

REPORT FROM THE INTERNATIONAL SYMPOSIUM ON ILLEGITIMATE DEBT

WIPE OUT ILLEGITIMATE DEBT



Church of Sweden 



THE LUTHERAN
WORLD FEDERATION
A Communion of Churches



NORWEGIAN CHURCH AID





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Photos 1 and 8: Agnar Skinlo/Norwegian Church Aid
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Front cover: Wipe out illegitimate debt. Balloons from Norway on their way to Rostock for the G8-summit in Heiligendamm 2007.
 Photo: Kjetil G. Abildsnes/SLUG

PREFACE

On 20-23 October 2008 the Church of Sweden, the Lutheran World Federation and Norwegian Church Aid convened – with the support and assistance of the Norwegian Royal Ministry of Foreign Affairs – an International Symposium on Illegitimate Debt at the Voksenåsen conference centre near Oslo. All three co-organizers had long been concerned about the issues surrounding external debt and its social impacts.

As churches and church-related organisations committed both to ‘speaking truth to power’ and to promoting dialogue as a means of resolving disputes, we feel we have a role in bringing all relevant actors and a broad spectrum of opinions together around tables of dialogue. And as churches and church-related organisations inspired by the Jubilee call to justice and to liberation from bondage, and committed to the protection of the God-given dignity of every human being, we feel we have something specific and distinctive to say on this matter – especially where prevailing economic policies and practices have signally failed to produce just and sustainable outcomes for the millions of people continuing to bear the burden of unsustainable and illegitimate debts. This is not just a matter of international financial relations; it is a matter of just and ethical relationships in our global village.

The concern regarding illegitimate debt can be seen as a paradigm for the wider concern regarding the lack of ethical

and legal regulation of financial markets that has become a leitmotif of the current global economic crisis – the first tremors of which were just beginning to be felt when the symposium took place in Oslo. Those early tremors subsequently grew to a worldwide economic earthquake of unprecedented dimensions. Much of what can be read in the summary of the symposium proceedings included in this report now has a prophetic ring.

We are pleased to join in presenting this report, not as an historical record of a symposium in October 2008, but as a document vitally relevant to the pivotal moment in which we live. We must not allow a return to ‘business as usual’. We must grasp this moment to reshape the rules by which economic life in our global village is conducted, and to bring an ethical perspective to this aspect of our lives together.

We would like to take this opportunity to thank all the participants in the Oslo symposium – representing an unprecedented diversity of actors and expertise – for contributing to the richness of discussions from which this report seeks to glean. If any error or misconception appears, the fault is most likely ours. But for all useful and constructive contributions to this policy debate that emerge from these pages, the credit is due to the participants and their combined wisdom.

August, 2009



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FINDING COMMON GROUND ON ILLEGITIMATE DEBT

When participants gathered for the International Symposium on Illegitimate Debt at Voksenåsen conference centre in Oslo in October 2008, the world was just beginning to appreciate the gravity of an economic crisis that later would be described as unprecedented in the post-World War II era.¹ Reduced growth, rising unemployment and collapsing financial markets resulted in record bailouts and other government interventions in the US and in Europe during 2009. Meanwhile, countries in Africa, Asia and Latin America, with less scope for counter cyclical policies, faced the consequences of reduced exports, fewer remittances and shrinking foreign direct investment. Uncertainty remains as to how long the crisis will last and what its implications will be in the medium- and in the long-term. Its impact also seems to vary across countries and regions. While some observers believe the worst is over, others fear that the long-term consequences will be felt for years to come, in particular in developing countries.

It is clear that this is not only a crisis of liquidity. The crisis has revealed fundamental weaknesses in financial regulation and global governance. Calls are being made for more responsibility, accountability, and transparency in the institutions charged with regulating the global economy. These issues were also at the core of the discussions at the symposium in Oslo. Irresponsible lending and borrowing, weak regulatory frameworks, a lack of transparency and

unaccountable financial institutions were - and are - key elements in the discussion about illegitimate debt. Sovereign debt crisis continues to undermine development around the globe, with unacceptable consequences for health, education, housing and other essential services for the populations in some of the poorest parts of the world. In such situations, debt is no longer purely an economic matter, but an ethical issue.

The crisis has also revealed the amount of resources governments in developed countries are able to mobilise when there is sufficient political will. While it has taken world leaders 15 years to cancel 100 billion dollars in debt for the 40 countries included in the Heavily Indebted Poor Countries (HIPC) Initiative,² the International Monetary Fund (IMF) has estimated that 10 trillion dollars have been spent on government intervention in response to the financial crisis so far.³ To date, only 24 countries have reached completion point in HIPC. Meanwhile, as a result of the financial crisis, a number of developing countries that have already received debt relief are again facing the risk of debt distress as exports fall, foreign reserves dwindle and currencies depreciate.⁴ While, in particular, low-income countries are in desperate need of concessional finance, questions are being raised about the sustainability and soundness of new crisis lending, as no binding international standards for responsible lending and borrowing have yet been agreed upon.

Background and objective

The discussion about illegitimate debt is not new. As was illustrated by legal experts during the symposium, the odious debt doctrine can be traced back more than a century. Social movements, activists and non-governmental organisations (NGOs) have for several decades questioned the legitimacy of many of the loans being serviced by developing countries. And while until recently absent in the official discourse on debt, issues of illegitimacy and odiousness have been subject to more debate among governments, within the UN and within the World Bank over the last couple of years. The arguments presented by the Bush Administration when calling for the cancellation of the Iraqi debt in 2003 resulted in a renewed interest in the doctrine of odious debt. In 2005 papers on the issue were presented by both UNCTAD and the World Bank. In 2006 Norway became the first country to accept the concept of creditor co-responsibility when it unilaterally and unconditionally cancelled the debt owed by five developing countries following a failed export credit scheme in the late 1970s. The same year Ecuador became the first country to announce that it would conduct an official audit of its external debt. In 2008 the World Bank organised a roundtable discussion on the issue of odious debt,⁵ while the German Bundestag organised a hearing on the issue a few months later. And finally, during his presidential campaign, Barack Obama promised that he as president would «lead

a multilateral effort to address the issue of odious debt».⁶ All this has coincided with a growing amount of academic literature on the issues of odious and illegitimate debt, some of which was presented in the symposium reader.⁷

