

## World Bank Paper on Odious Debt: Dismissive and Limited

### EURODAD Response

#### Introduction

This is Eurodad's response to the World Bank's September 2007 discussion paper: "The concept of odious debt: some considerations". It provides input for the round-table on odious debt and responsible lending which will be hosted by the World Bank on 14 April 2008. More specifically it points to the paper's one-sided treatment of the subject and provides counter-arguments to many of those levied by the World Bank in opposition to the concept of odious debt.

That the World Bank has finally accepted the need for a round-table discussion on this issue is welcome and is thanks to the advocacy efforts of a broad coalition of organisations around the globe. Many civil society groups believe that odious and illegitimate debt are important issues which have not been given fair due and attention by policy-makers. We trust that this dialogue will represent the first of a series of open and constructive exchanges on the subject.

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#### 1. Odious debt: clarifying the concept

The World Bank paper is largely dismissive of the concept of odious debt. The paper argues that there is little agreement on a definition of 'odious debts'. "The expression 'odious debts' may mean different things" says the paper (p. 2 and p. 5). The Bank authors quote Russian legal scholar, Alexander Nahum Sack, who is widely credited with having coined the term 'odious debt' in his writings on the subject in 1927, but do not spell out his full arguments. Sack defined 'odious debts' in detail. He wrote:

*"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. The reason why these odious debts cannot attach to the territory of the state is that they do not fulfill one of the conditions determining the lawfulness of State debts, namely that State debts must be incurred, and the proceeds used, for the needs and in the interests of the State. Odious debts, contracted and utilised for purposes which, to the lenders' knowledge, are contrary to the needs and the interests of the nation, are not binding on the nation – when it succeeds in overthrowing the government that contracted them – unless the debt is within the limits of real advantages that these debts might have afforded. The lenders have committed a hostile act against the people; they cannot expect a nation which has freed itself of a despotic regime to assume these odious debts, which are the personal debts of the ruler."*<sup>1</sup>

Sack argued that odious debts must fulfil three essential conditions *simultaneously* for a debt to be classified 'odious', namely: a) absence of benefit (for the population of the debtor nation); b) absence of consent (of the citizens of the borrower nation); and c) creditor awareness of the nefarious use of the funds. By definition therefore, a debt which fulfils only two of the three criteria cannot be declared odious. Importantly, within Sack's doctrine, the

burden of proof falls on the lender to show that the funds were indeed to be used for beneficial purposes.

## 2. Illegitimate debt: a broader approach

The terms ‘odious debt’ and ‘illegitimate debt’ should not be confused or conflated. While ‘odious debts’ may be defined in more concrete terms, the term ‘illegitimate debt’ refers to a broader category of debts, which for a variety of reasons many citizens in the borrower nation believe should not be repaid by their governments. This may be because the funds were extended to non-viable projects (and lenders should have been aware of this at the time they approved the loan), goods or services provided by lenders as part of the loan were sub-standard and/or charged for at inflated prices, the economic and financial terms and conditions of the loan were unfair (e.g. interest rates and penalty charges), borrowers were mis-sold or ‘pushed’ loans, or loans caused significant social or environmental damage which the lender should have been aware of. In these situations, lenders bear a significant part of the responsibility for the failures but are not held to account.

The Bank paper is also largely dismissive of the expanded concept of ‘illegitimate debt’. It avoids any analysis of well-known legal and academic literature on the subject and instead focuses on the easiest target: literature produced by non-governmental organisations.<sup>2</sup> It argues) that the literature produced by NGOs on the subject lack “*legal precision*” and therefore no “*meaningful debate*” on the issue is possible (p. 17). This argument is condescending. It implies that unless you are a qualified legal expert, you are unable to make a meaningful contribution on the issue of odious or illegitimate debt. Often it is the citizens and/or members of parliament of borrower states who are the first to draw attention to individual cases of illegitimate debt. They have also proposed innovative solutions to the problem such as proposals for comprehensive debt audits which would investigate individual credits in detail in order to determine their potential (il)legitimacy. Moreover in Norway, groups of students and concerned citizens proved that they could effectively pressure their government not to claim debts they argued were questionable.<sup>3</sup> Rather than dismiss these citizens’ efforts out of hand, surely it would be better to support them especially since the same paper says that it recognises the importance of citizen oversight in this matter.

