DEBT AND THE REALIZATION OF ECONOMIC AND SOCIAL RIGHTS IN SUB-SAHARAN AFRICA: BEYOND DEBT RELIEF TO SOLUTIONS IN THE COMMON INTEREST

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I. Introduction

July 8, 2005 was acclaimed by media and debt campaigners all over the world as a historic date for 14 countries in Sub-Saharan Africa ("SSA"). That day, in Gleneagles, United Kingdom, the Group of 8 Industrialized Nations ("G8") announced the 100 percent cancellation of the multilateral debts of 18 countries under the Heavily Indebted Poor Countries Initiative ("HIPC") of the International Monetary Fund ("IMF"), 14 of which are in Africa. This G8 initiative has been described in various quarters as laudable and a positive step towards helping Africa achieve the Millennium Development Goals ("MDGs"). Meanwhile, debt campaigners, while commending this initiative of the creditors, have noted that the deal without more would not eradicate the debt problem.

Sub-Saharan Africa countries are the poorest in the world and as of 2004 owe about $218.4 billion in foreign debt. The region is the most affected by the HIV/AIDS disease and nearly all the countries in that sub-region are far behind in meeting the targets set for the Millennium Development Goals. Yet, in these countries foreign debts are serviced at the expense of meeting the needs of their people, leading to a neglect of human development. Achieving the United Nations goals in terms of economic, social, and cultural rights is a big challenge for these countries. In spite of these realities, their creditors continue to demand and receive debt service payments. Debt obligations are being met at all odds and the principle of insolvency has not availed sovereign nations. Whatever the creditors give in forms of Official Development Assistance they

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seem to take back in the form of debt service.

In what seemed like a response by the creditors to the plight of the debtors, the HIPC initiative was launched by the IMF with the aim of bringing to sustainable levels the debts of developing countries, especially African countries. The Gleneagles debt deal is an outcome of the HIPC. But debt analysts have expressed doubts at the possibility of the HIPC program and, indeed the Gleneagles deal, to bring about a lasting and sustainable solution to the debt burden of developing countries, especially countries in Sub-Saharan Africa. The last may not have been heard of Africa's debt crisis if a sustainable solution is not adopted by the creditors with the aim of giving this continent a fresh start.

This essay takes a critical look at Sub-Saharan Africa's debt problem; explores conflicting claims by all stakeholders with respect to the debt issue; analyzes past trends in decision with respect to the problem; and considers the entire picture in the context of likely outcomes in future. In the end, recommendations and suggestions are made with a view to address the common interest of all. It is proposed that a world of human dignity would only be achieved if the barriers to the achievement of all human rights especially economic, social and cultural are removed through cooperation and economic integration by all the states of the world.

II. The Sub-Saharan Africa Debt Problem

A. Types of Sovereign Debts

The debts of a sovereign state consist of domestic and foreign debts. Foreign or external debt has been defined as "the money one country owes to another country, as a result of loans and/or, a negative balance of trade."[1] Foreign debts are different from domestic or national debts which are debts owed by a country to its local investors, contractors and so on. This essay is concerned with the foreign debts of the countries of Sub-Saharan Africa and other

[1] *Foreign Debt*, http://www.investorwords.com/2041/Foreign_Debt.html (last visited Jan. 16, 2008).

developing countries.

The foreign debts of a country comprise of debts incurred by the public sector and private sector. Debts incurred by the public sector are known as public debts while debts incurred by the private sector are known as private debts. When a private sector's debt is guaranteed by the public sector (*i.e.* the government) it becomes part of the public debts of the sovereign debts of the country involved.[2] Again, this essay is concerned with those foreign debts that form part of a state's sovereign obligation.

Public debts, which are also called official debts, could be bilateral, multilateral, or commercial depending on whom the creditor is. Bilateral debts are usually incurred through bilateral agreements between two states. This could be in a form of a loan agreement, a Bilateral Investment Treaty, an Investment Incentive Agreement, and so on. On the other hand, multilateral debts are debts owed by sovereigns to multilateral creditors known as the International Finance Institutions ("IFI") comprising the World Bank, the International Monetary Fund, and Regional Development Banks such as the African Development Bank, and the American Development Bank.[3]

B. Africa's Foreign Debt Profile

With an external debt of just $11 billion in 1970, Africa's foreign debts skyrocketed to about $340 billion in 1995, the year immediately preceding the introduction of the Heavily Indebted Countries Initiative for the purpose of granting debt relief to eligible poor countries.[4] However, this development did not result in drastic reduction in the overall debt profile of the continent, as is reflected in 2002, where its total external indebtedness stood at about $295.[5] In

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[2] Club de Paris, *Types of Debts*, http://www.clubdeparis.org/sections/que-faisons-nous/categories-de-dette (last visited Jan. 16, 2008).

[3] *Id.*

[4] United Nations Conference on Trade and Development, Geneva, Switz., 2004, *Economic Development in Africa, Debt Sustainability: Oasis or Mirage?* at 5, UNCTAD/GDS/AFRICA/2004/1 (Sept. 30, 2004) [hereinafter UNCTAD].

[5] Jorn Madslien, *Debt Relief: Hopes bring out the critics*, BBC News, ¶ 2 (2005), http://news.bbc.co.uk/2/hi/business/4619189.stm (last visited Jan. 23,

fact, available figures show that the continent received about $539.4 billion in loans and paid back about $549.1 billion in principal and interest between 1970 and 2002, and still owed about $295.4 billion.[6] For SSA, it received about $294 billion in loans and paid about $268.3 billion in debt service and still owed about $210.6 billion as at 2002 (See Fig. below).[7]

SSA is not the only region of the world with huge debt burden. Other regions, like South America, the Caribbean, East Asia, the Pacific, and South Asia also have huge debt problems. Hence, the debt problem has become associated with developing countries ("DCs"). But Africa's debt problem is peculiar because the continent is the poorest in the world with the least chance, if any, of achieving the United Nations Millennium Development Goals ("MDGs").[8]

The Global Development Finance, 2005, classifies the economy of 136 countries in the debtor reporting section in three categories—severely indebted low-income countries; moderately indebted low-income countries, less indebted low-income countries, and less indebted middle-income countries.[9] Of the 27 countries classified as severely indebted low-income countries, 22 are African countries.[10] Of the 17 moderately indebted low-income countries, 10 are in Africa.[11] Out of 14 less indebted low-income countries, 7 are

2008).

[6] *Id.* at ¶ 4.

[7] *Id.* at ¶ 12.

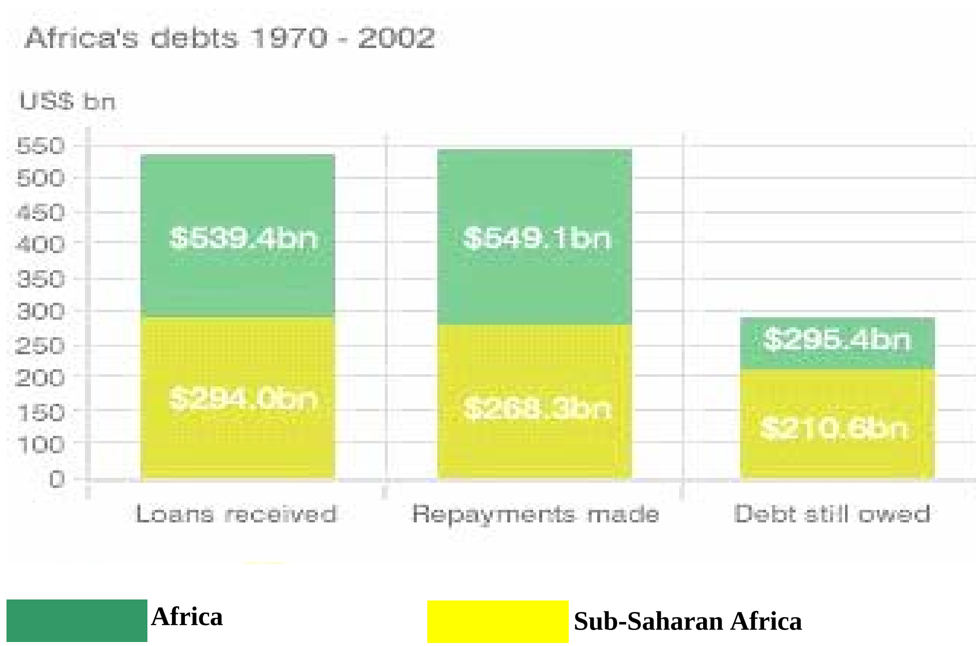
[8] *See, e.g.*, Millennium Development Progress Chart: 2005 2, http://www.un.org/millenniumgoals/docs/mdg2005progresschart.pdf. [hereinafter MDG Progress Chart 2005].

[9] The World Bank, *Global Development Finance: Mobilizing Finance and Managing Vulnerability*, app. at 169 (2005) *available at* http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTDECPROSPECTS/EXTGDF/EXTGDF2005/0,,contentMDK:20341503~menuPK:544389~pagePK:64167689~piPK:64167673~theSitePK:544381,00.html. [hereinafter GDF].

[10] *Id.* These countries are: Angola, Burundi, Central African Republic, Chad, Comoros, The Democratic Republic of Congo, Republic of Congo, Côte d' Ivoire, Eritrea, Gambia, Guinea, Guinea-Bissau, Liberia, Malawi, Rwanda, São Tomé and Principe, Sierra Leone, Somalia, Sudan, Togo, Zambia, and Zimbabwe.

[11] *Id.* These countries are: Benin, Burkina Faso, Cameroon, Ethiopia, Kenya,

in Africa, while of 29 less indebted middle income countries only 7 are in Africa.[12] It is therefore clear from the Global Development Finance analysis that Africa is the most indebted region in the world, constituting about 81 percent of the world's severely indebted countries, 58 percent of moderately indebted low-income countries, 50 percent of the less indebted low-income countries, and 24 percent of less indebted middle income countries. The figure below shows how the debts spiraled from 1970 to 2002. It also shows that within Africa itself SSA is more heavily burdened with debt than northern Africa.[13]



Madagascar, Mauritania, Niger, Nigeria, and Uganda.

[12] *Id*. These countries are: Equitorial Guinea, Ghana, Lesotho, Mali, Mozambique, Senegal, and Tanzania.

[13] Madslien, *supra* note 5, ¶ 12.

C. The Debt Crisis

A country may be said to be experiencing a debt crisis when its existing financial resources are not sufficient to satisfy all of its creditors.[14] Although the global debt crisis made international headlines in the early 1980s when countries in Latin America, like Mexico, Brazil, and Argentina, began to experience debt problems, many countries in SSA are believed to have started experiencing debt problems from as early as the mid 1970s. But this problem is said to have received no global attention because their debts represented no serious threats to the international financial system.[15] Beginning with Zaire in 1976, ten other SSA countries had rescheduled their official and commercial bank claims before 1982.[16]

A number of factors are said to be responsible for the debt crisis that rocked developing countries, including countries in Africa, from the 1980s on. First, the rise in the price of export commodities in the mid and late 1970s lowered the real cost of borrowing and brought about positive expectations that future export revenues would meet external obligations. High commodity prices increased government revenues and, as such, increased government expenditure. Also, with this trend, low income countries appeared credit worthy to export credit agencies, which financed intermediate and capital export goods to African countries in the 1970s.[17]

The next attributing factor is the drop in oil prices during the 1970s and 1980s and the fall in the price of export commodities that followed. The oil price shocks had seriously adverse effects on countries which imported as well as those which exported oil. It meant non-oil importing countries spent more of their export revenues on oil imports.[18] Also, the shocks coincided with a sharp rise in interest rates and less favorable terms of trade, which also

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[14] Christoph G. Paulus, *Some Thoughts on an Insolvency Procedure for Countries*, 50 AM. J. COMP. L. 631, 631 (2002).

[15] CHARLES HUMPHREYS & JOHN UNDERWOOD, *The External Debt Difficulties of Low-Income Africa*, *in* DEALING WITH THE DEBTS CRISIS 45 (Ishrat Husain & Ishac Diwan eds., 1989).

[16] *Id.* at 47.

[17] *Id.* at 46.

[18] *See* UNCTAD, *supra* note 4, at 7.

affected oil exporting developing countries.[19] The result was increased borrowing by several developing countries to maintain fiscal balance, believing that the recession would be short-lived.[20] But, it continued into the 1990s and many of these countries, especially those in Africa, found it difficult to adjust. In this respect, UNCTAD observed as follows:

> Some Asian countries with a strong manufacturing base chose to restrict the increase in their debt indicators by expanding export volume via a variety of export promotion measures and industrial policies. Many other developing countries did not adjust in this way, either because their economies were not sufficiently diversified or because they deliberately chose not to at the time. For many African countries, there was little room for manoeuvre not only because of their non-diversified economies, but mostly because of the steep decline in non-fuel primary commodity prices during the global recession of 1981-82.[21]

Other writers on this subject have pointed out some other causes of the problem which tends to shift more of the blame to the governments of the world's richest countries. Such causes are said to include the flooding of European markets with the "Eurodollar" after World War II, which allegedly prompted European Banks to lure "countries of the south," which wanted to finance their development, especially the newly independent African states and Latin American countries with loans at very low interest rates.[22] Also allegedly added to the Eurodollar is the "petrodollar" placed in western banks by oil producing countries during the oil boom, which increased the availability of easy funds for lending to DCs.[23] The huge financing of export credits to the DCs at this time by the Export Credit

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[19] *Id.*

[20] *Id.*

[21] *Id.* at 8.

[22] *See* DAMIEN MILLET & ERIC TOUSSAINT, WHO OWES WHO? 50 QUESTIONS ABOUT WORLD DEBT 19 (Vicki Briault Manus & Gabrielle Roche trans., 2004).

[23] *Id.*

Agencies ("ECAs") is also said to have been influenced by the economic recession that occurred in developed countries during this period. The World Bank is also alleged to have increased its loans to southern countries from 1968 to 1973, inciting them to finance the modernization of their export apparatus, thereby drawing them more tightly into the world market.[24]

The debt problem has also been attributed to the corruption of certain leaders of DCs at that time who took loans in the names of their countries but converted them to personal use.[25] One commonly cited example of this leadership problem is the case of Zaire under Mobutu Sese Seko. His regime has been described as legendarily corrupt to the extent that an IMF investigation of loans he took in the name of Zaire revealed that the loans were sent directly to his private Swiss bank accounts, with little if any of the funds ever being used for the country.[26] Another often cited instance is that of Jean Claude Duvalier of Haiti, who allegedly incurred 40 percent of the country's debts and took about $900 million of the amount for his personal use.[27]

Irrespective of where the blame may lie, it is indisputable that the debts later became the nightmare of several developing countries around the world. For countries in Sub-Saharan Africa, debt service became the bane to their development. Faced with sudden increase in interest rates and a fall in prices, many of these countries were unable to meet debt obligations as they became due.[28] Further, these loans were denominated in foreign and not local currencies, and so debtor countries, in the face of low national revenues and seriously devalued local currencies, had to procure hard currencies in the

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[24] *Id.* at 20.

[25] *Id*. at 23.

[26] Soren Ambrose, *Social Movements and the Politics of Debt Cancellation*, 6 CHI. J. INT'L L. 267, 277 (2005); *see also* MILLET & TOUSSAINT, *supra* note 22, at 23.

