

# **SUB-SAHARAN DEBT: THE IMPERATIVE OF CONTRACT ADJUSTMENT.**

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## **INTRODUCTION.**

As the world has finally come to accept the intractability of the Third-World debt, particularly that of the Sub-Saharan countries, fresh perspectives must emerge as to how best to deal with the matter in such a way that both the creditors and the borrowers in the divide will, in the short and even the long-run, go with a feeling of considerable assuagement. The Third-world debt is a reality that won't just go away mainly because there is ample lack of political will to tackle the problem<sup>1</sup>. All attempts so far at putting it under some form of control, have not yielded the desired result either for the lenders or for the creditors<sup>2</sup>. Efforts such as debt rescheduling, restructurings, debt equity swaps, debt securitization,<sup>3</sup> etc have all failed to

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<sup>1</sup> Fritz T. 'Special Issues in Debt Management Reform Examined' FTAP 2002 "In the developing world debt crises remain a recurrent feature of every day life, regularly destroying economic achievements and forcing millions of people into poverty...it appears necessary to have a closer look at the established procedure of international debt management, their functioning and obvious shortcoming"; see also Okonjo-Iweala N. et al DEBT TRAP IN NIGERIA- Towards a Sustainable Debt Strategy' 2003; statistics shows that the 'total debt of Sub-Saharan African countries reached a staggering \$209 billion in 2001. In that year, the sub-continent borrowed \$11.4 billion, but paid \$14.5 billion in debt service - \$9.8 billion as principal repayment and \$4.7 billion as interest. As a result, the region recorded a negative 'net transfer' of \$3.1 billion. This continued a trend of negative net transfers in the previous decade' see J. K. Boyce note 16 infra; also 'Nigeria lost between \$4 billion and \$5 billion in the last two years due to naira- currency-depreciation. This besides the accumulated arrears, penalties and interest actually hiked the external debt stock' Debt Management Office report, The Guardian Nov. 24, 2005

<sup>2</sup> See IMF's Sovereign Debt Restructuring Mechanism (SDRM) Anne Kruger 2001/2002; Sovereign Bankruptcy rules as proposed by Raffer K 2002, Pettifor A 2002, Odiadi Tony, 'Legal Issues in Sovereign Debt' 414-430 (2001)

<sup>3</sup> See Buchheit L. C. 'Exchanging Places, Intl. Fin. L. R May, 1991, see also Sylvester for general discussion of Brady Plan, Baker Plan, Miyazawa Plan, Congressional Proposal, Debt Equity Swap, etc 265-277

contain the debt problem. Other approaches such as the request for outright cancellation based on several other considerations one of which is the now popular doctrine of ‘Odious Debt’<sup>4</sup> are yet to enjoy wide acceptability. The ‘odious debt’ for example is a doctrine rooted in notions of what is ‘*just and fair*’ but lacking, as it were, the peremptoriness of a legal rule due to the inconsistencies of its application in matters relating to a sovereign’s obligation or willingness to assume responsibility for debt incurred by an earlier regime not used for purposes considered in the interest and for the benefit of the people. But the recent development in the Iraqi case warrants a fuller examination later in this article of this doctrine its potentials and limitation, which may yet offer a quicker and more decisive way out of the sovereign debt confusion.

As has been eminently argued, private debt default leads to bankruptcy, sovereign debt default leads to informal, often lengthy standstills. The creditors can wait out the period of distress, expecting eventual economic recovery to lead to a resumption of payments’.<sup>5</sup> Yet, this offers no consolation, as it still amounts to pushing forward the day of reckoning since most sovereign debtors are really where they are today from all the

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<sup>4</sup> See “Advancing the Odious Debt Doctrine” CISDL Working Paper, King .J and Khalfan. A, 2003; Gelpern A. ‘What Iraq and Argentina Might Learn from Each Other’ 6 Ch. J. I. L 2005; Feinerman J V “Odious Debt: Old and New’ 2004 GULC Workshop paper; also Adams P ‘Odious Debt’ 1999, all, exploring the thesis of Sack A.N ‘Les effets de transfoations des Etas sur leur publiques et autres obligations financieres’ Paris, 1927.

