The Creation of an Arbitration Tribunal on Debt : an Alternative Solution ?
On the position to take as the CADTM

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This note presents a brief analysis of proposals for the creation of an international arbitration tribunal on debt, and is aimed at the international the CADTM network, so as to better clarify our position and, at the same time, take the elements of such a tribunal to other activists. The note leaves aside analyses on the procedural aspects included in such proposals (who should launch the mechanism, who takes charge of the evidence, conditions in which debt may be considered illegitimate, conditions and mechanisms for civil society participation, etc). The detailed debates on internal mechanisms and procedures are sufficiently developed in several proposals, notably those of Jubilee Germany, Jubilee UK and Acosta-Ugarteche.

This document therefore approaches the subject from the general characteristics of the proposals. It is important to note that these proposals are not, in principle, contradictory with the positions taken by the CADTM. They are complementary in the process of struggle for the cancellation of Third World debt.

THE PROPOSALS

Recently, the CADTM has been confronted by three proposals. The first is that drawn up by Alejandro Bendana (Nicaragua) for Jubilee South (disseminated to the World Social Forum in Porto Alegre in January 2003 and the March 2003 AITEC meeting in Paris). At the time of writing, it is not known whether this represents an official Jubilee South document. This text, entitled 'Repudiation and arbitration : the need for an integral approach ?' is available in French (http://users.skynet.be/the CADTM/pages/francais/bendana01.htm).

There is also the proposal presented by Alberto Acosta and Oscar Ugarteche at the seminar on Latin American debt in Brussels in May 2003 (see the the CADTM web-site); and, finally, the Jubilee Iraq (UK) proposal presented by Justin Alexander in Geneva with respect to the Iraqi debt.

All the proposals put forward aim at a real solution to the foreign debt problem of the Third World. All have the same foundation: legal accountability (that is, the possibility of bringing a case) before an international body. Substantively, they entail the creation of independent international arbitration proceedings which recognise the respective responsibilities of debtors and creditors. As a general rule, the re-negotiation of foreign debt has taken place under the authority of the creditors.

Indeed, in view of the seriousness of the debt problem, the creation of an arbitration tribunal would seem a more realistic proposal than those advocating debt cancellation pure and simple - clearly just, but ineffective, in the view of the authors cited above. Thus the proposals seek a fundamental solution using means which are entirely normal and traditional in international law – arbitration, an institution widely used by states and the private sector, notably in matters of international private commercial law. In this respect, it is noteworthy that arbitration constitutes a much more flexible form of jurisdiction, with less burdensome procedures and thus greater accessibility, relative to other types of tribunal. Moreover, the cost of such proceedings would be borne by State governments, including those of the poorest countries.

The proposals are still more attractive if one takes into account the fact that loan contracts signed between private creditors and States, between States and the international financial institutions (IFI), or between States and States, generally anticipate recourse to tribunals or judicial organs outside the jurisdiction of the debtor country. The proposals envisage the use of a jurisdiction characterised in principle by neutrality, and intended to be more

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beneficial to the debtor country. Ultimately, the intention is to correct an unequal and inequitable legal relationship.

Reasons for an Arbitration Tribunal on Debt

1. One of the characteristics of the proposals presented is they propose an **independent tribunal** where **civil society** would play an important role. Given the nature of dispute settlement clauses between debtors and creditors and the law applicable to them, debtors are always at a disadvantage. It should be noted that, in the case of the IMF and the World bank, disputes with respect to debt are settled by the institutions themselves.

2. The second characteristic refers to the problem of finding a **balance** between debtors and creditors. In fact, it is normal to find dispute settlement clauses under which States explicitly renounce the exercise by national courts of their competence in favour of foreign courts. This transfer of competence is normally in favour of courts in the US (as in the case of the dispute settlement clause between Argentina, private creditors and the IFI) or in the UK. It is precisely to avoid situations where creditors act both as judges and parties in a dispute that these proposals are presented as credible alternatives. It should be noted that the IFI themselves are creditors which have a strong interest in perpetuating unequal creditor/debtor relations.

3. Thirdly, as already indicated, the proposals entail using a judicial mechanism **widely accepted** by States, the IFI and private creditors.

4. Civil society actors, like States, will be enabled to present their demands to the tribunal.

THE COMPETENCE OF THE INTERNATIONAL ARBITRATION TRIBUNAL AND POSSIBLE CONSEQUENCES

The central point on which the IATD (international arbitration tribunal on debt) should consider is the evaluation of a country's overall debt, in order to establish **which part is legitimate and which part is illegitimate**.. Among other things, the IATD should pronounce on debts:

1. contracted by illegitimate debtors or illegal regimes, or by creditors which acted illegitimately or illegally in collusion with the governments of debtor countries;
2. contracted for illegitimate or illegal purposes (war, oppression of the population, etc);
3. contracted by democratic governments but closely linked with corruption;
4. which violate human rights (economic, social, cultural, civil and political).