[27] Owen Bowcott & Charlotte Denny, *Haiti in Life and Debt Struggle*, THE GUARDIAN, June 17, 2000, ¶ 1-3, http://www.guardian.co.uk/debt/Story/0,2763,333220,00.html (last visited Jan. 25, 2008); MILLET & TOUSSAINT, *supra* note 22, at 23.

[28] MILLET & TOUSSAINT, *supra* note 22, at 28-9.

financial markets at huge costs. As they fought to balance both domestic and external obligations, they increased production of goods for exports which led to flooding and a crash in commodity prices.[29]

While arguments abound that tend to portray developing countries as the victims of western economic maneuverings, it is undeniable that many of these countries were besieged by unaccountable regimes which did whatever they wanted with public resources and undertook debt obligations without any institutional restrictions. Also, even in those countries where democracy existed, there were inexperienced leaders who failed to plan for the future and diversify their economies. Unfortunately, it would seem, the best interest of the population was lost to all the decision makers at this time and the result was a crisis.

The magnitude of the crisis is well summed up as follows: "total debts amassed by the world's poorest countries shot up from $25 billion in 1970 to $523 billion in 2002, resulting in endless misery and widespread poverty as many of these economies spiraled out control."[30] For Africa, in 1970, the continent's proportion of the total stood at less than $11 billion, not even half the entire debt owed by all the poor nations worldwide. By 2002, the figure had risen to well above half, or $295 billion and has continued to increase ever since.[31]

D. The Human Impact of the Debt Problem

Across Sub-Saharan Africa, the debt crisis resulted in chronic poverty and under-development. With nearly all countries spending more on debt service than on education, health, housing, water, food, and human development, there is no doubt that the debt burden had seriously impacted the population of these countries. Jeffrey Sachs has pointed out that the "squeeze of rising debt burdens and falling aid levels threw a large number of poor countries into persistent

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[29] *Id.* at 29.
[30] Madslien, *supra* note 5, ¶ 1.
[31] *Id.* ¶ 2.

stagnation or economic decline."[32] In 2004, Senegal spent almost 36 percent of its revenues on debt service and Malawi spent more than 30 percent.[33] In Ghana, for example, 11 percent of government spending goes into repaying debts, while only 9 percent is spent on health.[34] In Zambia, the ratio of debt service to health spending is 3.9 percent to 2.0 percent.[35] Foreign debts are being serviced by SSA at the expense of human development.

The impact of prioritizing debt service above human development is well illustrated in the health sector. SSA is the continent worst hit by the HIV/AIDS pandemic and yet countries of this sub-region spend four times more on debt payment than they do on health, with an annual debt service flow of $13.5 billion.[36] Experts have estimated that about $10-$15 billion would be required annually to effectively tackle the HIV/AIDS scourge.[37] It has also been noted that Africa's share of communicable diseases "is disproportionate and ought to revolt the human conscience."[38] This is apparently because of the magnitude of the problem in the continent.

Statistics compiled in 2005 indicate that while about 1.8 million people live with HIV/AIDS in Latin America; 8.3 million in Asia; 1.6 million in Eastern Europe and Central Asia; and 1.9 million in North America, Western and Central Europe, about 25.8 million African people in SSA are infected with the disease.[39] Meanwhile,

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[32] JEFFREY D. SACHS, RESOLVING THE DEBT CRISIS OF LOW-INCOME COUNTRIES, BROOKINGS PAPER ON ECONOMIC ACTIVITY 1 (2002), http://www.earth.columbia.edu/sitefiles/File/about/director/pubs/BPEA_Sachs1_2002.pdf.

[33] JOINT NGO BRIEFING PAPER, DO THE DEAL: THE G7 MUST ACT NOW TO CANCEL POOR COUNTRY DEBTS 4 (Feb. 2005), http://www.cafod.org.uk/var/storage/original/application/phpplS4LV.pdf.

[34] *Id.* at 5.

[35] *Id.* n.12.

[36] Ambrose, *supra* note 26, at 268.

[37] *Id.*.

[38] Nsongurua J. Udombana, *The Summer Has Ended and We Are Not Saved! Towards a Transformative Agenda for Africa's Development,* 7 SAN DIEGO INT'L L.J 5, 11 (2005).

[39] JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS [UNAIDS] AND

while SSA holds just over 10 percent of the world's population; it is home to more than 60 percent of all the people living with HIV.[40] Facts about the continent's state of human and economic development reveal that "[m]ore than 300 million Africans, nearly half the region's population still live in extreme poverty."[41] Furthermore, "[t]he infant mortality rate stands at 91 per 1000 births, while the adult literacy rate for males and females are 30 percent and 47 percent respectively."[42] According to the World Health Organization, the maternal mortality rate in Africa is 830 per 1,000,000 births much greater than Asia and Latin America's rates, 330 and 190 respectively."[43]

More generally, the impact of the debt burden can be seen from the fact that Africa is not likely to meet the goals set in the United Nations Millennium Development Goals ("MDGs") by the target year 2015.[44] The MDGs are currently the standards for determining global development, especially in new DCs. The need to close the wide developmental gap between the DCs and the developed countries motivated the General Assembly ("G.A."), in its Millennium Declaration, to adopt the MDGs at the 2000 millennium summit in New York, 2000.[45] By the G.A. Resolution embodying the MDGs, world leaders promised to co-operate to ensure the eradication of extreme poverty; achievement of universal primary education; promotion of gender equality and empowerment of

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WORLD HEALTH ORGANIZATION [WHO], AIDS EPIDEMIC UPDATE SPECIAL REPORT ON HIV PREVENTION, 3, 31, 65 (December 2005), http://www.unaids.org/epi/2005/doc/EPIupdate2005_pdf_en/epi-update2005_en.pdf.

[40] *Id.*

[41] Ubong E. Effeh, *Sub-Saharan Africa: A Case Study on How Not to Realize Economic, Social and Cultural Rights, and a Proposal for Change,* 3 NW. U. J. INT'L HUM. RTS. 2, 5 (2005).

[42] *Id.*

[43] WORLD HEALTH ORGANIZATION [WHO], UNITED NATIONS CHILDREN'S FUND [UNICF], & UNITED NATIONS POPULATION FUND [UNFPA], MATERNAL MORALITY IN 2000: ESTIMATES DEVELOPED BY WHO, UNICEF, AND UNFPA 1 (2000), http://www.whqlibdoc.who.int/piblications/2004/9241562706.pdf.

[44] *See, e.g.*, MDG Progress Chart 2005, *supra* note 8.

[45] Charles E. Di Leva, *Sustainable Development and the World Bank's Millennium Development Goals*, 19 FALL NAT. RESOURCES & ENV'T 13, 13 (2004).

women; reduction of child mortality; improvement of maternal health; combating HIV/AIDs, malaria and other diseases; ensure environmental sustainability; and the development a global partnership for development.[46] Most of the MDGs are expected to be achieved by the year 2015, but huge external debts have remained one of the major factors hindering progress towards meeting the MDGs. In fact, statistics complied in 2005 indicate that in spite of the $40 billion dollar debt cancellation granted very poor countries by the G8 in July 2005, the debt of African countries still remain close to one trillion dollars.[47]

The fact that a huge debt burden impedes economic and human development has been acknowledged widely. UNCTAD describes the problem as "an obstacle to savings and investment, economic growth and poverty reduction, and overall human development in the areas of health and human resources development."[48]

The United Nations Commission on Human Rights also points out that "[d]espite the improvement in some indicators, the foreign debt burden continues to be intolerable for a considerable number of developing countries."[49] The Commission recognizes that "[t]he serious problem of the foreign debt burden remains one of the most critical factors adversely affecting economic, social, scientific and technical development and living standards in many developing countries, with serious effects of a social nature."[50] The Commission also notes that Africa is largely affected by the foreign debt burden.[51]

A joint NGO Briefing Paper describes the servicing of debts

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[46] *Id.*

[47] U.S. STATISTICS DIV., MILLENNIUM DEVELOPMENT GOALS: PROGRESS CHART (2005), http://mdgs.un.org/unsd/mdg/Resources/Static/Products/Progress 2005/mdg2005progresschart.pdf.

[48] UNCTAD, *supra* note 4, at 9.

[49] C.H.R. Res. 1998/24, U.N. ESCOR Comm. on Hum. Rts., 51st Sess., at 92, ¶ 3, U.N. Doc. E/CN.4/1998/24 (1998).

[50] *Id.*

[51] *Id.*

in spite of the obvious problems in SSA as "unsustainable," "unjust," and a failure "to take proper account of the needs of these countries' people."[52] It also points out that about 30,000 children die daily in these countries as a result of preventable poverty linked to hunger, lack of clean water, and diseases which could be prevented if the huge sums being spent on debt service were made available for the social needs of the people. In particular, the report regrets that SSA is expected to keep repaying such debts in the "midst of a health crisis, being ravaged by HIV/AIDS, malaria and other treatable diseases."[53]

III. Conflicting Claims

A. The Claims of the Creditors to Repayment

It is not easy to pinpoint the primary claims of the creditors to repayment. An unpaid debt is an obligation which the debtor owes the creditor. Although sovereign debts have distinct characteristics in the sense that they are not as easily enforced as national debts are, and that sovereigns cannot go bankrupt under international law, the underlying principle is that a sovereign debt remains a contractual obligation that should be respected. It could be renegotiated if the parties agree to do so. Therefore, legally, creditors could assert the sanctity of contract to justify their claims.[54] In addition, the fact remains that a sovereign, through its approved representative, has the legal capacity to negotiate and enter into an agreement or a treaty with another sovereign or a person and is likewise bound by the outcome of such negotiations, if a binding contract or agreement

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[52] CAROLINE PEARCE, ROMILLY GREENHILL & JONATHAN GLENNIE, IN THE BALANCE: WHY DEBTS MUST BE CANCELLED NOW TO MEET THE MILLENNIUM DEVELOPMENT GOALS 5 (May 2005), http://www.actionaid.org.uk/_content/documents/inthebalance.pdf [hereinafter IN THE BALANCE].

[53] *Id.*

[54] James Thuo Gathii, *The Sanctity of Sovereign Loan Contracts and its Origins in Enforcement Litigation*, 38 GEO. WASH. INT'L L. REV. 251, 252-4 (2006); *see also* Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516 (2d. Cir. 1985) (upholding the sanctity of sovereign loan contracts in the United States).

results.[55] Therefore, a valid loan agreement is binding on both parties. But this fact, however, does not in any way undermine the harsh realities of the debt problem on developing countries.

Besides the strict legal claim to the sanctity of contracts, the creditors and their sympathizers have made other assertions to exonerate themselves of blame. Imprudent borrowing on the part of indebted countries has been cited as one of the reasons for the crisis.[56] But then as someone asserted "imprudent borrowing is usually impossible without imprudent lending."[57] Another assertion is one that attributes the debt crisis to the poor economic policies of developing countries which obstructed their economic growth.[58]

For private creditors, the problem presents serious consequences. The debt crisis was believed to endanger their ability to keep lending, especially in America where the largest banks had multiples of their capital base tied up in loans to various Latin America and Asian countries, massive default and inability to recover the loans threatened their very existence. For private creditors, debt cancellation could not have been an option, and for the U.S. government bailing out the banks and the indebted governments through the IMF was the most viable option at that time.[59]

However, considering the fact that the bulk of SSA debts were official and multilateral, one would think it would have been easier for debt relief to be granted by bilateral creditors and IFIs which are not strictly speaking commercial organizations like banks. But it would appear obtaining debt relief from these entities was not any easier, especially with official creditors pooling together under the auspices of the Paris Club with the IMF and the World Bank

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[55] *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter *VCLT*].

[56] John T. Cuddington, *The Extent and Causes of the Debt Crisis of the 1980s, in* DEALING WITH THE DEBT CRISIS 17 (Ishrat Husain & Ishac Diwani ed., 3d prtg. 1989).

[57] *Id.* at 17, quoting Guttentag Herring.

[58] Gathii, *supra* note 54, at 256.

[59] *Id.* at 256, 258.

working closely with them. In the words of Porzecanski:

> It turns out that it is the official creditor community, represented by the Paris Club of foreign aid and export credit agencies, and the multilateral organizations (the IMF, the World Bank, and the regional development banks), which has been far less responsive to the needs of governments with solvency problems. The G-7 governments that have pointed an accusing finger in the direction of the private capital markets are the same ones that have dragged their feet again and again in terms of granting permanent debt relief even after the Heavily Indebted Poor Countries ("HIPC") initiative came into effect precisely for such purpose.[60]

One can argue, therefore, that they were no less determined to minimize their losses than the banks were. But, if one considers Hagan's arguments, the issue with the IFIs, particularly in Hagan's opinion, the IMF, may be more legal than an unwillingness to grant relief. Hagan opines that:

> When the IMF extends financial assistance to a country, it must satisfy itself that two conditions have been met. First, the IMF's Articles of Agreement requires that its resources may only be used for the purpose of helping a country resolve its balance of payments problems. For this reason, the IMF must be of the view that the country in question is implementing policies that will address—rather than simply delay—the resolution of its external difficulties. Second, the IMF must also have assurances that the country will be in a position to repay the IMF within the relatively short period required under the Articles. The primary policy tool used by the IMF to ensure that these two conditions have been met is its "conditionality," which requires that the member be implementing an appropriate

[60] Arturo C. Porzecanski, *From Rogue Creditors to Rogue Debtors: Implictions of Argentina's Default*, 6 CHI. J. INT'L L. 311, 315 (2005).

> economic adjustment program. The adoption of corrective economic policies is designed to provide some assurance that the underlying problem will be resolved but also that, because of this favorable outcome, the country will have adequate foreign exchange to repay the IMF.[61]

For the above reasons, creditors, until recently, were reluctant to give into calls for debt cancellation. Instead, they pursued their claims against debtors, holding out as much as they can, at best opting for debt restructuring and rescheduling and, of course, opening their doors to the IMF to intervene with bail-outs.

In pursuing their claims, litigation was the least favored option pursued because of the inherent problems involved in suing sovereigns. Historically, efforts at recovery of private or official sovereign debts were not easy. The restrictive principle of absolute sovereign immunity was prevalent until sometime in the twentieth century which meant sovereigns could not be sued in foreign courts without their consent.[62] During this period, private lenders always relied on their own states to help them in the recovery of loans made to sovereigns and official debts were pursued under diplomatic means.

Under public international law, a state has a legitimate interest in seeing that its subjects are not mistreated by foreign states.[63] This protective principle has existed for a great length of time in international relations. For instance, in the late nineteenth and early twentieth centuries, creditor governments, it is said, did not just intercede verbally on behalf of their aggrieved bondholders, but they intervened physically in the debtor countries jurisdiction. It is also on record that foreign powers coerced Egypt, the Ottoman Empire, Greece, Haiti, and several other countries to accept the "orderly administration" of their fiscal affairs. They were reported to

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[61] Sean Hagan, *Designing a Legal Framework to Restructure Sovereign Debt*, 36 GEO. J. INT'L L. 299, 325-6 (2005).

[62] Lee C. Buchheit, *The Role of the Official Sector in Sovereign Debt Workouts*, 6 CHI. J. INT'L L. 333, 335 (2005).