<sup>5</sup> Bratton W. W & Gulati M. G ‘Sovereign debt reform and the Best Interest of Creditors’ 57 Vand. L. Rev p.3 (2004) a bankruptcy regime conceived here must be well adapted ‘so as not to replicate the transactional bias of American corporate reorganization, where the need to close the deal can override other concerns. In the sovereign context, the long-run interests of defaulting sovereigns and their creditors are more closely aligned than those of defaulting private borrowers and creditors. If the sovereign creditors do not like the restructuring on offer, it must be allowed to fail’; see also Sedlack J. ‘Sovereign Debt Reform: Statutory Reform or Contractual Solution’ 152 U. Pa. L. Rev. (2004) 1483 for some distinction between sovereign and corporate debt.

moratoria and rescheduling arrangements effected through the years. Experience has taught everyone now that ‘rescheduling – whether via Paris Club or the London Club – does not offer a permanent solution to the crisis. There is a cost to the debtor under the traditional rescheduling arrangement because the interest continues to accrue on any deferred amounts and the debtor must pay interest on the entire balance until the loan is paid in full. All that the debts reschedulings are accomplishing are the postponement of the debt service peaks accompanied by a steady increase in burden of debt’.<sup>6</sup> What is needed therefore is not how to walk around the problem, but how to completely extirpate it within the shortest time frame, in order to free the debtor nations of much or all their existing financial obligations, and enable them consolidate and deploy their limited resources to the much needed developmental initiatives. Sovereign defaults are very disruptive, leading to serious crisis in the international financial market, but are often products of difficult situations and given the choice most sovereign debtor would rather not embark on it. A country will avoid deliberate default and strive to make repayments ‘on its foreign debt in order to preserve reputational “collateral” needed for future borrowing’<sup>7</sup>

### **Audi alterem patem.**

Except for a few notable ones, much of the literature on sovereign debt in the last couple of years has failed to pay appropriate attention to the socio-economic dynamics that has kept the financial situation of the Third-world economies unsustainable. Most of the countries under that categorization

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<sup>6</sup> Sylvester J. H. ‘*Impracticability, Mutual Mistake and Related contract Bases for Equitably Adjusting the external debt of Sub-Saharan Africa*’ 13 NW. J. Int’l L. & Bus, 258 1992-1993 discussing Kettel B & Magnus G THE INTERNATIONAL DEBT GAME, 148 1986

<sup>7</sup> Bulow J. & Rogoff K. ‘Sovereign Debt: Is to Forgive to Forget?’ The Am. Econ. Rev 1989 p. 43

occupy the weakest link in the global economic chain. Their foreign exchange earning is insufficient to cover their developmental needs in the first instance, nor the payments made to external creditors over a long period of time, which inexorably leads them to liquidity crisis<sup>8</sup>. No country is or can be completely self-sufficient requiring nothing from others. Sovereign borrowing therefore arises from the scarcity of resources necessary for investment and economic growth. Borrowing ‘therefore allows a country to increase the resources available for investment without having to forgo current consumption. A country can borrow capital for investment for as long as the value of goods produced by that capital exceeds the cost of acquiring external capital, it is in the country’s long term economic interest to do so’<sup>9</sup> The distribution of labour and location of international capital, places them at a major disadvantage in the global economy. Their economies are vulnerable and captive to trends and decisions taken outside and far beyond their control, nor are they capable of withstanding the periodic shocks in the international economic scene. There is somehow in place a ‘structural dependency’<sup>10</sup> arrangement, which has been articulated as representing the situation of an entrenched hierarchy in international economic structure, where, first, developing countries will continue to

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<sup>8</sup> Buchheit L. ‘Capitalization of Sovereign Debt: An introduction’ 1987 p. 98 LATIN AMERICAN DEBT MANAGEMENT ed. Reisner R et al; also, DEBT TRAP IN NIGERIA supra, p.26 ‘Sub-Saharan Africa is a special case, the poorest region in the world, with 33 of the 48 least developed countries (LDCs), and with average per capita income in 1999 less than the level in 1969. Despite modest improvements since independence in the 1960’s, SSA lags far behind the rest of the world in terms of basic social indicators. Some of the indicators point to a crisis that is almost peculiar to Africa, and include poor education, high child mortality, and endemic diseases-tuberculosis, malaria, and HIV/AIDS- that impose severe costs on Africa’

