one category of private creditors should be regarded as inherently privileged relative to others in a similar position.

The objective of a more *equitable* distribution of the burden among private creditors is to be met by the introduction of so-called *Collective Action Clauses* (CACs) in international bond contracts. CACs would make it easier for debtor countries to call bondholders together and reach agreement on debt restructuring. They can help addressing particular aspects of the problems associated with the response to non-payment of bond obligations. In principle, CACs provide for an efficient framework in which bondholders can be contacted and in which their views can be represented, thereby facilitating a more orderly and equitable workout process (G-22, 1998). An obstacle in using them in global financial markets is that such clauses are a common feature of bonds issues under English Law but not under US Law. Currently, the prospects of US Law being changed to allow the use of CACs seem small. Also some emerging markets are resisting adding this clause to contracts, arguing that they would raise their borrowing costs [2]. Nonetheless, opinion seems to be growing that CACs may be useful for facilitating crisis resolution procedures. Recent initiatives by the official and private sectors are encouraging but a great deal of further work needs to be done Dixon and Wall 2000).

2 Research shows that this is not uniformly the case. Although adding CACs raise borrowing costs for less credit-worthy borrowers by on average 150 basis points, it lowers them for more credit-worthy borrowers by on average 50 basis points (Eichengreen and Mody 2000).

## Final Remarks on Ethics and Financial Contract

The previous sections show that a rigorous and policy-oriented analysis of the repayment of money debt will need to include ethical concepts. The recent discussion of liquidity problems and risk management in emerging financial markets provides another important example. In response to recent financial market turmoil it has been argued that debtor countries should pay more attention to managing and mitigating the risks they face through *financial contracting, in particular the use of derivative contracting technology.*

There are various risk-reducing financial contracts including the purchase of options that allow a country to borrow at a predetermined interest rate in times of crisis and insurance against declines in the price of a key commodity. The price of these risk-reducing financial contracts will be affected by the possibility and extent of opportunistic behaviour (moral hazard) and/or sovereign non-performance. The more severe these problems, the higher the price of managing these risks (via the use of insurance and other financial contracts).

The high price of moral hazard can be deduced from the rates that many countries pay when borrowing in their own currency. For example, consider country *x* that is paying 40 % on domestic-currency debt but only 20 % on foreign-currency denominated debt. Assume that the pre-announced annual exchange rate depreciation target is 10%. Country *x*'s *moral hazard risk premium* is then 10 %. This premium reflects the risk that country *x* will not stick to its depreciation target.

Risk-reducing financial contracts may be attractive as ways of risk-sharing among creditors and debtors. However, in order to obtain a favourable risk-reduction trade-off, debtor countries should minimise the risk of moral hazard and/or possibil-

ities for sovereign non-performance when choosing from the range of available financial contracting possibilities. Moreover, the credibility and track record of governments play a role.

High-trust countries will pay much lower prices for risk-reducing contracts. This means that assessments of moral standards and values need to be incorporated explicitly in *risk audits* of countries and institutions. The ethical dimension of risk is important for identifying the nature and size of risks, as well for choosing the most suitable risk-reducing financial contracts.

## ANNEX

## A framework for private sector involvement in crisis resolution [3]

The following framework should help to promote more orderly crisis resolution and therefore be of mutual benefit to debtors and creditors in finding co-operative solutions. It should also help to promote co-operative solutions between borrowing countries and the private sector and to shape expectations in a way which reduces the risk that investors believe they will be protected from adverse outcomes. Developing a framework of this kind which facilitates debtor/creditor co-operation should minimise the incidence and intensity of crises and also minimise the time before debtor countries can expect to regain market access.

### Principles

A) The approach to crisis resolution must not undermine the obligation of countries to meet their debts in full and on time. Otherwise, private investment and financial flows that are crucial for growth could be adversely affected and the risk of contagion increase.

B) Market discipline will work only if creditors bear the consequences of the risks that they take. Private credit decisions need to be based on an assessment of the potential risk and return associated with a particular investment, not on the expectation that creditors will be protected from adverse outcomes by the official sector.

C) In a crisis, reducing net debt payments to the private sector can potentially contribute to meeting a country's immediate financing needs and reducing the amount of finance to be provided by the official sector. It can also contribute to maintaining appropriate incentives for prudent credit and investment decisions going forward. These potential gains must be balanced against the impact that such measures may have on the country's own ability to attract new private capital flows, as well as the potential impact on other countries and the system in general through contagion.

D) No one category of private creditors should be regarded as inherently privileged relative to others in a similar position. When both are material, claims of bondholders should not be viewed as senior to claims of banks.

E) The aim of crisis management wherever possible should be to achieve co-operative solutions negotiated between the debtor country and its creditors, building on effective dialogues established in advance.

3 Excerpt from the Report of the G-7 Finance Ministers on strengthening the international financial architecture, published in June 1999.

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# On the scent of odious debt

*Cet article commence par distinguer cinq types de dette avant de se concentrer plus spécifiquement sur la dette odieuse, où l'argent prêté n'a pas été utilisé pour l'intérêt général du pays mais en vue du profit des seuls gouvernants. Dans un tel cas, la dette ne devrait pas être transmise aux gouvernements suivants, mais être considérée comme une dette personnelle des dirigeants concernés. Le texte montre les obstacles rencontrés par cette suggestion et évoque les solutions qui pourraient être mobilisées dans l'optique d'une prompte reconnaissance de cette conception de la dette odieuse.*

The purpose of this paper is to explore briefly the concept of "odious debt" and then to examine the possibilities of using the concept as a strategy to further the overall goal of canceling the debt of the poorest countries.

At the outset, it may be helpful to clarify the definition of odious debt vis a vis the many other terms that are used in discussions of debt cancellation.

### *a) immoral debt*

Immoral debt is a term used generally by anti-debt activists who argue that from an ethical perspective, debt payments for loans which did not benefit the general population or which prevent a country from providing minimum standards of care in health, education, clean water, and other essential developmental needs are unethical and render such a debt immoral.

### *b) illegitimate debt*

This term is closely related to the above one although it has a slightly different connotation. Illegitimate debt implies that the debt never had any legitimacy to begin with because it was loaned to poor countries under unjust circumstances.

### *c) unpayable debt*

Unpayable debt describes debt that is simply unpayable by the debtor as a result of debt accu-

mulation levels that are beyond any capacity of the debtor to pay. Since it is commonly understood that sovereign countries cannot declare bankruptcy, the part of a debt that is uncollectible becomes unpayable and often written off by lenders.

*d) moral hazard*

Moral hazard is a term used by lenders to describe a situation where the provision of insurance against a known risk will in fact encourage acts or behavior that will make the risk more likely to occur. Applied against debt, it refers to the fact that banks knowingly lend to State leaders who will not invest the money in the interests of the people to whom they are accountable. They do so because they can count on the authority of the international financial system (the IMF in particular) to ensure that the debts are repaid.

*e) odious debt*

Odious debt is a term with legal implications. It refers to money loaned to State representatives which was not used for the needs or interest of the State. Therefore, when those representatives fall from power, the debt incurred by them is not passed on to the next representatives of the State (whether corrupt or not) but remains a personal debt of those who incurred it.

## History of odious debt

A general principle of international lending holds that public liability for debts remains intact from one government to another. In other words, the State itself assumes responsibility for the repayment of debts, not the specific government in power at any given moment. However there have been exceptions to this rule.

One of the earliest cases to prove the exception occurred when the Unites States and the Cuban independence movement routed the Spanish from Cuba in 1898. In the negotiations which followed, the Spanish argued that the US ought to assume the debts of Cuba. The Americans replied that the original loans were used mainly to bolster the domination of the local population by the government of Spain and therefore should not be considered to be the debts of the Cubans themselves. Although the US, as the new holder of Cuban sovereignty, was obviously arguing out of its own self-interest, the ensuing debate and the final abrogation by the US of the Cuban debt lay some of the groundwork for the establishment of the odious debt doctrine.

This was more thoroughly established in legal doctrine by Alexander Sack, a Russian law professor, who wrote several works on the obligations of debtors after a major succession in government. Writing from his own experience of the Russian Revolution, Sack extended the application of odious debt not only when sovereignty changes hands, but also when there is a major change in government.

In order to prevent the entire lending system from becoming chaotic and to avoid arbitrary repudiation of debts, Sack proposed that a new government would be required to demonstrate that the debt of the previous regime had not served the public interest, and that the creditors were aware of this. It would then be up to the creditors to prove to an international tribunal that the loans were used for the benefit of the entire State as opposed to the previous regime. Failing this, the debt would become null for the new government.

One of the most famous cases involving odious debt was brought before the US Supreme Court by the new Costa Rican government after the exiling of President Frederico Tinoco in 1919. Interestingly, part of the case was against the Royal

Bank of Canada which had lent money to Tinoco, money which the new government argued was used primarily—with the Royal Bank's knowledge—for Tinoco's personal use after he had taken refuge in a foreign country. US Chief Justice W.H. Taft of the US Supreme Court ruled against the Royal Bank in a case which he felt had such great international significance that he refused to take any payment for rendering the Court's decision.

Unfortunately, in the period following, during which many of the new international financial institutions were born, the odious debt principle made clear by the US Supreme Court case receded in favor of granting security to the lenders during the post World War II economic boom. Creditors also took greater precautions in protecting their loans through alliances and engaging legal experts who ensured that every possible form of legal protection for the creditors was written into loan agreements with the borrowers. The formation of lending cartels such as the Paris Club, and the role conferred on the IMF as global financial policeman on behalf of the lenders further tipped the balance of power away from the possibility of invalidating debts.

A major result of this shift was the gradual diminution of the risk to lenders, a risk which had always been inherent in a loan transaction between lender and borrower. The modern day attempt to revive the concept of odious debt is basically an endeavor to reestablish the risk that the lender takes when entering into a loan contractual agreement with a borrower. If odious debts become uncollectible, then the debts will not only be revealed to be immoral, but also poor business practice. This will discourage creditors from making odious loans again.

## Other related legal concepts

In addition to the odious debt doctrine, there are two other related concepts that bear mentioning. The *ultra vires* doctrine has to do with contracts signed by a person or entity which had no legal authority to do so. A court of law can declare such contracts invalid. Although *ultra vires* has been used more often in national and municipal law, there have been attempts to apply the concept to international debt where for example, dictators have entered into loan agreements.

A *de facto* regime is one which has either seized power or otherwise gained effective control over a State without having the legal right to govern. Governments which have gained power through a military coup are one example. The loan transactions they enter into are deemed by some to be invalid as they had no State authority to undertake such transactions.

## The South Africa case

Although the concept of odious debt has remained in the shadows for much of the 20th century, the precedents set earlier and the establishment of international case law remain and some experts believe that the doctrine of odious debt could reemerge if a country were to test the doctrine again. Indeed, the leading possibility for doing so appears to lie with the post-apartheid government of South Africa. Church and NGO groups in South Africa have spelled out clearly the odious nature of the debts incurred by apartheid leaders. They argue that since apartheid was known to be a crime against humanity, all loans to apartheid South Africa should be seen as odious and the onus must be on creditors to prove that their loans benefitted the people of South Africa.

The South African case is bolstered by the fact that

even when international momentum had begun to shift against apartheid in the 1980s, the banks continued to lend money to the apartheid regime. The banks were well aware that by cutting off new loans, they could have played a pivotal role in ending apartheid. Although a few did refuse new lending, others—recognizing the risky nature of their business—actually increased their profits by imposing a surcharge on their normal interest rates. From 1986 - 1989, when the apartheid regime was under severe economic pressure, the banks could have delivered the *coup de grâce* but instead negotiated three separate accords with South Africa with generous terms that helped to keep the regime afloat.

Indeed, the banks appeared to be aware that some of their loans might not be recoverable. In 1982, for example, lawyers for a leading US bank wrote an article in a law review in which they warned their employers about odious debt. Written at the height of lending to apartheid South Africa, it is likely that they were especially concerned about these particular loans.

Regrettably, the new South African government has balked at calls to declare apartheid era debts odious and signal intent to not pay these debts. The government fears that pursuing odious debts will send a negative signal to present creditors and foreign investors, thereby diminishing the amount of investment capital that might enter the country and making it more difficult to secure future loans. Several banks which hold apartheid era debt are alleged to have warned the new government that any form of debt repudiation would have repercussions for South Africa's standing in the global financial community.

The power of the international financial community is a force that obviously must be considered by proponents of odious debt repudiation. Recognizing that the whole debt enterprise rests on shaky ground, global lenders have formed cartels such as the Paris Club, and employ the IMF as financial enforcer to ensure that any country which might consider unilateral measures is dealt with severely to send a signal to other countries contemplating similar action. Peru's unilateral moratorium on debt payments in the 1980s is perhaps the most infamous example of this. Even with the backing of international law, debtors contemplating legal challenges to odious debt might consider the losses of future loans and investments to outweigh any financial gains from successful challenges.

Nevertheless, as *Apartheid Debt: Questions and Answers* points out, "The market's reaction to government support for debt cancellation will be shaped by the strength of the movement, both here and abroad...If this support is weak, the market will be allowed to react negatively. On the other hand, a powerful campaign can be expected to inhibit an adverse market reaction."

Clearly what is needed and most difficult, and what the creditors also most fear, is the establishment of a successful modern day precedent whereby an international arbitrator would declare a loan, or series of loans, to be odious and therefore invalid. Although there are countless examples of odious debt globally, the South African situation might have the most potential for setting this new precedent. Although the government has so far publicly signaled its intention to pay all past debts, if it could be convinced that future repercussions would be negligible, it could quickly change strategy and opt for a challenge of apartheid debt. Furthermore, creditors already stained by their support for apartheid, might be reluctant to be seen as further impeding the freedom and development of South Africa.

Research is also needed around odious debt held by the multilateral banks. The IMF has been a major contributor to odious debt and has some of the worst lending practices of all the creditors. Could there have been any worse credit risk, for example, than providing loans to the Mobutu regime in the former Zaire? Yet for years, the IMF lent millions of dollars to Mobutu, the results of which are now evidenced by the scores of palatial residences and other personal luxuries left behind after the dictator fled the country. Similarly, IMF loans buttressed the brutal regime of Indonesia's former President Suharto, another country near the top of the list of corrupt nations. The documentation of multilateral odious lending would be a significant contribution to the global campaign against odious debt.

## Legal hurdles

Pursuing odious debt differs from other forms of debt repudiation in that debtors seek the independent authority of international law to declare debts invalid and uncollectible. In that sense, it should not be referred to as debt "repudiation" at all but as "debt invalidation". The whole point of odious debt is that it is recognized as such not just by the debtor, but by the creditor and international law as well.

Unfortunately, despite the fact that the phrase "international financial law" has been used by legal scholars for many years, no such thing exists. There is no clearly identified law which governs discussions and decisions about international finance. When international loan agreements are drawn up, they are usually governed by the national laws of the creditor, which as might be expected, do not contain references to odious debt. Furthermore, there is no commonly held definition of odious debt in any body of law. The fact that there has not been a single international case challenging odious debt since Alexander Sack first introduced the language speaks to the fact that it is not enshrined in financial legal discourse.

Hence, when we are speaking of international law and odious debt, we are entering the indistinct field of "case law." Debt activists need to enlist the support of legal experts who can provide advice on the mechanics of legal recourse and the best strategies to pursue around odious debt. This will give us added credibility when approaching governments who must ultimately initiate this kind of challenge.

## Conclusion

Any odious debt challenge by a debtor is more likely to meet success if other countries, including creditor countries, acknowledge the credibility and legitimacy of this discourse and concept. This is likely to meet with resistance from creditors but acceptance will be greater if we can be as precise as possible in spelling out criteria to qualify odious debt. Perhaps the greatest challenge to odious debt invalidation is the lack of a discriminating mechanism that would help to discern originally legitimate loans from odious ones. Furthermore, although the quantity of odious debt is likely to be fairly extensive, it must be seen as one instrument in our toolbox for canceling debt and not a panacea for tackling the total debt burden we are seeking to have lifted.

One of the greatest obstacles to meaningful debt cancellation lies in the fact that solutions have been relegated largely to the creditor coalition of international financial institutions, governments and banks. The meeting of the G8 in Cologne in June 1999 is evidence that even when the debt problem has been placed squarely on their agenda, no solutions are in fact forthcoming. As long as creditors

emphasize the sanctity of original contracts and the need to play by their own rules of international finance, no solutions can be expected in the future.