[63] *Id.* (citing IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 504 (Oxford Univ. 2d ed. 1973) (1966).

have employed threats of force, and in some cases actual force, to compel such states to honor their obligations.[64] Another example is the aggression of 1902 when British and German warships fired on Venezuelan coastal fortifications threatening to occupy Venezuelan territory unless debts to their subjects were paid.[65]

However, by the middle of the twentieth century, the principle of absolute sovereign immunity began to be questioned. It was contended that if sovereigns could cross their borders and take loans from other sovereigns or their subjects, then, they should be accountable for default in foreign courts. This thinking led states like the United States and the United Kingdom to enact the Foreign Sovereign Immunities Act of 1976[66] and the State Immunity Act of 1978.[67] These laws restrict sovereign immunity in these jurisdictions, making it possible for sovereigns to be sued in the domestic courts of these states. Litigation was therefore widely pursued against Argentina when it officially defaulted on certain of its foreign debts in December, 2001. Argentina, with over $100 billion external debt, claimed that its debts were too big to repay following four years of economic depression and mounting social unrest.[68] In response, the creditors initiated several claims in various jurisdictions against Argentina.

By late 2004, nearly 40 individual law suits and over a dozen class action lawsuits were filed against the Argentine government in New York. Judgments were entered in over 7 of the cases to the tune of about $740 million. In nearly all these cases, the Argentine government has claimed that it has no assets in the United States used for a "commercial activity" as provided under the Foreign Sovereign Immunities Act.[69] Meanwhile, a Bilateral Investment

[64] Buchheit, *supra* note 62.

[65] *Id.* at 336.

[66] Foreign Sovereign Immunities Act, 28 U.S.C. § 1330 (1976).

[67] State Immunity Act, 1978, c. 33, § 1 (Eng.).

[68] For more information on the Argentina debt default and the steps taken by the creditors, s*ee* J.F. Hornbeck, *Argentina's Sovereign Debt Restructuring*, CRS Report for Congress (Oct. 19, 2004), http://ncseonline.org/NLE/CRSreports/04Oct/RL32637.pdf.

[69] Porzecanski, *supra* note 60, at 327.

Treaty ("BIT") between Argentina and the United States entered into force in October 1994. Article 4 of the BIT provides that investments covered by it shall not be expropriated or nationalized except for public purpose upon payment of prompt fair-market value compensation. Some U.S. investors have claimed that the January 2002 unilateral conversion by Argentina of dollar-denominated contracts to Argentine Peso amounts to an expropriation of their investments. "A number of these investors have filed international arbitration claims against the government of Argentina."[70]

In addition, proceedings were commenced against Argentina in Italy and Germany. The Argentine government challenged these actions on the ground that it enjoys sovereign immunity. Meanwhile, under Italian law, any claim against a sovereign would only be executable against assets not used for public purpose.[71] In 2002, an Italian court ordered the freezing of certain assets belonging to Argentina in Italy.[72] Recently, the Italian bondholders proceeded against Argentina before the ICSID to recover on their bonds.[73] In Germany, over 100 law suits were filed against Argentina. Here, Argentina made a slightly different argument, claiming a state of necessity.[74] Although the German Constitutional Court's majority agreed that necessity could preclude the wrongfulness of a breach of international law, they held nevertheless that "currently no rule of general international law can be ascertained entitling a State, *vis-à-vis* private individuals, to suspend the performance of due obligations for payment arising under private law by invoking necessity based on an inability to pay."[75]

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[70] *See* U.S. Department of State, *2005 Investment Climate Statement – Argentina*, http://www.state.gov/e/ebb/ifd/2005/41948.htm (last visited Feb. 25, 2008).

[71] Porzecanski, *supra* note 60, at 327.

[72] Latin America Advisor, (Aug. 12, 2002), http://www.cato.org/current/argentina/pubs/hanke-020812.pdf.

[73] *See* Luke E. Peterson, *Italian Holders of Argentine Bonds Mount $3.6 billion Claims at ICSID*, INVESTMENT TREATY NEWS, Sept. 20, 2006, *available at* http://www.iisd.org/investment/itn/archive.asp.

[74] Porzecanski, *supra* note 60, at 327.

[75] Stephan W. Schill, *German Constitutional Court Rules on Necessity in Argentine Bondholder Case,* ASIL, Vol. 11, Issue 20, (July 31, 2007) *available at*

Considering the erratic path of litigation as evidenced above, it would appear that unless a better system is devised by the international community, the more effective way for creditors to pursue their claims against sovereign debtors remains in alternatives like collective approach, negotiations, debt restructuring, and rescheduling.

B. The Claims of the Debtors

Several claims have been put forward by DCs, especially those in Sub-Saharan Africa, for debt relief or debt cancellation. Much of the claims are based on political and moral grounds. Others are based on international law principles that have been advanced to persuade the creditors to drop the debt which they have described as "unpayable," "odious," and "illegitimate." At the forefront of these claims are national and international non-governmental organizations, SSA governments, and the United Nations.

The campaign for debt cancellation was championed in the mid-1990s by the Jubilee 2000 Campaigns which originated in the United Kingdom and spread all through Europe and other parts of the world. It became a huge coalition of NGOs who hinged their claims for debt cancellation on moral grounds drawn from certain portions of the Christian Bible which admonished creditors to free their debtors every fifty years known as the "Year of Jubilee."[76] The year of jubilee was the year 2000 and the campaigners vigorously petitioned their governments and members of the G8 to "drop the debt" and free up these resources for human development. They were visible at every G8 Summit and in other meetings of G8 Finance Ministers, the World Bank, and the IMF and much credit are due to them for the introduction of the HIPC in 1996 and other debt relief mechanisms which followed. The United Nations Secretary General and the UN Commission on Human Rights also advanced

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http://www.asil.org/insights/2007/07/insight070731.html.

[76] Jubilee Debt Campaign, *The Birth of Jubilee 2000*, http://www.Jubileedebt campaign.org.uk/The%20birth%20of%20Jubilee%202000+282.twl (last visited Jan. 28, 2008).

human rights issues inherent in the debt burden and contributed a great deal to the advocacy for debt cancellation. These claims are varied, cutting across more areas than the claims of the creditors and are more humanitarian than legal. These claims are considered in the next paragraphs.

1. Moral Claims

The moral arguments are strong. They form the core of the debt cancellation campaigns. The basis of the moral claims was discussed above while considering the impact of the debt burden. It is believed to be morally wrong for creditors to demand repayment in the face of all the hunger, disease, extreme poverty, HIV/AIDS, and all other problems faced by debtor countries. The creditors' demands are depriving the people of SSA the basic needs of life and, as a result, many are left to die. At the debt rallies that took place in Edinburgh, United Kingdom in July 2005, to persuade the G8 to endorse 100 percent debt cancellation for the world's poorest countries and "Make Poverty History," the campaigners were graphic about their demands: "a child dies every 30 seconds in Africa of preventable diseases" and "30,000 children die every day from preventable diseases." Children and the elderly also joined the call. A child of about 6 years old displayed his banner which urged the G8 to "send my friend to school." Some of those who were interviewed agreed that they were willing to give up some "comforts" and help those poor people in Africa in order to end the "injustice."[77]

2. Political Claims

Some advocates of debt cancellation base their claims on the ground that the debt problem represents a new form of colonialism which gives the creditors and their governments the power to control

[77] The writer participated in the Edinburgh Make Poverty History rally and had the opportunity to speak with some participants at the rally. *See* Interview with Edinburgh Make Poverty History rally participants (July, 2000). On the moral claims, *see* MILLET & TOUSSAINT, *supra* note 22, at 118.

and manipulate DCs. To them the debts should be cancelled as a matter of course and not only as an issue of morals. Such advocates have interpreted the interference of the IFIs in the economic policies of developing countries as a continuation of the principle of colonialism and have called it modern slavery aimed at keeping the developing countries in the clutches of developed countries. It has been argued in this respect that "true sovereignty will remain an impossible dream for the Developing Countries as long as they stay under the yoke of the IMF and the World Bank, and more generally of all the creditors of the North."[78]

3. Economic Claims

Economic claims are hinged on the fact that the debts of SSA countries have continued to increase rather than decrease. It is asserted that for every $1 owed in 1980, the developing countries have repaid, as of 2004, the sum of $7.5 and still owed $4.[79] This perpetual increase in the amount owed fueled the threat by Nigerian legislators to repudiate the country's huge debt if the creditors refused to make a deal. According to them, Nigeria's principal debt had been repaid three times over and the country still owed more than three times the initial sum it borrowed.[80] Nsongurua J. Udombana argues that:

> [T]he IMF classifies trade liberalization as a victim rather than a villain and confines the debt crisis to issues of good governance and economic reforms. Western countries and institutions often perceive Africa's problems as mainly consequences of some inscrutable force of nature, compounded by corruption. The truth is that much, certainly not all, of Africa's poverty results from the 'winner-takes-all' global economic system that is geared

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[78] MILLET & TOUSSAINT, *supra* note 22, at 121.

[79] *Id.* at 122.

[80] Ben Agande Abuja, *Stop Payment of Foreign Debts, Reps Tell Obasanjo*, *available at* http://www.cadtm.org/article.php3?id_article=1223 (last visited Jan. 28, 2008).

towards protecting the rich at the expense of the poor.[81]

4. Environmental Claims

It has been argued that one of the consequences of the debt burden is pressure on the economy and resources of developing countries. Over-production and over-utilization of natural resources is the outcome and results in environmental degradation such as pollution, deforestation, extinction of wildlife, and loss of water resources. It has been pointed out that:

> in developing countries . . . to obtain the hard currency needed to repay the debt or keep themselves in power, governments are ready to over-exploit and sell their natural resources (minerals, petroleum, fishing) putting biodiversity at risk. . .encouraging deforestation, soil erosion and desertification. In Africa, 65 percent of arable land has been degraded over the last fifty years . . .[82]

5. Legal Claims

Due to the fact that sovereign debts are contractual in nature and could involve claims by one sovereign against another, debt campaigners have also considered the legal issues involved and have made some legal claims to debt cancellation based on the principles of international law. The legal claims are derived from the principles of *force majeure*, necessity, distress, and odious debts. Also, debt cancellation advocates have explored the option of debt repudiation and its possible application under international law. The established principles of international law are discussed in part IV while the questions of odious debts and debt repudiation are considered in the preceding paragraphs.

a. Odious Debts

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[81] Udombana, *supra* note 38, at 13.
[82] MILLET & TOUSSAINT, *supra* note 22, at 128.

The odious debt doctrine was popularized by Alexander Nahum Sack. He defined the concept the following way:

> When a despotic regime contracts a debt, not for the needs or in the interests of the state, but rather to strengthen itself, to suppress a popular insurrection, etc, this debt is odious for the people of the entire state. This debt does not bind the nation; it is a debt of the regime, a personal debt contracted by the ruler, and consequently it falls with the demise of the regime.[83]

The basic elements of an odious debt are said to be that the population for whom the debts were supposedly incurred could not have consented to it by its nature; they derived no benefits from it; and the creditor was aware of such situation and still went ahead and completed the transaction.[84] Certain categories of third world countries debts have been described as odious and they include debts used to finance suppression and aggression on the population (hostile debts) and debts used to finance wars (war debts).[85] The debts incurred by Saddam Hussein of Iraq, Mobutu Sese Seko, and other dictators have been described as odious.[86] To promote the doctrine, Sack proposed a process where the interests of both the debtor and the creditor would be adjudicated, while at the same time addressing the issue of genuine odious debts.[87]

It has been noted that the international community is unwilling to promote this doctrine because in the first ILC draft Convention on the Succession of States in Respect of State Property, Archives and Debts, there was a reference to odious debts defined as

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[83] A.N. Sack, *Les effets de transformations des Etats sur leur dettes publiques et autres obligations financières*, (Paris: Recueil Sirey, 1927), as quoted in Jeff King, *The Doctrine of Odious Debt Under International Law: Definition, Evidence and Issues Concerning Application, in Advancing the Odious Debt Doctrine* (CISDL Working Paper) 13, 14 (2003), http://www.odiousdebts.org/odiousdebts/publications/Advancing_the_Odious_Debt_Doctrine.pdf.

[84] *Id.* at 14.

[85] *Id.* at 17-20.

[86] *See* Kevin H. Anderson, *International Law and State Succession: A Solution to the Iraqi Debt Crisis?*, 2 UTAH L. REV. 401 (2005).

[87] *See* King, *supra* note 83, at 17.

debts contracted by the predecessor state with a view to obtaining objectives contrary to the major interest of the successor state or not in conformity with international law. This clause was subsequently excluded from the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, 1983 which is yet to come in to force.[88]

The doctrine of odious debts has also been linked to the repudiation of sovereign debts by Mexico in respect of Austrian Debts in 1867, the US repudiation of the Cuban Debt at the Paris Conference of 1898, and the Repudiation of Polish Debts at the Treaty of Versailles, 1919.[89] More recently, the arguments proffered by the United States to secure debt reduction for Iraq from its creditors have been said to be premised on the odious debt doctrine—that the former Iraqi regime used the loans to finance the war in Iran and that the debts constitute an unjust burden on the people of Iraq.[90] However, the odious debt doctrine is not yet a recognized principle under international law and at best serves as a very persuasive humanitarian claim for debt cancellation. The doctrine also has one problem, how easy would it be to prove before a tribunal that a creditor knew that the despot intended to use the funds for any of the enumerated purposes?

b. Debt Repudiation

Debt campaigners have explored the option of debt repudiation when it becomes impossible for a sovereign to repay its debts to its creditors and they are unwilling to grant debt relief. Although, admittedly an option that could only be adopted as a last resort, there were instances in the history of international relations when debts were repudiated by sovereigns. This is irrespective of the fact that unilateral debt repudiation of sovereign debts amounts to

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[88] Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, Apr. 17, 1983, 22 I.L.M. 298, 306.

[89] King, *supra* note 83, at 24-28.

[90] Mark Engler, *Debt Cancellation: Historic Victories, New Challenges*, FOREIGN POLICY IN FOCUS, May 17, 2005, http://www.fpif.org/pdf/reports/SR0505debt.pdf.

a breach of an international obligation by a sovereign debtor. Such instances when debts were repudiated include the Mexican Repudiation of Austrian Debts in 1867 when President Juarez repudiated the entirety of debts incurred by Emperor Maximilian in 1883 on the grounds that ". . . a large part of those debts has been created to maintain that usurper in his place against the legitimate authority and all of them were mostly scandalously usurious."[91] Also, in 1918, the Soviet government repudiated the debts of the predecessor regime and they remained unpaid till this day. In 1922, Costa Rica refused to honor loans made by the Royal Bank of Canada to the former dictator Federico Tinoco and a US court upheld the repudiation. Germany, upon annexation of Austria in 1938, refused to assume any of the foreign debts of the Austrian government on the grounds that the debts were contracted against the state's interest and supported its position by citing instances when the US and Great Britain have similarly repudiated certain debts in the past.[92]

In recent times, there haven't been any serious attempts at debt repudiation. The abstention is probably due to a fear of sanctions and the impact such attempts might have on the reputations and economies of repudiating countries in a globalized economy context. On March 8, 2005, Nigeria's Lower House of Parliament passed a motion urging the Nigerian government to repudiate its debts, which the Parliament described as illegitimate. Nigeria subsequently secured a debt reduction deal with the Paris Club, which resulted in the cancellation of approximately 60 percent of its debt. Therefore, the threat was never carried out. More commonly, developing countries tend to inherit debt from successor governments, even when the preceding governments were dictatorial and unaccountable. However, Nigeria decided that it should maintain a good image in its national community, and that debt repudiation would make it difficult to secure future loans when the need genuinely arose.[93] In any case, debt repudiation would

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[91] King, *supra* note 83, at 24.