The paper – for reasons not spelt out in the document – focuses only on three categories of illegitimate debt: ‘criminal’, ‘unfair’ and ‘ineffective’ debts. The Bank paper is quick to dismiss the concepts of ‘criminal debts’ (on the grounds that lenders may not know that corruption exists in a borrower nation) and ‘ineffective debts’ (on the grounds that national bankruptcy law requires that lenders be among the first to be repaid when a commercial project fails). But the Bank’s comments – or lack of – on ‘unfair’ debts are quite revealing.

‘Unfair debts’ are described as debts “*incurred for activities considered inappropriate, or which contain unacceptable conditions, such as usurious interest rates or policy demands inconsistent with the borrower’s national law*”. The paper then goes on to state that: “*In the context of national law, courts have determined that repayment demands can be considered illegal on the grounds that the terms of the original loan were usurious, that the lenders perpetrated fraud on the borrowers, or that the lenders broke other national laws in order to extend the loan*” (pp. 20-21). This confirms – albeit implicitly – that borrowers can indeed successfully challenge some loans they consider unfair and/or illegal. And that, in cases where national courts determine that lenders broke national laws in the borrower nation, it is

<sup>2</sup> See for example, Centre for International Sustainable Development Law (CISDL), Montreal March 11, 2003, Advancing the Odious Debt Doctrine by Ashfaq Khalfan, Jeff King and Bryan Thomas:

[http://www.odiousdebts.org/odiousdebts/publications/Advancing\\_the\\_Odious\\_Debt\\_Doctrine.pdf](http://www.odiousdebts.org/odiousdebts/publications/Advancing_the_Odious_Debt_Doctrine.pdf)

<sup>3</sup> In October 2006, the Norwegian Government announced it would cancel US\$80mn in claims it held on five countries: Ecuador, Egypt, Jamaica, Peru and Sierra Leone. The Norwegian Government stated that the credits had been extended without due assessment of the development needs of recipient countries and the materials provided (ships) had been inappropriate for the beneficiaries needs. See: Royal Norwegian Ministry of Foreign Affairs, Cancellation of debts incurred as a result of the Norwegian Ship Export Campaign (1976-80):

<http://www.regjeringen.no/en/dep/ud/Documents/Reports-programmes-of-action-and-plans/Reports/2006/Cancellation-of-debts-incurred-as-a-result-of-the-Norwegian-Ship-Export-Campaign-1976-80.html?id=420457> This outcome was in large part thanks to the tireless efforts of local organisations to draw attention to the issue over many years.

justified for the borrower state to cease repayments on that credit (i.e. repudiate the loan). The Bank however chooses not to expand its comments further in this section, even though in other sections it is quite happy to provide detailed arguments as to why lenders cannot be held responsible for failed loans and why borrowers should repay.

### 3. Odious debt and legal responses

The World Bank paper argues that “*treaties of peace and other international agreements [...] have not led to any codification treaty embodying a general rule on odious debts*” (p. 11). Yet the paper reviews four historical cases in which the concept of odious debt has been invoked in order to repudiate a credit. A paper recently published by UNCTAD on odious debt goes further and cites a total of 12 instances between 1844 and 2006 in which the concepts of odious debt or creditor co-responsibility have been invoked as arguments to reject the repayment of specific credits.<sup>4</sup>

These cases show that although to-date there may be no general legal rule or accepted international practice on the issue, the problem is a recurrent one. Just because international law and international custom are still evolving does not mean that the concept of odious debt should be dismissed out-of-hand. Yet this is precisely what the Bank paper tries to do.

The Bank fails to consider some of the many recent theoretical and academic contributions to the debate on how to operationalise the doctrine of odious debt. These include proposals advanced by Sabine Michalowski that debt may be considered odious if they violate ‘ius cogens’ principles.<sup>5</sup> Ius cogens norms are fundamental principles of international law which are accepted by the international community as a whole and from which no derogation is possible. These principles include the prohibition of genocide, torture, slavery, wars of aggression and territorial aggrandisement. Thus debts which could be shown to have aided and abetted any of these crimes could be declared odious. Some lending to Saddam Hussein’s regime in Iraq would fall into this category, for example.