<sup>9</sup> Sedlack J, supra p.2; see also Fitch Ratings for Sub-Saharan Africa May, 2005- where ‘grant assistance has made an important contribution to fiscal consolidation. This is due to weak domestic tax bases and the need for high expenditure on poverty reduction...But governments have no direct control over donor budgetary aid and any interruption to flows can be disruptive to budgets and wider economy’

<sup>10</sup> Sylvester J. H. supra p.313

produce raw materials for Western industrialized countries; second, have the prices of these raw material fixed by the buyers; third, buy finished products from the industrialized countries at the prices fixed by the latter. ‘The long-term payment deficits of these countries ... have been caused by the unjust terms of trade existing between them and the industrialized world.... The debt problem is merely the superstructural symptom of this unbalanced relationship’.<sup>11</sup> It is within this global economic arrangement, its dynamics and consequences, that the Sub-Saharan debt problem can only be more objectively appraised and the likelihood of an effective solution better worked out.

In effect, therefore, regardless of the volume of output of the many distinguished writers in this field, the debtor perspective has not had enough scholarly attention as to have the needed impact on the informed theories, policy directions and strategies currently jostling for dominance in the debt management debate. Much academic energy have been devoted to articulating creditor management and control strategies- role of litigation, Sovereign Bond issues, the preference or otherwise for Collective Action Clauses (CAC) as against Unilateral Action Clauses (UAC), Majority Action Clauses, utility of the *pari passu* clause, Hold-outs schemes<sup>12</sup>, etc; generally, how best to control or rein in creditors, so as to constitute a more

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<sup>11</sup> Baloro John quoted by Sylvester supra, 313; see also Ohlin G ‘Economic Risks in Sovereign Lending’ P.23 in SOVEREIGN BORROWERS ed. Kalderen L & Siddiqi Q. S 1984

<sup>12</sup> See Fisch J. E. & Gentile C. M ‘Vultures or Vanguard?: The role of Litigation in Sovereign Debt Restructuring 2004 GULC Workshop on Sovereign Debt Restructuring; but much of that is as a result of the serious focus on bond issues which has gradually become the preferred mode of raising capital by sovereigns and its attendant financial and legal complexities. See also, Wilson N. ‘Bond Issue Documentation’ p. 193, Kalderen et al supra; also, Gelpern A & Setser B ‘Domestic and External Debt: The Doomed Quest for Equal Treatment’ 2004 G.J.I.L for an analysis of the complex dimension created by the concurrent existence of domestic and external creditors in sovereign debt management as a result of the bond instrument being available whoever purchases it.

predictable, formidable and well coordinated front, in the pitted financial engagements with the debtor countries. It has been noted, expectedly, in a global economic arrangement of this sort, that there are many facets to the debt crisis and the fundamental weakness in its overall management is that the creditors, who constitute the donors, are in control of every facet and therefore continue to dominate the entire decision making process, regarding how best to solve the debt crisis<sup>13</sup>.

### **Which way, contract?**

One of the positions beginning to come into focus is that which holds that the debt issue must be examined and re-examined using the contractual prism or paradigm. As the international loan agreements have led to the debtors not being able to meet their obligations under the arrangement, the entire Contract jurisprudence needs total re-examination in order to identify existing but rarely used defenses necessarily available to the debtors<sup>14</sup>. The effort in this direction should now be based on the 'thesis that the debt contracts should be analogized to the world of continuing contractual relations where reliance, good faith and fiduciary self-restraint have a voice, rather than to the world of one shot transactions and arms length gambles, where parties can readily deny responsibility for effects upon their contractual partners of their claim to exercise rights'.<sup>15</sup> The underlying

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<sup>13</sup> See Kapijimapanga. O 'Fair and Transparent Arbitration on Debt' Odious Debt online 2002; See also Mutasa C 'Information Sheet on Africa's Debt' 2003 AFRODAD The (debt) issue 'has featured in almost all debates pertaining to financing development and struggles against poverty and injustice in the continent. Tremors of restlessness, civil strife, directly related to the debt burden have begun'