[92] *Id.* at 28.

[93] Josephine Lohor Abuja, *Obasanjo to House: Give Me More Time*, CADTM, Mar. 19, 2005, http://www.cadtm.org/article.php3?id_article=1223 (last

certainly amount to a breach of an international obligation under the doctrine of state responsibility, as discussed in part III below. However, seeking remedies in the international forum would probably be a better approach.

IV. Past Trends in Decision

As previously mentioned, there is not an international mechanism to regulate the relationship between a sovereign debtor and its creditors. In essence then, the terms of a debt agreement apply in each case, subject only to the parties' abilities to negotiate the issue and come to a decision. Also, the creditor could initiate litigation for the attachment of the debtor government's assts, which may be found in the creditor's jurisdiction. But, as seen above, the litigation method has proven unsuccessful. In the face of the global debt crisis, the creditor governments have had to find ways to contain the debt problem, restore sanity to the international financial market, and respond to the distress signals of debtor courtiers and their citizens, while protecting the interests of their own citizens. The remainder of this section is devoted to identifying the trends in methods utilized to alleviate this issue.

A. Private Creditors' Collective Action Clauses

Commercial banks and bondholders have used Collective Action Clauses ("CACs") in recent times, as a way of addressing debt defaults by sovereign debtors. It should be noted that such devises aren't necessarily debt relief mechanisms, as they only make claims, debt rescheduling, and restructuring easier for the creditors to collectively handle. Furthermore, CACs do not apply to official or multilateral debts. But, sovereign bonds governed by the UK have long included CACs specifying the voting rules, which permit a predetermined majority of bondholders to adjust payment or interest terms in the event of a debt crisis. In contrast, bonds governed by New York state law traditionally give each bondholder the power to

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visited Jan 28, 2008).

accept or refuse a restructuring. The New York approach was criticized in the 1990's, because it made restructuring difficult and the inclusion of CACs in these bonds was subsequently advocated.[94] In 2003, the U.S. Treasury Department approved the voluntary inclusion of CACs in sovereign bonds and CACs have subsequently become part of New York bonds issued to Mexico, Brazil, Uruguay, and a host of other nations.[95]

B. Specific Debt Relief

1. The IMF Bailouts

A discussion of the IMF bailouts requires an analysis of the role of the IMF in the international financial system. It has been emphasized that one of the primary purposes of the IMF, is "to shorten the duration and lessen the degree of disequilibrium in the international balance of payments of members."[96] Furthermore, the IMF's Articles require that its resources may only be used to help countries resolve their balance of payment problems. Therefore, it has been noted that in the performance of its functions, the IMF must have assurances that the aided country would be in a position to repay the IMF within the short time period required by its Articles.[97] As such, the IMF is a lender interested in recovering its funds, just like other creditors. The only difference being that the IMF has the added leverage of being able to influence countries' domestic policies by virtue of their memberships.

Following the debt crisis, banks in creditor countries that gave loans to distressed countries have faced the prospect of massive defaults. In 1982, Mexico was the first country to announce its inability to honor its debt obligations, followed by Argentina, Brazil,

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[94] Patrick Bolton & David A. Skeel, Jr, *Redesigning the International Lender of Last Resort*, 6 CHI. J. INT'L L. 177, 181 (2005).

[95] *Id.*

[96] *Id.*

[97] International Monetary Fund [IMF], Articles of Association, art. 1(vi), *available at* http://www.imf.org/external/pubs/ft/aa/aa01.htm (last visited March 3, 2008). *See also* Sean Hagan, *supra* note 61.

and other countries in Eastern Europe, Asia, and Africa. Governments of developed countries, especially the United States, whose banks were endangered by this development, needed to address the problem and protect their banks' interests. As an institution largely controlled by these governments, the IMF came to the rescue. It made bail-out loans to the distressed countries, enabling them to meet their debt obligations.[98]

Therefore, the IMF assumed these loans and saved the day for the banks. This development led to the growth of multilateral debts, which until that time did not constitute the bulk of developing countries' debts. Furthermore, the debt crisis was pervasive, in that "all the indebted countries in Africa and Latin America (and a little later, Asia) regardless of the type of government, the degree of corruption or of democracy, were confronted with the debt crisis."[99] Therefore, the intervention through bail-outs increased the influence of the IMF over developing countries, because the bail-outs were not unconditional. They were premised upon the debtor countries undergoing either Structural Adjustment Programs ("SAPs"), or implementing a Poverty Reduction Strategy Paper ("PRSP"). These instruments are intended to help developing countries transform their economies through measures such as liberalization, privatization, institutional reforms, and cuts in public spending. IMF loans requiring implementation of these measures are intended to bring about such transformations, enabling the debtor countries to service their debts and become more integrated into the world economy.[100]

The bail-out has been severely criticized by many as benefiting only the creditors and failing to consider the needs of indebted countries for certain concessions such a recognition of the fact that a sovereign could, like a corporate debtor, go bankrupt. Such critics assert that the IMF bail-outs are motivated by the need to protect the creditors and not necessarily the debtors. And the SAPs

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[98] MILLET & TOUSSAINT, *supra* note 22, at 29.

[99] *Id.* at 30.

[100] Soren Ambrose, *Multilateral Debt: The Unbearable Burden*, FOREIGN POLICY IN FOCUS, vol. 6, No. 37 (Nov., 2001), *available at* http://www.fpif.org/briefs/vol6/v6n37multidebt.html (last visited Jan. 28, 2008).

have been criticized for robbing debtor countries and their citizens of sovereignty and the power to choose which path to follow in their development.[101] Soren Ambrose wrote, "SAPs have almost invariably caused increased poverty, unemployment, and environmental destruction, while also leading to an increase in the overall size of a country's multilateral debt."[102] Others have argued that the IMF has exceeded its jurisdiction, and that it adopts a "one size fits all" approach to the SAPs without taking into account the specific problems encountered by individual countries, in terms of its social, economic and political characteristics, in that the same prescriptions were applied to Russia, Korea, Thailand, Ghana, Burkina Faso, and Zambia, even though these countries suffered essentially different crisis.[103]

Whatever the motives of the IMF and the creditors may be for initiating bail-outs and insisting the debtor countries implement SAPs, the fact remains that the sovereign debtors seem to have had little choice in the processes and generally complied with the processes, even though there aren't any fixed, identifiable processes in the international community to prosecute the claims against them. In other words, the IMF helped the creditors ensure that the debtors did not walk away with their money. It also helped the debtors to fulfill their obligations to their creditors without having to face diplomatic squabbles. Importantly, the bail-outs have not decrease the debts, because they've provided funds to repay old debts that had multiplied as a result of accrued interests and penalties. In actual terms, they mean increased indebtedness, as the new loans also come with interests, even though they may be at lower rates. The bail-outs probably calmed the storm that came with the debt crisis, but they neither sanitized the system, nor address the impact of the debt burden on poverty, disease, and other developmental needs of the debtor countries. The IMF bail-outs have also been criticized for "creating 'moral hazards' and encouraging future indiscriminate lending by creditors to weak borrowers on the basis of expected

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[101] *See* Ofer Elder, *Reform of IMF Conditionality: A Proposal for Self-Imposed Conditionality*, 8 J. INT'L ECON. L. 514 (2005).

[102] *See* Ambrose, *supra* note 100.

[103] *See* Elder, *supra* note 101, at 511, 516.

future bailouts."[104]

On the other side, the IMF's role in the HIPC, and the entire debt mechanism has been described as "a major advance over earlier methods by which the official sector attempted to influence the behavior of errant sovereigns…"[105] This view asserts that in the nineteenth century, the "historical equivalent of today's G7 may have simply taken over the running of a debtor country's fiscal affairs. But, in the twenty-first century, the same result can sometimes be accomplished through the less intrusive tool of the IMF conditionality."[106] Apparently justifying the SAPs, Buchheit opines further that:

> The IMF's desire to safeguard its own lending has provided the principled justification for the Fund's involvement in debtor countries' dealings with private creditors. . .This "lending into arrears" policy has allowed the Fund to monitor and, in some cases, visibly influence a debtor country's debt management strategy. It has also thrust the IMF into the uncomfortable position of being seen by some private creditors as the anointed official sector instrument of reprimand and correction for wayward sovereign borrowers.[107]

2. Paris Club Debt Restructuring, Rescheduling and Reduction

While the IMF bail-outs dealt mainly with commercial debts, official creditors of developed countries were also confronted with the problems of bilateral debts and how they should be approached. SSA countries were particularly affected by the decision of official creditors, because as previously noted, the bulk of their debts consisted of bilateral debts, which were publicly guaranteed ECAs debts and multilateral debts. The Paris Club is the forum where

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[104] Sachs, *supra* note 32, at 4.
[105] *Id.*
[106] Buchheit, *supra* note 62, at 341.
[107] *Id* at 341-42.

official bilateral debts owed to its members are dealt with, in collaboration with the IMF and the World Bank. A sovereign debtor in need of a debt treatment could approach the Paris Club, which treats each case as they come, without any formal rules.[108] This style has been criticized for being a tactic, which effectively prevented debtors from forming a united front to address their debt problems before the creditors could do the same. In essence, similar cases are not treated alike, in that whatever a debtor gets out of the negotiations might depend largely upon its good will amongst the various creditors. Such negotiations have been described as "characterized by a high degree of ad hockery and a low degree of systematization of international rules."[109]

More often than not, the Paris Club would reschedule or restructure debts, rather than grant debt reduction, much to the chagrin of the debtors.[110] As a general rule, the Paris Club restructurings consist of the rescheduling of principal, and the deferral of interests and decisions to restructure are normally taken in conjunction with an approval of an IMF financing arrangement, which gives the Paris Club the signal that the sovereign debtor is conducting appropriate adjustment policies.[111]

Because there was not a uniform practice on the way debtors were treated, many times the process was influenced by political considerations and interests, and not necessarily because of an actual assessment of the financial situation of the particular country involved.[112] For instance, the reduction of Poland's debt in 1991 has been attributed to its leaving the Warsaw Pact, and opening up to liberalization.[113] Egypt's debt treatment in 1991 has also been linked to its cooperation during the Gulf War.[114] It can be said that the former Yugoslavia also benefited from such debt treatment, in that

[108] ClubdeParis.org, *Rules and Principles*, http://www.clubdeparis.org/sections/principes-et-regles/principes (last visited Mar. 3, 2006).

[109] Sachs, *supra* note 32, at 4.

[110] Hagan, *supra* note 61, at 334.

[111] *Id.*

[112] MILLET & TOUSSAINT, *supra* note 22, at 72.

[113] *Id.*

[114] *Id.*

the Serbian government cooperated with the North by handing over Slobodan Milosevic to the former state's International Criminal Tribunal.[115] It is believed that Pakistan's debt relief came as a result of its breaking connections with the Taliban.[116] Allegedly, the same "preferential treatment" was recently given to Iraq, because of the U.S.'s present occupation.[117] Whatever truths may lie in these allegations, the fact remains that not all the debtor countries have been treated in the same manner, and in most cases, the countries that desperately needed debt reduction did not receive it, while less indebted, low income countries like Poland and Egypt did receive a reduction. Sachs also points out that, "debt reduction targets were set and reset arbitrarily – writing off 30 percent, then 50 percent and so on – rather than based on serious assessment of the needs of each country."[118] Also, countries under Paris Club debt treatment, especially those that received debt reduction, are compelled to undergo SAPs with the IMF.

Sachs analyzed all Paris Club reschedules between 1975 and 1996, and the outcomes from 1997-2001. More precisely, he considered fifty nine developing countries. He classified the countries into three categories; cured, in remission, or in chronic crisis as of 2001. By his definition, a country is "cured" of debt crisis, if it was current on its debt servicing, did not restructure its debt in the Paris Club during 1997-2001, is not a candidate for relief under the present HIPC initiative, and was not under an IMF lending program during 1997-2001. Secondly, a country is considered to be in "remission," if it meets the conditions for being "cured," except that it is currently under a lending program with the IMF. Lastly, a country is considered to be in "chronic crisis" if it required a Paris Club restructuring during 1997-2001, is a candidate for the HIPC relief, or is in default on its Paris Club debts.[119] Of the fifty nine

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[115] *Id.* at 73.

[116] *Id.*

[117] Paul Blustein, *U.S. Push to Forgive Iraq's Debt Underway*, WASHINGTON POST, April 12, 2003, at A29, *available at* http://infoweb.newsbank.com/iw-search/we/InfoWeb (last visited February 20, 2008).

[118] Sachs, *supra* note 32, at 10.

[119] *Id.* at 11.

countries; only eight were cured, twelve were in remission and thirty nine were in chronic crisis.[120] Amongst African countries, only Morocco and Equatorial Guinea were considered "cured," only Egypt and Algeria were in "remission," while thirty nine others were in a "chronic crisis," with thirty three of those being SSA countries.[121]

Sachs' analysis shows that neither the Paris Club debt treatments, nor the IMF bail-outs resolved the debt crisis, because by 1996 the IMF creditors had to introduce a new debt framework, the HIPC, to address the problems of the heavily indebted, poor countries, the majority of which were in SSA. Sachs also notes that seventeen of fifty nine countries in the low income category experienced rescheduling six or more times.[122] Indeed, the whole process had become an endless circle and unquestionably, there was a need for a comprehensive debt treatment, if sanity was to be restored in the world of sovereign debts.

3. The Heavily Indebted Poor Country Initiative

Both the IMF and the World Bank proposed and endorsed the HIPC in 1996. Its initiators described it as the first comprehensive effort to reduce the external debt of the world's poorest and most heavily indebted countries, and said that it represented a necessary step in placing debt relief within the framework of poverty reduction.[123] Most likely, it was introduced in response to the Jubilee and other debt related NGO movements around the world, which called for debt cancellation.[124] Additionally, the United Nations had considered national debt as a human rights issue.

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[120] *Id.* at 12-17.
[121] *Id.*
[122] *Id.*
[123] Int'l Monetary Fund, *A Factsheet: Debt Relief under Heavily Indebted Poor Countries (HIPC) Initiative*, Oct. 2007, http://www.imf.org/external/np/exr/facts/hipc.htm (last visited Jan. 15, 2008) [hereinafter HIPC Factsheet].
[124] Jubilee Debt Campaign, *Our Mission*, http://jubileedebtcampaign.org.uk/?lid=2245 (last visited Jan. 28, 2008).