The objective of the symposium was to reflect on these developments and to consider possibilities for further legal and political action for the resolution and prevention of debt crisis. Its aim was to broaden the communicative space for an ethical reflection on sovereign lending and borrowing by bringing different perspectives into this discourse. Specifically the objective was to:

- Review the current practice and policy with regard to the resolution of sovereign debt crisis, including especially the Norwegian and Ecuadorian initiatives;
- Review relevant legal principles, doctrines and jurisprudence concerning the establishment of sovereign debt contracts and the resolution of debt crisis, and to examine these sources for the building blocks of a new international legal framework for debt management and resolution, based upon principles of justice, equity and human rights; and to
- Make proposals for the further elaboration of this framework and for political action to implement it.

Outcome and achievements

The symposium gathered a unique group of people from academia, governments, UN agencies, international financial institutions, civil society and parliaments, representing a great diversity of contexts and expertise.

Participants received presentations on the cancellation of debts arising from the Norwegian ship export campaign and on Ecuador's debt audit commission, and heard an expert panel discussion on «Beyond Sustainability: New Approaches to the resolution of sovereign debt crises, based on the concept of illegitimate debt». Two successive roundtables on the "Possibilities for further political/legal action on illegitimate debt" elicited numerous proposals that were subject to further discussions in groups. A «special dialogue» took place with H.E. Erik Solheim, Norwegian Minister of the Environment and International Development, and H.E. Washington Pesántez Muñoz, Attorney-General of Ecuador. Senior government and parliamentary representatives from Liberia, the Democratic Republic of Congo and the Philippines also provided important inputs.

A number of aspects were raised in the discussions, including different views as to the merit of existing debt relief initiatives, what criteria that could be used to define odious or illegitimate debt, the extent to which the issue primarily should be perceived as a political or as a legal matter, and what are the institutional mechanisms that need to be put in place. However, as the outcome document illustrates, participants were able to find common ground. There was general agreement among the participants that sovereign lending and borrowing must be examined from

moral/ethical and political points of view, as well as from economic and legal points of view, that more responsibility and accountability is needed on the side of both lenders and borrowers, that academic legal writings, state practice and other sources do provide a basis for the development of criteria to define illegitimate debt, that although currently it is more a political concept illegitimate debt is undergirded by well-established legal principles, and that ongoing discussions about the precise legal status and content of the concept of illegitimate debt should not impede further political and legal action on the issue.

The initiatives by Norway to recognise creditor-responsibility and by Ecuador to establish a debt audit commission were welcomed by the participants, who also issued a call to other governments, both borrowers and lenders, to take similar initiatives. In particular, participants stressed the importance of both lender and borrower governments conducting audits in order to increase transparency in lending and borrowing practices. All lenders, both public and private, were encouraged to accept and apply the principle of co-responsibility as a fundamental matter of justice. There was also general agreement among participants that political and legal approaches to illegitimate debt are not mutually exclusive, but complementary approaches. The outcome document also says that a referral to the International Court of Justice for an advisory opinion should be considered, and underlines the indispensable role played by civil society in mobilising political will and promoting initiatives to deal with illegitimate debt and creditor co-responsibility.

Subsequent developments

Following the symposium several initiatives on illegitimate debt and responsible finance have been taken. At the symposium UNCTAD foreshadowed its planned three-year project aiming to develop standards for responsible borrowing and lending, criteria for defining illegitimate debt and proposals for an independent debt workout mechanism.⁸ This project has recently been launched, and carries many expectations as a key vehicle for furthering this debate and building consensus for a new ethically informed framework for sovereign lending and borrowing.

Shortly after the symposium the World Bank launched a new paper on odious debt as part of the preparation for the conference «Debt Relief and Beyond» in Washington DC in November 2008. The conference also included a panel discussion on responsible lending and illegitimate debt.⁹ The issue of illegitimate debt was also raised in the negotiations leading up to the Financing for Development Follow-Up conference in Doha in December 2008. In his recommendations to the conference Dr Cephas Lumina, the UN Independent Expert on Foreign Debt and Human Rights, urged leaders to adopt the conclusions of the Oslo symposium.¹⁰ While references to illegitimate debt did not ultimately make it to the final outcome document, the issue was an important part of the discussions in the official roundtable on debt. In January 2009 the Oslo symposium was the subject of discussions in the Paris Club when Norway reported back on the conclusions of the symposium.

In January 2009 the Center for Global Development proposed the establishment of a task force to promote the idea of an ex-ante loan sanction mechanism to address odious debt at a conference at Harvard University. The idea was first proposed by Michael Kremer and Seema Jayachandran in an academic article in 2003,¹¹ but has later been included in the Obama campaign position paper. The task force was officially launched in May 2009 in Washington DC. While welcoming the initiative to address odious debt, civil society has stressed that any ex-ante approach to odious regimes needs to be complemented by an effective ex-post approach to illegitimate debt based on a broader set of criteria for responsible lending and borrowing¹².

The Ecuadorian debt audit commission delivered its final report in November 2008. The Ecuadorian government subsequently announced a moratorium on servicing all portions of the external debt considered illegitimate, and its intention to prosecute all those found to have been involved in illegal actions.

Dr Cephas Lumina, the UN Independent Expert on Foreign

Debt and Human Rights, is currently working to review and develop draft general guidelines on foreign debt and human rights, exploring linkages between trade and debt and examining the issue of illegitimate debt. As part of this work the Independent Expert made official visits to Norway and Ecuador in April/May 2009 with the objective of examining their roles in the debate about illegitimate debt, and with a view to «identifying good practices that may be replicated by other countries».¹³ A mission report will be presented to the UN Human Rights Council in June 2010.