<sup>14</sup> See Walde T. 'The Sanctity of debt and Insolvent Countries: Defenses of Debtors in International Loan Agreements' in Bradlow D, supra. JUDICIAL ENFORCEMENT OF INTERNATIONAL DEBT, p.120 1987; see also Mairal H. A. 'Issues Arising from Legal and Constitutional Validity of Debt under the Debtors own Law' Bradlow supra p.147

<sup>15</sup> Lothian T 'The Criticism of Third-World Debt and the Revision of Legal Doctrine' 13 Wisc. Int'l L. J. 455, 1994-1995 for a seminal contribution to the broad subject matter

issues concerning the debt burden of the Sub-Saharan nations demand a complete reconstruction, as it were, of the current rules and practices in order to contain creditor hyper-advantage and make extant contract defenses more efficacious to the debtors. For one, it will help demonstrate the universality of the rules and reduce the current arbitrariness in their application, where unequal power-play, enables the stronger party to redefine, seemingly at will, or, pick and choose, which set of the rules should or should not, be operational.

And so, much of this article will be devoted to the thesis that the loan transactions being purely contractual, must submit to key rules and doctrines operational in the law of contract. The purpose of contract law has been argued to be, first, to identify which agreements are legally binding; second, to establish the rights and duties enforceable even though contained in ill-defined agreements; and third, to establish the consequences of an unexcused breach by the contracting party.<sup>16</sup> Equally so, the whole essence of legal analysis is the process of risk allocation as a means of protecting the weaker party in a legal relation. The law, in this regard, is often concerned with the question: how should the exchange or interplay of economic power be regulated in a legal relation; who will bear the loss or injury occasioned in a relationship? The resolution of that legal responsibility is ordinarily to be achieved through the adjudicatory process, and how successful this happens depends on the thrust of, or underlying, policy position of the evaluating panel. Specifically, however, Contract law deals with the process of voluntary exchange and is concerned with maintaining appropriate

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<sup>16</sup> See A. T. Kronman '*Contract Law and Distributive Justice*', 89 Yale L. J. 472 1979-1980, p. 472 quoting A. Corbin, G. Tullock and O. W. Holmes

incentives for individuals to maximize self interest, reducing the cost of negotiation and facilitating the planned management of risks.<sup>17</sup> It is this latter function, the management and allocation of risks, that tasks the legal process to achieve results that are not offensive to settled notions of what is fair and just in the circumstance each case.

### **Courts and policy.**

Following that, it is the position in this article that the basic excuse rules of contract such as frustration (used conterminously as impossibility of performance), unequal bargaining power, abuse of fiduciary relationship, lack of capacity, undue influence, mistake, etc, should operate, when the facts fit in, to discharge the specific debt or substantial part thereof, in other to make repayment less onerous and burdensome<sup>18</sup> as it seems currently.

Excuse rules of contract become operational when parties to a contract leave gaps in their agreement concerning the allocation of risk, the occurrence of which makes performance very onerous.<sup>19</sup> How does legal policy come into play, in the adjudicatory or mediatory process, in other to facilitate the just resolution of a very serious problem without further destroying the weak party in the contractual relations? What doctrinal parameters should guide an adjudicatory panel to achieve results that reinforces and vindicates the

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<sup>17</sup> Speidel R. E. 'Court Imposed Price Adjustments Under Long-Term Supply Contracts' 76 NW. U. L. Rev. 369 1981-1982 quoting Posner. R. 'ECONOMIC ANALYSIS OF LAW' 10 (2d ed. 1977), see also for some useful discussion Speidel R. E. 'After word: The Shifting Domain of Contract' 90 NW. U. L. Rev. 254 1995-1996

<sup>18</sup> See J.K Boyce and L. Ndikumana '*Africa's Debt: Who Owes Whom?*' in "From Capital flight and Capital Controls in Developing Countries, Ed. G. Epstein Political Economy Research Institute, 2005 "The debt burden forces these countries to divert scarce resources from basic necessities, such as health and education, into debt service. Despite bearing these heavy social costs, African countries cannot keep up with the payment and so they become ever more indebted"; see also Okeke C. N. 'The Debt burden: An African Perspective' 35 Int'l. L. p. 1489 (2001)

<sup>19</sup> Hillman R. A. THE RICHNESS OF CONTRACT LAW 1997 p.32

higher essence of contract law- to allocate risks, distribute wealth and to balance generally the power relations in an economic intercourse?