The Bank paper also does not cover recent developments in domestic consumer law. These receive only a cursory mention. In many countries, in commercial and retail relationships, lenders are required by law to exercise due-diligence and to behave in a fair manner. At the same time, consumers are afforded certain protections against so-called ‘predatory lenders’. The UK Consumer Credit Act of 1974 – amended in 2006 – is one such example. It places a number of responsibilities squarely on the shoulders of lenders in order to protect borrowers. These include measures to prevent coercion, unreasonable interest rates and independent dispute resolution procedures. British courts are allowed to take into consideration “*all relevant factors*” when assessing whether the loan extended was fair and takes into account the borrower’s capacities to repay. If lenders do not comply with the law, the courts can make lenders liable for compensation.<sup>6</sup> An example of this is a case in July 2005 when a couple who feared losing their home after a loan of less than US\$11.000 spiralled to more than US\$700.000 had their debts cancelled by a judge who ruled that interest and penalty charges were “*extortionate*” and “*unfair*”.<sup>7</sup>

While these principles have not yet been applied where the borrower is a sovereign state, the continued evolution of domestic consumer law is undoubtedly influencing debates on lending at the international level. Some analysis by private sector analysts of the ‘megawap’ debt conversion agreed between the government of Argentina and some of its bondholders in 2001 uses very similar arguments.<sup>8</sup>

The paper also ignores many other suggested approaches to the problem of odious debt, for example the approach actively pursued by Buchheit/Gulati/Thomson of ‘unclean hands’

<sup>4</sup> See: UNCTAD: The Concept of Odious Debt in Public International Law: [http://www.unctad.org/en/docs/osgdp185\\_en.pdf](http://www.unctad.org/en/docs/osgdp185_en.pdf)

<sup>5</sup> Sabine Michalowski, University of Essex Human Rights Centre, the doctrine of odious debts, 2006

<sup>6</sup> UK Consumer Credit Act 1974 – amended in 2006:

[http://www.ofc.gov.uk/advice\\_and\\_resources/resource\\_base/legal/cca/CCA2006/](http://www.ofc.gov.uk/advice_and_resources/resource_base/legal/cca/CCA2006/).

<sup>7</sup> See: Guardian, Court cancels debt that grew from .6,000 to .380,000, July 28, 2005:

<http://www.guardian.co.uk/business/story/0,,1537428,00.html>

<sup>8</sup> Blustein, Paul, And the Money Kept Rolling In (and Out), Wall Street, the IMF and the Bankrupting of Argentina (Public Affairs, 2005, p. 129).

and 'agency'.<sup>9</sup> The principles of agency law are such that an agent (the government of a nation) must act in good faith with regards its principal (the citizens of a country). The faithless agent cannot bind the principal to an obligation when it receives no benefits. The Nigerian Lower House passed a resolution in 2005 which argued that Nigeria's debts were potentially odious and illegitimate and the government should cease payments on this debt. In addition to allegations of 'odiousness', parliamentarians alleged that creditors had breached general principles of law accepted by civilised nations such as the prohibition of unjust enrichment and usury. Other suggested approaches include the principle of 'free will,' i.e. it must be shown that both parties entered into the contract without pressure and were equals in the transaction.

The issue of 'authority to borrow' is also not tackled by the World Bank's paper, i.e. a loan may only be approved and signed by authorised representatives of the sovereign state otherwise it could be declared null and void. This is precisely what led the Paraguayan Government to challenge a commercial debt of US\$85mn in 2005 on the grounds that the individual in question was not authorised to take-out a loan in the name of the state. It argued that the lender was aware of this and that Paraguay's Constitution requires that the Executive approve all publicly-guaranteed loan transactions. The debt was therefore illegal.<sup>10</sup>

Moreover, although there is no codified legal definition of odious or illegitimate debt, some governments have unilaterally adopted progressive stances and accepted co-responsibility for unfair debts. In October 2006, the Norwegian Government unilaterally cancelled US\$80mn in debt owed by five developing countries citing "shared responsibility" for the debts. While the World Bank paper mentions the Norwegian case, it does so in a particularly slanted and misleading way. Its use of the words "*some international lenders have independently and voluntarily forgiven debts*" (emphasis ours) is annoying (p. 33). The Norwegian government explicitly recognised its co-responsibility in these cases. Rather than Norway forgiving debts, should it not be debtors forgiving Norway? Moreover, the Bank could have used this case to encourage other lenders to explore specific and notorious allegations of odious or illegitimate debt in their national contexts.