Originally launched in Lyon on December of 1996, the HIPC was later consolidated in 1999, and was renamed the "enhanced" HIPC, after the creditors agreed that some of its stringent requirements should be relaxed. By July of 1999, only six countries had reached decision point from the 1996 arrangement.[125] The aim of the HIPC is to reduce to sustainable levels, the debts of poor, heavily indebted countries. With its creation, the concept of debt sustainability was first introduced, along with idea that multilateral debts (debts owed to the IMF, the World Bank, and other regional financial institutions) could be cancelled in addition to bilateral debts, unlike the debt rescheduling that dealt only with bilateral debts. Under the Lyon terms (1996 terms), a country's debt could be reduced by up to eighty percent. Additionally, debts were to be cancelled to bring a country's debts to between two hundred and two hundred and fifty percent of its exports of goods and services. Under the Cologne terms of 1999, up to ninety percent of the debt could be reduced, and to qualify, the debt percentage was reduced from two hundred to one hundred and fifty percent.[126] In all, forty-two countries became eligible for the HIPC program. Thirty-four of these countries were in SSA, four of those were in Latin America, three in Asia, and Yemen.[127]

But, the HIPC did not come without the notorious IMF conditions. To be eligible, countries were required to qualify for the debt reduction, before their debts could be reduced. Therefore, reduction was not automatic.[128] Eligibility required countries to implement certain reforms and economic policies, subject to the approval of the IMF, which were called the Poverty Reduction Strategy Papers ("PRSPs").[129] This was done by entering a three year agreement with the IMF on the implementation of the PRSPs,

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[125] *See* HIPC Factsheet, *supra* note 124 (indicating Bolivia, Côte d' Ivoire, Mali, Mozambique, Uganda, and Burkina Faso as eligible for and possibly desiring HIPC assistance, as of Sept. 2007).

[126] Sachs, *supra* note 32, at 20-21.

[127] MILLET & TOUSSAINT, *supra* note 22, at 92.

[128] *Id.* at 90.

[129] *Id.*

which was to be accomplished with the supervision of the IMF.[130] The PRSP usually stipulated that a country must adopt the policy of trade liberalization, the privatization of public infrastructure, and deregulation.[131] Cuts in public spending and the removal of subsidies where they existed were key features of the PRSP, just like other IMF adjustment programs.[132]

At the end of the three-year period, the IMF and the World Bank would assess the progress of the country to determine whether the country's debt was sustainable. This was accomplished by comparing the ratio of debt to exports, thusly determining whether it exceeded the one hundred and fifty percent as contained in the qualification requirement. A country that satisfied this test was said to have reached the decision point. Such a country would then benefit from some debt service (though not debt stock) reduction of up to ninety percent for the period covered by the HIPC agreement. After the decision point, a country desiring to qualify for debt stock reduction would then have to reach the completion point.[133] At this juncture, the country was required to draw up the final PRSP, which was to embody the reforms mentioned previously. Only after the final PRSP was drawn and signed, could the country reach the completion point. After reaching the completion point, ninety percent of a country's bilateral or multilateral debt stock could be cancelled.[134]

a. The Gleneagles Debt Deal

The Group of eight industrialized nations ("G8"), who were also members of the Paris Club, met in July of 2005, in Gleneagles, U.K., to agree to cancel the debts of eighteen countries that had reached completion points under the HIPC initiative.[135] Fourteen of

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130 *Id.*
131 *Id.*
132 Gathii, *supra* note 54, at 258.
133 *Id.*
134 MILLET & TOUSSAINT, *supra* note 22, at 90.
135 G8 Gleneagles, *The Gleneagles Communiqué* (2005), http://www.fco.gov.uk/Files/kfile/PostG8_Gleneagles_Communique,0.pdf.

these countries were in Sub-Saharan Africa. Twenty other pre-decision and post-decision points countries were expected to benefit in the years to come. According to the G8 communiqué, the deal amounted to one hundred percent multilateral debt cancellation for eighteen of these countries. U.K. Chancellor Gordon Brown described the development as a "historic breakthrough" and that it amounted to the "the most historic comprehensive statement that finance ministers have ever made on the issues of debt, development, health, and poverty."[136] In reaching the agreement for debt cancellation, the creditors stated that they were motivated by the need to help Africa achieve the Millennium Development Goals and to fight poverty.[137]

The debt deal was worth over forty billion dollars in nominal terms, but would be delivered over a forty year period, and on average, the eighteen countries whose multilateral debts were cancelled would save one billion dollars each, over ten years in debt service.[138] At the time of the deal, the net value of the deal was seventeen billion dollars.

NGOs and other debt cancellation advocates around the world agreed with Chancellor Brown, in that the move was unprecedented in the history of sovereign debts, and that it showed the increasing acknowledgement by the creditors, especially those of Sub-Saharan African nations, of the debt burden of poor countries. Notably, the Sub-Saharan nations received the largest portion of the deal.

b. Uncovering the Gleneagles Deal

The Gleneagles debt deal was an outcome of the enhanced HIPC. But, because of its unprecedented outcome and the coverage it received, a detailed inspection is needed to determine if it

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[136] *Id.*

[137] *Id.*

[138] European Network on Debt and Development, *Devilish Details: Implications of the G7 Debt Deal* 4 (2005), http://www.eurodad.org/whatsnew/reports.aspx [hereinafter *Devilish Details*] (last visited March 15, 2008).

represents an exit for SSA countries from the debt trap, since SSA countries account for up to eighty percent of the deal's beneficiaries.

Firstly, it has been observed that many countries in need of debt relief to enable them to meet the MDGs were excluded from the Gleneagles deal. In SSA, countries like Angola, Kenya, and many other developing countries needing debt cancellation were not considered. NGO's, such as Oxfam International have noted that:

> [O]ver 60 countries will need 100 percent of their multilateral debts cancelled if they are to reach the MDGs by 2015, at an annual cost of $10 billion. In contrast, the deal covers 18 countries initially at a cost of $1.5 billion, to rich countries each year. . . qualifying countries will still have to complete the HIPC process, which involves complying with harmful World bank and IMF policy conditions and budget ceilings . . . .[139]

Secondly, the European Network for Debt and Development noted:

> [T]he deal includes debts to three multilateral institutions only: the IMF, the World Bank, and the African Development Bank. Ghana for example, has debts owed to nine multilateral organizations. Five Latin American countries owe the Inter-American Development Bank over $3.3 billion in debt service payments over the next ten years. Debts to the Caribbean Development Bank are also excluded from the deal . . . . [A]ll in all, there are 19 multilateral creditors, many of whom have not even cooperated in the HIPC initiative.[140]

Additionally, the deal did not address private sector debts, which remain a key source of concern for many middle and low-income

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[139] Oxfam Briefing Paper, *Gleneagles: What really happened at the G8 Summit?*, at 5, (July 29, 2005), *available at* http://www.oxfam.org.uk/what_we_do/issues/debt_aid/downloads/g8_gleneagles.pdf. [hereinafter Oxfam Briefing Paper] (last visited January 18, 2008).

[140] Devilish Details, *supra* note 139, at 5.

countries.[141]

Penultimately, the fact that the deal was spread over a forty-year period significantly reduced the deal's effect, and the extent to which new money would accrue to beneficiaries. Also, the deal meant a dollar-to-dollar reduction in aid flow, which would be the equivalent to the amount cancelled. So, the Official Development Assistance to these countries would reduce to the equivalent of the amount they received in debt cancellation.[142]

Finally, it has been noted that on one day in 2004, creditors canceled thirty billion dollars of debt owed by Iraq, which amounts to the entire amount of relief granted to African countries in the last ten years.[143]

c. An Assessment of the HIPC as Debt Relief

The HIPC was commended for being the first debt relief initiative to address the needs of the very poor countries when states and NGOs introduced it globally. If anything, it represented a positive outcome for all the campaigns and calls on the creditors, to help developing countries achieve sustainable development. Due to the fact that debt relief works for the good of a country's economy and population, there is a general consensus that the HIPC should be continued, but with considerable modifications and improvements.[144]

However, some scholars and activists steadfastly criticize the HIPC initiative. The first issues posed are debt sustainability and the IMF criterion for eligibility for the HIPC. It has been argued that defining debt sustainability as a ratio of debt to export has led to the IMF's disqualification of so many poor countries from the initiative.

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[141] *Id.*

[142] *Id.* at 6.

[143] *Id.* at 4.

[144] *See, generally*, JUBILEE USA NETWORK, DEBT RELIEF WORKS, http://www.jubileeusa.org/learn_more/debt_relief_works.pdf; see also JOINT NGO BRIEFING PAPER, DO THE DEAL. THE G7 MUST ACT NOW TO CANCEL POOR COUNTRY DEBTS (Feb. 2005), http://www.actionaid.org.uk/doc_lib/ 62_1_do_the_deal.pdf.

Among other considerations, this is because a country's income should actually be assessed with respect to the needs of the population of the debtor country. It has been noted that:

> The current definition of debt sustainability in the enhanced HIPC initiative is as arbitrary as the previous standards, if a bit more generous. A ratio of debt to exports of 150 percent or a ratio of debt to government revenue of 250 percent cannot truly be a good way of judging what debt is sustainable or unsustainable except it is placed in the context of each country's needs which includes vital considerations like the country's population and the level of HIV/AIDs prevalence. It is perfectly possible, and indeed is currently the case, for a country or a region to have a "sustainable" debt under these criteria while millions of its people are dying of hunger and disease.[145]

The UNCTAD's analysis of the HIPC based upon the Lyon terms states:

> Three years after its launch in 1999, it had become evident that the initiative was not sufficient to provide HIPCs with a permanent exit from repeated debt rescheduling, nor did it provide enough resources to deal with the pressing challenges of poverty reduction. Concerns were expressed about the limited country coverage of the initiative and the fact that it provided too little debt relief and delivery was too slow. In addition, even with the debt relief, beneficiary countries were still spending much more on debt servicing than on public health and education. . .[146]

These opinions highlight some of the weaknesses plaguing the HIPC initiative. UNCTAD raises the issue of the Lyon list, which had just five countries. The Cologne list had thirty-four SSA countries, whereas approximately thirty-nine African countries actually needed debt relief. Moreover, a country could go through the rigors of implementing a PRSP, reach the decision point, and the

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[145] Sachs, *supra* note 32, at 21.
[146] UNCTAD, *supra* note 4, at 15.

IMF could still deny them relief, as was the case of Angola, Kenya, Vietnam, and Yemen.[147]

Furthermore, it has been noted that although the HIPC aims to bring a country's indebtedness to sustainable levels, more often than not, the resulting debt stock reduction was carried for several years and could even escalate to unsustainable levels in the future as the country continued to pay debt service on the remnant that was not cancelled. Millet and Toussaint further noted that, "it is what could not be paid that gets cancelled. The HIPC initiative aims above all to ensure that repayments continue and to dissimulate reinforced structural adjustment beneath a semblance of generosity."[148]

What's more, several writers on the debt issue have described the PRSP, also known as the IMF "conditionalities," as very harsh. According to the critics, these "conditionalities" have harmed the population, rather than helping them, because they encourage cuts on spending in education, health, water, and other publicly subsidized services that poor people need, and they encourage the privatization of these services.[149]

Finally, the HIPC has been criticized for imposing these policies on the populations of debtor countries without due consultation with the people, only with their governments, and in rare instances with NGOs in the urban areas, which leaves out the rural and poor people, while these policies affect them in crucial ways.[150]

C. Governments of Sub-Saharan Africa

In their public statements, leaders of the African continent did not specifically make issues of the debt problems during the emerging debt crisis period. But, as time passed, and the impact of the problem became obvious, they made frequent appeals for aid to

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[147] MILLET & TOUSSAINT, *supra* note 22, at 93.
[148] *Id.* at 96.
[149] In the Balance, *supra* note 52.
[150] MILLET & TOUSSAINT, *supra* note 22, at 97.

their creditors. These appeals were made under the auspices of the Organization of African Unity ("OAU"), now called the African Union ("AU"), and spanned over a decade, before the 1995 introduction of the HIPC.

In 1980, the leaders of the OAU's Lagos Plan of Action proclaimed the need for them "to take necessary steps with a view to establishing an international framework to sustain their development efforts and appeal to industrialized countries and international finance institutions to give increased financial assistance and aid to Africa."[151] Although not clearly specified, the question of foreign debts was a likely motivator for this statement. However, during the OAU's third extraordinary session in 1987, it adopted a Declaration on Africa's Indebtedness, which decried the huge debt burden and the adverse consequences it had on the growth and recovery of Africa, as planned in Africa's Priority Programme for Economic Recovery of 1986-1990.[152] The declaration identified the international community's undeniable role in alleviating the debt burden and called for creditor and debtor dialogue to enable both sides to arrive at "appropriate, emergency, short, medium, and long-term solutions" to the debt crisis.[153] In 1989, the OAU adopted the resolution for an Enduring Alleviation of Africa's Debt Problems, where it was pointed out that the worsening debt situation stunted growth and development and engendered political instability in some African countries.[154] That resolution also called on the international community to urgently evolve a more comprehensive strategy to address all the aspects of Africa's debt problems on an enduring basis. They appealed to the creditors to write-off Africa's official debts, in view of the impact of the debt burden on the economy and development of the continent.[155]

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[151] Lagos Plan of Action for the Economic Development of Africa, 1980-2000 (1980), *available at* http://www.uneca.org/itca/ariportal/docs/lagos_plan.pdf.

[152] Org. Afr. Unity, 23d Ord. Sess., O.A.U. Doc. AHG/Decl.3. (XXIII) (July 27-29, 1987).

[153] *Id.*

[154] Org. Afr. Unity, 25th Ord. Sess., O.A.U. Doc. AHG/Res. 185. (XXV) (July 24-26, 1989).

[155] *Id.*

African leaders made another statement on the debt issue in 1990, when they released the Declaration on the Political and Socio-economic Situation in Africa and the Fundamental Changes Taking Place in the World. They sounded both desperate and frustrated, when they said:

> [I]t has not so far been possible to achieve our objective of laying a firm foundation for self-sustained development of our countries. On the contrary, throughout the decade of the 1980s, most of our productive and infrastructural facilities continued to deteriorate. The per-capita incomes of our peoples fell drastically and so did the volumes of our exports as well as imports. There has been a sharp decline in the quality of life in our countries as spending on public health, housing and education and other social services had to be severely curtailed. Food production has also fallen in proportion to the expanding population. All this contrasted sharply with the alarming rise in Africa's external debt stock which shot up from about US$ 60 billion in 1980 to about US$ 257 billion by the end of 1989. As a result of this combination of acute economic problems and external indebtedness, the number of African member states classified as least developed rose from 21 to 28 during the same period.[156]

To tackle this problem, African leaders again called on their creditors to take positive action to redress the inequities present in the international system and pledging on their part to continue to strive for the establishment of a just and equitable international economic system.[157] In 1996, the continent again called for a "practical and durable solution to the debt crisis. . . through a systematic re-appraisal and review of all measures intended for its servicing and through a concerted search for new, appropriate

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[156] Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World, (1990), http://www.chr.up.ac.za/hr_docs/african/docs/ahsg/ahsg33.doc (last visited February 13, 2008).