Pursuing odious debt represents one way to put more power in the hands of debtor countries and restore the balance of legal protections available to both parties in a loan transaction. It presents itself as a significant opportunity for the Jubilee movement as it allows for the intersecting of moral and legal arguments. Finally, it is an opportunity to test new directions in the campaign for debt cancellation: away from dependence upon the "good graces" of the creditors and towards a declaration and implementation of debt invalidation by the debtors.

## Reference

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# Remboursement de dette et transition économique

*In the centrally planned economies, firms and money played quite different roles from those they play in market economies, giving a profoundly different meaning to debt. Debt served objectives of output, not of profit; it was an integral part of the plan laid down by the central authorities, which largely abolished the link between debtor and creditor. With the shift to the market economy and its demands of profitability, the question arises of who inherits these debts, which arose from the requirements of a central power which has been done away with, but which have now become real financial obligations. This paper examines how the Czech Republic, the former GDR and Russia have each in their own way attempted to find a solution to this novel situation.*

La transformation des pays à économie planifiée en économie de marché est un exemple extrême de la problématique du remboursement d'une dette monétaire.Il s'agit de décider du traitement des dettes nées dans le contexte d'une économie planifiée et qui se trouvent brutalement solidifiées dans un nouveau système dont les règles du jeu n'ont rien à voir avec les précédentes.Les constructions juridiques artificielles des rapports entre agents avaient maintenu une illusion de Droit pendant toute la période soviétique. Ces rapports ont étés transmis intacts dans le nouveau système, où leur portée et leur signification sont tout autre.

Afin d'expliciter l'enjeu de cette question il est utile de rappeler les caractéristiques d'une économie centralement planifiée ainsi que ses différences ontologiques avec une économie de marché. Cette présentation se limite au secteur des entreprises et ne traite pas du cas des particuliers. Dans une économie planifiée existent non pas de véritables entreprises, mais des unités de production, propriété de l'État, et qui échangent des biens entre elles, conformément au Plan d'État qui a force de loi. Parallèlement à ce Plan qui établit des balances

matières est appliqué le plan financier qui alloue aux différentes unités les ressources financières nécessaires correspondantes.

Si le système n'a jamais réussi totalement à supprimer la monnaie, il en a profondément altéré le rôle et la place. La monnaie est devenue une simple unité comptable et un instrument d'ajustement résiduel. La conversion de la monnaie en biens réels n'est pas assurée.

Selon cette même logique, la signification d'une dette pour une entreprise soumise à un objectif de production et non de rentabilité est très relative. Les questions financières sont ainsi reportées sur le centre du système qui est limité dans ses actions par les fuites monétaires générées par le comportement, impossible à maîtriser, des consommateurs et par la dette extérieure.Le lien débiteur-créancier est noyé par l'intégration dans le Plan d'État et par l'absence de consentement libre des parties qui doivent exécuter les décisions prises par le centre. Les banques et les entreprises sont des agents du Plan. Il y a même identité systémique ou organique entre le débiteur et le créancier qui sont deux émanations de l'État.

L'instauration d'une économie de marché est un changement brutal de paradigme et implique:

- l'individualisation et l'émancipation des entreprises, c'est à dire la transformation des unités de production, agents du Plan, en entreprises indépendantes,
- l'instauration de rapports marchands entre les agents économiques,
- la restauration de la monnaie (et notamment de sa convertibilité interne),
- la privatisation des moyens de production.

Ce changement de référentiel transforme brutalement des postes comptables d'endettement en véritables dettes financières. Concomitamment, les entreprises restaurées sont soumises à la contrainte de la rentabilité et à un environnement institutionnel et économique bouleversé (concurrence, effondrement du chiffre d'affaires). La restauration du Droit selon les principes traditionnels aboutit à la restauration du lien créancier-débiteur, mais s'applique à une situation héritée du passé sans la volonté des parties.

Enfin, l'individualisation et la privatisation des entreprises, en transformant les rapports de propriété et ses contours, posent le problème de la répartition des patrimoines, c'est à dire des actifs et des passifs, entre les différents acteurs que sont l'État, les municipalités et les agents privés. Avec le changement des règles du jeu, la valeur des actifs et des passifs se trouve modifiée, de même que leur clé de répartition (nouvelle structure de prix, nouvelles méthodes de valorisation, restitution des biens à leurs anciens propriétaires...) Qui des nouveaux propriétaires, des anciens ou nouveaux créanciers et de la collectivité va finalement assumer l'héritage des dettes?

Dans la pratique cette question n'a pas été traitée de manière uniforme et systématique mais plutôt au gré des circonstances et des contraintes les plus pressantes. Dans tous les cas, les gouvernements ont été confrontés au dilemme suivant: alléger le fardeau des entreprises afin notamment de favoriser l'emploi, renforcer le système bancaire qui est un outil indispensable ou encore chercher à réduire les dépenses budgétaires afin de concentrer les ressources pour financer la transition.L'exemple de la Tchécoslovaquie, de l'Allemagne et de la Russie illustrent la diversité des méthodes effectivement appliquées.

## Le cas tchèque

À l'époque soviétique, les entreprises ont fait l'objet de taxes supplémentaires visant à drainer vers le

budget de l'État les ressources excédentaires des entreprises. Cette ponction fiscale fut compensée par des crédits de la banque d'État aux entreprises, dits "crédits revolving de financement des stocks" au taux fixe de 6% et sans échéance.Lors de la reforme du secteur bancaire en 1990, ces crédits représentaient 35% du total des encours de crédit (180 Milliards de CSK) et menaçaient la stabilité du secteur bancaire en raison de l'écart entre les taux de marché et le taux fixe appliqué aux crédits revolving de financement des stocks.

La décision a été prise de restructurer cet encours de la manière suivante: la moitié était transformée en crédits à moyen terme au taux du marché, et l'autre en crédits court terme, également au taux du marché (20-24%). Cette restructuration aboutissait mécaniquement à transférer sur les entreprises le poids de la dette dont le service était pratiquement multiplié par quatre. Une telle situation était évidemment intenable, d'autant que les entreprises affrontaient la baisse de leur chiffre d'affaires et la concurrence extérieure.Afin de sortir de l'impasse, le gouvernement a créé en 1991 la "banque de consolidation". Les 2/3 des "crédits revolving de financement des stocks" lui ont été transférés (ainsi que les passifs correspondants) et de nouvelles conditions fixées: crédits à long terme (8 ans) à taux variable au taux de refinancement des banques diminué de 400 points de base.

L'histoire ne s'arrête pas là. Aujourd'hui, une partie de la dette a été réduite par l'inflation. Cependant la banque de consolidation à travers ses interventions sur les entreprises en difficulté se retrouve au cœur de la restructuration du tissu économique tchèque et représente une charge budgétaire et un enjeu politique énormes.

## Le cas de la RDA: la réunification allemande

Dans le cas allemand, la transformation des entreprises a été réalisée d'une manière à la fois plus brutale et plus construite. Du jour au lendemain, les entreprises de la RDA, placée sous la tutelle de la *Treuhandanstalt*, ont basculé dans l'économie de marché, en adoptant la monnaie et l'ensemble des règles et institutions de l'Allemagne fédérale. Ce mouvement s'est déroulé selon un cadre juridique précis et très complet. Les entreprises ont en outre bénéficié d'une aide en moyens humains et financiers sans précédent.

Conformément au traite d'union monétaire le DM a été adopté au taux de change de 2 Ost Mark pour 1 DM. L'application de ce taux de change a eu pour effet mécanique de diviser par deux les créances et symétriquement les dettes monétaires. Les autres postes du bilan des entreprises étaient en outre affectés par l'union économique de manière indirecte, à travers la modification de leur valeur intrinsèque. Dans la pratique, la quasi totalité des entreprises de la RDA se retrouvait ainsi en faillite virtuelle, sans capitaux propres.

Afin de permettre aux entreprises de s'adapter, et donc de maintenir des emplois, différents mécanismes de désendettement et recapitalisation avaient été prévus.Avec l'aide de conseillers externes, les entreprises devaient élaborer un concept d'assainissement et un bilan d'ouverture au jour de la réunification.L'objectif était de déterminer le niveau adéquat des fonds propres et de procéder à la recapitalisation et au désendettement correspondants des entreprises. Le calcul était fondé sur des normes statistiques élaborées par la Bundesbank pour chaque secteur d'activité en fonction du chiffre d'affaires et des résultats prévisionnels. La *Treuhandanstalt*, à la fois propriétaire et créancier des entreprises, procédait ainsi à une

mise à niveau financière de l'entreprise par rapport aux concurrents du secteur. Enfin, un certain nombre de postes d'ajustement comptable au passif et à l'actif permettaient d'équilibrer les bilans d'ouverture du point de vue comptable et offraient les moyens techniques de modifications ultérieures rétroactives éventuelles.

Dans une deuxième étape, lors des négociations de privatisation, le montant des dettes acceptées par les repreneurs était âprement discuté, au même titre que le prix d'achat, le niveau des engagements d'investissement et le nombre d'emplois "garantis".Apres avoir calculé pour elle le coût total de l'opération (en déduisant du prix de vente le montant des désendettements effectues), la *Treuhandanstalt* le rapportait au nombre d'emplois sécurisés. Sa décision était largement fondée sur la comparaison de ce ratio au coût moyen de maintien d'un emploi dans la branche considérée.

Le traitement de la dette héritée de l'ancien régime (*Altschulden*) apparaît ici comme un modèle de pragmatisme et d'équité. Il constitue aussi un renversement de l'approche classique du créancier: à aucun moment il n'est fait référence à la dette historique ou à une exigence de remboursement. L'approche est tournée vers l'avenir et vise à placer l'endettement du débiteur à un niveau qui lui permette, dans le temps, d'affronter la concurrence dans des conditions normales. Une telle stratégie de la dette était cohérente avec l'objectif de privatisation des entreprises dans l'Allemagne réunifiée et la recherche du maintien des emplois, et rendue possible grâce aux importants moyens financiers mobilisés par la *Treuhandanstalt*.

## Le cas russe

Le cas russe est complexe et mériterait à lui seul des développements qui dépassent le cadre de cette présentation.

Ici le processus de transformation s'est déroulé de manière caricaturale et anarchique. En l'absence d'un renforcement des institutions et de l'élaboration de réformes adéquates et coordonnées, la privatisation des entreprises a tourné à l'appropriation des biens publics par ceux qui en avaient les moyens. L'État, lui, conservait les dettes, tandis que les actifs les plus intéressants étaient transférés au secteur privé.

L'hyper-inflation des années 90 n'a pas fondamentalement modifié le problème des dettes puisqu'aucunpuisque aucun changement structurel n'est intervenu pendant cette période. Le chaos institutionnel et politique de l'époque Eltsine est caractérisé par le non-respect généralisé de la norme juridique et plus particulièrement du lien débiteur-créancier, à tous les niveaux, qu'il s'agisse de l'État, des entreprises publiques ou privées. L'État n'honore pas ses commandes, ne paie pas les salaires des fonctionnaires, tandis que les entreprises ne payent pas leurs employés, leurs fournisseurs, leurs créanciers et le fisc. Les particuliers n'honorent pas leurs factures de gaz ou d'électricité.

Parfois les règles de remboursement des dettes sont utilisées de manière plus rigoureuse. Ainsi par exemple dans le cadre d'opération d'initiés d'acquisition de titres de sociétés du secteur des matières premières, à des prix avantageux et sans enchères publiques. Des banques avaient reçu en garantie de prêts de refinancement de la dette fédérale les titres d'entreprises qu'elles convoitaient. Bien entendu, à l'échéance, ces dettes n'étaient pas remboursées, et la propriété du collatéral transférée aux créanciers.

Le cas d'opérations militaires pour prendre le contrôle de centrales énergétiques qui ne livrent plus en électricité des installations stratégiques de la défense nationale en raison du non-règlement des factures n'est malheureusement pas anecdotique et reflète la dimension du problème.

Il n'est pas douteux que le rétablissement effectif et non discriminatoire de la norme de droit et en particulier des rapports débiteurs-créanciers est une condition sine qua non de la refondation économique et politique de la Russie.

Le passage à l'économie de marché est par nature une rupture avec le passé. Toutefois la précipitation avec laquelle les réformes ont été menées, sans véritable stratégie, ni réflexion préalable, a conduit à transmettre ou traduire dans le nouveau cadre des rapports biaisés, qu'il aurait été judicieux d'apurer au préalable. La transmission de cet héritage illégitime pèse encore aujourd'hui. L'opération vérité est inévitable.

# Through what mechanisms is it legitimate to demand the repayment of a debt?

# *Au moyen de quels mécanismes est-il légitime d'exiger le remboursement d'une dette?*

La seconde section de cet ouvrage présente quelques propositions visant soit à mieux déterminer si une dette internationale répond effectivement à des conditions agréées justifiant que ses créanciers en exigent le remboursement, soit à en faciliter le remboursement.

La première proposition a beau être la plus concise, elle n'en est que plus percutante. Elle donne le ton pour cet ébauche de recherche de solutions non seulement equitables mais réalistes.

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# Ill-gotten gains to the rescue

*La rémission de la dette de pays endettés risque au fond de récompenser les kleptocrates qui ont pillé leurs pays. M. Dherse propose que lors de la renégociation de la dette dans le cadre du Club de Paris, le pays concerné remette à ses créanciers en contrepartie le titre à tout fonds que les régimes précédents auraient illégalement exporté, car ce sont les gouvernements créanciers plutôt que le débiteur qui disposent des moyens de retrouver les comptes secrets et de les saisir.*

Pressure for large-scale, coordinated debt relief, perhaps including a debt write-off for the poorest countries, has never been greater. The World Bank's HIPC initiative, inter-faith pressure in the context of the Jubilee 2000 campaign, all of this seems to be pushing on an open door. But there are nay-sayers, who cannot be ignored.

They warn that writing-off (or writing-down) debt can set a dreadful precedent, appearing to reward the kleptocrats who have reduced their countries to penury, and penalising those countries (like Uganda) that have genuinely made an effort to meet their international obligations. This "moral hazard" argument is a hard one, and it risks derailing the movement for substantial debt relief – a movement that, in my view, has a moral imperative of its own.

Is there a way to keep the train on track? I think there is. The idea came to me when thinking about the role of the Paris Club in rescheduling official debt incurred by some of the worst regimes we have experienced in the emerging world – Marcos in the Philippines, Mobutu in Zaire/Congo, Abacha in Nigeria and so on – and when reviewing the pathetic efforts of successor governments to track down the assets that the kleptocrats and their cronies spirited abroad.

Not surprisingly, many right-thinking people in the West (not just hard-hearted bankers) are reluc-

tant to write off billions of dollars of loans when they know that a very large part of the money (perhaps all) is sitting offshore in Geneva or Miami or Vienna.

Debtor governments know that, and they do from time to time make an effort to get the money back. But, as the Aquino government found, it is an uphill struggle: lawyers are expensive, and political muscle can be as important as the law in prying open the bad guys' strongboxes.

My suggestion is simple: as part of the price for a comprehensive debt rescheduling (or write-down) of official debt through the Paris Club, the debtor government should formally transfer to its creditors title to any funds illegally spirited abroad by previous regimes. After all, it is the creditor governments (not the debtors) that have the money, the muscle and the lawyers to track down secret accounts and to sequester them.

I am aware that, as it stands, my proposal needs fleshing out. A definition of funds illegally exported will not be easy to agree; and what happens if the present regime's hands are no cleaner than those of its predecessor?

How does one ensure that all available documentation is handed over? And who will take over the claims? The Paris Club itself? Or individual creditor governments? Jointly or severally? But, though important, these are details; the crucial point is the principle that debt relief will not be given unless the debtor country is willing to surrender all rights to illegal offshore accounts.

In my view, this proposal, if adopted, would have two powerful results. First, it would mean that debt relief could actually be presented to Western electorates as potentially cost-free, in that the money recovered might well exceed the value of the relief. (Whether creditor governments choose to hypothecate any funds recovered to their aid budgets would, of course, be up to them.) Second, and linked to the first point, it would build up a political constituency for debt relief that would transcend party and that could not be undermined by the "moral hazard" argument.