#### 4. Current international responses to debt crises: sufficient to deal with illegitimate debt?

Part IV of the World Bank's paper argues that although the aims of proponents of the illegitimate debt doctrine are "*in principle laudable*" (p. 24), it is more desirable to focus on the fairness and effectiveness of future loans because the concept of odious debt is too "*elusive*" and "*complex*". Moreover, operationalising a doctrine of odious debt runs the "*risk of disrupting international financial flows to developing countries altogether*" argues the Bank (p. 24).

<sup>9</sup> See Buchheit/Gulati/Thomson:

<http://www2.law.columbia.edu/contracteconomics/papers/Gulati/OdiousDebts.pdf>

<sup>10</sup> In 2005, the Paraguayan Government repudiated some of its commercial debt on the grounds of illegality. Between 1986 and 1987, Paraguayan Consul in Geneva, Gustavo Gramont Berres, requested a loan of US\$85mn in the name of the Paraguayan State. The loan was granted by the "Overland Trust Bank" in Geneva Switzerland, allegedly with full knowledge by the bank that the individual in question had no legal right to request a loan in the name of the state. The Paraguayan Government maintains that none of the funds ever reached Paraguay. Overland Trust Bank has subsequently ceased to exist but before its dissolution, it sold the debt on to nine banks which then demanded full reimbursement of the funds by the Paraguayan State. The government refused to pay-up on the grounds that the debt was fraudulent, so in 1995 bondholders took the Paraguayan State to the Swiss courts for non-compliance with the contract. The ruling was that the Paraguayan State had to pay-up: the full US\$85mn plus interest amounting to 185% of the principal. The Paraguayan Government however squarely rejected this. In August 2005, the Paraguayan Government refused payment of these debts and in Presidential Decree 6295 declared that the Paraguayan authorities considered these debts illegal and therefore the state had no obligation to reimburse them. The Paraguayan Government also invoked the country's Constitution of 1967, which states that loans must receive the express authorisation of the Executive arm of the government. In this context, the loan guarantees given by the individual in the name of the state were therefore non-existent. The individual in question had no authority to act as representative of the Paraguayan State and lenders did not observe all due domestic and constitutional processes which regulate the taking-on of new loans.

The facts just do not support this argument however. HIPC and MDRI debt cancellations and Paris Club debt cancellations have shown that creditors can take often significant haircuts but this can in fact help to restore creditworthiness and increase financial flows to a country. More recently in the case of Argentina, although creditors involuntarily suffered a significant 'hair-cut', this helped to quickly restore creditworthiness and led to a resumption of financial flows to the country, as a majority of large private sector creditors to Argentina had predicted.<sup>11</sup> These examples show that where there are good investments opportunities to be had and money to be made, investors are quick to forget about the past.

The paper then outlines a number of measures which could be implemented by lenders in the future to help remedy the problem of odious debt over time. These include an examination of the governance standards in the borrower nation, enhanced public disclosure provisions, CSO oversight, debarment of individuals and firms found to be involved in corruption, whistleblower protection, ensuring conformity with internal laws and regulations, more extensive and intensive consultation, preparation, evaluation and appraisal processes. Most of these proposals are welcome and indeed the Bank recognises that the "constant pressure [of shareholders, non-governmental organisations and civil society] has led to improved lending practices in some official lending institutions" (p. 30).<sup>12</sup> CSOs are moreover committed to maintaining pressure on the most important lending institutions to constantly improve on their future lending policies and practices. An example of this is Eurodad's Responsible Finance Charter published in January 2008 which outlines step-by-step what a responsible, legitimate loan looks like.<sup>13</sup>