In the US the Jubilee Act, which requires the US Government Accountability Office to do an audit of US claims in at least two South countries to check for odious, onerous, or illegal claims, passed the House and the Senate Foreign Relations committee in 2008, but was held by one Senator. Campaigners are now working for reintroduction of the bill in 2009¹⁴. In May 2009 the Foreign Affairs Committee in the Norwegian Parliament called upon the Norwegian government to take further steps to address illegitimate debt and responsible finance, including calling on the government to conduct an audit of Norwegian lending practices and to work internationally for the development of binding responsible finance standards and the establishment of an independent debt workout mechanism that can assess both the sustainability and legitimacy of debt. Meanwhile, the Government of Paraguay is proposing to the Government of Brazil to launch a joint audit commission in order to investigate the «Itaipú Project», which is a hydroelectric generation plant built jointly in the 1970s.

Much has happened since the symposium concluded in Oslo on 23 October 2008. Most importantly, the current global financial crisis has starkly revealed the inadequacies of the current international financial architecture and has given new strength to demands for stronger legal and ethical frameworks for economic relations. The International Symposium on Illegitimate Debt in Oslo can be seen as part of an increasing stream of work being done in academia, among governments, in civil society, in the UN and in the international financial institutions in response to this increasingly evident need. The symposium especially highlighted three key focuses for future work concerning sovereign lending and borrowing: 1) debt audits in both borrowing and lending countries, 2) standards for responsible finance and criteria for defining illegitimate debt, and 3) institutional mechanisms to deal with debt on a more fair, transparent and independent basis. In the present context of the global economic crisis, the discussions that took place at the symposium in Oslo and the outcomes that emerged are more relevant than ever.

SUMMARY OF THE DISCUSSIONS AT THE SYMPOSIUM

Opening session

The three co-organisers – the [Church of Sweden](#) (CoS)¹⁵, [Norwegian Church Aid](#) (NCA)¹⁶ and the [Lutheran World Federation](#) (LWF)¹⁷ – focused on the challenge of operationalising the concept of illegitimate debt and expectations of progress towards that end as the outcome of the symposium. They highlighted:

- the role of churches and related organisations in creating «communicative space», engaging with government authorities, promoting ethical policy responses and hosting dialogue among relevant actors.
- the diverse constellation of actors represented at the symposium, encompassing governments, intergovernmental organisations and financial institutions, academics and civil society.
- that the symposium was intended as an opportunity for actively working together rather than passively listening to each other.

The [Norwegian Ministry of Foreign Affairs](#) (MFA),¹⁸ as a principal sponsor of the symposium, affirmed the Norwegian government's desire to use the symposium as an opportunity for achieving practical progress on the issue of illegitimate debt, noting that successive governments of different political persuasions have been concerned about this issue. The role of civil society in analysis and campaigning was acknowledged and affirmed. Rhetoric alone was insufficient. Criteria and international mechanisms for addressing illegitimate debt were needed.

The keynote address by Norwegian Deputy Minister of Finance Roger Schjerva is available in full at www.regjeringen.no/en/dep/fin/The-Ministry/Other-Political-Staff/roger-schjerva/Speeches-and-articles/2008/consequences-of-debt.html?id=534103. Main points include:

- The heavy burden that foreign debt places on many developing countries is an important concern to the Norwegian government. Where government loans have not been used to promote development and the welfare of the people, it is understandable that servicing these debts is seen as an unjust imposition.

- Given the current international financial crisis, a discussion of the causes and consequences of debt is very timely. A significant amount of new lending is likely to take place in the weeks and months to come.

Issues arising: Since the time of the symposium, the global economic situation has worsened dramatically. How much new lending has in fact taken place, and by and to whom? Has the profile of lenders and borrowers changed? Have lending and borrowing practices changed?

- Functioning credit markets are important for any agent in the economy, and the possibility to both lend and borrow is part of the normal operation of governments. But government borrowing involves both business and politics.

Issues arising: In the context of the current global economic crisis; has access to credit become a more pressing issue for governments than responsible lending and borrowing? How is the political dimension of sovereign debt relationships being reflected in the current context?

- Some examples of problematic debts include lending to the apartheid regime in South Africa and Cold War era loans to dictators for political hegemony and proxy wars.
- The notion of odious debt has a certain basis in international law and suggests that debt incurred by a regime for purposes that do not serve the best interests of the nation should not be enforceable. Illegitimate debt is a broader concept than odious debt, but it is a very young concept and does not yet have a clear legal and practical content.

Issues arising: Is a legal definition of illegitimate debt really necessary as a starting point? To what extent do the criteria identified by the academics attending the symposium (see below) answer this concern? How will the implementation of the UNCTAD program on illegitimate debt affect this picture?

- Ability to pay rather than illegitimacy has been the starting point of existing international debt relief mechanisms. The

amount of resources that debt service would take away from development and poverty reduction is an important criterion.

- Norway wants to encourage responsible lending practices and avoid creating new debt crisis.
- The emergence of developing countries as bilateral creditors is something that needs to be taken into consideration in this context.

Issues arising: What has been the experience of sovereign debtors in South-South debt transactions?

- The dilemmas involved in addressing illegitimate debt include the following:
 - What criteria should be used to define illegitimacy? What about successful projects in illegitimate regimes, unsuccessful projects in legitimate regimes, and who determines when a regime is illegitimate and how?

Issues arising: One of the participating academics commented that if the loan/project effectively served the (legitimate) purpose of development, the possibility of cancellation should not arise, or unjust enrichment would be the result. But Liberian Deputy Minister of Finance Tarnue Mawolo commented that good projects can be used by dictators to legitimise their regimes. Good governance, transparency, accountability and sound public management systems are key.

- How do you ensure that debt cancellation does not dry out credit markets for developing countries?
- How do we address illegitimate debt without threatening the progress of existing initiatives?
- Conditionality: When granting loans; to what extent should the international community undermine the principle of a nation's sovereignty?
- What is the best way to spend our limited resources? If the goal is to ensure more resources and a better framework for development, the benefit-cost ratio of pursuing illegitimate debt must at least be as high as other projects.