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# An international insolvency procedure for sovereign States

*En cas d'insolvabilité du débiteur, que celui-ci soit privé ou public, la déclaration de faillite apparaît comme une solution à la fois plus juste - le paiement de la dette ne peut être exigé au détriment de la dignité humaine des personnes endettées - et plus conforme à la raison économique - la stricte imposition des clauses du contrat de dette initial conduisant en définitive à la ruine du débiteur, donc à son incapacité durable de tout remboursement. De plus, la déclaration de faillite implique l'intervention d'une instance tierce, conformément au principe de droit selon lequel on ne peut être juge et partie, et comporte donc une amélioration notable par rapport aux pratiques actuelles laissant aux créanciers, publics ou privés, tout pouvoir dans la résolution du problème de l'endettement des pays les plus pauvres. Une cour d'arbitrage internationale, indépendante des institutions financières multilatérales, devrait être instituée à cet effet. Le Chapitre 9 de la loi américaine sur la faillite contient des dispositions qui pourraient inspirer avec profit la pratique de cette nouvelle institution, chargée de trouver des solutions équitables au problème du surendettement des Etats souverains, prenant en compte les intérêts de toutes les parties.*

> *When it becomes necessary for a state to declare itself bankrupt, in the same manner as when it becomes necessary for an individual to do so, a fair, open, and avowed bankruptcy is always the measure which is both least dishonourable to the debtor, and least hurtful to the creditor.*
>
> - Adam Smith, *Wealth of Nations* (1776)

In spite of this lucid advice of a Scottish professor of moral theology the idea of international insolvency remains anathema, especially to official creditors. Soon after 1982 a British banker, David Suratgar, recommended international insolvency procedures modelled after the US Chapter 11 (the insolvency of private firms) to solve the international debt crisis, an idea that was widely discussed in the mid-eighties. Recently, it has gained currency again. Many years of failed attempts by creditors to find a solution seem to explain this. UNCTAD (1998) renewed the proposal of applying Chapter 11 insolvency to sovereign creditors, initially made by it in 1986. In connection with the Asian crisis insolvency procedures for firms are seen as essential for avoiding future crises. The Reports on the International Financial Architecture published by the OECD (1998) recommend it strongly, but avoid the word 'insolvency' with regard to sovereign debtors. The Working Group on International Financial Crises proposed an insolvency procedure in all but name, demanding

the international community to provide: "in exceptional and extreme circumstances ... a sovereign debtor with legal 'breathing space' so as to facilitate an orderly, co-operative and negotiated restructuring" (OECD 1998, p.37).

Emulating insolvency features, such as debt reduction by qualified creditor majority or 'Collective Action Clauses' for sovereign bond contracts, was recommended as a major contribution to "creating the institutional structure needed to encourage orderly workouts" (ibid., p.21), because a "binding insolvency regime for sovereign debtors is unlikely" (ibid., p.19). The Report even admits that "a purely voluntary approach" might not be feasible because "the government may not have the bargaining power to obtain sustainable terms" (ibid., p.30), e.g. if creditors demand destabilisingly high interest rates. It remains to be asked why the Working Group shied away from the obvious conclusion - the need for an independent entity empowered to decide in such cases - and why all the advantages it praised in the case of firms should not be equally advantageous in the case of sovereign debtors. Why emulate features of insolvency instead of simply using the existing model, which can be adapted so easily?

The IMF, a bulwark against insolvency over years went one step further. Michel Camdessus suggested "some sort of Super Chapter 11 for countries" in an interview with the *Financial Times* (17 September 1998), qualifying the need for international bankruptcy procedures "already" an "obvious lesson". This conclusion is welcome, even though 'already' is definitely the wrong word. A bill officially named 'Global Sustainable Development Resolution' about to be introduced in Congress by Congressman Bernie Sanders called for an international insolvency mechanism based on Chapter 9 of US bankruptcy laws, including arbitration as proposed within an international Chapter 9. Meanwhile the OECD (1999, p.191) too has come around to accepting insolvency: "Moreover, an international lender of last resort and an international bankruptcy court could help to prevent financial panics altogether."

Encouraged by these recent evolutions and fully agreeing with the OECD's present view about international insolvency, this paper is going to show why such procedures make economic sense, how easy it would be to implement them, and what damage is being done by those creditors opposing them.

## The Essence of Insolvency

The basic function of any insolvency procedure is the resolution of a conflict between two fundamental legal principles. In a situation of overindebtedness the right of creditors to interest and repayments collides and the principle recognised generally (not only in the case of loans) by all civilised legal systems that no one must be forced to fulfil contracts if that leads to inhumane distress, endangers one's life or health, or violates human dignity. Briefly put, debtors cannot be forced to starve themselves or starve their children to be able to pay. Although the claims of *bona fide* creditors are recognised as legitimate, insolvency exempts resources from being seized by them. Human rights and human dignity of debtors are given priority over unconditional repayment. It is important to emphasise that insolvency only deals with claims based on a solid and proper legal foundation. In the case of odious debts, e.g., no insolvency is needed, as these are null and void. Demands for cancelling apartheid debts are therefore based on the odious debts doctrine.

Debtor protection is one of the two essential features of insolvency. The other is the most fundamental principle of the Rule of Law: that one must

not be judge in one's own cause. Civilised insolvency laws applicable to all debtors except developing countries demand a neutral institution assuring fair settlements. Like all legal procedures insolvency must comply with the minimal demand that creditors must not decide on their own claims. Even at the time of debt prisons creditors were not allowed to do so - in contrast to present international practice which most flagrantly violates this very minimum required by the Rule of Law. Creditors have been judge, jury, experts, bailiff, even the debtor's lawyers, all in one. This unrestricted creditor domination is not only an open breach of the Rule of Law, a principle presently preached to Developing Countries by OECD governments, but also inefficient from a purely economical perspective. Creditors tend to grant too small reductions too late, thus prolonging the crisis rather than solving it.

Insolvency relief is not an act of mercy but of justice and economic reason. Substantial shares of present debts exist only because of prolonged, unsuccessful debt management by official creditors refusing necessary debt relief over years. This increased debt burden is creditor-caused damage. When the debt crisis was declared over during a brief period of euphoria the IBRD (1992, pp.10ff, stress in original) suddenly lectured: "In a solvency crisis, early recognition of insolvency as the root cause and the need for a final settlement are important for minimizing the damage. ... protracted renegotiations and uncertainty damaged economic activity in debtor countries for several years ... It took too long to recognize that liquidity was the visible tip of the problem, but not its root."

Two of the IBRD's economists, Ahmed & Summers (1992, p.4) quantified the costs of delaying the recognition of the "now" generally acknowledged solvency crisis as "one decade" lost in development. It was conveniently forgotten to mention that this delay had been caused by the defenders of the illiquidity theory, most notably the Bretton Woods Institutions (BWIs) supporting it by overly optimistic forecasts "proving" that debtors would "grow out of" debts so that meaningful debt reductions were not required. In spite of the IBRD's insight about damage done the HIPC-Initiative delayed the solution again for six years, and insolvency remained shunned. This delay must - according to the IBRD - have damaged poor debtor economies further. Neither Bank, Fund nor other official creditors see their delaying tactics as a reason for compensating at least part of the damage caused by them.

Logically, debts have grown further by capitalised arrears, adding unpayable debts on top of those obligations an insolvent debtor is already unable to honour. If a debtor has to pay n% interest, but is only able to pay m% (m<n) the stock of debts grows by (n-m)% every year. With n and m assumed constant (5 and 2.5 respectively) debts would, e.g., increase by 28 percent over a decade. The example could be complicated, e.g. by introducing repayments of principal, variable interest rates or inflation, but the basic mechanism remains unchanged. If the debtor is insolvent rather than illiquid, debts start accumulating on paper, further beyond an insolvent debtor's economic capacity to repay. Debts that can never be repaid because of increasing gaps between economic capacity and payments contractually due - "phantom debts" (Raffer 1998) - must increase eventually. As anyone familiar with basic mathematics can verify, creditors unwilling to grant sufficient relief when necessary, increase irrecoverable debts. Total debts are pushed to ever more unrealistic levels, making reductions to economically sustainable amounts appear costlier and costlier on paper as the share of phantom debts increases. Existing only on paper they nevertheless compromise the debtor's eco-

nomic future. They also allow creditors to exert pressure. "Forgiving" them means losing political power not money. One cannot lose money one cannot get. Deleting phantom debts simply means stopping to play the Emperor's New Clothes, acknowledging the naked economic truth.

As phantom debts make sensible debt reductions look costly creditors are reluctant to grant them, although the money is already lost, and real costs are zero. This applies in particular to official creditors, either because they unjustifiedly insist on preferential treatment, or because they have no loan loss reserves. Trying to keep write-offs small to go easy on their budgets, official creditors have allowed debts to grow further, thus increasing the problem, forcing themselves to accept much bigger write-offs later when the illusion of repayment finally crumbles. Insolvency laws in all decent legal frameworks avoid precisely this kind of creditor-dominated debt management increasing phantom debts at the expense of the debtor's economic recovery. They insist on neutral bodies deciding necessary debt reductions. The fatal flaw of the HIPC-Initiative - unhampered creditor power causing insufficient debt reductions - is ruled out by all insolvency procedures. Debtors are not left completely at the mercy of creditors. Phantom debts show that a neutral institution makes economic sense.

## International Chapter 9 Insolvency and Arbitration

As courts in creditor or debtor countries are unlikely to be totally unbiased, an international court of arbitrators is necessary. This is by no means a new or radical proposal. Arbitration is a traditional mechanism of international law, already used in the case of debtors. Differences between Germany and its creditors were to be settled by arbitration pursuant to the London Accord. Loan agreements in the 1930s stipulated it to solve disagreements. Recently it has become extremely popular except for Southern debts: both the World Trade Organisation (WTO) and the NAFTA Treaty established arbitration as an important means of problem solving. OECD governments wanted to make it part and parcel of the fiercely debated Multilateral Agreement on Investment. The WTO alone has had many more than 100 cases already. Apparently arbitration is always popular, provided it does not safeguard the human dignity of the poorest in indebted developing countries.

A neutral court of arbitrators is mandatory to assure fairness to both debtors and creditors. It must not be forgotten that creditors themselves are not unbiased when making decisions affecting their own claims as well as those of other creditors. *Emerging Markets this Week* (no. 26/1999 of October 15, 1999, stress in original) published by the Commerzbank in Germany, expresses this concern very clearly: the BWIs "will be concerned *with protecting their own balance sheets* rather than with fair 'burden sharing'." Therefore the "IMF and World Bank are not suited either as arbitrators or as objective regulators of sovereign insolvency procedures."

The problem faced by arbitrators boils down to determining which percentage of debts is uncollectable, either because they are phantom debts or because of debtor protection guaranteeing a minimum of human dignity of the poor and providing resources necessary for economic recovery and sustainability. An economic solution with a human face is needed - international insolvency. There is a formalistic counterargument against internationalising US Chapter 11 (of Title 11, 'Bankruptcy') that carries enough weight to destroy it. As insolvency procedures for firms do, of course, not tackle the problem of sovereignty or governmental powers, it

was rightly argued that it cannot be applied to sovereign debtors. This argument is right as far as it goes, but there is an easy way out. Instead of internationalising Chapter 11, one can easily and immediately apply the US Chapter 9 to sovereign debtors. Designed and used for decades in the US to solve debt problems of municipalities, debtors vested with governmental powers, its essential points can be easily applied to sovereign borrowers. Like all good insolvency laws it combines the need for a general framework with the flexibility necessary to deal fairly with individual debtors.

During the Great Depression Chapter 9 procedures were introduced precisely to avoid prolonged and inefficient negotiations, allowing a quick, fair, and economically efficient solution for overindebted US municipalities. They became law for the very purpose of avoiding the kind of "debt management" practised internationally. Under Chapter 9 US laws protect both the governmental powers of the debtor and individuals affected by the plan. Affected tax payers as well as employees of the municipality have a right to be heard and to defend their interests. Creditors are to receive what can be "reasonably expected" from the debtor under given circumstances. The living standards of the indebted municipality's population are protected. The US Supreme Court stated in the case of Asbury Park that a city cannot be taken over and operated for the benefit of its creditors. Public interest demands that the debtor must be allowed to go on functioning as a public entity providing basic services in fields such as health, welfare or security to the population. The "lemon squeezer" approach of the BWIs would be illegal and unthinkable in the US.

The jurisdiction of the court depends on the municipality's volition, beyond which it cannot be extended, similar to the jurisdiction of international arbiters. A first draft by municipalities that did not bar creditor intervention into the governmental sphere was rejected by lawmakers as unconstitutional (Spiotto 1993). Creditor interventions such as those usual in developing countries nowadays were considered unacceptable. This demonstrates the appropriateness for sovereign debtors. Technically, Chapter 9 offers the legal possibility to implement an economically sensible solution.

## Basic Features of an International Chapter 9

Having repeatedly presented this proposal (especially Raffer 1990; Raffer & Singer 1996, pp.203ff) since I made it first in 1987, I only sketch its most essential elements briefly.

– *Arbitration*: Both sides (creditors/debtor) nominate the same number of persons, who elect one more person to achieve an uneven number. This international panel of arbitrators would enforce economic reasoning to establish the economic capacity to pay, taking into account necessary expenditures for social safety nets protecting a minimum of human dignity of the poor, and the resources needed to safeguard the debtor's economic future.

In an international insolvency, people affected by the solution would be represented by organisations speaking on their behalf, e.g. trade unions, employees' associations (like in US Chapter 9 cases), employers' associations, religious or non-religious NGOs, grassroot organisations of the poor, or international organisations, such as UNICEF. This transparency, also demanded by domestic Chapter 9 proceedings, would guarantee a fair outcome. Minds more critical than this author's might ask whether it is mere happenstance that M. Camdessus (when Managing Director of the International Monetary Fund) suggested some kind of international Super Chapter 11 for countries instead of Chapter 9, in spite of its legal inap-

propriateness. Understandably Chapter 11 – a framework for insolvent firms – does not demand the open and transparent procedure of Chapter 9. Unlike the latter Chapter 11 would accommodate the IMF's well documented desire for secrecy. One could continue to negotiate behind closed doors. The right to be heard in fair and equitable proceedings and the possibilities of describing the expected effects on the poor in public, which would certainly have mitigating effects, would be gone. Participation - another demand of OECD governments when acting as aid donors - with it.

Like in the US the final settlement must also take creditors' justified interests duly into account. This is essential as only a fair mechanism of solving overindebtedness would be generally accepted internationally in the same way national insolvency procedures already are. The Commerzbank publication quoted above pointed out: "What private creditors object to is not a framework for restructuring debt in cases of extreme distress", if the procedure is fair and the burden of debt reduction is shared among all creditors. Insolvency is also in the best interest of *bona fide* creditors.

- *Assessment of Debts*: All claims have to be verified loan-by-loan at the beginning, a routine procedure in any domestic insolvency case.

- *Socialised Debts*: Governments were frequently forced to assume retroactively losses from private lending initially done without any government involvement, which increased the debt burdens of some countries perceptibly. This has never met audible protest by IFIs. This socialisation of private losses must be declared null and void, socialised debt should be re-privatised.

- *Economic Reforms and Determining the Capacity to Pay*: Doubtlessly there exists a need for reform within debtor countries too. These reforms, monitored by the council of arbitrators should adjust the debtor to the real international environment, not to a textbook illusion of "free markets". Realistic strategies have to drop the BWIs' predilection for one-sided liberalisation by those countries that can be forced to do so. Import substitution should be encouraged where economically viable to form the basis of future economic diversification. Monitoring by the arbitrators could help to overcome the problem of petrifying protection. Temporary protection should allow domestic industries to compete with imports, and should be reduced as domestic industries become more efficient.

Debt service payments have to be brought in line with the debtor's capacity to earn foreign exchange. Where the removal of protectionist barriers can be expected to lead to higher export revenues a trade-off between more repayments and less protection or higher debt reduction without reduced protection is necessary. Percentages must not be determined unilaterally by creditors.