[157] *Id.*

solutions commensurate with an equitable promotion of economic and social progress in all parts of the world."[158]

In 2001, the OAU established the New Partnership for Africa's Development ("NEPAD"), to carry out the vision and strategic framework for Africa's renewal. NEPAD was designed to address the current challenges facing the African continent including; poverty, underdevelopment, and the continuing marginalization of Africa.[159] The NEPAD Framework Document sets out its procedure for achieving either debt relief, or sustainability for the continent. It states that the "long term objective of NEPAD is to link debt relief with costed poverty outcomes."[160] With the goals of achieving debt relief and ODA, NEPAD hoped to engage in negotiations with the creditors, especially those who already had a debt relief mechanism like the Paris Club and the HIPC.[161] Finally, on July 4, 2005, at the AU Summit in Sirte, and on the eve of the G8 Summit in Gleneagles, African leaders called upon the G8 to forgive the continent's debt, noting that debt forgiveness "must be applied by all creditors (multilateral, bilateral, and commercial), including the Africa Development Bank and that all African countries must benefit from this measure."[162]

[158] Yaoundé Declaration, Org. Afr. Unity, 32nd Ord. Sess., P2, O.A.U. Doc. AHG/Decl.3 (XXXII) (July 8-10, 1996), *available at* http://www.africareview.org/docs/govern/yaounde.pdf as quoted in Nsongurua J. Udombana, *supra* note 38, at 24.

[159] NEPAD, *NEPAD in Brief*, http://www.nepad.org/2005/files/inbrief.php (last visited Jan. 25, 2008).

[160] NEPAD, NEPAD Framework Document, 37-8 (2001), http://www.nepad.org/2005/files/documents/inbrief.pdf.

[161] *Id.*

[162] BBC News, *Africa Calls on G8 to Scrap Debt*, http://news.bbc.co.uk/2/hi/africa/4651337.stm (last visited Feb. 25, 2008).

D. Sovereign Debt and Traditional International Law

1. The Vienna Convention on the Law of Treaties (VCLT)

Some writings on the debts of DCs have alleged that some of the debts are odious and ought not to be repaid.[163] As previously mentioned, much of these debts are believed to have been incurred by despotic, unaccountable, and corrupt regimes, which were not working in the interests of their populations, but for their own dubious purposes. These facts were obvious to the creditors, who nevertheless gave them loans. Therefore, it is necessary to consider some of these claims to see if they are plausible, and to see what defenses may be available to a sovereign embroiled in a debt crisis.

The Vienna Convention on the Law of Treaties ("VCLT") contains legal prescriptions governing agreements and contracts between sovereign states. While sovereign debts are not specifically mentioned in the VCLT, a valid debt agreement between two states (official debts), or between a state and the IFIs (multinational debts) may come within the purview of the VCLT, subject to specific provisos. Unfortunately, the VCLT does not contain any provisions relating to these odious forms of debt. Instead, it contains provisions concerning fraudulent transactions, coercion of a state or its representatives, lack of consent of a state, and corruption of state officials.[164] For example, Article 49 of the VCLT provides that "if a state has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the state may invoke the fraud as invalidating its consent to be bound by the treaty."[165] Clearly, these provisions are accusatory and not defensive. In other words, a state can neither allege its own internal corruption, nor a lack of popular consent to avoid a treaty, even though the other state may be aware of that situation. The VCLT also provides that the violation of a state's internal law cannot be used as an excuse for its failure to perform a treaty, unless as provided in Article 46, the state can show

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[163] MILLET & TOUSSAINT, *supra* note 22.
[164] VCLT, *supra* note 55, arts. 49-52.
[165] *Id.* art. 49.

that the violation was manifest and it concerned a rule of its internal law of fundamental importance.

Article 26 of the VCLT codifies the principle of *pacta sunt servanda*, which provides that treaties are to be performed by parties in good faith, while Article 31 also requires good faith interpretations of those treaties.[166] It is said that the principle of *pacta sunt servanda* is often used as a justification for the continuity of contractual relationships, such as debts to foreign creditors following a regime change.[167] The notions of "good faith" and *pacta sunt servanda* are certainly the principles of the VCLT. But, it is the author's view that the import of all these provisions is that debt agreements, to which the VCLT may apply, are subject to the previously mentioned principles of good faith and consent. This means that the burden of proving a lack of consent, fraud, or corruption would be on the party alleging the violation. Therefore, discharging this burden may not be an easy hurdle for any state seeking to rely upon it to escape liability from a debt obligation.

Finally, Article 62 embodies the principle of *rebus sic stantibus*, which means that a fundamental change of circumstances that occurred with regard to the ones exiting at the time of the treaty can be a practical and legal justification for reneging on treaty obligations. But, that provision sets out the limitations to the application of that principle, which are that such circumstances must not have been foreseen by the parties, the existence of the circumstances constituted an essential basis of the consent of the parties to be bound by the treaty, and the effect of the change is to radically transform the extent of the obligations still to be performed under the treaty.[168] It is doubtful if this principle could be applied to any of the instances outlined here. It appears as though an extenuating circumstance really has to be fundamental and unforeseen. However, this principle is similar to the principles precluding state responsibility, which are discussed below.

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[166] *Id.* art. 26.
[167] Anderson, *supra* note 86, at 402-403.
[168] *Id.* at 403.

2. The Articles on State Responsibility (ASR)

Under international law, the principle of state responsibility makes a state responsible as an international person for actions in breach of its international obligations. The sovereignty of a state affords it no basis for denying that responsibility, and a failure to comply with an international obligation constitutes an international wrong, which could give rise to international responsibility of that state, from which flow certain legal consequences.[169] The ILC Articles on State Responsibility 2001 ("ASR"), "commended to the attention of Governments" by the United Nations General Assembly in December, 2001,[170] represents either customary law or general principles of law as well as progressive development on the subject.[171] They have tremendously influenced international law on the subject, and have been referred to by the International Court of Justice ("ICJ"), other international tribunals, as well as scholars.[172] The ICJ referred to certain provisions explicitly as representing customary international law.[173]

Article 1 of the ASR states that "every internationally wrongful act of a state entails the international responsibility of that state."[174] Article 2 defines the elements of state responsibility, to the extent that it consists of a conduct or omission attributable to a state under international law, and constitutes a breach of an international obligation of that state.[175] Article 12 of the ASR provides that: "there is a breach of an international obligation by a state when an act of that state is not in conformity with what is required of it by

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169 W. MICHAEL REISMAN et al., INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 893 (2004) (citing the ILC Report 2001: Related Commentaries).

170 U.N. G.A. Res. 56/843 (Dec. 12, 2001).

171 For a discussion of the legal nature of the Articles, see Siegfried Wiessner, *The Articles on State Responsibility and Contemporary International Law*, 35 THESAURUS ACROASIUM 245, 249-256 (2006).

172 U.N. GAOR 56th Sess., Supp. No. 10, at 155-168, U.N. Doc. A/56/10 (Aug. 10, 2001).

173 *Id.*

174 *Id.* at 63.

175 *Id.* at 68.

that obligation, regardless of its origin or character."[176] The commentaries to the ASR on Article 12 states that: "international obligation may be established by a customary rule of international law, by treaty or by a general principle applicable within the international legal order. . ."[177] Furthermore, a state cannot invoke its internal laws as an excuse for breaching an international obligation. In the *S.S. "Wimbledon"* case, the ICJ found Germany in breach of the Treaty of Versailles when Germany attempted to rely upon the provisions of its internal law and the need for neutrality in times of war, and further held that Germany was responsible for the loss occasioned as a result of her actions to the vessel "Wimbledon."[178]

In sum, under international law, a state is not permitted to breach a treaty or contractual obligations with another state. Therefore, a state may incur liability, if it breaches its obligations under a debt contract, which involves another sovereign or its citizens, regardless of the nature of the debt agreement. Export credit loans guaranteed by governments or even commercial loans could attract international responsibility once the government of the commercial creditor or the ECA assumes the responsibility of recovering the loan on behalf of its corporate citizens under the principle of diplomatic protection of persons.[179] In the *Barcelona Traction* case, the ICJ held that a company incorporated in a state is a national of that state, and that state can bring claims under the principle of diplomatic protection in respect of that company.[180]

From the legal angle, debt campaigners have argued that under international law there are circumstances that exclude state responsibility and such circumstances could avail a sovereign debtor and release it from responsibility for certain international obligations.

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[176] REISMAN et al., *supra* note 169, at 897.
[177] *Id.* at 897.
[178] S.S. "Wimbledon" (U.K., Fr., Italy, Japan v. Ger.), 1923 P.C.I.J. (ser. A) No. 1 at 11-14 (May 28).
[179] REISMAN et. al., *supra* note 169, at 897.
[180] Barcelona Traction, Light, and Power Company (Belg. v. Spain), 1970 I.C.J. 3, 33, 42 (Feb. 5). *See also Société Commerciale de Belgique*, 1939 P.C.I.J. (ser. A/B) No. 78 (June 15).

Such circumstances are said to derive from the law of treaties; the doctrines of consent, self defense, *force majeure*, distress and necessity. International debt campaigners have also canvassed the odious debt doctrine and some of them have made claims that seemingly justify outright repudiation of these debts. These legal claims are considered below.

a. Force Majeure

The ASR in Article 23 provides that:

> the wrongfulness of an act of a state not in conformity with an international obligation of that state is precluded if the act is due to *force majeure*, that is the occurrence of an irresistible force or an unforeseen event, beyond the control of the state, making it materially impossible in the circumstances to perform the obligation."[181]

Paragraph 2 of Article 23 excludes *force majeure* if the situation is due to the conduct of the state invoking it or the state has assumed the risk of the situation occurring. The commentaries to the ASR have identified three elements that must be met before *force majeure* could avail a state. Namely, that the "act in question must be brought about by an irresistible force or an unforeseen event, which is beyond the control of the state concerned, and which makes it materially impossible in the circumstances to perform the obligation."

The commentaries interpret the words "irresistible force" to imply constraining factors beyond a state's control or avoidance, and the word "unforeseen" as meaning that the "event must have been neither foreseen nor of foreseeable kind."[182] Also, they interpret "material impossibility of performance" as occurrence "due to a natural or physical event . . . or to human intervention . . . or a

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[181] ASR 2001, *supra* note 170, art. 23.

[182] REISMAN et al., *supra* note 169, at 950 (citing the ILC Report 2001: Related Commentaries).

combination of the two."[183] In the *Case Concerning the Payment of Various Serbian Loans Issued in France, (Fr. v. Serb.)*,[184] the PCIJ held that war itself, despite its grave economic consequences did not affect the legal obligations of contracts between the Serbian Government and the French Bondholders. The economic dislocations caused by war did not release the debtor from responsibility. The court however, found that since it had become materially impossible for Serbia to perform under the terms of the original agreement, paper francs could be used for payment by the debtor state.

The claim of *force majeure* as a circumstance precluding responsibility for sovereign debt obligations hinges on the argument that:

> [*F*]*orce majeure* can be invoked when a government or public body finds itself, due to external circumstances beyond its control, unable to fulfill its international obligations. This is inclusive of the repayment of a debt. This is the juridical codification of the fact that no one can be expected to do the impossible . . .[185]

Such unforeseen circumstances by sovereigns have been said to include the outrageous hikes in commercial interest rates, the fall in commodity prices and shocks which distressed the economies of developing countries and other unforeseen situation.[186] But where a war has been held by the PCIJ not to constitute *force majeure*, it is doubtful whether the claims cited above would survive in an international adjudication.

b. Necessity

Necessity as a ground for precluding wrongfulness as defined by the ASR in Article 25 may only be invoked where it "is the only

[183] *Id.*

[184] Payment of Various Serbian Loans Issued in France (Fr. v. Serb.), 1929 P.C.I.J. (ser. A) No. 20, at 30 (July, 12).

[185] REISMAN et al., *supra* note 169, at 950.

[186] MILLET & TOUSSAINT, *supra* at note 22, at 124.

way for the state to safeguard an essential interest against a grave and imminent peril" and such action "does not seriously impair an essential interest of the state or states towards which the obligation exists, or of the international community as a whole."[187] Paragraph 2, however, provides that necessity cannot be invoked if the international obligation in question excludes its invocation or in cases where the state has contributed to the situation of necessity. The ILC Commentaries state that special features in the definition of necessity "mean that necessity will only rarely be available to excuse non–performance of an obligation and that it is subject to strict limitations to safeguard against possible abuse."[188] This approach to the interpretation of the doctrine of necessity was followed by the ICJ in the case of *Gabcíkovo-Nagymaros Project (Hung. v. Slovk.)*,[189] when it defines the words "essential interest" under the doctrine of necessity to mean that a state must show not just a possibility of an imminent danger to its environment in order to invoke the situation of necessity, it must show the objective existence of a "peril" as a component element of a state of necessity at the relevant point in time. According to the court, "the mere apprehension of a possible 'peril' could not suffice in that respect. . ."[190] It therefore held that although environmental concerns of a country could be classified as essential interests, "the Hungarian argument on the state of necessity could not convince the court unless it was at least proven that a real, 'grave' and 'imminent' 'peril' existed . . .and that the measures taken by Hungary were the only possible response to it."[191] In *Société Commerciale de Belgique*,[192] it was held that a state's serious economic situation will not discharge it of performing its obligations under a debt agreement.

It has been argued that necessity is characterized by a situation where the existence of a sovereign state is endangered and

[187] ASR 2001, *supra* note 170, art. 25.
[188] REISMAN et al., *supra* note 169, at 951.
[189] Gabcíkovo-Nagymaros Project *(Hung. v. Slovk.)*, 1997 I.C.J. 1 (Sept. 25).
[190] *Id.*
[191] *Id.* at 39.
[192] Société Commerciale de Belgique, 1939 P.C.I.J. (ser. A/B) No. 78 (June 15).

its economic or political survival is under peril.[193] Following this argument, it is claimed that it is unconscionable to require a state to sacrifice the needs of its population in order to service foreign debts. Such a requirement is seen as both impractical and undesirable where millions die from HIV/AIDS and other grievous diseases, and in cases where scores of people are denied access to education, housing, food and the like, at the cost of debt service. The United Nations Commission for Human Rights resolutions in respect of foreign debts and their human rights impact on poor countries seem to follow this line of argument. Further proof of this will be explored in the next paragraphs.

E. The United Nations

As noted earlier in this essay, the debt problem has been an obstacle to the realization of the economic, social and cultural rights of the population of heavily indebted countries in the areas of health, education, housing, food, water, provision of basic infrastructure and so on. This fact did not escape the attention of the monitoring bodies of the United Nations, who have been very vocal on the issue.

The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities had been working on the issue of poverty and the realization of economic, cultural and social rights with a Special Rapporteur designated for that purpose.[194] In 1992, the Sub-Commission's Special Rapporteur presented its final report on the issue and identified structural adjustments and foreign debts as some of the factors militating against the realization of economic and social rights by developing countries.[195] Subsequently, in one of its resolutions, the United Nations Commission for Human Rights stressed the importance of alleviating the debt and debt-service burdens of developing countries in the framework of the realization

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[193] MILLET & TOUSSAINT, *supra* note 22, at 125.

[194] *See, e.g.*, Danilo Turk, *The New International Economic Order and the Promotion of Human Rights*, ¶ 1-7 ESCOR Res., U.N. Doc. E/CN.4/Sub.2/1990/19 (July 6, 1990).