Issues arising: Further consideration of each of these challenges.

- Norway seeks to be a leading force for debt cancellation, working through existing multilateral mechanisms such as HIPC and MDRI.

Issues arising: How has the global economic crisis affected the situation of post-completion point countries?

- Norway encourages responsible lending practices and was among the five countries to formulate and present the new OECD guidelines on sustainable lending. Norway is also the biggest donor to the UN's work to build debt management capacity in poor countries.
- Norway has financed studies on the "odious debt" doctrine both by the World Bank and UNCTAD.
- Norway also supports the work on a new internationally accepted debt workout mechanism, including assessments of the legitimacy of debt, and the possibility of more permanent debt mediation or arbitration mechanisms.

The Sovereign Debt Restructuring Mechanism (SDRM) proposed by the IMF in 2001 might be a starting point for this work.

Issues arising: In discussion, the SDRM proposal was contested as an appropriate starting point for developing international debt workout mechanism. In response, the Norwegian government was said to be seeking some kind of international debt settlement mechanism, preferably in the UN.

- Norway unilaterally cancelled debts incurred as a result of the Norwegian Ship Export Campaign, becoming the first country to accept the principle of creditor co-responsibility.

Issues arising: In discussion, it was clarified that Norway's unilateral cancellation of these debts was not based upon a determination of illegitimacy. The claims were considered to be legally valid, but Norway cancelled the debts on the basis of creditor co-responsibility for the outcome of those transactions.

What is the current state of the debate on the principle of creditor co-responsibility? Have other governments indicated support for this principle? How has discussion on the issue been affected by the global economic crisis?

- Countries can independently undertake reviews of their debt stock.

Issues arising: Discussion on the presentation emphasised more strongly the role of official or civil society audits of sovereign debt portfolios. The importance of examining the model of the Ecuadoran audit process was stressed. It was acknowledged that in cases of apparent illegality, appropriate court proceedings should be undertaken. Transparency is an essential prerequisite for identifying possible cases of illegitimacy and illegality. Audit processes can help promote transparency.

- Debtor governments should involve themselves more actively in the debate on illegitimate debt.

Issues arising: How will the UNCTAD program help engage developing countries in this debate?

Recognising creditor co-responsibility: The Norwegian Ship Export Campaign case

Presented by Henrik Harboe, Deputy Director General, Multilateral Bank and Finance Section, Royal Ministry of Foreign Affairs, Norway¹⁹.

Main points:

- In Norway, unlike other countries, responsibility for debt issues, relations with multilateral development banks and the Paris Club lies with the Ministry of Foreign Affairs rather than the Ministry of Finance.
- Debt is recognised as a serious obstacle to development, and is a priority issue for international discussions on financing for development etc.
- Much has been achieved through HIPC. The 24 HIPC completion point countries have reduced the share of funds used for debt repayment and have increased expenditure for poverty reduction.
- Demands for cancellation of debts can be triggered by debtor countries, creditor country governments' own investigations, pressure from NGOs, pressure from parliamentarians etc.
- Cancellation of the outstanding claims from the Norwegian Shipping Export Campaign was triggered by a combination of individual parliamentarians and the Norwegian Debt Movement.
- Cancellation of these debts was not reported to the OECD as ODA, unlike most other debt cancellations.
- The legal status of the outstanding debt claims was not doubted. But Norway unilaterally cancelled the debts on the basis of a political acknowledgement of creditor co-responsibility for the debts. Norway did not make any determination that the debts were illegitimate.
- Norway hopes that this unilateral action will stimulate debate and that other creditors will follow the Norwegian example. Private as well as public creditors need to participate in this process. We also need debtors to participate in this debate. We do not know if HIPC countries are in favour of the illegitimate debt approach. Civil society, not only in the North but also in the South, should also be engaged.
- Further work is required on the normative content of the concept of illegitimate debt.
- Who should make the necessary judgments on historic debts and future lending policy, and on what criteria? We need a new international debt settlement mechanism. We must specify criteria of illegitimacy. We do not need a precise legal definition, but we must have clear criteria so that actors can know the terms of accountability.
- New approaches should not jeopardise valuable existing initiatives or marginalise the improvement of existing debt relief mechanisms.
- From a strict cost-benefit point of view, the sustainability of existing debts is probably a more important issue than

illegitimate debt. But a discussion on illegitimate debt can also help to make future lending more responsible.

A panel comprising Liberian Deputy Minister of Finance Tarnue Mawolo, Salvador María Lozada (Chair of the International Association of Constitutional Law, Argentina), Beverly Keene (Coordinator Jubilee South), and Charles Abrahams (Abrahams Kiewitz Attorneys) and subsequent plenary discussion on the presentation highlighted the following:

- By 2006 Liberia was USD 5.6 billion in debt and had an annual budget of USD 8 million. Illegitimate debt has not come up in discussion because the debt is clearly unsustainable and will be cancelled on that basis. But if one looks back on how the debts were contracted, there are clear indications of illegitimacy. From 1943 to the 1970s Liberia was experiencing rapid growth, but it was growth without development. Ruling elites excluded the indigenous majority. If lenders continued to lend to regimes that excluded the indigenous majority, should they not assume the obvious risk? The money was used not for development but to strengthen the military machine. The lending was odious and illegitimate. (Mawolo)
- The relationship between banks/private corporations (creditors) and national states (debtors) is differentiated and not equal. The state is public, and unlike the private corporation it does not have profit but the common good as its purpose. *Pacta sunt servanda* cannot apply exclusively in this context. These relationships cannot escape the moral order and general principles of law. (Lozada)
- Already in 1988 a commission had determined that the ship export campaign was a failed policy and that it should not be repeated. But the debtors had to continue to pay for another 20 years before the cancellation was finalised. (Keene)
- Human rights obligations should have primacy over all other obligations, also in the context of debt relationships. The legal framework has to be (re-)integrated. (Keene)
- The broader picture has to be taken into account; trade, privatisation and aid, as well as debt. (Keene)
- The concept of illegitimate debt is inherently a political one. Most - if not all - of the loans were legally concluded, but we can still talk about the illegitimacy of legally concluded debts. We should not try to squeeze the illegitimacy of debt into a legal construct. It is a political concept with legal underpinning. (Abrahams)
- We should focus on the role of export credit agencies. (Abrahams)
- Respect for contract is an important principle, especially for the protection of weaker countries. (Harboe)

Auditing the debts – Ecuador

Presented by H.E. María Elsa Viteri Acaiturri, Minister of Finance, Ecuador²⁰.