Thus, beyond the legal aspect, the IATD could consider not only the illegality of debts, but also their legitimacy.

THE PRACTICAL DIFFICULTIES

What appears simple in principle may nonetheless be extremely difficult to put into practice.

1. Any tribunal, as a judicial organ of international law, must be given its own competence. In the case of the IATD, it would have to rule on the validity or illegality (and potentially on the illegitimacy) of the debt contracted by a State, which could lead to the nullification of a particular debt. Would the creditors (public and private) submit themselves to a jurisdiction which could lead to the nullification of debts contracted by certain governments? Equally, the debt problem is closely linked with the corruption of southern governments, which places them in a difficult situation, since the analysis would be concerned with the legality or legitimacy of their debts. Would they accept that a decision would equally signify government corruption in the process of borrowing and the implementation of privatisation? The Tribunal thus exceeds the purely judicial to become, strictly, political in nature.

2. The creation of any international tribunal raises, in international law, the issue of the willingness of the debtors and creditors. They are the subjects of law who can take such an initiative and bring it to a conclusion in a treaty or agreement. Thus the creation of any international tribunal must necessarily pass through the stages of **negotiation**, **conclusion** and **ratification** of a treaty. In practice all this implies, and international law provides for, bitter negotiations between the parties concerned. In the particular case of the IATD, its creation requires prior negotiations between States, and between them and the IFI, also subject to international law. This is where the juridical figure of debtor/ creditor is brought to bear. A fundamental question remains to be resolved: what status to accord the private creditors. The Acosta-Ugarteche proposal entails referring the creation of the IATD to the UN General Assembly, where the negotiations would be conducted. At present, there are more than 160 UN Member States. However, wherever the proposal is made, the initiative would always be that of States or the IFI. In the latter case, it seems unlikely that they would take or support such an initiative.

   Equally, the basis of international law concerning treaties is **essentially voluntary (until now, at least)**.. It is governed by the 1969 *Vienna Convention on the law of treaties between States* and the 1985 *Vienna Convention* .

3. This **voluntary nature** means that States can participate or refuse to participate in negotiations prior to the conclusion of the IATD. Moreover, if such a convention or agreement were concluded, States and the IFI could equally refuse to sign or to ratify it. Under the 1969 *Vienna Convention on the law of treaties between States*, States and international organisations which do not sign, do not ratify or do not become parties to it remain third parties. As a result, they are not legally bound by it. To consider this hypothesis: if the IFI, the US or the EU Member States refused to ratify or be parties to such an accord, they would remain third parties, and the IATD could not exercise its competence in relation to them. There is a very high risk that the IFI or certain of the more powerful Western countries may not participate in the IATD negotiation process, may not ratify it or will not be parties to it.

4. There is a co-responsibility between Southern governments, the IFI and the private creditors in the process of indebtedness. These are, in principle, the same governments which, though already having at their disposal the legal means not to pay their foreign debts, have not used them. These are the same governments which would have to put in place an international arbitration tribunal on debt in collaboration with the IFI.

5. With regard to the IFI, the proposals do not contain references (at least not explicitly developed as yet) concerning the i**nternational responsibility of the IFI and/or the private creditors. For the CADTM, this issue is an essential element to call into question, on the one hand, the legitimacy of the IFI' policies, and on the other hand the constant and permanent violation of international law resulting from the application of these policies**. Raising the issue of the international responsibility of the IFI and the private banks is a matter of primary importance, where civil society and citizens' groups have the initiative, and not governments.

6. There is another fundamental problem which has not yet been subject to detailed analysis. What, in fact, would be the law applicable to the IATD? International law? The domestic law of debtor countries, or that of creditor countries? Both? And, for private creditors: international commercial law or the domestic law of debtor countries? The definition of the applicable law is not simply a technical legal issue, but essentially a political problem.

7. **A very important issue for the the CADTM is that of individual criminal responsibility and the responsibility of moral persons for serious violations of international law**. For example, the collusion of the IFI and private creditors with the Argentinian dictatorship, responsible for the worst crimes against humanity, or that of trans-national companies with the apartheid regime in South Africa. This is a question which exceeds the competence of the IATD, unless the States and the IFI party to such an agreement decide otherwise or consider that the norms which will govern their competence come under *jus cogens* or imperative norms, which takes us back to international criminal law.

the CADTM'S POSITION

As the CADTM, our aim is not only that the legality or illegality of the debt should be analysed.

The CADTM has taken a firm position on the illegitmacy, illegality and nullity of third world debts. According to the public position, it is a question of policies imposed on peoples by the dominant States and the IFI. In our view, it is about illegitimate institutions carrying on policies in favour of trans-national capital, so as to submit peoples to their domination. Thus the CADTM appropriates international law to cast into question the policies decided by the IFI, their legitimacy and the legality of their actions. In this way, **the CADTM directly proposes that their activities should be deemed criminal, including those of private creditors and Western governments**.