- *Measures against Capital Flight*: In analogy to domestic laws the international Chapter 9 should provide the possibility of overruling banking secrecy if justified suspicion exists that money was obtained by certain criminal activities, such as corruption, theft or embezzlement. A particularly interesting and innovative idea by Jean-Loup Dherse (President of the *Observatoire de la finance*) is presented earlier in this volume. Debtor countries should formally transfer to the Paris Club or its members title to any funds illegally spirited abroad by former regimes. These creditors have the means to track down and sequester this money. Debt reductions would thus be at least partly self-financing. The concern that debt relief would mainly benefit corrupt élites could be thoroughly dispelled. Of course, OECD governments could also choose to let former dictators have that money as a reward for whatever services rendered to cred-

itor governments, as long as the country and the poor would not have to pick up the bill.

- *Symmetrical Treatment of All Creditors* : Logic and fairness suggest that official creditors, including International Financial Institutions (IFIs), must be treated in the same way as commercial banks. The Commerzbank rightly demands that IFIs "must also accept accountability for their past lending policies." While this demand would already be justified by the simple fact that IFIs lend, they also have - in contrast to commercial banks - routinely taken decisions how their loans were to be used. It is the most basic precondition for the functioning of the market mechanism that economic decisions must be accompanied by (co)responsibility: whoever takes entrepreneurial decisions must also carry entrepreneurial risks. If this link is severed - as it was in Centrally Planned Economies - market efficiency is severely disturbed.

For an international Chapter 9 a symmetrical treatment of IFIs follows convincingly. Debt reduction must be uniform, the same percentage must be deducted from all debts. Symmetrical treatment would hold IFIs financially accountable. It is a matter of fairness to debtors as well as to other creditors. If IFIs do not reduce debts other creditors have to grant more to re-establish the debtor's economic viability. The example of "Brady bonds" shows that even generous reduction by one class of creditors alone is insufficient, particularly so if IFIs increase their lending at the same time. Ecuador's inability to honour its commitments under the Miyazawa/Brady scheme drives this point home.

By contrast, the idea of financial accountability for projects, i.e. compensation for damages negligently caused by IFI or donor staff within projects, where determining faults and errors is much easier, is an issue in its own right. It has nothing to do with insolvency. But it would reduce the debt burden further (Raffer 1993; Raffer & Singer 1996, pp.206ff). Presently IFIs gain from their own failures at the expense of their clients, as failed IFI-projects usually lead to more IFI-loans and thus higher IFI-income. Flops create jobs. As long as the big moral hazard of this perverted incentive system is tolerated by OECD governments, one cannot believe their moral hazard arguments when it comes to relief for debtors.

- *Expenditures Protecting the Poor and for Sustainable Economic Recovery*: It is mandatory that schemes to protect a minimum standard of living be part of every international composition plan. In analogy to the protection granted to the population of an indebted municipality by domestic Chapter 9 the money to service a country's debts must not be raised by destroying basic social services. Subsidies and transfers necessary to guarantee humane minimum standards to the poor must be maintained. Funds necessary for sustainable economic recovery must be set aside. The principle of debtor protection demands exempting resources necessary to finance minimum standards of basic health services, primary education etc. This exemption can only be justified if that money is demonstrably used for its declared purpose. Not without reason creditors as well as NGOs are concerned that this might not be the case.

The solution is quite simple - a transparently managed fund financed by the debtor in domestic currency. In a discussion with public servants of the G7 and representatives of the BWIs Ann Pettifor (1999) proposed a Poverty Action Fund as a means to guarantee that the money is actually used for the poor and for expenditures necessary for a fresh start of the debtor economy. The management of such a fund could be monitored by an international board or advisory council consisting of members from the debtor country as well as members from creditor countries. They could be nominated by

NGOs and by governments (including the debtor government). As this fund is a legal entity of its own, checks and discussions of its projects would not concern the government's budget, which is an important part of a country's sovereignty. Aid could also be channelled through the fund, changing its character of money just set apart from the ordinary budget towards a normal fund for the poor.

– *Creditor Claims and Debt Reduction*: The effects of necessary debt reductions on creditors differ quite strongly. Creditors with loan loss provisions are in a better position than others. Provisioning spreads losses, which might ruin a creditor if they had to be absorbed in one year, over several years. In contrast to private creditors governments do not provision. Due to antiquated accounting techniques debts (including phantom debts) remain in their books at nominal values, uncorrected by provisioning, even if their real economic value is but a small fraction. The *Washington Post* (16 March 1999) reported e.g. that a nominal value of $3 billion of official US loans to be forgiven amounted to $190 million if valued according to market practice. Without loan loss reserves covering the difference between nominal and real values, governments have to absorb the full amount of debt reduction at once.

Without the appropriate mechanism of *ex ante* risk management by provisioning governments would have to emulate the effect of loan loss reserves *ex post*. This can be done by transferring all debts that have to be cancelled to a fund, freeing the country immediately from its debt overhang. Creditor governments could go on holding these claims against this fund, stretching debt reduction over years to avoid the shock of absorbing the full amount in their books at once. Admittedly, this is not an elegant solution. But as public accounting is not done in an elegant way, it is a feasible trick to make reductions absorbable. The example of public creditors underlines the stabilising function of loan loss provisioning. They allow creditors to react more flexibly and adequately.

A clarifying remark on tax deductible loan loss provisions is necessary, because their costs to the taxpayer have often been exaggerated, to the point of being misunderstood as a taxpayers' subsidy to banks. Economically, reserves should bridge gaps between nominal and real values. If the loss in value of claims equals precisely provisions made, tax deductibility avoids the taxation of illusory profits, bringing taxable income in line with actual, economic income. Only to the extent that reserves are larger than actual losses they are in essence a loan. In continental Europe this loan carries no interest – not only in the case of banks, but of all creditors. At a tax rate of 50%, and an interest rate of 5% at which the government itself borrows, a difference of $100 costs taxpayers $2.5 annually. The longer it takes to solve the crisis (= to realise losses) the higher will these costs become. However, tax systems without deductibility do not automatically imply no costs to taxpayers as cases such as Continental Illinois or S&L institutions in the US prove. If the regulatory framework functions properly, keeping the difference between losses in value and reserves low, costs will be minimal. But stabilising effects will be large.

Introducing international insolvency could also be used as an opportunity for changes allowing creditors to react more appropriately in the future. Complicated norms creating "legal risk" should be changed appropriately. Introducing tax deductibility of loan loss reserves in those countries where they are not deductible would also be indicated.

## Conclusion

An international insolvency procedure for states is a necessary part of a meaningful international financial architecture. Without such an orderly and fair procedure crises are prolonged and damage is inflicted unnecessarily, mostly to the poorest, so-called vulnerable groups. History shows that protracted manœuvring does not make unpayable debts paid. Therefore the idea of an insolvency for states has come up repeatedly. Sometimes countries – many of them nowadays themselves creditors – simply refused to pay. Occasionally, *de facto* insolvency was granted, Germany in 1953 being one prominent case. Comparing Germany's debt indicators with those considered "generous" for the poorest countries by the Cologne Summit shows an inexplicable difference regarding the treatment of debtors. During the years before the London Accord Germany had e.g. a debt service ratio of less than 4% (Hersel 1998), which was considered unsustainable though well below the 15% of HIPCs after Cologne. The successful economic policies Germany was allowed to pursue, characterised by the term 'social market economy' (*Soziale Marktwirtschaft*) were the very opposite of BWI-type 'structural adjustment'.

The management of the Egyptian debt crisis of 1876 is another success story contrasting vividly with present BWI-policies. The administrator appointed to protect creditor interest, Evelyn Baring, did not apply the "lemon squeezer" approach. He lowered taxes, postal fees and other charges, financed expenditures in public health and education, and encouraged improvements in irrigation (cf. Dommen 1999). Wages and pensions were paid out in full. After a surprisingly short time his concept was economically successful for creditors and the debtor alike. A hard nosed 19th century capitalist managed this debt crisis much better and more quickly than international public sector institutions did after 1982. It remains to be noted that the representatives of private bondholders had decided to use Egyptian insolvency law as the yardstick for the solution. This underlines that Adam Smith was right. His advice should finally be heeded to avoid further unnecessary damage to debtor economies and further unnecessary suffering by vulnerable groups.

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# An international debt-relief forum

*La mise sur pied d'un conseil de médiation international appelé à intervenir sur les questions concernant les dettes publiques constituerait un développement souhaitable à la fois pour les Etats les plus endettés et pour les créanciers privés, qui verraient leurs droits mieux défendus avec l'existence d'une telle instance. Lorsque la charge financière est excessive, la remise en question du contrat de dette doit être conçue comme un droit pour les débiteurs souverains, suivant le modèle de la déclaration de faillite des débiteurs privés que l'on rencontre dans tous les systèmes législatifs modernes. L'existence d'une telle procédure autoriserait les Etats les plus pauvres à suspendre le service de la dette extérieure au cas où les montants ainsi utilisés menaceraient la satisfaction des besoins les plus essentiels de la population indigène. Le contrat de dette devrait ensuite être renégocié devant les instances du Conseil de médiation international. L'article évoque les mécanismes et procédures qui devraient présider aux travaux d'une telle institution, il montre clairement qu'une telle évolution serait parfaitement congruente avec les diverses sources du droit international, ainsi qu'avec les différentes traditions religieuses.*

This paper discusses the question posed in the title of this Colloquium, "Under what conditions is it legitimate to demand the repayment of a money debt", by focussing upon the legal issues involved in the establishment of an international forum for resolving sovereign claims for debt relief. Such a forum has been proposed before, called by some an international court of arbitrators (Raffer 1992; Raffer in Eurodad 1998), a Sovereign Debt Mediation Council by others (Lambeth Conference of Anglican Bishops, August 1998) and an International Insolvency Court by still others (Jesuits for Debt Relief and Development 1999). Given the need for agreement by all nations (both debtor and creditors States), to establish such a forum, a less formal structure, along the lines of current Paris Club consultative meetings, or meetings of the HIPC nations, appears the more likely to emerge as a first step. For this reason, the term Sovereign Debt Mediation Council ('the Council') is preferred in this paper.

A number of writers have pointed to Chapter 9 of the US Bankruptcy provisions as a possible model for a new international sovereign debt relief mechanism. Chapter 9 enables bankruptcy proceedings to be initiated in relation to local municipal governments in the USA, and has been considered relevant in relation to national governments because (at least until recently, when similar legislation was

enacted in Hungary), it has provided the only legislative precedent in the world providing for formal insolvency of a sovereign entity.

In recognition of the uniquely *international* nature of the financial undertakings given by debtor national governments when raising money overseas, the aim of this paper is to broaden the scope of the debate beyond this, and to focus upon precedents and concepts drawn from international law. Since the new international regime will, in the end, need to be accepted as part of international law, the international law problems raised by sovereign insolvencies, and the possible solutions to such problems that would still be valid in an international law context, must eventually be addressed more fully, so this paper is, at most, just a beginning.

Looking to international law, rather than domestic legal regimes when discussing the sovereign debt problem helps to avoid entanglement in arguments over whether the sovereign independence of individual nations might be compromised by an international bankruptcy forum having significant supervisory, monitoring and decision-making powers. No one suggests that membership of the WTO or the International Court of Justice (ICJ) compromises national sovereignty; and the new Debt mediation forum proposed here would be simply one more such institution, forming part of the same global institutional infrastructure accepted by all sovereign states in today's world, and recognizing the same principles of the law of nations as other intergovernmental institutions.

Looking to universally accepted international legal principles also helps to avoid accusations of cultural bias. A number of international institutions and conventions have been criticised for conforming with western legal norms, with only minimal recognition, at best, given to norms and principles drawn from other cultures.

A large part of the reason for distinguishing commercial from public sovereign debt stems from the fact that while the former arises from activities directed towards making, indeed maximising, profits generated for commercial gain, the latter is, or should be, directed towards the improvement of a whole society, that is, a group of people with a recognised social and national identity. Commercial borrowing is by its nature a risk-taking exercise, and debtors are justifiably required to turn to the Private bankruptcy procedures of national courts and legal systems for relief. Around the world, this has always been, and continues to be the case for all disputes arising from commercial activity involving at least one private party.

In other words, where government debt is incurred for commercial reasons and in the pursuit of commercial activity, such debts can be recovered by the creditor in accordance with ordinary commercial legal procedures. Moreover, government commercial assets cannot be the subject of an legally effective moratorium on repayment. A survey of most national legislative regimes supports this. Most nations have legislation dealing with sovereign immunity that outlines when such immunity can be claimed. And most such legislation provides that sovereign immunity cannot be claimed in respect of government commercial assets; with some countries making the distinction between commercial and sovereign assets by providing that sovereign immunity can validly be waived only in respect of the former (Memoranda to Debevoise and to Sturzenegger in Pearce 1987).[1] The USA's Chapter 9 does become useful here as a model of how one might approach the task of separating public from commercial debt when the two are, as

1 Pearce 1987b provides a comprehensive overview of relevant legislation in a broad range of common law and civil law countries throughout the world.

they often are, closely intertwined in a series of similar institutions and /or transactions.

To say that sovereign debt should be distinguished from commercial debt incurred by government instrumentalities helps to define the nature of the debt when sovereign debt relief processes occur within an international forum, and helps to clarify the particular principles of international law which should govern the case. But governments often borrow from private banks and financial institutions. Private creditors can argue that, just as sovereign debt is immune in the context of national forums, so private claims on debtors should not fall within the purview of international law. Moreover, it might be argued, to focus on the (sovereign) debtor in resolving claims for payment of debt owed (or claims for relief from such debt) is to deny proper protection for the rights of the private creditor. Such a claim however, avoids the real issues involved, and in particular ignores the competing claims of large sectors of debtor nations to basic human rights and dignities. Moreover, there is no reason why an international forum, governed by international law, cannot be established so as to ensure that the rights of private parties are fully protected in legal disputes between a sovereign state and one more private legal persons. The International Court of human rights and the European Court of Human Rights are both examples of forums established and governed by international law to deal with private claims against state institutions. The International Convention for the Settlement of Investment Disputes between States and Nationals from other states[2] is another example of a treaty aimed at protecting the rights of private parties in disputes with national governments. There is no reason why an International Debt Mediation Council could not be structured along similar lines, and governed by similar rules and principles. Indeed, the very concept of international insolvency for sovereign debts seems to have first emerged from the private sector when Banker David Suratgar suggested it in 1982. Another banker, the late Alfred Herrnhausen, was among the most vocal advocates of negotiated debt reduction (Raffer, in Eurodad 1998).

If we look at international practice, we see that commercial banks have quite often, though not always without 'persuasion', granted debt reductions in various forms. Encouraged by a private consulting firm, Hungary has recently introduced insolvency proceedings for municipal governments – largely modelled on the US Chapter 9 example. The international business community did not voice concerns. To the contrary, it can be argued that there is increasing recognition within this community that an international insolvency mechanism that could serve as an early warning and prevention mechanism is in fact necessary for the proper and effective protection of creditor rights. (Raffer, in Eurodad 1998).

## The right of debtor nations to claim relief from oppressive debt

It will be argued in this paper that debt relief is a right that has been and can be claimed by insolvent states in certain circumstances. It is not, as many creditor governments and institutions seem to believe, something that can be granted or withheld according to creditor whim of generosity or greed. All modern national legal systems recognise the right of bankrupt debtors to claim relief from overly oppressive debt obligations in order to maintain a minimum standard of living in accordance with the preservation of decency and self-respect. What

2 The recent OECD proposal for a Multilateral Agreement on Investment aimed at protecting the rights of foreign investors is based on a similar kind of idea.

then are the international law precedents and principles that might require recognition of a similar right for sovereign debtors?

To answer this question requires an examination of the various recognised sources of international law. These are outlined in Article 38 of the Charter of the International Court of Justice (the ICJ Charter), as follows:

- "international conventions, whether general or particular, ...
- "international custom', as evidence of a general practice accepted as law;
- "the general principles of law recognized by civilized nations;
- "... judicial decisions and the teachings of the most highly qualified publicists of the various nations, ..."

Each of these sources of international law needs to be examined.

### *a) International conventions*

Michael Pearce, in his 1987 Master of International Law thesis (Australian National University) puts forwards a persuasive and coherent argument for the existence in international law of a right of debtor nations to declare a unilateral moratorium on their debts. After careful consideration of the various relevant sources for such a right in accordance with Article 38 of the ICJ Charter, he finds that the most clear cut case under international law for the existence of such a right arises under treaty law, specifically Article VIII, Section 2 of the International Monetary Fund's (IMF) Articles of Agreement. This provision enables a state to impose a suspension of payments on the foreign debts of certain of its instrumentalities and enterprises by means of foreign exchange restrictions.