Main points:

- As Deputy Minister of Finance, she had been in charge on behalf of the Finance Ministry of facilitating the work of the Comisión para la Auditoría Integral del Crédito Público (CAIC).
- The CAIC report exists, but the complete report has not yet been officially released.
- CAIC's mandate is founded on very clear decree of the President and concerns regarding dependency on IFIs, indications of irregularities in the contract and renegotiation of credits. It is the duty of the State to ensure human rights and promote sustainable development and the need for truth and accountability.
- Purpose to examine and evaluate processes of contract and re-negotiation, use of funds, implementation of programs; to determine the legitimacy, legality, transparency and efficacy of the processes of indebtedness.
- The initiative of Ecuador is important because of the political commitment it represents and the example it provides of moving beyond suspicions to evidence.
- Follow-up will not depend only on the determination of Ecuador, but also on the response of other countries.
- Where shall the evidence be submitted? Who will judge? The international community should determine how to categorise these cases. A multilateral approach is needed.

A panel, comprising Member of Parliament in the Philippines Lorenzo Tanada III, Marta Ruiz (Eurodad), professor Kunibert Raffer (University of Vienna), Peter Lanzet (EED), and subsequent plenary discussion on the presentation highlighted the following:

- An initiative for a congressional audit commission in the Philippines has not yet passed the Senate. Similar

conditions exist between Ecuador and the Philippines, but in the Philippines (unlike Ecuador) political commitment is absent. Civil society in the Philippines has been in the forefront of this struggle. A citizens' audit has been set up, but it will not have the same impact. (Tanada)

- How to promote the implementation of audit processes in other countries: Can Norway support the initiative of the government of Ecuador as an example for others to follow? (Ruiz)
- The EU Parliament resolution calling for member states to recognise illegitimate debt. (Ruiz)
- More concrete information on the criteria used by the CAIC and its findings and recommendations is needed before an opinion could be formed about its value as a model. However, there is general support (including from Norway) for the process of auditing national debt portfolios for evidence of illegitimacy and illegality. (plenary discussion)
- What will the government of Ecuador do next with the CAIC outcome? Will legal proceedings be instituted in any cases? If there is clear evidence of illegality, why not go ahead with legal challenges? (plenary discussion)
- Some felt that the whole process of debt negotiation and contract falls within a paradigm of illegality. (plenary discussion)
- The CAIC process and outcome could be seen as tainted by self-interest on the part of the government of Ecuador. Where is the Commission's independence and neutrality? The Norwegian government's unilateral debt cancellation was a step taken against its self-interest. (plenary discussion)
- For the CAIC, an illegitimate debt is a debt that did not serve the country and was distorted or diverted. (Viteri)
- First thoughts on follow-up to the CAIC report include establishing a team around the Attorney General. But specific decisions on next steps are still pending. (Viteri)
- A neutral space/authority for consideration of these issues is needed. «For us, the IFIs are not neutral.» (Viteri)

Beyond sustainability

Of the 35 post decision point HIPC countries, 14 are again facing debt distress. This illustrates the need to go beyond considerations of sustainability, to a deeper and more comprehensive approach to the issue of external debt.

A panel, comprising Kaj Hober (Mannheimer Swartling, Attorneys), Frederico Gil Sander (World Bank), Alejandro Olmos Gaona (CAIC member), Cephaz Lumina (UN Independent Expert on foreign debt and human rights), and Sabine Michalowski (University of Essex), discussed this concern. Perspectives expressed in the discussion included the following:

- Odious debt does not form part of customary international law. Needs to be more consistent and sustained state

practice. But the principle of good faith applies, and most national legal systems would allow for challenges on this basis. International arbitration mechanisms are also available. If you want to get the attention of lenders, sue them or take them to arbitration. (Hober)

- Lenders do have a moral responsibility, and good lending practices need to be in place in order to avoid future problems. But there are problems with the unilateral repudiation of debt, especially concerning the effect on credit markets. Also, it is sometimes difficult to assess the risks in advance. Not all policy failures result from wrong actions. Corruption in international lending must certainly be addressed, and proceeds of such corruption confiscated. (Sander)

- Debt has become an instrument of domination. As proposed by Espeche Gil, the issue should be referred to the International Court of Justice for an advisory opinion on the legal framework for international lending. Systemic changes need to take place. A new financial architecture is necessary. (Olmos)
- International human rights principles speak to the issue of foreign debt. Governments cannot be forced into a situation where they cannot deliver these rights, as a result of debt service commitments. At the same time, credits are

sometimes needed to deliver these rights. The Independent Expert on foreign debt and human rights will draft general guidelines on this issue. (Lumina)

- Must look at how to use human rights obligations to define illegitimacy or illegality of debt; how debt repayment can be linked to rights violations. Economic, social and cultural rights (ESCR) are most relevant in this regard, but need more content on what is required to fulfill ESCR. Legally speaking, the use of ESCR is very limited. *Ius cogens* debate. (Michalowski)

Possibilities for further political/legal action

Two panel discussions and related group work addressed the issue of possibilities for further political/legal action.