[195] Danilo Turk, *The Realization of Economic, Social and Cultural Rights*, ¶ 42, 65,ESCOR Res., U.N. Doc. E/CN.4/Sub.2/1992/16 (July 3, 1992).

of economic, social and cultural rights. They observed that a major objective of any debt strategy should be that indebted developing countries achieve a level of growth sufficient to enable them to satisfy their social, economic and development needs. Particularly, they emphasized that debt payments should not take precedence over such basic rights of the people of debtor countries to food, shelter, clothing, employment, health services and a healthy environment.[196]

The Commission, again, in 1998, passed a resolution on "[e]ffects on the full enjoyment of human rights of the economic adjustment policies arising from foreign debt, and on the implementation of the Declaration on the Right to Development."[197] In that resolution, the Commission reaffirmed the Right to Development proclaimed by the UN General Assembly in December 1986, and based on that, reiterated the issues of human rights arising from the debt problem. In addition, the Commission pointed out that "the absolute amounts attained by the foreign debt and debt service of the developing nations indicated the persistent seriousness of this situation. It stated that despite the improvement in some indicators, the foreign debt burden continues to be intolerable for a considerable number of developing countries."[198] The resolution reiterated the fact that the debt burden was one of the most critical factors affecting economic, social, scientific and technical development and living standards in many developing countries, especially in Africa.[199]

In particular, the Commission expressed strong concern regarding the need to exercise basic rights to food, employment, housing, clothing, education, health services and a healthy environment. It pointed out that these things were being

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[196] Effect of the Full Enjoyment of Human Rights of the Economic Adjustment Policies Arising from Foreign Debt and, in Particular, on the Implementation of the Right to Development, C.H.R. Res 1994/11, U.N. Doc. E/CN.4/1994/132 (Feb. 25, 1994).

[197] Effect of the Full Enjoyment of Human Rights of the Economic Adjustment Policies Arising from Foreign Debt and, in Particular, on the Implementation of the Right to Development, C.H.R. Res. 1998/24, ESCOR Supp. (No.3) at 92, U.N. Doc. E/CN.4/1998/24 (Apr. 17, 1998).

[198] *Id*.

[199] *Id*.

"subordinated to the implementation of structural adjustment policies and economic reforms arising from debt."[200] In keeping with this idea, the Commission therefore emphasized the need for the HIPC to be implemented completely and flexibly, with less rigidity in the eligibility criteria for the HIPC. By that resolution, the Commission appointed a Special Rapporteur on the effects of foreign debts on the full enjoyment of economic, social and cultural rights.[201]

Having recognized the related nature of foreign debt and structural adjustment policies, the Special Rapporteur on the effect of foreign debts on the full enjoyment of economic, social and cultural rights and the Independent Expert on structural adjustment policies decided to submit a joint report to the Commission on Human Rights reflecting both subjects.[202] The report recognized three critical issues that require an immediate response from the international community because of their impact on the promotion and protection of the human rights of millions of destitute people. The first of the issues concerned the impact of the foreign debts on the fights against HIV/AIDS. The report notes that the HIV/AIDS epidemic, besides being the most important public health problem, has become the greatest threat to Africa's development.

The United Nation's efforts to link the debt problem with human rights contributed to the establishment of the HIPC initiative. But to date, there is no international framework that deals specifically with the debt issue. The link between debt and human rights, especially Economic, Social and Cultural Rights and the Right to Development ("RTD"), has been shown in the UN initiatives mentioned above. The preamble to the RTD appears to make human rights, especially the ICESCR, a matter of international cooperation and obligation. It questions the notion that achieving Economic and Social rights is the sole responsibility of each state party. The preamble to the RTD states among others:

> *Considering* that under the provisions of the Universal Declaration of Human Rights everyone is entitled to a

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[200] *Id*.
[201] *Id*.
[202] ESCOR Res., U.N. Doc. E/CN.4/2000/51 (Jan. 14, 2000).

> social and international order in which the rights and freedoms set forth in that Declaration can be fully realized, *Recalling* the provisions of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights. . .[203]

In addition, Article 3 of the RTD provides:

> States have the primary responsibility for the creation of national and international conditions favorable to the realization of the right to development. The realization of the right to development requires full respect for the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations. States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfill their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights.[204]

However, the notion of international cooperation with respect to the realization of human did not start with the RTD. This is especially true regarding economic, social and cultural rights. Part II, Article 2 of the International Covenant for Economic Social and Cultural Rights ("ICESCR"), provides, in Numeral 1:

> Each State Party to the present Covenant undertakes to take steps, *individually and through international assistance and co-operation*, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all

[203] Declaration of the Right to Development, G.A. Res. 41/128, annex, 41 U.N. GAOR, 97th Sess., Supp. No. 53 at 186, U.N. Doc. A/41/53 (Dec. 4, 1986).
[204] *Id.*

> appropriate means, including particularly the adoption of legislative measures.[205]

Article 3 also provides that "the States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."

In the Vienna Declaration and Programme of Action, 1993,[206] the United Nations General Assembly called on the international community to make all efforts to help alleviate the external debt burden of developing countries. This was done in order to supplement the efforts of the Governments of such countries to attain the full realization of the economic, social and cultural rights of their people. It was noted that there is a need for States and international organizations, in cooperation with non-governmental organizations, to create favorable conditions at the national, regional and international levels to ensure the full and effective enjoyment of human rights. In the United Nations Millennium Declaration, 2000,[207] world leaders recognized the impact of foreign debts on the realization of human rights in developing countries and made the debt issue one of the cardinal goals for the 21st century.[208]

Apart from the ICESCR, none of the above declarations are binding documents and at best constitute soft law. The ICESCR, though a binding document, only binds state parties to ensure the rights guaranteed to persons within their jurisdiction.[209] It does not place an obligation on state parties to guarantee these rights to persons within the jurisdiction of another state. The statement on international cooperation contained in the ICESCR may not be interpreted to create such a right which could be claimed from the

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[205] G.A. Res. 2200A, Art. 2, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Jan. 3, 1976).

[206] World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, U.N. Doc A/CONF.157/23 (October 13, 1993).

[207] United Nations Millennium Declaration, G.A. Res. 55/2, U.N. GAOR, 55th Sess., Supp. No. 49, at 4, U.N. Doc. A/55/49 (2000).

[208] *Id.*

[209] ICESCR, *supra* note 195.

creditor governments. Thereby, the duty to ensure the rights recognized in the ICESCR primarily remains on the state to which an individual is subject. On the other side, it could also be argued that the fact that state parties to the ICESCR ratified its provisions means that they recognize the fact that there is an expectation on them to cooperate with other state parties to ensure that the rights guaranteed in the ICESCR are achieved by all.

The rights prescribed in the ICESCR that the burden of foreign debt could curtail their realization include the right to work (Article 6) and the right to social security (Article 9). Article 11 (1) of the ICESCR, just like the UDHR, provides:

> The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

Other important provisions are the right to health as provided by Article 12. Herein, state parties agree that everyone has the right to the highest attainable standard of physical and mental health, and as such, steps should be taken by state parties to ensure the achievement of good health by reducing infant mortality; improving all aspects of environmental and industrial hygiene, prevention, treatment and control of epidemic, endemic, occupational diseases; and the assurance of medical services and medical attention during sickness.[210] Education is also given priority in the ICESCR. State parties recognized in Article 13, the right of everyone to education and to full development of human personality and sense of dignity.[211]

In all, while the United Nations has contributed immensely to the debt campaigns and its recent outcomes, it has yet to come out

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[210] *Id.*
[211] *Id.*

with an international structure that legally addresses the debt problem. One hopes that establishing such a framework is on the agenda of the Commission for Human Rights. A leaf could be borrowed from the WHO Framework Convention on Tobacco Control, 2003. Just as tobacco is harmful to human health, unsustainable debt burden threatens the survival of millions of people in the world.

V. Prediction

Debt relief as embodied in the Gleneagles Deal is the latest trend in decision by the creditors with respect to the debt problem. This decision was conditioned by public outcry from various groups in the world community, including the United Nations, and also by the realization by the creditors that something needed to be done to mitigate the crisis. As previously noted, however, the deal without more does not solve the debt problem. It has only succeeded in alleviating the multilateral debt burden of HIPC implementing countries, leaving out bilateral, and commercial debts, and the debts of many other poor or low income countries which are not classified as HIPC, but which nevertheless, need debt relief if they must achieve the MDGs or develop their economies.

It is therefore evident that Gleneagles was not an *Uhuru*[212] for the world's poor countries and debt activists and affected governments have not stopped asking for more relief and concession from creditors, especially bilateral creditors. For example, Kenya is one country in Africa that needs debt relief if it is to successfully alleviate poverty in the country. Kenya, however, is not a HIPC country, and therefore may have to seek other means of negotiating a debt reduction.[213] Nigeria, likewise, is not an HIPC country. Nor does it have an IMF program. The country owed over $34 billion dollars, and 80 percent of its debts were bilateral, to members of the

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[212] *Uhuru* is the Swahili word for "freedom." NGOs use the word to express the accomplishment of a mission. In this case, the goal of freedom or jubilee for the poor countries of the world is not yet accomplished.

[213] IN THE BALANCE, *supra* note 52.

Paris Club. Nigeria had an oil windfall due to rise in the price of crude oil in the world market and had saved about $28 billion from crude oil sales. The Paris Club creditors accepted the idea of a debt buy back at a discount since Nigeria had some savings to part with. In the process, Nigeria was granted 60 percent debt reduction, provided it made a payment of about $18 billion to the creditors from its savings. That is how Nigeria exited the Paris Club in 2005. This is a special case; unprecedented in the history of debt treatments. This is especially true in view of the fact that the country does not have an IMF program (although one of the conditions of the debt reduction was that Nigeria implements a policy support instrument under the IMF supervision). Many other poor, non-HIPC countries are not as fortunate as Nigeria, and may not be able to buy back their debts at a discount. For those countries, the debt problem still looms large.

It must however be emphasized that the aim of the HIPC has never been to grant 100 percent debt cancellation. Under the Lyons terms debt cancellation could go as far as 90 percent of debt stock of bilateral or multilateral debt. In other words, the aim is to bring a country's foreign debt to a sustainable level to enable servicing without adverse impact on the country's economy. While this is a good idea, it fails to give the country a brand new beginning, and leaves the risk that the debts could multiply again, bringing the country back to the point of distress. In any case, what is the guarantee to ensure a sovereign does not borrow again after it completes the HIPC, rids itself of the IMF program, and becomes free again to borrow as it pleases? In any case, the HIPC does not prevent countries from borrowing while implementing the PRSP. And, what stops the private creditor, who has some funds to lend, from lending again to this sovereign without appropriate safeguards to forestall a crisis? This would likely serve only to start the whole cycle of creditor-debtor chase again.

In the light of these realities, it is my prediction that even with the HIPC, one may not have heard the last of the debt crisis, and that countries are still vulnerable to future crisis unless a concrete solution that goes beyond the HIPC is introduced by the international community. No doubt, the debt campaigns would continue in order to ensure that the remaining countries which are not part of the HIPC, but which need debt cancellation as well, would be considered for some form of debt treatment probably under a new framework. The United Nations Human Rights Council also is expected to continue with the work of the Independent Expert in order to come up with recommendations to the General Assembly on how to tackle the debt issue. It is difficult at this stage to predict how soon an international framework on foreign debt would emerge. Increased advocacy by the United Nations and members of Civil Society on the issue could likely produce such an outcome in the near future.

In addition, the IMF and the World Bank might, in the near future, modify their mode of operation, and further relax their conditionalities on the countries who are undertaking the HIPC program. Expectedly, more countries would achieve decision or completion points in 2006 and the years to come, which means that more relief may be granted to other countries under the initiative.

At the G8 meeting expected to be held in Petersburg, Russia this year, it is expected that the G8 would include Africa, particularly SSA, in its aid and relief agenda. Not much might be achieved, however, because the Gleneagles deal is yet to be fully implemented.

For the African Union and other African governments, it is not clear what their agenda on debt is, apart from the declarations mentioned above, and the establishment of NEPAD. It is hoped that with NEPAD and firm commitment to growth they might be able to convince their creditors to grant more debt relief to other countries.

In all, I do not see a fast exit from the debt burden for SSA. One can only hope the leaders of that region of the world do not continue to borrow indiscriminately in the years to come. I do not see reforms taking place rapidly either, in the next couple of decades, with the existing machineries of today—the IMF, World Bank, the G8 and the African Union. The real catalyst in the subject of debt has remained the civil society, and to a less degree, the UN. With increased advocacy on their part, a world of freedom from debt might happen sooner than expected.

VI. Appraisal and Recommendation of Alternatives in the Common Interest

The essence of debt relief is not to outlaw sovereign borrowing or lending, because indeed responsible borrowing and lending could help growth and development once resources are used with accountability and transparency. So, beyond debt relief is the need to put in place institutional structures or frameworks that would sanitize the financial system and ensure there is order and responsibility, especially in the interest of the individuals that make up the population of debtor countries. Unfortunately, the current international system does not have such structure in place, although suggestions and proposals to that effect have been made. Such proposals include the Sovereign Debt Restructuring Mechanism ("SRDM"), sovereign debt bankruptcy; a fair and transparent international debt arbitration tribunal; a new IMF without the harsh conditionalities, and so on. Some of the proposals are considered below.

A. Sovereign Debt Restructuring Mechanism (SRDM)

The SRDM was designed and endorsed by the IMF Executive Board between 2001 and 2003. It is based on the recognition there is need for a fundamental change in the international financial system. The SRDM envisages establishing, through an amendment to the IMF Articles of Agreement, a treaty-based framework to restructure sovereign debt.[214] The SDRM is said to intend to accomplish what diplomats, gunboat captains, administrators, and judges of the last two hundred years failed to achieve: an effective method by which the official sector could bring on orderly workouts of private sector claims against distressed sovereigns without shouldering the full moral, political, and financial responsibility for these workouts.[215] In other words, SDRM will eliminate the problems associated with

[214] Hagan, *supra* note 61, at 300.
[215] Buchheit, *supra* note 62, at 342.

CACs; sovereign immunity and litigating a sovereign including the constraints and limitations in attaching a sovereign's assets under international law.[216]

The SDRM is expected to work like this: first, it envisages a legal framework that would enable a qualified majority of creditors to make critical decisions, including but not limited to the acceptance of the final restructuring terms, that would be binding on all private creditors holding external claims. The SRDM would aggregate claims across different instruments and the qualified majority (about 75 percent of creditors) would make decisions binding on all. The voting provisions of the SDRM would be applied to the stock of claims in existence at the time of its establishment and not only to contractual claims but also judgment creditors.[217]

Second, the SRDM proposes a Dispute Resolution Forum that would be given exclusive jurisdiction over all disputes that may arise during the restructuring proceeding. Finally, the SDRM proposes the possible inclusion of official bilateral creditors (the Paris Club), as a separate class, designed to facilitate the resolution of inter-creditor equity issues.

With respect to multilateral debts, the SDRM envisages that claims owed to IFIs, such as the IMF and the World Bank, be excluded from the process. This, it claims, is in keeping with the tradition of the "preferred creditor" status of the two institutions. This, it is believed, would shield the IMF from the risk of nonpayment and restructuring. The IMF can then provide financing when other lenders would be unwilling to do so, and the IFIs could maintain their role of enhancing economic growth and financial stability as well as provide a public good that, in the long run, is in

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[216] *See, generally*, SDRM, International Monetary Fund, *Proposals for Sovereign Debt Restructuring Mechanism (SRDM)* (2003), http://www.imf.org/external/x10/changecss/changestyle/aspx; *see also*, Sean Hagan, *supra* note 61, at 306-335.