Article VIII Section 2(a) provides:

"Subject to the provisions of Article VII, Section 3(b)[3] and Article XIV, Section 2[4], no member of the Fund shall, without the approval of the Fund, impose restrictions on the making of payments and transfers for current international transactions."

Article VIII, Section 2(b) provides, in part, as follows:

"Exchange contracts which involve they currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member."

The Executive Board of the IMF has said that a measure will be regarded as an exchange control regulation for the purposes of Article VIII, Section 2 if: "it involves a direct governmental limitation on the availability of use of exchange as such."(Pearce 1987 at 2.4, citing Decision No 1034, 1 June 1960, published in IMF, Selected Decisions of the International Monetary Fund, 13th Issue, 1987, 298).

Examples include where a debtor institution falls into arrears because the government has centralized all foreign exchange transactions, and as a result the hard currency needed to service the debt is not available on time. Exchange guarantee regulations, whereby the government promises to make exchange available in the future to debtors at preferential rates if local debtors forego the opportunity to satisfy foreign-exchange debt obligations sooner, have a similar effect. In such cases, the debtor either cannot obtain exchange at all in time

3 Article VII, Section 3(b) permits restrictions in respect of "scarce currencies" and has not had any practical significance.

4 Article XIV, Section 2 permits restrictions by members who joined the IMF on the understanding that they could maintain, on a transitional basis, their pre-existing exchange restrictions and adapt them to changing circumstances.

to meet its debt payments or it can only do so at prohibitive rates and is thus induced to suspend payment (Ibid., at 2.4-2.5).

The use of exchange control regulations as a means of imposing a moratorium is thus recognized in international law. What Pearce also points to, however, are the difficulties which have arisen over the interpretation of Section 2(b) in particular. While the interpretation which arguably commands the most widespread acceptance would allow the use of exchange controls only for rare and limited (but ill-defined) categories of sovereign debt, and only in strictly prescribed circumstances, Pearce argues that such an interpretation stems from a failure to understand the essentially public law nature of Article VIII. Recognizing the public law nature of the article's contents, argues Pearce, requires the recognition of a binding international obligation of member states to refrain from giving effect to certain contracts (Ibid., at 2.7).

The other side of an international obligation of creditor states to refrain from giving effect to these debt-related contracts is the existence of a right in the debtor state to demand such restraint. The existence of such a right is further supported by the widespread acceptance which now exists for the 1974 GA Charter of Economic Rights and Duties of States, and the principles it outlines.

The United Nations General Assembly's *Charter of Economic Rights and Duties of States*[5] also provides guidance as to the circumstances which might be recognised as giving rise to such a right. In light of the widespread acceptance of the Charter by the international community, it can be argued that there is an international law obligation on all states to protect the Economic Rights and/ or fulfill the Economic duties outlined therein – even when doing so requires that international debt obligations be forgiven.

In Resolution 3281 (XXIX) the General Assembly expressly invoked the spirit and terms of its resolutions 3201 (S-VI) and 3202 (S-VI) of 1 May 1974, outlining its Programme of Action for the Establishment of a New International Economic Order, and called for a new Charter that would constitute an effective instrument towards the establishment of a new system of international economic relations based on equity, sovereign equality, and interdependence of the interests of developed and developing countries.

According to Chapter II of the Resolution:

(Article 1). "Every State has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever.

"Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.

(Article 2)."Each State has the right:

"To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. Not State shall be compelled to grant preferential treatment to foreign investment;

"To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply within its laws, rules and regulations and

5 Part of the GA Resolution adopted on 12 December 1974 by a vote of 120 in favor, 6 against (USA, UK, Belgium, Denmark, German Federal Republic, Luxembourg) and 10 abstentions; extracted in *International Legal Materials* (1975), pp 262-5.

conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State. Every State should, ..., cooperate with other States in the exercise of the right set forth in this paragraph; ...

(Article 8) "States should cooperate in facilitating more rational and equitable international economic relations and in encouraging structural changes in the context of a balanced world economy in harmony with the needs and interests of all countries, especially developing countries, and should take appropriate measure to this end.

(Article 10) "All States are juridically equal and, as equal members of the international community, have the right to participate fully and effectively in the international decision making process in the solution of world economic, financial and monetary problems, *inter alia*, through the appropriate international organizations in accordance with their existing and evolving rules, and to share equitably in the benefits resulting therefrom.

(Article 17) "Every State should co-operate with the efforts of developing countries to accelerate their economic and social development by providing favourable external conditions and by extending active assistance to them, consistent with their development needs and objectives, with strict respect for the sovereign equality of States and free of any conditions derogating from their sovereignty.

(Article 32) "No State my use or encourage the use of economic, political or any other type of measure to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights."

Article 11 of the Charter refers to the duty of all States to cooperate in adapting international organizations to the changing needs of international economic co-operation. And article 34 ensures that the Charter of Economic Rights and Duties of States is included on the General Assembly agenda at every 5th session for discussion.

The Charter of Economic Rights and Duties places a particular emphasis on economic sovereignty as an indispensable condition for preserving the principle of equality of states in international relations. Nor is it the only such instrument to do so. For as Michael Pearce points out (at 4), economic sovereignty is, in fact, one of the essential preconditions for statehood – preconditions which have been largely agreed upon, and can be found in Article 1 of the Montevideo Convention of 1933 as follows:

a) permanent population,
b) defined territory,
c) government and
d) the capacity to enter into relations with other states.

It is the attribute of government listed here which forms the basis for the central requirement of independence, and it is the central requirement of independence which requires that every state be able to exercise unimpeded authority over all national persons, all national affairs and all national resources.

Independence thus involves economic independence. Schwarzenberger wrote: "Without a minimum of political, economic or military *de facto* independence, *de jure* independence is meaningless. And in light of the principles spelt out by the

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6 These are the principles spelt out in the *Charter of Economic Rights and Duties of States*, General Assembly Resolution 3281(XXIX), 1974, in (1975) I.L.M. 251. This Charter was preceded by GA Resolution 3171 (XXVIII) of 1973 (GAOR, 28th Sess., Supp. 30, p. 52 (1973) in (1974) 68 A.J.I.L. 381. This Resolution was adopted by 108 votes to one, with 16 abstentions); and by the Declaration on the Establishment of a New International Economic Order 1974 (GA Resolution 3201 (S-VI), (1974) I.L.M. 715. The Declaration was adopted without a vote. The FRG, France, Japan, the UK and the US made reservations to it *ibid* pp. 744 ff. (1974).

New International Economic Order", the principle of economic sovereignty has also probably been strengthened in recent years.7

As international law commentator Ian Brownlie notes (at 258-260), the UN Charter, in Chapters IX and X, recognizes the urgent need to deal with economic and social problems, and imposes obligations on all member states to maintain human rights. According to Brownlie "[T]here is probably also a collective duty of member states to take responsible action to create reasonable living standards both for their own peoples and for those of other states." This argument is persuasive. Many governments currently operate on the basis of significant balance-of-payments foreign debt obligations. And the existence of foreign debt is often justified by reference to the need for government investment in growth-promoting infrastructure and services (transport, education, communication networks, tax incentives to encourage private-sector investment etc.). When the increasing cost of interest and dividends owed to foreigners results in an unacceptably high current account deficit, national economies can be devastated when foreign investors lose confidence and withdraw their capital. The exchange rate collapses, real interest rates reach recession-inducing levels and governments are forced to cut spending on essential social services. When these cuts are forced down to levels inadequate for ensuring sufficient national living standards are maintained, debt relief arguably becomes a necessary component of human rights protection. As has recently been recognized in East and Southeast Asia, reducing the burdens of foreign-debt obligations which cannot be honored becomes an essential pre-condition to restoring and maintaining the basic levels of food, clean water, health, and education needed to ensure the protection of economic and social rights guaranteed by international law.

In other words, to deny debt relief can often mean denying the human rights of a whole society to adequate education, health, standard of living etc. These rights have, at least since the establishment of the UN itself, been embodied in human rights laws binding upon and now accepted by all nations – creditor and debtor.

### *b) International custom as evidence of a general practice accepted as law*

In international practice, one important mechanism for ensuring the protection of human rights at the international level has been the giving of aid. The means by which economic aid may be provided are many and varied.[8] In all cases, however, international law, as evidenced by general practice, requires that the objectives of aid must be lawful, and in particular should not be given under conditions which lead to infringement of the principles of the sovereign equality of States and of permanent sovereignty over natural resources (Brownlie 1979). The United Nations Conference on Trade and Development has recognised this in its recommended principles for the giving of aid (UN Monthly Chronicle (July 1964), p 49), as have the United Nations Capital Development fund and the United Nations Industrial Development Organization (UNIDO).

In customary debt relief practice as well as in the

7 See *ibid*, and see Pearce 1987a, at 5, citing Schwarzenberger, *The Principles and Standards of International Economic Law*, 117, Recueil des Cours 1, 31 (1966-I).

8 Examples include loans by governments, construction or technical assistance projects with no provision for payment or collateral advantages, loans by specialized agencies of the United Nations, and loans from, and aid projects supported by, private corporations with or without government sponsorship and support, for example by the requirement of guarantees from the recipient state on the international plane.

giving of aid, the importance of economic independence has been recognised in international relations. In particular, it has been recognised, when debtor governments have declared unilateral moratoriums on sovereign debt, and these have been respected by creditor nations.

Historical precedents for moratoriums on State debts are relatively numerous, and have increased during the various debt crises of the 1980s. They include Turkey's 1876 interest moratorium, Serbia's unilateral reduction in interest payments in 1885, Argentina's and Uruguay's suspension of interest payments in 1890, Portugal's interest reduction in 1892 and Greece's the following year. In the 1930s a number of countries unilaterally suspended payment on their foreign debt, including Germany and France.

The moratoriums of recent years have included: Zaire in 1975; Costa Rica and Poland in 1981; Mexico, Argentina and Brazil in 1982; Chile, Venezuela and Argentina, again, in 1983; Bolivia and North Korea in 1984; Peru and South Africa with a debt standstill in 1985; Nigeria in 1986; and Ecuador, Brazil, again, Zambia, Cote d'Ivoire and Yugoslavia in 1987.

Most recently, with the so-called Asian economic crisis of 1997-98, Malaysia is one nation that has imposed foreign exchange regulations aimed at protecting the integrity of the local economy and the value of the local currency, the Ringgit. While many have criticised the moves by the Malaysian government on economic grounds, no one has questioned Malaysia's sovereign right to resort to such measures should its government see fit to do so.

Pearce 1987b points to certain consistent features in the conduct of particularly the more recent moratoriums, and from this series of precedents, he postulates a detailed rule of customary law as follows:

A debtor State in economic difficulties is entitled unilaterally to suspend payments on its foreign debts.

It may do so if:

- it believes, in good faith, that this action is necessary for the maintenance of essential public services to ensure its citizens a minimum standard of living;
- it consults first with its creditors; and
- it agrees to take all steps reasonable and necessary for the resuption of its debt payments, including a rescheduling of debt and an economic adjustment program as negotiated with its creditors.

Pearce 1987b also finds that the following ranking of debt has generally been observed, both to entitle certain debt to be excluded from the moratorium in preference to lower ranked debt, and for the purposes of reschedulings:

- Debt owed to international financial institutions,
- Bonds,
- Trade and supplier credit,
- Intergovernmental debt,
- Principal owed to commercial banks, and
- Interest owed to commercial banks.

There is, it would seem, nothing in either treaty law or customary international law to prevent, and much to compel, the world community to unite in drafting an international instrument formalising a set of debt relief principles along the lines of those suggested by Pearce 1987b.

Pearce finally concludes, after applying the strict criteria of customary international law, insufficient support for the existence of a rule, binding on creditors, that would allow unilateral moratoriums on state debts. Pearce was writing, however, in 1987, more than twelve years ago. And even then he recognised that the development and emer-

gence of such a rule was probably not far away, given trends in international law and relations at the time. At the turn of the century, it is now possible to say not only that this trend has continued, but also that the need for such a rule is more pressing and more urgent than ever before.

That justice in international relations requires relief for the world's most debt-burdened nations, which, not surprisingly are also the world's poorest countries, has been and continues to be recognised by governments around the world from both debtor and creditor nations. The Heavily Indebted Poor Countries initiative (commonly referred to as the HIPC initiative) is one such recognition. Many of the features of the HIPC initiative – though in watered-down fashion – recall aspects which are already customary in insolvency proceedings. The concepts behind the initiative are, to a large extent, similar to those already recognized as principles of law in all modern legal systems. Thus, in late September 1999, President Clinton's pledge to forgo all $6 billion owed by the 41 HIPC nations to the USA was completely in line with the spirit of the principles of international law discussed above.

Other aspects of the HIPC initiative, however, have, in practice, proven to be very different to the spirit and the rules of conduct of international law. As Kunibert Raffer has pointed out, it has now become obvious that the whole HIPC process has been dominated by creditor nations – to the demonstrable detriment of living standards in debtor states. The primary reason for this appears to be absence of a *neutral* institution to chair and supervise negotiations. Other factors include such things as the effect of using notoriously 'optimistic' projections by the World Bank, the IMF and other Bretton Woods Institutions in calculating the debtor's ability to pay. Accepting actual data of the recent past as an alternative basis would seem to be both more accurate and probably fairer.

Dominance of the negotiation process by one side is completely against all established principles of international law, every aspect of which requires the sovereign equality of States. It also violates all current trends in international dispute resolution.

Arbitration before a neutral forum acceptable to both parties is an old and well established mechanism of international law, already used in the case of debtors. Differences between Germany and its creditors were to be settled by arbitration according to the London Accord. More recently, arbitration has become more and more popular in international relations. Both the World Trade Organisation and the NAFTA Treaty established arbitration as a key means of problem solving. OECD agreements, including the unsuccessfully proposed Multilateral Agreement on Investment, frequently include neutral conciliation and/or arbitration as an important component (Raffer in Eurodad 1998). Any mechanism for resolving debt restructuring and debt relief problems must include a similar principle of neutral facilitation and, where necessary, neutral dispute resolution.

### *c) The writings of publicists*

When Michael Pearce looks at international law publicists who have dealt with the question of sovereign debt and sovereign bankruptcy, he finds sentiments and beliefs expressed that appear very similar to those expressed in Christian, Islamic and other religious teachings. Manes and Borchard in particular are noted by Pearce has having written extensively on the issue. Sir Hersch Lauterpacht, another commentator in the area, noted the possibility of analogies to private law. Westlake, another respected authority, wrote:

"And if the rule of protecting subjects against a flagrant denial of justice be looked to, the reduction of interest or capital is always put on the ground of inability of the country to pay more – a foreign

government is scarcely able to determine whether or how far that plea is true – supposing it to be true, the provisions which all legislation contain for the relief of solvent debtors to pay prove that honest inability to pay is regarded as a title to consideration ..." (quoted in Brownlie 1979, pp. 332-333).

In other words, for the debtor, honest inability to pay is required. For the creditor, the condition requiring the creditor to refrain from enforcing an obligation is that without such restraint, the sovereign independence of the debtor will be impugned.

### *d) General principles of law recognised by civilised nations*

As mentioned above, all modern national legal systems recognise, in law, the principle embodied in the African proverb "the debtor must eat". General principles of law recognised by civilised nations require that the debtor's right to preserve a decent standard of living be protected. The claim that this principle has now become so important as to be binding upon all nations can be further supported by reference to recent developments at the international level, including the HIPC initiative. The HIPC initiative takes as its starting point the concept of debt sustainability which takes the fundamental ability of the debtor into account in a manner very similar to insolvency proceedings. Preparing debt sustainability analyses in co-operation with officials of the debtor country – on a tripartite basis – recognises the need for debtor participation, and the need afford equal treatment to all parties in ensuring procedural justice.