The World Bank's debt sustainability framework for low-income countries is also presented as an important tool to avoid future debt build-up. This voluntary coordination tool for lenders assesses a borrower's capacities to service their debt and issues a red, yellow or green light signal to potential lenders, signalling for example that it is imprudent to lend to a country which has red light (debt distress) status. One of the major criticisms of this framework is that it offers no assessment as to the *quality* of the finance on offer to the borrower. Poor quality finance, often extended for political purposes are among the key causes of the current debt difficulties many countries face. Yet the Bank/Fund debt sustainability framework is presented as the magic bullet to avoid future rounds of unsustainable and irresponsible debt even though it would seem poorly equipped to deal with some of the root causes of current sovereign debt problems.

The paper also mentions the Bank's recently launched Stolen Assets Recovery (StAR) Initiative. This programme aims to provide technical assistance to those developing countries which are trying to obtain the repatriation of stolen wealth, often hidden in the financial centres of developed nations. While initiatives such as these are welcome, the Bank does not seem to be making the link between illegitimate debt, stolen assets and tax havens. The Bank's researchers and analysts are therefore missing an important opportunity to contribute meaningfully to this debate and to use their influence to lever much-needed change in these areas.

So are these measures really enough? While very few analysts would disagree with the importance of good lending and borrowing practices, it remains the case that measures currently tabled by the World Bank, commercial banks (such as the Equator Principles) and the international community so far, rely exclusively on the voluntary acceptance of standards and codes by lenders. There exists no instrument to enforce due-diligence and good behaviour on reluctant lenders.

In this context, the paper comprehensively fails to mention well-advanced proposals for mechanisms such as a 'Sovereign Debt Restructuring Mechanism' (SDRM), proposed by Anne Krueger of the IMF, the 'fair and transparent arbitration procedure' (FTAP) advanced by

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<sup>11</sup> Report of Capital Markets Consultative Group meeting, October 21, 2001, cited in Blustein, Paul, *And the Money Kept Rolling In (and Out)*, Wall Street, the IMF and the Bankrupting of Argentina (Public Affairs, 2005, p. 162).

<sup>12</sup> Most of the measures the World Bank cites in its odious debt paper to promote responsible and transparent future lending are to be welcomed. However, what could be controversial is an assessment of the governance standards in a borrower nation. Who would conduct such an assessment? On what governance indicators would it be based? How impartial would it be? And would it be public? The World Bank's Country Policy and Institutional Assessment (CPIA) is precisely the sort of tool that is currently being used to provide such assessments. Yet the quality and independence of such analyses has been challenged.

<sup>13</sup> Eurodad: Responsible Financing Charter, January 2008: <http://www.eurodad.org/whatsnew/reports.aspx?id=2060>

Kunibert Raffer or the international tribunal for the arbitration of sovereign debts (TIADS) proposed by Alberto Acosta and Oscar Ugarteche.<sup>14</sup> Raffer's model proposes the internationalisation of Chapter 9 of the US bankruptcy code. Acosta/Ugarteche propose a permanent independent arbitration tribunal possibly under the auspices of the United Nations to hear cases of generalised repayments difficulties or disputes. A key feature of both models is that independent arbiters would be empowered to judge instances of illegitimate debt and to declare those debts null and void. Acosta/Ugarteche and Eurodad argue that the right to be heard before such an independent panel should be codified within future loan agreements. The only way to enforce (and reward) responsible behaviour by lenders is to make them understand that their credits could be independently scrutinised in case of dispute or default.

The Bank paper argues that in many cases *"the success of a project entails risks that are usually outside the control of the lender"* (p. 29) therefore how can lenders be held responsible for so-called "ineffective" debts? Precisely the role of an independent arbitration panel would be to judge on issues such as the fairness of the terms and conditions of the loan, the quality and independence of the ex ante project assessment, the quality of goods and services provided by the lender as part of the loan, prices charged, quality of advice provided by the lender, whether borrowers were misled the loan, whether there was pressure to lend/borrow, fairness of any extra fees and charges levied, and whether loan linked to any other deals e.g. trade deals. In these cases, the lender has direct control over his/her actions.