Perspectives expressed by the panelists – comprising Maria Lucia Fatorelli (Auditor of Federal Public Expenditure, Brazil), Yuefen Li (Director, Debt and Development Branch, UNCTAD), Neil Watkins (Jubilee USA), Elvira Méndez Chang (Pontifical Catholic University of Peru), Nkechi Mbanu (Advisor to US Congressman Donald M. Payne), Tarnue Mawolo (Deputy Minister of Finance, Liberia); Jean Claude Kibala (Vice-Governor, South Kivu Province, DRC); John Williamson (Peterson Institute), Mitu Gulati (Duke Law School), and Lidy Nacpil (Jubilee South, Asia-Pacific) – included the following:

- We need more comprehensive audits and disclosure of results. We also need a juridical forum in the international arena and more studies. (Fatorelli)
- The international financial system is not well coordinated and regulated. The current financial crisis gives a sense of urgency. G77 and G24 are asking questions on illegitimate and odious debt. We are being pushed. But achieving consensus on illegitimate debt is going to take time; meanwhile more illegitimate debt will be contracted. Norwegian decision was courageous, especially as the cancellation was not recorded as ODA. UNCTAD analysis shows that ODA figures are inflated by debt relief numbers. Ecuador's initiative is equally admirable. Even if the term illegitimate debt is not being used, actions are taking place. We have to address not only current debts but also ways of avoiding future illegitimate debts. Guidelines are needed for shared responsibility and mutual accountability. All stakeholders should be involved. UNCTAD is establishing an online multi-stakeholder forum on illegitimate debt. (Li)
- More audits are needed, not only in indebted countries, but also lending audits (including USA and IFIs). The financial crisis is a helpful context for this discussion. The Jubilee Act in the USA would call on the US Treasury Secretary for a binding legal framework and an independent oversight entity. The EURODAC Charter on Responsible Lending is an interesting start for working towards a legal framework. It is important to press for official recognition of odious and illegitimate debt in the Financing for Development process. Cf. Norwegian proposal for text on this. (Watkins)
- Bringing this issue to the International Court of Justice

(through the UN General Assembly) for an advisory opinion on the applicable legal framework for dealing with debt and its consequences is a priority. Should also make use of the UN International Law Commission, which has worked on the issue of state succession, but has not addressed debt issues. Should also think of establishing an international arbitral tribunal on debt. (Méndez Chang)

- Congressman Payne is concerned about the issue of odious debt and vulture funds. He helped introduce the Jubilee Act; presently before the Senate. Treasury argues that it is too expensive, but the Congress can still move forward. Relationship between debt and human rights is obvious but new for this discussion. Calls to have hearings on why and how the US lends to other countries. (Mbanu)
- It is important to address the issue of sanctions. Just identifying responsibilities is not enough (sanction – restitution – reparation). Writing off the debts would however also serve as a sanction. (plenary discussion)
- There has been a paradigm shift in the discussion of this issue; a couple of years ago a discussion on illegitimate debt would have been unimaginable. Lack of a precise legal definition is not a fundamental obstacle. Political action is needed, as legal change will follow political change. Audit and evidence is the key. We also need to bring internal debt into the equation, and need to nurture civil society's role in this debate. (Mawolo)
- Mobutu debts: loans are not duly sanctioned by IMF internally. Cold War – Zaire is used as a proxy. Not only did the people not benefit, but the loans were used against them. The World Bank cannot attribute responsibility for this to the DRC. Debt cancellation is not a matter of charity, nor just a question of sustainability, but a matter of justice, for all countries. (Kibala)
- Questions: 1) Illegitimate debt or odious debt? Odious is well defined. Illegitimate is broader, but not well defined. It might be better to focus on odious debt. 2) Ex-ante or ex-post? Ex-ante: Have existing bodies to determine whether lending is possible to given countries. This would enhance possibilities for sanction. Ex-post: May raise costs of lending and borrowing. We prefer an ex-ante plus approach: to allow prosecution on a case-by-case basis (e.g. DRC). (Williamson)
- Campaigning is needed on specific cases, especially through North-South bilateral partnerships (e.g.

Germany-Indonesia, Austria-Philippines). Unilateral actions must be taken by governments/parliaments in the South for repudiation. (Nacpil)

Related group work on the issue of possibilities for further political/legal action produced the following proposals:

- Every country should take more responsibility for its lending and borrowing: co-responsibility and co-accountability.
- Norwegian and Ecuadoran initiatives need to be made more widely known in the public. Norwegian cancellation shows that lenders are beginning to accept responsibility for bad lending. Ecuador audit process shows the importance for examining the debts forensically. Others need to be encouraged to undertake audits.
- Support Norway's proposal for language on co-responsibility and illegitimate debt in the Doha Financing for Development document.
- Support the UNCTAD process for the establishment of an inter-disciplinary expert group to identify best practices.
- Seek a referral from the UN General Assembly to the International Court of Justice for an advisory opinion.
- Debt issues should be taken out of the strictly financial context into the legal, ethical, political, and human rights arenas.
- We must seek universal recognition of illegitimate debt, finding ways to make the issue enter into the agendas of the Paris Club, the World Bank etc.
- There needs to be stronger intersection within governments between ministries/departments responsible for finance, development, foreign affairs, human rights etc.
- We need to be cautious regarding the Ecuadoran model until we see the results and learn more about the process.
- We must urge the governments of Norway and Ecuador to deepen their bilateral dialogue on this issue.
- Discernment of the relationship between legal and political approaches. There are concerns about whether the legal approach can bring us much further because of the limitations of the law. On the other hand, the law helps give backing and pressure for political will. The approaches are not exclusive, but mutually supportive. The overarching approach should be a political one, but with legal actions encompassed in it.
- The initiatives by both Norway and Ecuador are worthy of support as to process and procedure, even if doubts remain on content.
- Advocacy for the Jubilee Act in the USA.
- Support for the proposed Congressional Commission in the Philippines.
- Support for citizens audits, as in the UK and the Philippines.
- Promote North-South cooperation on specific cases, such as Sweden-Liberia, Germany-Indonesia.
- Undertake litigation/arbitration in appropriate cases.
- Advocacy based on EURODAD Charter on Responsible Lending.
- G20 meeting in UK in November 2009 as a target for advocacy.
- Affirm push from Germany and Norway for a discussion on illegitimate debt in the Paris Club.
- Consider role of International Organization of Supreme Audit Institutions (INTOSAI).
- Inter-university studies on the issue of illegitimate debt.