Another recent development in international relations demonstrating the increasingly universal acceptance of the need for, and the right to, debt relief for HIPC nations was the Asia Pacific NGO Conference on Human Rights (Bangkok, March 1993). The Bangkok Declaration which emerged from this Conference, recognised *inter alia* that oppressive debt inevitably prevents the effective exercise of human rights particularly the right to development. In doing so, the Conference also:

"*Reconfirm[ed]* the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights, which must be realized through international cooperation, respect for fundamental human rights, the establishment of a monitoring mechanism and the creation of essential international conditions for the realization of such right;

"*Recogniz[ed]* that the main obstacles to the realization of the right to development lie at the international macroeconomic level, as reflected in the widening gap between the North and the South, the rich and the poor;

"*Affirm[ed]* that poverty is one of the major obstacles hindering the full enjoyment of human rights;

"*Affirm[ed]* also the need to develop the right of humankind regarding a clean, safe and healthy environment; ..." (Bangkok Declaration 1993)[9]

The need for equal treatment of all parties involved, and in particular the need to protect the human rights of debtor countries in debt relief pro-

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9 Parenthesis added for the purposes of sense.

*Bangkok Declaration*, adopted by Ministers and representatives of Asian States, meeting at Bangkok from 29 March to 2 April 1993, pursuant to General Assembly resolution 46/ 116 of 17 December 1991 in the context of preparations for the World Conference on Human Rights.

Extracted in *Our Voice: Bangkok NGO Declaration on Human Rights: Reports of the Asia Pacific Conference on Human Rights and NGO's Statements to the Asia Regional Meeting* (Published by the *Asian Cultural Forum on Development (ACFOAD) on behalf of the Organizing Committee and Coordinating Committee for Follow-Up Asia Pacific NGO Conference on Human Rights*, 1993) at 242.

cesses is expressly recognised in the Bangkok Declaration. Both the Declaration and the statements and discussions which led to its formation also recognised that to be truly effective in protecting the interests of all parties involved, debt cancellation must be dealt with as part of a wider, overall aid development strategy. Martin Wolf from the World Bank has also argued forcibly that simply canceling debt will not help the world's poorest. But debt relief as part of an aid development strategy might: Wolf 1999).

More recently, at the Lambeth Conference of Anglican bishops held in August 1998, international debt was the only subject which every bishop at the conference could agree should be addressed as part of the Conference Agenda. Resolution I.15 of the Conference, *inter alia*, recognizes the need for debt relief procedures to form part of wider strategies aim at promoting development and protecting the right to development of all peoples, including the world's poorest. The Resolution calls upon the political, corporate and church leaders and people of creditor nations:

"to accept equal dignity for debtor nations in negotiations over loan agreements and debt relief;

"to ensure that the legislatures of lending nationals are given the power to scrutinize taxpayer-subsidized loans; and to devise methods of regular legislative scrutiny that hold to account government-financed creditors, including the multilateral financial institutions, for lending decisions;

"to introduce into the design of international financing systems mechanisms that will impose discipline on lenders, introduce accountability for bad lending, and challenge corruption effectively, thus preventing future recurrence of debt crisis;

The Resolution also calls upon political leaders and finance ministers in both creditor and debtor nations to develop, in a spirit of partnership, a new, independent, open and transparent forum for the negotiation and agreement of debt relief for highly indebted nations. In particular, the Lambeth Conference participants call upon political leaders and finance ministers in all nations to:

"... cooperate with the United Nations in the establishment of a Mediation council whose purpose would be:

"to respond to appeals from debtor nations unable "to service their debts, except at great human cost;

"to identify those debts that are odious, and therefore not to be considered as debts;

"to assess, independently and fairly, the assets and liabilities of indebted nations;

"to determine that debt repayments are set at levels which prioritise basic human development needs over the demands of creditors;

"to hold to account those in authority in borrowing countries for the way in which loans have been spent;

"to hold to account those in authority in lending nations for the nature of their lending decisions;

"to demand repayment of public funds corruptly diverted to private accounts;

"to consult widely over local development needs and the country's capacity to pay; and

"to ensure, through public monitoring and evaluation, that any additional resources made available from debt relief are allocated to projects that genuinely benefit the poor."

There are few who would deny that the over 100 countries represented at the Lambeth Conference can be said to represent a clear majority of 'civilized nations'. Some may object that only the Christian religion, and only one version of that,

was represented, and that other versions of Christianity, and even more so other religions and faiths, were excluded. The response to this is, of course, that all of the world's major religions have something to say on the issue of debt, and all reach very similar conclusions – as has been demonstrated on a number of occasions, such as the Asia Pacific NGO Conference on Human Rights where a broad majority of the world's cultures and beliefs have been represented.

Turning to other forms of Christianity, both the Pope, who represents Catholics, and the Jesuits for Debt Relief and Development (JDRAD) have supported the swelling civil movement that is the Jubilee 2000 campaign. Anglican, Uniting and other denominational churches throughout my own country, Australia and, I have been reliably informed, in nearly every other country with significant Christian populations, participated in the Jubilee 2000 "Wake-Up Call" campaign in the lead up to the year 2000. Churches everywhere hung large banners outside proclaiming their support for the campaign, most noticeably from August 1999 onwards, and many continue an active level of participation in the world-wide campaign for debt relief.

Turning to other religions, in Islamic law we find an even stronger basis, if that is possible, than in Christian teachings for denouncing the enormous debt burden currently borne by the HIPC. According to Islam, in a just society there should be an equitable distribution of wealth. This does not mean that some people would not be richer than others, just that there should not be extremes of wealth – such as does in fact currently exist in our far-from-just world. In a world that was just in the Islamic sense, countries and peoples of means would have an obligation to help the poor, and in particular to pay zakat to assist those who were less fortunate. The aim is to prevent the accumulation of wealth in the hands of a few and to make money available for the good of society (Hussain 1999 p.163).[10]

In Islamic law, unlawful gain (*riba*) is prohibited. In particular, making money from money (*riba* is often translated as 'interest') is not acceptable. The charging of interest on loans is a particularly reprehensible form of exploitation of the poor. Another principle of Islamic law is the rule against uncertainty. Many current international loan arrangements would probably be prohibited by Islamic law for violation of this rule. In particular, if performance is to take place in the future, the date of performance should be certain. This places an obligation on both the lender and the borrower in Islamic law to agree on precisely when, where and how a loan, ie the principle, will be repaid.

Islamic banking principles further require that banks (and other lending institutions) should be actively concerned with promoting the social benefits of the economy, and should take an active interest in all aspects of the borrower's activities (Hussain 1999, pp. 177-178). Financial structures used by Islamic banks are in accordance with this principle, and also provide some possible solutions for helping to solve the HIPC debt problem on a more permanent basis. Just to provide a couple of examples:

The Islamic *Mudarabah* format provides a means for international lending to the benefit of both parties when money is lent for profitable purposes. *Mudarabah* is a contract whereby one party ('the lender' or 'silent partner') contributes capital while the other provides work and management skills. The lending institution lends money for a capital-generating business or other venture, and in return receives a specified percentage of the venture's

10 Hussain also notes (at 169) that "Zakat is assessed as 2.5 per cent of the total of the payer's genuinely owned assets held for one full year after deducting his or her liabilities".

profits for a specified period of time. On an international scale, the structure could be adapted for use when HIPC and other developing nations borrow money to establish a micro-financing network through the whole country or part of it. Local units (eg. local cooperatives) at each level would account for profits to the next unit above, and the central unit would account to the lender/ provider of capital for an agreed percentage of those profits for a specified period of time.

When poorer, developing nations borrow money to construct or help construct social infrastructure of the kind that is unlikely to generate any income, a different Islamic financing structure could be adapted for international use. Examples include loans provided to establish and/or repair/rebuild public transport systems (road, rail etc), public telecommunications networks, educational institutions, particularly at primary and secondary levels, hospitals and other public health services etc. – all of which inevitably operate at a significant loss if they are to be made widely available. The Islamic *Bay Bithaman Ajil* (BBA) contract is often used by Islamic banks for long-term financing of major assets. In this form of contract, the asset is purchased/constructed by the financing institution, and then sold to the borrower at cost plus an agreed profit. The payment for the asset is usually deferred payment by installments, although it can be deferred payment by lump sum in which case it is more akin to the Islamic *Mudarabah* contract. The BBA arrangement is almost identical to what in conventional forms of financing is known as a Build-Own-Operate-Transfer contract, and so should be easily adaptable by major conventional finance institutions with funds to led, as well as acceptable to Islamic countries in need of finance.

One could go on. Buddhism, Hinduism and other minority religions contain similar principles and teachings. The point here is that there is obviously no shortage of ideas for solving the HIPC debt burden. Nor is there any shortage of means and mechanisms available for making a more equitable and just place for future generations to live in. All that is needed is the political will to tackle the issues and problems involved in doing do. And, as the Jubilee 2000 campaign continues to demonstrate, political will can be generated when voting populations threaten to withdraw support unless something is done.

## Conclusion:

An examination of the most important sources of international law thus allows, if it does not actually require, the establishment of an international debt relief process along the following lines:

First, the debtor nation would declare a moratorium on payment of debt obligations, thereby making a claim to debt relief. As both Pearce and Ryan have argued, this would be equivalent to a private legal person filing for bankruptcy in a local bankruptcy court:

The bankruptcy-equivalent for a foreign state itself is the purported declaration by its government of a moratorium on the payment of indebtedness, external or otherwise, or other public admission by that government of an inability to pay indebtedness when due.[11].

In accordance with the customary rule posited by Pearce[12], the validity of a unilaterally declared moratorium would depend on the willingness of the debtor state to submit its claim for re-negotiation of, or relief from, repayment of debt to a con-

11 At 4.20 Pearce 1987b cites R.H. Ryan's view ("Defaults and Remedies Under International Bank Loan Agreements with Foreign Sovereign Sovereign Borrowers – New York Lawyer's Perspective" (1982) *Uni of Illinois L Rev* 89, 97).

12 Above, nn. 20 and 21, and accompanying text.

ciliation panel – structured along lines proposed by both the Lambeth Conference and the JRDAD (JDRAD 1999). The JRDAD has also recommended that debtor governments should voluntarily enter a conciliation process once its debt problem had reached a certain critical level.

The function of the conciliation panel (facilitators) would be to facilitate negotiated settlements between debtor nations and creditors. Where both sides could not reach a settlement, a more formal arbitration procedure would come into effect. This kind of two-step process is very similar to the processes established by the WTO's Dispute Settlement Understanding (DSU), 1995.

Procedures for appointment of facilitators and arbitrators could also be along the lines established by the WTO DSU and/or other widely accepted international treaties. For example, the JDRAD have proposed that arbitrators would be nominated by both government and civil society within debtor and creditor countries. The final appointments of four successful candidates, two from the debtor's nomination list and two from the creditor's, would be up to the governments involved. The four arbitrators would then elect a fifth as chair. The arbitration process could be overseen by the UN.

After a preliminary assessment, the conciliation panel would either validate the stay on repayments claimed by the debtor country, or declare it illegal. Decisions would be subject to appeal. Past experience shows that dispute over the debtor's need for at least some breathing space on repayments are extremely rare. Debtor nations fully understand the immediate negative effect on credit ratings and their ability to raise capital that any failure to pay debts can have. They would be unlikely to submit to an international debt-resolution forum unless their debt problem was truly critical.

Once a debtor country had been formally granted a stay on its repayments (thereby validating its previous unilateral action), a detailed assessment of its situation would then be carried out. This would be prepared by officials from both debtor and creditor countries, in consultation with NGOs and representatives from civil society. The aim of the assessment would be to clarify how much debt is owed, to identify any illegitimate debts (eg. odious debt, or debt incurred on the basis of a misrepresentation by the creditor), and to agree on how much debt is payable.

A debt relief plan could then be prepared. This would include (i) an assessment of how much a country could afford to pay while ensuring full protection of human rights and a decent standard of living in civil society; (ii) elements of rescheduling, reduction and outright cancellation of debt; and (iii) agreement on how the money made available would be targeted for poverty reduction. All of these elements would be based upon a clear recognition of the close link between protection of human rights and freedom from debt.

Concrete examples of targeting for poverty reduction have been provided by the Uganda government's Poverty Eradication Fund, as well being developed in Tanzania and South Africa. A range of ways in which funds can be targeted to reduce poverty have also been proposed by Oxfam and Jubilee 2000, among others. Another initiative that might be available in cases of debt reschedulings, or debt forgiveness, is the exchange of debt for environmental protection measures in the debtor country. This will become particularly feasible if and when the concept of tradable greenhouse carbon credits is formally accepted at the international level. Other possible initiatives include the exchange of debt for improved labor standards, or improved social security mechanisms in the debtor country.

The whole process of debt-rescheduling and development of poverty eradication programs would be aimed at defining when and under what conditions a creditor could legitimately demand repayment of money debts. In particular, demanding the repayment of debt would become conditional on the willingness of the creditor nation to assist in creating the circumstances required for promoting the debtor's ability to repay. For example, a creditor nation could not place unjust limits or restrictions on imports from the debtor nation thereby denying the debtor the capacity to earn the income needed for meeting debt obligations. More generally, the aim of the new system for international regulation of debt obligations would be to ensure that debt repayment could no longer be required where doing so would have the effect of denying effective protection for human rights standards in the debtor nation.

Where the various sides could not reach agreement the court would ultimately have the authority to arbitrate between the various sides. Its decisions would be binding in the same way that decisions by WTO dispute-resolution panels are binding. As also recommended by the JDRAD, appropriate penalties could be established for failures to implement the debt relief plan by way of enforcement mechanisms. Debtor government who failed to implement appropriate reforms and /or failed to use their debt relief to support poverty eradication would lose the benefits of insolvency protection.

While the emphasis would be on negotiated settlements, the efficacy of the international debt relief forum would, in the end, reply on its power to make and implement decisions. This power is what gives each side the incentive to make the best case possible. Obviously, the wider the number of countries which accept and ratify the forum, the more likely it is to be effective. For the sake of the three billion people currently living on less than $2 a day, for the sake of the 1.3 billion people without access to clean water, and for the sake of the 40,000 children who die each day because of hunger-related diseases (Robinson 1999), one can only hope that it will be as many countries as possible.

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# Responsabilité bancaire: une jurisprudence française à transposer dans l'ordre international?

*French legal practice provides for sanctions against banks making ruinous or unsuitable loans, particularly to firms in a hopeless situation. Banks who fail in their duty to advise can also be liable to judicial sanctions. This paper examines whether it would be desirable to extend these practices to the international level.*

La jurisprudence des tribunaux français a élaboré en matière de responsabilité bancaire et de relation banque/emprunteur des concepts intéressants bien que discutables. La transposition de l'argumentaire dans les relations financières internationales est tentante, quoiqu'elle relève de la pure science fiction.

En France, le banquier prêteur peut voir sa responsabilité engagée lors de procédures de redressement ou de liquidation judiciaires, tant vis-à-vis de tiers créanciers que de l'emprunteur lui-même et être appelé, au-delà de sa perte sur les concours financiers non remboursés, à leur verser des dommages et intérêts.La décision du juge s'appuie essentiellement sur le principe de responsabilité pour faute (art 1382 du Code Civil). Vis-à-vis de tiers créanciers, la faute reprochée au banquier est qualifiée de:

- financement d'une entreprise en situation désespérée (la banque n'aurait pas dû octroyer ou maintenir des crédits alors que l'entreprise n'avait aucune chance de survivre),
- crédit ruineux (la banque n'aurait pas dû permettre à l'entreprise de s'endetter dans une mesure et à des conditions générant des charges financières incompatibles avec ses ressources),

- crédit inopportun (la banque n'aurait pas dû soutenir un investissement dont la rentabilité était excessivement douteuse).

Le préjudice, conséquence d'un crédit fautif, est lié à l'apparence trompeuse de prospérité ou à la poursuite d'une activité génératrice d'un passif supplémentaire. Dans la pratique, l'indemnité que la banque doit verser aux autres créanciers correspond souvent à l'insuffisance d'actif.

Un cas particulier est constitué par la responsabilité pour faute de gestion. Dans ce cas particulier il faut démontrer que le banquier est dirigeant de fait et a commis une faute de gestion. En cas de redressement judiciaire il peut alors, sur la base de l'article 180 de la loi de 1985, être appelé en comblement de passif.Vis-à-vis du débiteur lui-même, la faute reprochée au banquier est fondée sur la notion de

- devoir de conseil (la banque a manqué à son devoir de conseil),
- financements excessifs (la banque a fourni des crédits disproportionnés par rapport aux moyens de l'entreprise)

Une telle jurisprudence place les banquiers domestiques dans une situation délicate vis-à-vis de leur clientèle, puisqu'ils doivent en permanence naviguer entre deux écueils opposés: l'octroi abusif de concours et la rupture abusive de ces mêmes concours.