The Bank paper states that many loan contracts already contain clauses on the settlement of disputes. But as the Bank itself points out, the jurisdictions often used in commercial cases is that of New York or London. These are widely perceived as very creditor-friendly jurisdictions. Many bilateral concessional and non-concessional loans also tend to apply national jurisdictions to their loans (e.g. German loan agreements stipulate the courts of Frankfurt-am-Main or Danish bilateral loan agreements the courts of Copenhagen). The International Chamber of Commerce in Paris is another commonly used organ for the settlement of disputes and contracts usually state that the law of the lender nation will be applied. One of the key concerns centres around the fact that in such cases, the lender will have a distinct advantage: it knows its laws better than the borrower state, can more easily hire relevant experts and the language of the procedure is often that of the lender.

Given current concerns by some of the world's most important countries over the potential re-accumulation of unsustainable and irresponsible debt by countries which have recently benefited from the HIPC and MDRI Initiatives, the moment would seem opportune to re-launch international debates over some form of fair and transparent arbitration procedure as one way to encourage responsible behaviour by creditors and to resolve debt crises fairly and efficiently. However the Bank currently seems to be missing this important opportunity.

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<sup>14</sup> For further information on the SDRM of the IMF, see: <http://www.imf.org/external/np/exr/facts/sdrm.htm>. The key features of the SDRM model include: majority restructuring—The mechanism would allow a sovereign and a qualified majority of creditors to reach an agreement that would then be made binding on all creditors that are subject to the restructuring. Deter disruptive litigation—The mechanism would discourage creditors from seeking to enhance their position through litigation during the restructuring process. Protecting creditor interests—An SDRM would need to include safeguards that give creditors adequate assurances that their interests are being protected during the restructuring process. Priority financing—As a means of inducing new financing, an SDRM could exclude a specified amount of new financing from the restructuring, if such exclusion were supported by a qualified majority of creditors. Meanwhile, the key features of Raffer's model include a neutral decision-making body which arbitrates and decides which debts need to be declared null and void, and which need to be repaid; the rights of both debtor and creditor to be heard by arbitrators; protection of the human, social and economic rights of the citizens of the debtor; the institution of automatic stay and transparency of process and decisions. Internationalisation of this procedure would ensure comparability of treatment between countries and between debts. In cases of financial difficulties or dispute, debtors and creditors should be able to turn to such an independent mechanism as a serious option should they so choose. According to Raffer's model, arbitration may be heard on an ad-hoc basis. Unlike Raffer's model, the 'tribunal internacional de arbitraje de deuda soberana' or 'TIADS' model would involve the institutionalisation of an arbitration court – possibly under the aegis of the United Nations or International Court of Justice – to hear sovereign debt related disputes and/or repayment difficulties. Acosta and Ugarteche argue for an 'international financial code' (código financiero internacional) which would codify the right to be heard before an arbitration tribunal.

Most importantly, the fair and transparent arbitration procedure would deal with sovereign debt crises equitably. The Bank paper cites the recent cases of bilateral and commercial debt cancellations to Iraq and Nigeria as evidence that current debt resolution mechanisms are working well. These countries obtained large debt reductions, says the paper. What it omits to say however is that these decisions were based largely on politics rather than an objective assessment of each country's loan portfolio or real needs. This helps to explain why a middle-income country such as Iraq was able to obtain and 80% write-down in the Paris Club while low-income Nigeria was able to obtain just 67%.

This example is typical of the tendency of the paper to present current international debt relief mechanisms – such as the HIPC and MDRI Initiatives, Paris and London Club write-downs and the unilateral action of Norway to cancel US\$80mn in debt due to development policy failures – as sufficient to deal with sovereign debt crises. The implication is that there is very little more to be done. Many CSOs and citizens of debtor nations would argue very strongly however that 'debt is not done' for them. If their country was not classified a Heavily Indebted Poor Country (HIPC), or is of little strategic importance to the Paris Club, then despite a severe debt burden they are considered ineligible for debt cancellation. Moreover, with the notable exception of Norway, no creditor has admitted co-responsibility for any loan failure. This means that citizens in many debtor countries are left to foot the bill for loans which did not benefit them or indeed caused them harm. Seen in this context, it is little wonder there are calls for these debts to be addressed and for changes to be instituted to the way loans are extended to and taken-on by sovereign states. The Bank paper, in its insistence on future lending practices only, wilfully neglects these important realities, i.e. that it is the poor who alone have to shoulder the burden of the mistakes of the past. For an institution which describes itself as a 'development' bank concerned with the eradication of global poverty, these are glaring omissions indeed.