Dialogue between Erik Solheim and Pesántez Muñoz

In a dialogue between H.E. Erik Solheim, Norwegian Minister of the Environment and International Development, and H.E. Washington Pesántez Muñoz, Attorney General of Ecuador, the following issues were raised:

- The financial crisis provides the framework for this discussion. The crisis has helped liquidate the idea of US unilateralism. The main economies have responded in a more or less concerted way; a hopeful sign. Market fundamentalism is dead. It is understood that there is a need for more regulation, not less. (Solheim)
- We need a new financial architecture. We need to remove existing theories, doctrines and practices. We need to establish pre- and post- controls of lending and borrowing. We need neutral arbitration; it does not have to be in our country. (Pesántez)
- «When I take a loan, I take responsibility». But the lender also has responsibility. Norway accepted its responsibility as a lender in deciding to cancel the remaining ship export campaign debts, although there was a lot of criticism. Illegitimate debt was not mentioned, but it is good that civil society is using this term because of the moral implication. Illegitimate debt is a political concept. It is doubtful if it can be converted into legal terminology. (Solheim)
- We are not saying that we are not paying the debt, but we have to analyse the situation. For this, the audit is essential. Ecuador is also pioneering, in undertaking the audit process. (Pesántez)
- We also want to insist on the principle of co-responsibility. And we have to take our own responsibility. There are odious debts, but there are also odious functionaries in our own countries. (Pesántez)
- Liberia: It is outrageous that Liberia today must carry the burden of debt incurred by dictators in the context of the Cold War. (Solheim)
- Zimbabwe: This is a harder case. At what exact point did Mugabe turn from being a liberation hero into a dictator? (Solheim)
- Doha/Financing for Development process: Examining investment and development aid, now in the context of the financial crisis. But the crisis is no excuse for reducing efforts to fight poverty. Debt relief has to be part of this agenda. Norway will bring the issue of illegitimate debt into this discussion. (Solheim)
- Debt relief should not be counted as ODA. (Solheim)
- By not booking this debt relief to ODA, you helped break a bad rule/practice that most other countries follow. (Pesántez)
- President Correa has asked me to look into the CAIC results with regard to the legal issues to be followed-up. We are still determining what exactly we will do, but we will follow-up. (Pesántez)

Developing criteria for defining illegitimate debt:

During the symposium professor Sabine Michalowski (University of Essex), professor Mitu Gulati (Duke Law School), professor Kunibert Raffer (University of Vienna) and Charles Abrahams (Abrahams Kiewitz Attorneys) compiled a set of criteria they propose could form a basis for defining illegitimate debt:

Illegal and Unlawful Debts (based on generally legally accepted principles)

- Debts contracted where there has been no compliance with the lawful requirements in the lender and/or the borrow country as well as international law;
- Debts contracted under duress;
- Debts contracted under fraudulent and/or gravely negligent misrepresentation;
- Debts contracted contrary to the public morals of society;
- Debts contracted where a party or parties have unclean hands, i.e. corruption;
- Debts that amount to unjust enrichment;

Odious Debts (based on generally legally accepted norms and principles)

- Debts that violate peremptory norms of international law;
- Debts granted to states where lenders know or should have known that loans would likely be used for violating generally accepted human rights;

Unsustainably Onerous Debts (based in part on legal, moral and ethical norms)

- Debts that would be reduced by insolvency protection in the case of any other debtor than a developing country.

Unsustainable Debts (based on moral and ethical norms)

- Debts contracted where the parties thereto know that it is incurred for unproductive purpose.

OUTCOME DOCUMENT

Recognising the role of churches to exercise moral guidance also in relation to matters of economic governance, Norwegian Church Aid, the Lutheran World Federation and the Church of Sweden jointly convened an International Symposium on Illegitimate External Debt in Oslo, Norway, on 20-23 October 2008. Concerns regarding responsibility and accountability in international financial relations have been greatly sharpened in the context of the current global financial crisis.

Participants in the symposium - representing governments, Parliaments, UN agencies and international financial institutions, academics, churches and civil society organisations - met in order to:

- review the current practice and policy with regard to the resolution of sovereign debt crises, including especially the recent Norwegian and Ecuadoran initiatives;
- review relevant legal principles, doctrines and jurisprudence concerning the establishment of sovereign debt contracts and the resolution of debt crises, and to examine these sources for the building blocks of a new international legal framework for debt management and resolution, based upon principles of justice, equity and human rights; and to
- make proposals for the further elaboration of this emerging framework and for political action to implement it.

Participants received presentations on the cancellation of debts arising from the Norwegian ship export campaign and on Ecuador's debt audit commission, and heard a panel discussion on «Beyond sustainability: New approaches to the resolution of sovereign debt crises, based on the concept of illegitimate debt». Two successive roundtables on the «Possibilities for further political/legal action on illegitimate debt» elicited numerous proposals that were further examined in group work. A 'special dialogue' took place with H.E. Erik Solheim, Norwegian Minister of the Environment and International Development, and H.E. Washington Pezántes Muñoz, Attorney General of Ecuador. Senior government or parliamentary representatives from Liberia, the Democratic Republic of the Congo and the Philippines also provided important inputs.

In discussions during the symposium, there was general agreement among the participants:

1. That sovereign lending and borrowing must be examined from moral/ethical and political points of view, as well as from economic and legal points of view.
2. That every country should take more responsibility and accept more accountability in relation to its lending and/or borrowing.
3. That it is important to continue with the development

of the concept of illegitimate debt, and useful criteria for assisting in the identification of illegitimate debts can be distilled from academic legal writings, state practice and other sources.