[217] *Id.* at 336. *See also* Alon Seveg, *When Countries Go Bust: Proposals for Debtor and Creditor Resolution*, 3 ASPER REV. INT'L BUS. & TRADE L. 25, 60-63 (2003).

the interests of all stakeholders.[218]

The SDRM is yet to be approved by members of the IMF. By April, 2003, the United States, which holds 17.4 percent of IMF voting powers, had signaled that it could no longer support the proposal even though support for it was strong among some members. It is believed that the SDRM might be reintroduced in the future.[219]

The SDRM has been faulted for a number of reasons and so has failed to receive the needed support. First, it has been criticized for giving the IMF too much control over and involvement in the restructuring process.[220] Second, the fact that it excludes from coverage IMF debt, debt of other official creditors and domestic debts, is said to make it an incomplete process. Third, it is claimed that the fact that the SDRM decreases the probability of future IMF bailouts would make emerging market lending more expensive. Other issues raised by critics include the likelihood of conflict of interest, considering that the IMF is also a creditor, and will be the custodian of the process. The proposal envisages the establishment of a single law with a single court, which would likely override national law, and private contracts therefore, would not protect the interests of creditors. It also said that the IMF by SDRM wishes to shift the risk of default back to the creditors, and away from the IMF, and discourage private lenders from relying on international public institutions to provide a rescue package when a sovereign faces a financial crisis.[221]

Also, SDRM has also been described as a proposal that fell short of being a genuine mechanism of arbitration, as the government of the indebted country would not have standing equal to its creditors in the process. Instead, it is seen more as a process of negotiation among creditors, with the IMF working to force a majority agreement at some point, acting in what it saw as the best interests of

[218] Hagan, *supra* note 61, at 355.
[219] *Id.* at 301.
[220] A. Michele Dickerson, *A Politically Viable Approach to Sovereign Debt Restructuring*, 53 EMORY L.J. 997, 1020 (2004).
[221] *Id.* at 1021-1022.

the global economy.[222]

B. Sovereign Bankruptcy Proposal

A bankruptcy model has been proposed by a number of scholars and advocates, including Jeffery Sachs and the Jubilee 2000 network, but not exactly in the same way. It is modeled after the original United States Chapter 9 municipal bankruptcy law which enables certain persons to participate in, and if necessary object to, the outcome of the governmental insolvency process.[223] The procedure is similar to Chapter 11 reorganization of the US legal code; the Canadian Companies' Creditors Arrangement Act ("CCAA")[224] and the German Plan Proceeding.[225] Under the U.S. system an insolvency procedure can be initiated against municipalities without a violation of the principle of sovereignty. The US procedure allows municipals which are insolvent to file for bankruptcy before a bankruptcy judge.[226] Examples of municipal distress cases include those involving the New York City's inability to make payments in 1975. [227]

The model of the Jubilee Research Network known as the Jubilee Framework has the following essential characteristics as shown below:[228]

- The existence of a framework, enabling any indebted nation

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[222] Ambrose, *supra* note 26, at 283.

[223] Seveg, *supra* note 217, at 68.

[224] Michael A. Fitch, et al, *Recent Trends in Canadian Restructuring Cases*, (2003), http://www.fasken.com/files/Publication/1d527800-25c7-4057-a817c4 bcb4cedf46/Presentation/PublicationAttachment/5f3014c0-17ed-4d9b-8d21 a28df13e04ba/RECENT_CASES_IN_CDN_RESTRUCTURING_CASES.PDF.

[225] Paulus, *supra* note 14, at 535.

[226] Seveg, *supra* note 217.

[227] Paulus, *supra* note 14, at 535; *see also* Ropico, Inc. v. The City of New York, 425 F. Supp. 970, 977 (S.D.N.Y. 1976).

[228] Ann Pettifor, *Resolving International Debt Crisis—the Jubilee Framework for International Insolvency*, NEF Report. London: New Economics Foundation (2000), http://www.jubileeresearch.org/analysis/reports/jubilee_framework.html (Apr. 5, 2006).

to file for a standstill on debt payments, or for her creditors to declare her insolvent. This will be a form of regulation of international capital flows, and will discipline both lax lenders and reckless borrowers.

- The criteria for petitioning for a standstill would be determined by the debtor nation and by the assessment of the creditors. Debts that can only be repaid at a cost to the fundamental human rights of the population are deemed unpayable debts.

- The Framework would remove international creditors like the IMF, from playing the role of plaintiff, judge and jury in the event of international debt crises.

- The creation of a court which would be an ad-hoc body, appointed to deal with each individual petition for insolvency. It would not require an international treaty. The composition of the court would be determined by the sovereign debtor on the one hand, and creditors on the other. Both sides would nominate one representative each; the two representatives would then choose a third, in whom they both have confidence – to act as the judge. The proceedings of the court will be transparent and accountable both to creditors; but most importantly, to the citizens of debtor nations. The court will assess all debts, and ascertain if they were contracted legitimately.

- The Framework would accept the IMF as a 'portal' or 'gateway' to the process, given the vital role that the Fund will play in assembling working capital for the sovereign debtor during the debt standstill period. The IMF would not be able to influence the appointment or the proceedings of the ad-hoc, independent panel. The role of ensuring the independence of the panel should be assigned to the Secretary General of the United Nations.

Fundamental to the Jubilee Framework is public participation in the proceedings of the court, and in the resolution of crises involving public money. The Jubilee Framework, like Chapter 9 of the US legal code, will give rights to citizens to comment on the economic soundness of the court's 'composition plan'; and give taxpayers the right to object to the plan.

Jeffrey Sachs has also advocated for the adoption of insolvency procedures for sovereigns similar to US Chapter 9 procedure as a way of tackling the debt problem to guarantee debtor countries a fresh start after the debt crisis rather than the IMF bailouts and programs. In his view:

> The absence of a fresh start for sovereign debtors can have a particularly pernicious effect on economic and social development. In a country whose government is insolvent, but that has not been released from extremely onerous debt servicing, the provision of public goods is likely to be severely curtailed. Macroeconomic stability and even public order. . .can be easily lost. Prolonged political uncertainty and instability may result, as the sovereign power has limited means to defend itself against internal insurgencies and external military threats.[229]

The Jubilee Framework has been faulted also. Seveg punches a number of holes in the framework as enumerated in this paragraph. First, the framework's assessment of insolvency based on whether debt payments are made at a cost to the human rights and the dignity of a country's people is seriously faulted. This is described as ambiguous on the ground that it is unclear how a country can determine in specific terms when its citizenry's human rights and dignity is being undermined by debt.[230] Second, it is claimed that introducing the procedure would lead to numerous countries claiming default and subsequent standstills on the grounds of justice and fairness for their people. Third, it is believed that the framework also risks debtor "moral hazards" a reverse of the alleged IMF creditor moral hazards. This is because it is soft on debtors and makes it easy for sovereigns to declare bankruptcy, receive a standstill and a stay of litigation, and collect new financing on a secured priority basis. Again, it is contended that the proposed

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[229] Sachs, *supra* note 32, at 4.
[230] Seveg, *supra* note 217, at 74.

involvement of civil society in the framework has some inherent weaknesses because it does not address countries that do not allow civil society to participate in governmental matters such as China, Venezuela, Singapore and much of the Middle East. Finally, it is alleged that involving civil society civil society in a process that is already slow and cumbersome will only exacerbate the process.[231]

C. A Fair and Transparent Arbitration Process

Arbitrating the debt problem is also a proposal supported by many as a solution to the debt problem. The United Nations Secretary General in the millennium report stated that "I would go a step further and propose that in the future, we consider an entirely new approach to handling the debt problem. The main components of such an approach could include. . . establishing a debt arbitration process to balance the interests of creditors and sovereign debtors and introduce greater discipline into their relations."[232] The Fair and Transparent Arbitration Process ("FTAP") was endorsed by the Jubilee 2000 Coalition all over the world. It shares certain similarity with the Jubilee Research Framework only it is not hinged on Chapter 9 procedure. The FTAP was proposed to members of the G7 by the Jubilee 2000 Coalition at its 2001 summit in Genoa.[233]

The FTAP is an international insolvency procedure that relies on Fair and Transparent Arbitration Processes to solve debt crises. It seeks to replace the present "fragmented debt management approaches that deal with private, bilateral and multilateral debts in different fora and schedules," with a process that deals with all outstanding external debts in a comprehensive way. According to the FTAP, in cases of payment difficulties, an indebted state should be allowed to open an FTAP, and thereby declare a temporary debt service moratorium until completion of the arbitration process. It

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[231] See, *Id.* at 75-76.

[232] Kofi A. Annan, *We the Peoples: The Role of the United Nations in the 21st Century*, 38, (2000), http://www.un.org/millennium/sg/report/ch2.pdf.

[233] Jubilee 2000 Coalition, Letter to the G7 Heads of State, Finance Ministers and Sherpas and the Respective Embassies (May 31, 2001), *available at* http://www.blue21.de/PDF/FTAPletterG7finalversion.pdf.

proposes the establishment of ad-hoc panels to tackle individual countries' debt problems. An FTAP-panel should be composed of one or two individuals from both the debtor side and the creditor community. They would then agree on a third or fifth person so that an uneven number could make decisions by simple majority. The sessions of the arbitration process should be open to the public and all stakeholders in the process: creditors, debtors and other parties affected by the debt situation. "All claims against the concerned country must be brought forward by the creditors and then the FTAP-panel would decide on the legitimacy of the various parts of the debt stock and rule as to how much debt relief is necessary."[234]

The same kinds of criticisms have been leveled at the FTAP as those noted in regard to the Jubilee Research Framework. In addition, it is feared that creditors may not participate in the arbitration and even if they did, there would likely be problems with such sovereign accessing new money from creditors.[235]

Although the above proposals have been supported or opposed by various persons who have either pinpointed their strengths or weaknesses, it is not in question that there is a general consensus among all there is need for a permanent solution to the sovereign debtor creditor problem. What is lacking is an agreement by all concerned on what system would be adopted. The Independent Expert on Foreign Debts, appointed by United Nations Commission on Human Rights, is still working on the issue. It is expected that by the time he concludes his work, the Commission would come up with its own proposal that could be deliberated by the General Assembly of the United Nations, and possibly lead to the establishment of United Nations framework on the question of sovereign debts and human rights. Such would ensure public order in sovereign lending and borrowing. Meanwhile, until something positive happens in this direction, indebted countries and activists

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[234] Thomas Fritz & Philipp Hersel, *Fair and Transparent Arbitration Process: A New Road to Resolve the Debt Crisis* (2002), http://www.odiousdebts.org/odiousdebts/publications/FTAP_english.pdf.

[235] *See* Report on the G-24 Workshop on Financing for Development, Intergovernmental Group of Twenty-Four on International Monetary Affairs and Development (Sept. 6-7, 2001), *available at* http:// www.g24.org/ICFDRep.pdf.

have to make do with the HIPC initiative, keep pressuring for its reform and expansion, and possibly for the creation of a new initiative.

D. Recommendations in the Global Common Interest

The foregoing paragraphs show that there is yet no global consensus on how to bring order and sanity to the sovereign debt problem. What we have today are mechanisms that alleviate or reduce the impact of a debt crisis, but not one that seeks to prevent or resolve a crisis. The models proposed above all have their merits and demerits. While the SDRM seems to lean more in favor of the sovereign creditors, the model chapter 9 procedure and the FTAP seems not to have won the support of the creditors, but are favored by sovereign debtors.

Based on eight human values, policy-oriented jurisprudence approaches law from a process that enables members of a community to seek to clarify and secure their common interest. These values have been identified in detail as power, enlightenment, wealth, well-being, skill, affection, respect and rectitude.[236] In essence, decisions must clarify and secure the common interests all with these values in mind to ensure a world of human dignity in the interest of all. Any model solution to serve the common interest, should aspire to ensure access by all to all things humans value in life, which are in the aggregate, a global order of human dignity.

Applying the above context to the problem at hand, it is imperative that in inventing evaluating and selecting alternatives to the debt problem, one must seek to balance conflicting interests and arrive at a decision that would not unduly favor one party against the other—in this case, the creditors and the debtors. It is therefore necessary to bear in mind that a lender lends with the expectation of a return and not a loss based on the terms of the agreement. But expectedly, a lender has a responsibility to lend with caution to minimize the risk of loss. Further, a lender ought not to take undue

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[236] *See* HAROLD D. LASSWELL & MYRES S. MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY 738 (1992).

advantage of the borrower's plight, or take undue advantage of the borrower. But then, sovereign debts are not like every day contractual relationships. This is because they involve people: their futures and the interest; they also involve sovereigns who enjoy certain privileges in international law by virtue of their sovereignty. All these show that in lending to a sovereign, a lender must consider several factors and not proceed as if a sovereign is a corporate organization or an individual.

In some cases, sovereigns have borrowed recklessly, and lenders likewise, have given recklessly. In other cases, sovereigns have also abused and misused such funds with no regards for accountability, transparency and accountability. Governments, too, have also on several occasions changed hands, and the burden passed on to others. The population, however, has always remained. They are the ones who bear the burden of debt crisis—the inability of their governments to ensure their basic economic rights, added to the brunt of structural adjustment programs, such as cuts in public spending in education, health, housing, and other basic infrastructure. It is therefore important that every decision to borrow or to lend must always consider their best interests.

Having said that, the following alternatives are proposed in the interest of a world of public order and human dignity:

- The enactment, under the auspices of the United Nations of a Foreign Debt Convention which shall address the issues of foreign debts and human rights; how foreign debts affect the realization of economic, social and cultural rights; and the enactment of rules to govern both the sovereign lender and the sovereign borrower.

- The establishment of a permanent international debt tribunal to arbitrate all disputes on foreign debts and to consider cases of sovereign distress and bankruptcy. The tribunal shall be based on the equality of every member state and grant the sovereign borrower the same rights.

- The establishment of a Foreign Debts Commission that would educate and liaise with governments on the question of foreign debts; insure that national constitutions contain provisions that regulate foreign borrowing and conduct negotiations on behalf of governments before cases are heard by the debt tribunal.

- The Foreign Debts Commission shall insure that Civil Society organizations are engaged in the process to educate and sensitize the citizens of every state on the need to hold their leaders accountable for reckless borrowing against their interests.

VII. Conclusion

It is obvious that the sovereign debt problem is a complex one. Still, it is a problem that can be solved if the international community takes it seriously, and summons the political will and courage to restore order in the global financial system with respect to sovereigns. Responsible borrowing and lending must be advocated by all. A debt burden on a sovereign sets back the population and slowly kills because of poverty and want. The situation could be as bad as the evils that occur in a war. This is a prime reason why it should not be ignored. Sovereign debt transactions ought not to be big business because the happiness and dignity of so many individuals are affected by them. It is hoped that in the years to come the lenders and borrowers will come together to tackle this problem more effectively in the interest of human dignity and the common interest of all.