La transposition à l'international de l'argumentaire de cette jurisprudence, parfois extravagante, est peu réaliste mais tout de même intéressante au plan de la légitimité dans les rapports débiteurs/créanciers. En effet cette jurisprudence tient compte largement du déséquilibre dans le rapport de forces entre un prêteur professionnel et un débiteur moins expérimenté et que la Loi tente de protéger.

Le cas de la Russie, et plus particulièrement celui des bons du Trésor russes (GKO) dont la suspension du remboursement a déclenché la crise d'août 1998, peut servir de modèle pour cet exercice de transposition. Les banquiers occidentaux étaient parfaitement au fait des difficultés fiscales du gouvernement et notamment de l'accumulation des arriérés de salaires des fonctionnaires et employés des entreprises publiques. L'achat de titres GKO ne relevait-t-il pas alors du financement d'une entreprise en situation désespérée? Les banques n'ont-elles pas négligé leur devoir de conseil? Les financements octroyés n'étaient-ils pas manifestement abusifs (disproportionnés par rapport aux ressources de l'emprunteur)? De plus, le niveau très élevé des intérêts versés sur ces obligations reflétait le niveau de risque réel de l'instrument. Au cours du temps une part croissante des nouvelles émissions était utilisée pour servir les intérêts sur les anciennes émissions. A ces conditions, ne s'agissait-il pas de crédits ruineux?

Ainsi, non seulement les banques n'auraient aucune légitimité pour obtenir le remboursement de leurs concours, mais elles devraient verser des indemnités aux autres créanciers du gouvernement russe. Selon cette même logique jurisprudentielle, le FMI, gestionnaire de fait des affaires russes, ayant en outre commis des erreurs de gestion (ouverture prématurée aux capitaux étrangers du marché, réduction des taxes sur les exportations de produits pétroliers par exemple), pourrait être appelé en comblement de passif, pour à la fois compenser les pertes réalisées par les banques et verser les salaires des fonctionnaires et employés des entreprises publiques.

Ces questions évidemment provocatrices, de même que la présentation très succincte et par conséquent caricaturale d'une jurisprudence complexe, visent seulement à susciter le débat et la réflexion. En particulier elles montrent le décalage qui peut exister sur le plan de l'argumentaire et de la légiti-

mité entre un ordre juridique interne sur-normé et l'ordre juridique international en manque d'institutions. D'un coté sont affirmés des principes de droit de portée générale et de l'autre la réalité des marchés internationaux est un espace ou les relations, sous des apparences policées, sont en réalité dominées par le seul rapport de forces. Ou bien cette jurisprudence nationale est mal fondée auquel cas elle n'a pas lieu d'être, ou bien elle mérite d'être transposée a l'international. À la globalisation de l'économie devrait correspondre aussi une globalisation du droit.

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# Repaying debt in the wake of an international financial crisis[1]

*À la racine des crises financières, on observe toujours un problème d'action collective, où l'attitude d'investisseurs individuels prenant décision de se retirer du marché déclenche des phénomènes de masse. Alors même que la situation pourrait rester sous contrôle, la contagion des comportements sème la panique chez les investisseurs et la situation prend dès lors une tournure qui ne peut plus être maîtrisée par les autorités des pays concernés. Les causes des crises peuvent être diverses (politique économique inappropriée, taux de change inadéquats...), mais elles se traduisent toujours par ces manifestations irrationnelles de grégarité. Les pays concernés ne disposant pas de moyens suffisants pour faire face à ces situations de crise, il convient donc de mobiliser d'autres mécanismes à l'échelon supranational, tels que la mise en place d'un prêteur international de dernier recours qui pourrait fournir les liquidités nécessaires, ou l'introduction d'une procédure de déclaration de faillite autorisant la suspension des paiements et la renégociation du contrat de dette devant une instance de médiation internationale. Les pays du G7 sont malheureusement très réticents à envisager de tels développements.*

## The background: financial instability, crises and debt

Since the collapse of the Bretton Woods system, increased global capital mobility has been accompanied by greater frequency of financial crises in both developed and developing countries alike. A number of common features have marked the history of the post-Bretton Woods crises. First, many of them have been preceded by liberalization of the economy, notably the financial sector. Second, all episodes of currency instability have been started by a sharp increase in capital inflows followed by an equally sharp reversal. Such swings in flows are related to internal or external policy changes that produce divergences in domestic financial conditions relative to those of the rest of the world, often initially reflected in interest-rate differentials and prospects of capital gains. Reversals of capital flows are frequently, but not always, associated with a deterioration in the macroeconomic conditions of the recipient country. This deterioration often results from the effects of capital inflows themselves such as overvaluation of the exchange

1 This chapter consists of edited extracts from Yilmaz Akyüz & Andrew Cornford *Capital flows to developing countries and the reform of the international financial system*, UNCTAD discussion paper No. 143, Geneva, UNCTAD, November 1999.

rate, excessively rapid credit expansion, and speculative bubbles in asset prices. But the deterioration is also generally influenced by external developments affecting interest rates and exchange rates in international markets as much as by shifts in domestic macroeconomic policies. Finally, financial crises tend to be associated more closely with certain types of financial flow and with certain classes of lenders and borrowers than others.

However, currency and financial crises in emerging markets have occurred under varying macroeconomic conditions. They have occurred when current-account deficits were large and unsustainable (Mexico and Thailand), but also when such deficits were relatively small (Indonesia and Russia). Although significant overvaluation has often been characteristic of countries experiencing currency turmoil (Mexico, Russia and Brazil, all of which used the exchange rate as a nominal anchor to bring down inflation), this has not always been the case: for instance, in most East Asian countries the appreciation of the currency was moderate or negligible. Similarly, while in some cases crises were associated with large budget deficits (Russia and Brazil), in others the budget was balanced or in surplus (Mexico and East Asia). Finally, crises occurred when external debt was owed primarily by the public sector (Brazil and Russia) or primarily by the private sector (East Asia).

Financial crises in developing countries are all characterized by a rush of investors and creditors to exit and a consequent financial panic. Indeed, whatever the proximate causes of financial crises or the events that trigger attacks on currencies, international investors and creditors of developing countries tend to manifest herd-like behaviour in exiting as well as in investing or lending. The debt crisis of the 1980s witnessed a drastic cutback in lending by international banks to sovereign debtors, while during the 1995 Mexican crisis the rush for the exits by international creditors took the form of rapid liquidation of government paper and conversion of the proceeds into dollars. Again, in the more recent turmoil in East Asia, the refusal to roll over short-term loans together with the attempt of unhedged debtors to avoid exchange-rate losses were the principal factors deepening the crisis. Creditor overreaction to debtors' financial difficulties is often explained in terms of a collective-action problem. Even though the creditors as a group are better off if they continue to roll over their maturing claims on a debtor, an individual lender or investor has an incentive to exit. Without access to liquidity a debtor entity is then forced to curtail operations or to resort to distress sales of assets, which in turn lower its income and wealth, thereby further constraining its ability to service debt and hence damaging the interests of creditors as a group.

A generalized debt run by international creditors triggered by a loss of confidence can easily turn a liquidity problem into widespread insolvencies and defaults by altering key asset prices, interest rates and exchange rates. In the absence of a large stock of reserves or access to international liquidity, the ability of a debtor developing country to repay its entire stock of short-term external debt on demand is no greater than the ability of a bank to meet a run by its depositors. In the case of bank lending, withdrawal of loans by foreign creditors is likely to trigger a rush by unhedged private debtors into foreign currency as they seek to pay debt or cover their open positions, and may also lead to speculative selling of the currency by residents. This in turn drives down the foreign-exchange value of the domestic currency and raises interest rates, making it more difficult for debtors to service their debt, forcing them to liquidate assets and thereby deepening the debt-deflation process. Debt runs by foreign creditors are often also associated with a flight

from non-debt instruments held by both residents and non-residents, notably from the equity market. Since such investors face a decline in prices when they attempt to liquidate their holdings, the selling pressure in the currency market may be weakened. Moreover, since they would also suffer from depreciations, they may have less inducement to exit. However, investor overreaction can none the less still amplify destabilizing feedbacks between equity and currency markets.

## Policy responses focussed specifically on emergency financing and debt relief

### *An international lender of last resort*

As just noted, currency crises in emerging markets develop as self-fulfilling debt runs, leading to overshooting of exchange rates and translating liquidity into insolvency crises. In view of the ineffectiveness of monetary policy in reversing such attacks and the probable inadequacy of reserves and credit lines to meet the resulting demand for foreign currency, there have been calls to establish an international lender-of-last-resort facility in order to provide international liquidity to countries facing financial panic and to support their currencies.

Provision of liquidity to pre-empt large currency swings has not been the international policy response to currency crises in developing countries. Rather assistance coordinated by the IMF has usually come after the collapse of the currency, in the form of bailout operations designed to meet the demands of creditors, to maintain capital-account convertibility, and to prevent default. Moreover, availability of such financing has been associated with policy conditionality that went at times beyond macroeconomic adjustment. Such bailout operations pose a number of problems. First, they protect creditors from bearing full costs of poor lending decisions, thereby putting the burden entirely on debtors. Moreover, they create moral hazard for international lenders and investors, encouraging imprudent lending practices. Finally, they require increasingly large amounts of financing that have been difficult to raise. These problems could not be evaded in the creation of a genuine international lender of last resort. The effective functioning of such a lender depends on two conditions: it should have the discretion to create its own liquidity (or to have unconstrained access to international liquidity), and there should be reasonably well defined rules and conditions that the borrower must meet.

Strictly speaking, the IMF does not satisfy either of the above conditions to qualify as a lender of last resort.[3] Nonetheless, on the eve of the Mexican crisis the IMF explored the possibility of creating a new "short-term financing facility" (STFF) for this purpose, to be used by countries with close integration with international capital markets, including industrial countries and emerging markets. Although it was not put into practice, discussions concerning the scheme pointed to various problems involved (which were subsequently highlighted during the bailout operations in response to the Mexican and East Asian crises): of special importance in this context were the sheer scale of the financing required (although it was not envisaged that the facility would fully offset financial shocks)

2 For instance, some of the conditions imposed by the Fund as part of its rescue package for the Republic of Korea have been regarded as interfering «unnecessarily with the proper jurisdiction of sovereign government" (Feldstein, 1998: 26).

3 For a more optimistic appraisal of the IMF's potential here see Fischer (1999).

4 The idea actually goes back to the Committee of Twenty. It was revived by the IMF in 1994 and elaborated in a paper by the management (IMF, 1994). For discussions of the issues raised therein see Fitzgerald (1996) and Williamson (1995).

and the difficulty of deciding on the terms on which money would be made available.[4]

The SDR might play a key role in the creation of a lender-of-last-resort facility as part of a process of making it a true fiduciary asset and enhancing its role in global reserves.[5] Recently proposals have been made to allow the Fund to issue reversible SDRs to itself for use in lender-of-last-resort operations, that is to say the allocated SDRs would be repurchased when the crisis was over.[6] But either approach would probably require an amendment of the Articles of Agreement and could face opposition from some major industrial countries. Even if one were to agree that the IMF could act as an international lender of last resort but without such a capability to create its own liquidity, the Fund would still require access to adequate resources. Since there is agreement that the IMF should remain largely a quota-based institution, funding through bond issues is ruled out. This leaves the Fund's own resources and borrowing facilities (both the GAB and the NAB) as the only potential sources of funding. However, they alone could not provide financing on the scale made available by the IMF and other sources during the Mexican and East Asian crises. On the other hand, even if mechanisms could be put in place to allow the IMF to have rapid access to bilateral funds at times of crisis, it is highly questionable whether the Fund could really act as an impartial lender of last resort in accordance with rules analogous to such operations by national central banks since its decisions and resources would depend on the consent of its major shareholders who are typically creditors of those countries experiencing external financial difficulties.

The terms of access to such a facility pose additional problems. The conditions of lender-of-last-resort financing, namely lending in unlimited amounts and without conditions except for penalty rates, would require much tightened global supervision over borrowers to ensure their solvency, an unlikely development. While automatic access would ensure a timely response to market pressures, it would also create moral hazard for international borrowers and lenders and considerable risk for the IMF. By contrast, conditional withdrawal of financial support would reduce the risk of moral hazard, but negotiations could cause long delays, perhaps leading to deepening of the crisis. It could also lead to irrational and unnecessarily tough conditionality since the countries facing attacks on their currencies would be too weak to resist such conditions.

One way of avoiding these problems might be through pre-qualification: countries meeting certain *ex ante* conditions would be eligible for lender-of-last-resort financing, with eligibility being determined during Article IV consultations. Access to the lender-of-last-resort facility on a pre-qualification basis could be subject to limits (for example, as a multiple of country quotas) but, after a crisis occurred, the country might have access to additional funds subject to its commitment to undertake certain actions. However, pre-qualification involves its own set of problems. First, IMF would have to act like a credit-rating agency. Second, the result could be a further segmentation of the

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5 A suggestion along these lines was made by the Managing Director of the IMF to the Copenhagen Social Summit in March 1995, when he stated that an effective response to financial crises such as the Mexican one depended on "convincing our members to maintain, at the IMF level, the appropriate level of resources to be able to stem similar crises if they were to occur", adding that this should lead to a decision in favour of "further work on the role the SDR could play in putting in place a last resort financial safety net for the world" (*IMF Survey*, 20 March 1995).

6 Ezekiel (1998); United Nations (1999); and Ahluwalia (1999).

Fund's membership, with attendant consequences for its governance. Third, lending at penalty rates might not be enough to avoid moral hazard. Finally, it would be necessary constantly to monitor the fulfilment of the terms of the financing, adjusting them as necessary in response to changes in conditions (which might include those in financial markets or others beyond the control of the government of the recipient country). In these respects difficulties may emerge in relations between the Fund and the member concerned. Such problems are exemplified by the recent Brazilian agreement with the IMF. The Brazilian package might be described as an experiment with the provision of international lender-of-last-resort financing to an emerging market: it was intended to protect the economy against contagion from East Asia, subject to a stringent fiscal adjustment and a gradual depreciation of the *real* throughout 1999. After a political struggle the Brazilian Government succeeded in passing the legislation needed to meet the fiscal target but, when the currency came under attack, the Fund allowed the agreement to collapse, requiring additional and more stringent conditions regarding the fiscal balance in order to release the second tranche of the package.

The IMF has recently taken steps to strengthen its capacity to provide financing in crises, though this capacity still facts short of that of a genuine international lender of last resort and the terms associated with the new financing are likely to be subject to shortcomings discussed above. The Supplemental Reserve Facility (SRF) approved by the IMF's Executive Board in response to the deepening of the East Asian crisis in December 1997 (and already used in some cases such as that of Brazil), provides financing without limit to countries experiencing exceptional payments difficulties but under a highly conditional stand-by or Extended Arrangement. However, the SRF depends on the existing resources of the Fund which, recent experience suggests, are likely to be inadequate on their own to meet the costs of bailouts. The creation of the Contingency Credit Line (CCL) in April is intended to provide a precautionary line of defence in the form of short-term financing which would be available to meet balance-of-payments problems arising from international financial contagion.[7] The pressures on the capital account and international reserves of a qualifying country must result from a sudden loss of confidence amongst investors triggered largely by external factors. The terms of the CCL involve elements of pre-qualification as described above: the availability of funds is subject to the country's compliance with conditions related to macroeconomic and external financial indicators and with international standards in areas such as transparency, banking supervision and the quality of its relations and financing arrangements with the private sector. The hope is that the precautionary nature of the CCL will restrict the level of actual drawings, but the danger is that countries will avoid recourse to it, even in the circumstances for which it is intended, owing to fears that it will have the effect of a tocsin in international financial markets, thus stifling access to credit. Moreover, although no limits on the scale of available funds are specified, like the SRF, the CCL will depend on the existing resources of the Fund.

Perhaps a more critical issue is that establishing a genuine international lender of last resort would imply a fundamental departure from the underlying premises of the Bretton Woods system which provided for the use of capital controls to deal with

7 *IMF Survey*, 12 January 1998: 7.