4. That ongoing discussion regarding the precise legal status and content of the concept of illegitimate debt should not impede further political/legal action on the issue. Although illegitimate debt might currently be considered more as a political concept than an established legal doctrine, it is nonetheless undergirded by well-established legal principles.
5. That the initiative by the Government of Norway to unilaterally and unconditionally cancel the debt claims against five developing countries arising from the ship export campaign – acknowledging its co-responsibility as lender/creditor – is a very positive step forward, an important example to other lenders and a contribution to the debate on illegitimate debt.
6. That the fact that this debt cancellation pursuant to the acknowledgment of creditor co-responsibility was not counted as official development assistance (ODA), following Norway's commendable established practice on bilateral debt cancellation, must also be underlined.
7. That the Government of Ecuador's sovereign decision to conduct an official comprehensive audit of Ecuador's public debt in order to assess the legality, legitimacy and impacts of these claims is a very welcome initiative and example.
8. That wider public awareness of both of these initiatives should be promoted.
9. To issue a call to other governments - both borrowers and lenders - to take similar initiatives, recognising the contribution of such actions to advancing the discourse and response to the issues of creditor co-responsibility and illegitimate debt.
10. To particularly encourage governments of both borrower and lender countries to undertake official audits to establish the legality and legitimacy of the debts.
11. To call upon all lenders – both public and private - to accept and apply the principle of co-responsibility as a fundamental matter of justice.
12. That political and legal approaches to the challenges of illegitimate debt are not mutually exclusive, but complementary approaches. Legal actions have to be accompanied by a political strategy, and political initiatives will invariably require legal support and follow-up.
13. That a referral to the International Court of Justice for an advisory opinion on relevant legal aspects of external debt should be considered.
14. That civil society has an indispensable role to play in mobilising political will and in proposing and supporting legal interventions with regard to illegitimate debt and creditor co-responsibility.

Specific areas of current or possible action identified by participants (but not necessarily the subject of common commitment or consensus) included the following:

The Financing for Development process: The Doha Review Conference should explicitly recognise and address the issues of illegitimate debt and responsible financing. The language introduced by Norway on these issues should be supported and promoted by other governments and civil society organisations engaged in the Financing for Development process.

Binding standards and mechanisms on responsible lending and illegitimate debt: The EURODAD Charter on Responsible Lending provides a valuable starting point for the elaboration of future binding standards for responsible lending. The new UNCTAD project on responsible lending and illegitimate debt provides an important new intergovernmental framework for the development of standards concerning these issues. The establishment of a new independent sovereign debt resolution mechanism that encompasses these issues and standards should be considered.

Paris Club discussion: German and Norwegian proposals for a discussion in the Paris Club on illegitimate debt should be supported by other Paris Club members and civil society organisations.

Ongoing dialogue with International Financial Institutions on issues of responsible lending and illegitimate debt: In particular, issues regarding access to World Bank reserves and accountability to IFI statutes and procedures need to be discussed.

Official debt audit commissions: Existing or envisaged initiatives such as the proposed Congressional Audit Commission in the Philippines should be strongly supported.

Citizens audits: Especially where the political will is lacking for the establishment of official audit processes, «citizens' audits» (such as those conducted in Brazil, the Philippines and elsewhere) are valuable tools for promoting public awareness and political will to address illegitimate debt.

National legislation: The need for national legislation on illegitimate debt and responsible lending is an important area

for action. Existing initiatives such as the Jubilee Bill in the USA should be strongly promoted and supported.

Transparency and accountability in budget processes: Improved transparency and accountability in budget processes in borrowing countries will help to avoid some cases of illegitimate debt.

North-South/Lender-Borrower cooperation: Bilateral interaction and cooperation between the governments, academic institutions and civil society organisations of specific lender and borrower countries in order to examine and address illegitimate debt and/or irresponsible lending/borrowing should be promoted.

Research on specific cases: In these contexts or others, research on specific cases is necessary to identify likely illegitimate debts. This research could be undertaken through inter-university studies, which should have an emphasis on the practical applications of the research.

Litigation/arbitration: Specific contracts concerning debts exhibiting strong signs of illegitimacy should be considered for referral to arbitration or litigation, with a view to establishing relevant practical precedents.

Impunity: Issues of impunity for criminal or negligent conduct resulting in illegitimate debts should be further examined.

Coherence of government policy: More interaction and coherence between relevant government ministries (Finance, Foreign Affairs, Development etc) on responsible lending and illegitimate debt should be promoted.

Debt and human rights: Sovereign lending and borrowing is not just a matter of finance and economics, but of politics, law, justice and ethics. It is important therefore that further efforts be made to promote reflection on the relationship between foreign debt and human rights, and that human rights guidelines for responsible and legitimate lending and borrowing be developed (by/in cooperation with the UN Special Rapporteur on foreign debt and human rights).

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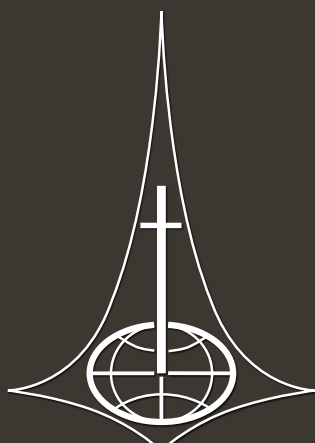
1. Parts of the opening session were covered by the Norwegian state television, NRK, on live broadcast. Also the commercial channel TV2 covered the event.
2. Interpreters. The symposium is translated in Spanish and English.
3. Centre: Frederico Gil Sander, Economic Policy and Debt Unit, World Bank.
4. From left: Henrik Harboe (Ministry of Foreign Affairs, Norway), Roger Schjerva (Deputy Minister of Finance, Norway), Atle Sommerfeldt (General Secretary, Norwegian Church Aid), Ishmael Noko (General Secretary, Lutheran World Federation).
5. Overview, International Symposium on Illegitimate Debt

Photos: Jens Aas-Hansen/Norwegian Church Aid



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