In this respect, the CADTM deserves praise for exploiting the OLMOS Sentence of July 2000, which shows the criminal machinations and the criminal organisational behaviour of the IFI, and the illicit conduct of the private creditors. The development of, and efforts to adapt, the **doctrine of odious debt** point in the same direction.

In the same way, for the CADTM the debt problem, like the application of the policies linked to it, is not a one-way problem. It is also in this context that we raise the question of the responsibility, complicity and corruption of the dominant élite within most Third World States. These are the same dominant élite who benefit directly from the policies of indebtedness and who are responsible for applying the policies dictated by the IFI. This entails that there is especially good reason to use the appropriate legal instruments available to citizens to start proceedings aimed at recovering the funds diverted by corrupt leaders. There are numerous precedents.

THE INTERNATIONAL REPONSIBILITY OF THE IFI AND THE PRIVATE CREDITORS AND THE OBLIGATION OF REPARATION

Put simply, international responsibility, including criminal responsibility, is of primary importance.

In fact, research on and debates about international law show that the policies imposed by the IFI, like the machinations of the governments of the Centre and of the Periphery, are **substantially contrary** to the obligations imposed by international law, particularly those relating to the protection of human rights in a broad sense.

Emphasising the system of international responsibility implies that the policies of indebtedness of the Third World constitute permanent and constant violations of international law – that is, illicit acts. Moreover, whatever the system in place in a particular State, our research has shown that international law (including the Statutes of the World Bank, for example) places in the charge of the IFI the obligation of **due vigilance or due diligence** to ensure that their activities do not have the effect of violating international law, notably relating to civil and political rights, and to economic and social rights, including the obligation to ensure that the loans extended to governments in power are not used, for example, to buy arms so as to commit a genocide.

The other point on which we are working is that of **the obligation of reparation**. The obligation of reparation is a logical consequence of the policy of violation of international law on the part of the IFI.. It is not a question of negotiating the conditions in which debt is licit or illicit: **since the policies are substantially contrary to international law (permanent violation of economic and social rights, for example), the IFI and private creditors are under obligation to provide compensation for the consequences of such violations**.

INTERNATIONAL CRIMINAL LAW

In the criminal domain, recourse to the rules of international criminal law, in particular to those applied by the Nuremberg Trials, but also to those which are widely introduced and incorporated in several state legal systems, allows us to point the finger at the IFI as being criminal organisations, since they have acted in full knowledge and in collaboration with criminal regimes, thus becoming accomplices in serious violations of international law: forced disappearances, large-scale torture, extra-judicial killings, rape, etc.

THE CHOSEN PATH : RECOURSE TO DOMESTIC AND INTERNATIONAL LAW

Unlike proposals on the IATD (an international legal organ which would have to be the result of negotiations between debtors and creditors), the CADTM has deliberately chosen recourse to the domestic law of States whose foundation is constituted by international law. Ultimately, it is a question of how to begin legal proceedings when the State's law allows such recourse.

This choice responds to the need to give citizens who are victims of the policies of the banks and the IFI the basic formal legal instruments to initiate enforceable legal proceedings. It is important to note that this choice is based on recent precedents such as the complaints against the multinationals for serious violations of international law – the Ogonis of Nigeria against Shell, the complaint against Total Fina in Belgium for complicity in crimes against humanity in Burma, and the complaint by South African citizens against 21 multinationals for complicity in the crimes of the apartheid regime, among others. The importance of these complaints is that they throw light on the criminal machinations of the multinationals. Will this be so in an international court like the IATD?

These complaints, while they concern multinationals, which are totally different from the IFI under international law, can only reinforce the choice of targeting the IFI.

Note that, as the CADTM, we raise the issue of **the criminal responsibility of the top executives of the IFI and creditor banks**.. These executives should be identified publicly (and the law allows this) as accomplices deliberately providing the financial means to criminal regimes which have committed, and continue to commit, crimes against humanity.

The CADTM considers that citizens' groups will take the leading role. They must not have to depend on the good will of their States for the violation of their rights to be recognised as an injustice. Moreover, there is no guarantee that the final agreement, after the negotiations, will not be emptied of its original meaning.

Finally, it is important to note that the proposal for the creation of the IATD in not incompatible with the search for other means of cancelling foreign debt. Indeed, it is citizens' movements which are proposing it, so that it becomes a tool in the struggle against the policies imposed by the IFI. In is one instrument among many others which seek the same goal: the cancellation of Third World debt. But we have our own specific purpose: recourse to the domestic legal system – the laws exist.. This path allows us to avoid the problem of dependence on international negotiations between states and between international organisations towards the conclusion of a treaty on the creation of the IATD.