8 IMF Press Release no. 99/14, 25 April 1999.

capital flows. In discussion of such a facility its introduction is frequently linked to concomitant arrangements regarding rights and obligations with respect to international capital transactions together with a basic commitment to capital-account liberalization. Even if a properly functioning international lender of last resort could be put in place, it is not clear that this would be the right course of action in response to financial crises and the problems they cause for developing countries.

### *Orderly debt workouts*

Commenting on the debt crisis of the 1980s more than a decade ago, UNCTAD pointed to the circumstance that debtor countries often had to face at and the same time "the financial and economic stigma of being judged *de facto* bankrupt, with all the consequences that this entails as regards creditworthiness and future access to financing, [while also largely lacking] the benefits of receiving the financial relief and financial reorganization that would accompany a *de jure* bankruptcy handled in a manner similar to chapter 11 of the United States Bankruptcy Code".[9]

Chapter 11 procedures are especially relevant to international debt crises resulting from liquidity problems because they are designed primarily to address financial restructuring rather than liquidation. They are based on the premise that the value of the firm as a going concern exceeds the value of its assets in the event of liquidation. Debtors are usually left in possession of their property, and the aim of the procedures is to facilitate orderly workouts in three stages. At the outset procedures allow for an automatic standstill on debt servicing in order to provide the debtors-in-possession with a breathing space from their creditors. The automatic-stay provision is based on the recognition that a "grab race" for assets by the creditors is detrimental to the debtor as well as to the creditors as a group. It allows the debtor the opportunity to formulate a reorganization plan and ensures that creditors are treated equally. Secondly, the Code provides the debtor with access to working capital needed to carry out its operations. A seniority status is granted to debt contracted after the filing of the petition. The final stage is the reorganization of assets and liabilities of the debtor and its operations. The Code discourages holdouts by a certain class of creditors and accelerates the process towards a rapid resolution. The plan does not require unanimous support by the creditors, and the debtor can obtain court approval of the reorganization plans under the "cram-down" provisions. For solvent but illiquid firms, automatic stay and access to new financing may need to be supplemented with an extension of debt maturities. Insolvent firms, on the other hand, would require debt write-downs and conversions, financial and managerial reorganization, and where solvency cannot be restored through such means, liquidation. These procedures are used not only for private debt. Chapter 9 of the Code deals with public debtors (municipalities) and applies the same principles. Similar arrangements exist in most other industrial countries.[10]

Naturally, the application of such principles to cross-border debt involves a number of complex issues. What is under consideration here is not the resolution of individual cases of cross-border

9. UNCTAD (1986: annex to chap. VI). The need for orderly workouts for cross-border claims has subsequently been recognized by many observers, including Sachs (1995), Sachs (1998), Radelet and Sachs (1998), Group of 22 (1998), and Eichengreen (1999). For a recent survey of the issues involved see Radelet (1999).

10. For a comparison between the United States, the United Kingdom and German bankruptcy codes see Eichengreen and Portes (1995), and Franks (1995).

claims, but systemic illiquidity problems associated with a generalized rush to exits and run on the currency. Individual debtors may enjoy insolvency protection subject to provisions in their contracts with the creditors, including collective action clauses in bond contracts designed to allow changes in the payment terms.[11] However, while helpful, under generalized debt runs such provisions do not offer much relief to the country concerned, even if the bulk of the external debt is owed by private banks and firms. When there are numerous debtors, it is very difficult to activate appropriate procedures simultaneously for all so as to halt the run on the currency. More importantly, as in East Asia, most private debtors may indeed be solvent, but the country may not have the reserves to meet the demand for foreign exchange. However, as noted above, debt runs can make such debtors insolvent, and this danger is greater when external debt is owed by the private sector and exchange controls have been dismantled. Thus the task of stemming runs on the currency falls on the governments of debtor countries.

Current judicial practices and government policies in the major industrial countries do not allow debtor governments to benefit from standstill provisions regarding their external debt. In this context, a question arises as to whether the provisions of the Articles of Agreement of the IMF can provide a statutory basis for action by debtor governments through exchange controls. The most relevant provisions are in article VIII, section 2(b): "Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, cooperate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement". This article has given rise to a number of conflicting interpretations as to the latitude it provides for governments to impose standstills on payment of external obligations. In practice governments are reluctant to resort to unilateral suspension of debt servicing and exchange controls even in the extreme event of financial panic since, as recognized by the IMF, "there exists no well-defined and accepted legal process that is applicable in such cases", so that "the process of debt resolution by involuntary restructuring is necessarily ad hoc with uncertain outcome" and "involuntary debt restructuring will damage creditworthiness and may increase the cost of accessing international markets in the future" (IMF, 1995: 11).

In view of the deficiencies of current institutional arrangements for dealing with debt crises, and the increased capacity of financial markets to inflict serious damage, there is now a growing recognition of the need for reform. One proposal is to create an international bankruptcy court in order to apply an international version of chapter 11 (or chapter 9) drawn up in the form of an international treaty ratified by all members of the United Nations (See the chapters by Raffer and de Jonge in this volume[12]). A less ambitious and perhaps more feasible option would be to establish a framework for the application to international debtors of key insolvency principles, namely debt standstill and

11 Even in individual cases, the application of such provisions involves a number of complex legal questions, such as the determination of the relevant law and forum, and enforcement. See, for example, Sassoon and Bradlow (1987).

12 see also Raffer 1990

debtor-in-possession financing, and to combine them with the established practices for restructuring debt.

On one view, under such a framework standstills would need to be sanctioned by the IMF: «upon determination by the Executive Board of the IMF, the debtor government would be protected from legal challenges by its creditors for immediate debt collection» (Sachs, 1998: 52). It has in fact been suggested that «a definitive interpretation of article VIII (2) (b) would support the IMF in this role even if it did not have legal effect in national courts» (Eichengreen and Portes, 1995: 50). The Canadian Government has gone further, proposing an Emergency Standstill Clause to be mandated by IMF members.[13] However, it would be difficult to avoid delays and panics in any procedure requiring prior consultations with the Fund. Moreover, there is a problem of conflict of interest. The Executive Board of the IMF is not a neutral body which could be expected to act as an independent arbiter, because countries affected by its decisions are also among its shareholders. Besides the Fund itself is a creditor and a source of new money. An alternative procedure would be to allow countries meeting certain *ex ante* criteria during Article IV consultations to have the right to impose standstills should their currencies come under attack. This would be similar to pre-qualification in lender-of-last resort financing discussed above, and while such a procedure would suffer from the same drawbacks, it would certainly be superior to a procedure entailing lengthy *ex post* negotiations with the IMF.

Under another alternative, which is free of the objections to procedures involving sanction by the IMF, the decision for standstill could be taken unilaterally by the debtor country and then submitted to an independent panel for approval within a specified period. Its ruling would need to have legal force in national courts for the debtor to enjoy insolvency protection. Such a procedure would in important respects be similar to WTO safeguard provisions allowing countries to take emergency actions.[14]

Recognizing the difficulties in establishing internationally agreed standstill provisions, emphasis has been placed, notably by the Group-of-22 Working Group, on voluntary mechanisms.[15] The dilemma here is that the need for mandatory provisions has arisen precisely because voluntary approaches have not worked in stemming debt runs. On the other hand, while a number of proposals have been made to introduce mechanisms to provide automatic triggers, such as comprehensive bond covenants or debt roll-over options designed to enable debtors to suspend payments, these are unlikely to be introduced voluntarily and would need an international mandate.[16] Thus, in the absence of a genuine

13 Department of Finance, Canada (1998).

14 The GATT includes provisions for various kinds of safeguard measures. For example, under the heading of safeguarding a country's external financial position or balance of payments, import restrictions may be imposed to forestall a serious decline in foreign exchange reserves or (in the use of a developing country) to ensure a level of reserves adequate for implementation of its programme of economic development. Moreover, safeguard action is also possible in the form of suspension by a country of its obligations under the agreement to protect a sector from serious injury caused or threatened by increases in imports. For more detailed discussion see Jackson (1997: chap. 7).

15 See Group of 22 (1998: sect. 4.4) and the thrust of the discussion on facilitating the private sector's involvement in forestalling and resolving financial crises in IMF (1999: 9–24).

16 Concerning the difficulty of achieving changes in this area voluntarily see Eichengreen (1999: 66–69). For the proposal that all lending in foreign currencies include a "universal debt roll-over option with a penalty" to enable the borrower at his own discretion to roll over such debt for a specified period (Buiter and Silbert, 1998).

lender of last resort, an internationally agreed standstill would appear to be the only effective mechanism to stop self-fulling debt runs.

If they are to have the desired effect on currency stability, debt standstills should be accompanied by temporary exchange controls over all capital-account transactions by residents and non-residents alike. There would also be a need to combine debt standstills with debtor-in-possession financing in order to replenish the reserves of the debtor country and provide working capital. This would mean IMF "lending into arrears". The funds required for such emergency lending would be much less than the scale of bailout operations. Moreover, the Fund could also help arrange emergency lending from private capital markets with seniority status.

Legally sanctioned standstills would facilitate debt restructuring negotiations. For sovereign debt to private creditors, reorganization could be carried out through negotiations with the creditors, and the IMF could be expected to continue to play an important role by providing a forum for negotiations between creditors and debtor governments. Special arrangements would be needed for bonds, and the covenants mentioned above would facilitate their restructuring.

For private debtors, government involvement in negotiations would be inevitable when the stability of the domestic banking system was at stake. In past episodes of crisis, negotiated settlements often resulted in the socialization of private debt when the governments of developing countries were forced to assume loan losses.[17] Such practices are not consistent with bankruptcy principles and make restructuring more difficult. The introduction of an internationally sanctioned automatic stay, together with debtor-in-possession financing, could help to relieve such pressures. Judicial procedures could be applied to individual debtors according to the law and the forum governing the contracts at issue. Their application would be greatly facilitated by the existence of proper bankruptcy procedures in debtor countries. Indeed, it would be in the interest of those countries lacking such procedures to establish domestic insolvency regimes in order to allow an orderly resolution of debt crises and to reduce their likelihood by reducing uncertainties and raising confidence.

Writing such a standstill mechanism into the rules and conditions governing international financial contracts would mean that lenders and investors knew in advance that they might be locked in, should a financial panic develop and a country's currency come under attack. This should promote a better assessment of risks, eliminate moral hazard, and reduce purely speculative short-term capital flows to emerging markets. It would also eliminate the need for large-scale bailouts. Together with IMF lending into arrears, it would prevent an unnecessary squeeze on the economy and collateral damage for firms and other economic agents bearing no responsibility for the financial crises, while allowing the country breathing space to design and negotiate an orderly debt reorganization plan. Overall, such orderly workout procedures would promote greater stability and contribute to a more equitable allocation of the costs of a crisis between lenders and borrowers.

17. For example, in the restructuring of the bank debt of the Republic of Korea in January 1998 private debts "effectively became nationalized via a guarantee by the Korean Government ... Creditors, for their part, came out better after the rollover than before: there was no writedown, the new loans carried higher interest rates than the original loans". See Radelet (1999: 11). Similarly, in the Chilean debt crisis of the early 1980s private debts were included in debt rescheduling negotiated between the Chilean Government and its foreign bank advisory committee, apparently as a result of pressure from this committee including a tightening of the terms on short-term trade credits (Díaz Alejandro, 1985: 12).

## Conclusions

Given the inherent instability of international capital movements, recent experience shows that any country closely integrated into the global financial system is susceptible to financial crises and currency turmoil. Developing countries are particularly vulnerable owing to their dependence on foreign capital and their net external indebtedness. Indeed, the recent bouts of crisis in emerging financial markets have pointed to the limits of national policy responses for dealing with such crises and have provoked widespread agreement that there are structural and institutional weaknesses regarding their prevention and management. Since systemic deficiencies in the current regime for capital flows and exchange rates regularly give rise to costly financial crises in developing countries regardless of institutional and policy differences amongst them, for such countries global financial reform is an issue deserving top priority.

In an ideal world global arrangements designed for the prevention and management of financial instability and crises would include *inter alia* (a) globally agreed but nationally implemented rules for the control of capital flows through oversight of international lenders and borrowers, (b) a lender of last resort with discretion to create its own liquidity, and (c) orderly debt work-out procedures in international finance.

However, such a world is still a remote prospect. So far, efforts to redesign the financial architecture have been hostage to disagreements among the G–7 countries. There is unwillingness to establish a genuine international lender of last resort. Instead, the tendency is to introduce solutions involving limited increases in the availability of external financing designed to impose discipline on debtor countries and to keep them on a short leash. By contrast, political support is growing in the major industrial countries for more orderly debt work-out procedures, and for involving the private sector in the resolution of financial crises.

Thus, in the current political environment a feasible strategy offering considerable potential benefits to developing countries in their search for greater financial stability would involve preservation of the principle of national control over capital flows together with internationally agreed arrangements for debt standstills and lending into arrears.

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***Finance & the Common Good/Bien Commun***
is a quarterly publication of
Observatoire de la Finance,
32 rue de l'Athénée, CH - 1206 Genève, Switzerland.
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Ordinary subscription (4 issues): 75$, 75€ or 110 CHF

Institutional subscription (4 issues, 2 copies at the same address) : 100$, 100€ or 150 CHF

Supportive subscription 200$, 200€ or 300 CHF

To be paid
to Observatoire de la Finance,
Union Bank of Switzerland,
clearing # 240, account # 810 946. 00J

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L'Observatoire de la Finance a pour but d'encourager la reflexion, le débat et la formulation de propositions visant à promouvoir le bien commun dans et par les activités financieres. Par ses activités formelles et informelles, il cherche a établir la liaison entre divers groupes partageant les mêmes preoccupations afin de mieux être prêts a relever le défi que constitue pour le monde contemporain le developpement des activités financieres.

Dépôt légal

Mai 2001

Conception : GRAPHIC SPACE SA – Genève

# Debt Beyond Contract

The cancellation of third world debt is a cause which mobilises a large number of people. In response to the pressures of indebted countries and civil society, the international financial institutions claim that contracts must be respected and insist on the discipline which that entails. What are the limits to their arguments? How is one to respond to them? Can better ones be brought to bear against them? Even accepting their claims, can the fairness be improved along with the efficiency of the mechanisms which determine the conditions of repayment?

The *Observatoire de la finance* has invited lawyers, economists, financiers, senior international officials, an ethicist, an accountant and a specialist in international commercial arbitration to examine these questions. The authors come from varied professional backgrounds; they therefore express themselves in a variety of styles which add to the spice of this anthology.

This work is intended to be impartial and intellectually rigorous. It presents a set of objective arguments explaining the conditions under which it is permissible, according to the standards of the different professions involved in finance, for a debtor to refuse to repay his debt as originally contracted or for a creditor to forgive it. Thus equipped, those who are campaigning to lighten the debt burden will be better acquainted with the arguments on which they can rely, or conversely with those to which they need to find a convincing answer.

# La dette au delà du contrat

Annuler la dette du tiers monde est une cause qui mobilise un vaste public. Face aux pressions des pays endettés et de la société civile, les institutions financières internationales apportent des arguments qui défendent le respect des contrats et la rigueur qui en découle. Quelle est la portée de leurs arguments? Comment y répondre? Peut-on leur opposer de meilleurs arguments? Même si on les accepte, peut-on améliorer l'équité et en même temps l'efficacité des mécanismes qui déterminent les conditions du remboursement?

L'Observatoire de la finance a invité des juristes, des économistes, des financiers, des hauts fonctionnaires internationaux, un éthicien, un expert-comptable et un spécialiste des arbitrages commerciaux internationaux à se pencher sur ces questions. Les auteurs sont divers non seulement par leur métier mais aussi par leur milieu professionnel. Ils ont donc des styles différents qui confèrent à ce recueil une vivacité propre.

L'ouvrage se veut impartial et intellectuellement rigoureux. Il présente un argumentaire objectif qui explique les conditions sous lesquelles il est admissible, selon les normes des différentes professions de la finance, pour un débiteur de refuser de rembourser sa dette comme prévu ou pour un créancier d'en faire remise. Ainsi pourvus, ceux qui militent pour l'allègement du fardeau de la dette sauront mieux de quels arguments ils peuvent se prévaloir pour leur cause, ou inversement contre lesquels il leur faut élaborer une réponse convaincante.

ISBN 2-8700333-1-2