## 5. Conclusion

The World Bank paper on odious debt is lacking on several fronts. It argues that there is no coherent or concrete definition of what constitutes an 'odious debt'. Instead the concept is "confused" and "elusive". On the contrary, the A.N. Sack doctrine of odious debts states that three concrete criteria must be fulfilled simultaneously in order for a debt to be classified as odious. These are a) absence of benefit; b) absence of consent and c) creditor awareness. The Bank paper is also dismissive of the broader concept of illegitimate debt. It argues that much civil society literature lacks "legal precision" therefore no meaningful engagement on the subject is possible. This is to severely deride the efforts of citizens around the globe who have been among the first to raise this important issue and to point to instances where they believe serious mistakes have been made. Rather than deride these efforts, steps should be taken to encourage and support such oversight attempts.

The Bank suggests that because there is no universally agreed legal definition of, or international custom on, the issue of odious debt the doctrine must therefore be rejected. This is a false argument. There are more than a handful of cases historically where the doctrine has been used to support arguments that the debt should be repudiated. Moreover this area of public international law is hugely underdeveloped and continues to evolve. More and more academics, lawyers and activists are contributing to theoretical advances in this field and are developing innovative proposals to deal with the continued problem of odious and illegitimate debt. These include proposals to extend the principles of consumer protection in domestic consumer law to the international lending arena and proposals to declare a debt null and void if it violates *ius cogens* principles.

Instead the Bank has chosen to focus its efforts exclusively on future lending activities. It argues this would be more constructive. While very few people would argue against the importance of responsible lending and borrowing in the future, this is insufficient. It is also of little comfort to those citizens of borrower nations who are saddled with the burden of debts which did not benefit them and indeed harmed them in some cases. The Bank's point about the need to tighten up future lending standards implies that there were shortcomings in the past. The issue is who was responsible for this, who suffered and what can be done.

The Bank should accept that there are many cases which must be looked into by independent experts, along the lines of comprehensive debt audits proposed by many Southern NGOs. The actions of the Ecuadorian Government to support an integral audit of its public debt are



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among the first of its kind in the world.<sup>15</sup> At the same time, it should be encouraging – and be part of – a broad international process which aims to promote international dialogue and consensus on the issue of illegitimate debt, as well as debate potential solutions to the problem.

In this context the paper represents a missed opportunity. It suggests that the Bank's ex ante anti-corruption measures and debt sustainability analyses are an across-the-board remedy for the structural problems of counter-productive, reckless lending. Instead there should be clear ex ante and ex post rules of the road as the only way to enforce and reward responsible behaviour by lenders and borrowers. Otherwise we can only expect history to repeat itself and for the calls for the cancellation of illegitimate debt to become stronger still.

<sup>15</sup> See Presidential Decree: No. 472. el 9 de julio de 2007:  
[http://mef.gov.ec/pls/portal/docs/PAGE/MINISTERIO\\_ECONOMIA\\_FINANZAS\\_ECUADOR/SUBSECRETARIAS/SUBSECRETARIA\\_GENERAL\\_DE\\_COORDINACION/COORDINACION\\_DE\\_COMUNICACION\\_SOCIAL/PRODUCTOS\\_COMUNICACION\\_PRENSA/ARCHIVOS\\_2007/57COMISIONDEUDA.PDF](http://mef.gov.ec/pls/portal/docs/PAGE/MINISTERIO_ECONOMIA_FINANZAS_ECUADOR/SUBSECRETARIAS/SUBSECRETARIA_GENERAL_DE_COORDINACION/COORDINACION_DE_COMUNICACION_SOCIAL/PRODUCTOS_COMUNICACION_PRENSA/ARCHIVOS_2007/57COMISIONDEUDA.PDF)