The duty of courts of law amongst others is to admit to those rules, which will limit the hardship of the weaker party in a legal relation so as to facilitate the ends of justice. The 'law of contracts should also be used as an instrument of distributive justice,'<sup>20</sup> thus, the making, as well as, the application of the rules, should be such that it helps in the distribution of the collective wealth fairly amongst the members of the society.<sup>21</sup> The global society is actually thriving on an arrangement where vast sections of that society are held in a state of perpetual peonage and economic servitude from the fallout of the loan transactions entered into decades ago. When these factors and others become part of the considerations in the Third-World debt issue, the doctrinal weaknesses and flaws in the current approach to resolving the problem would turn out more obvious. This is the challenge and responsibility, which the courts as well as policy makers and sovereign debt managers must face in the coming years.

Contractual rules are therefore a veritable means of examining the Sub-Saharan debt in order to strengthen the case for substantial adjustment, if not, outright cancellation. Much of the circumstances of the loan transactions have been found to be deliberately unfavorable from the onset to the borrowers. There were frenzied and unrestrained lending by mostly commercial banks, many of which were to rogue regimes, and quite naturally, the fact that having ballooned beyond all expectations, full or

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<sup>20</sup> A. T Kronman, *supra*. p. 472

<sup>21</sup> *supra*. p. 472

substantial repayment has proved impossible and a sure recipe for intolerable social hardship.<sup>22</sup> The objection to such lending practices, which can be directly injurious to the borrower, is at the root of the American Community Reinvestment Act, 1989 (CRA) an instructive legislation, which has been seen as concerned with regulating lending in such a manner that it leads or helps to enhance the over-all financial health of the community<sup>23</sup>. Also with regards to Sub-Saharan nations, a pattern had come into place in which contractual relations are systematically imposed from above, without thorough negotiations of the terms, despite the fact that many debtor nations, to the knowledge of the lenders, are ill-equipped to anticipate, or withstand, the consequences of excessive borrowing or wasteful consumption encouraged by the lending.<sup>24</sup> The lenders were instead egged on because of the high profit mark leveraged in the loan contracts in the first place. It is this obvious patronizing situation between the lender and the borrower, from the beginning, which is, a contractual relation of glaringly unequal powers, which is at the very core of the Sub-Saharan debt problem. There is now, as mentioned earlier, an urgency for the review of the existing framework relating to these loan transactions which has created a world, as mentioned earlier, in which a large proportion of it's teeming population live under intense poverty, where a disproportionate part of their available resources

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<sup>22</sup> See Lothian, *supra*; also Ohlin *supra* p. 23

<sup>23</sup> see Marsico R. D. 'Subprime Lending, Predatory Lending, and the Community Reinvestment Act Obligations of Banks' 46 N. Y. L. Sch. L. Rev. 2002-2003, 735 'the three purposes of the CRA: to encourage banks to make more loans in their local communities (and in particular in low and moderate income neighborhoods within their communities; to make sure that the loans meet the credit needs of their communities, ("meet the credit need" meaning meeting both the demand for loans and the needs of the borrower); and to meet the credit needs in a way that is consistent with safe and sound banking practices'

<sup>24</sup> Lothian, *supra*; see also Korobokin R 'Bounded Rationality, Standard Form Contracts, and Unconscionability' 70 U. Chi. L. Rev 2003 & Jacobs J. E. 'The Battle of the Forms: Standard Term Contracts in Comparative Perspective' 1985 34 I.C.L.Q for interesting discussions on standard form contracts of which the loan documents typifies as most of the clauses are never really negotiable.

and fiscal efforts are not for developmental programs, but for servicing a debt that won't go away, but continues to add up yearly.

This article is divided in five parts. In section II, I reviewed the essential rules and doctrines in the law of contract and situating them in the sovereign loan transactions, taking the position further that notwithstanding, one of the parties or a selected domestic law normally applies as most of the consequential litigations have amply demonstrated; this article argues that with the near complete removal of the legal immunity previously enjoyed by sovereigns, domestic rules and practices must be given full reign in this specie of transaction<sup>25</sup>; in section III, I reviewed the negotiation process; the origin, nature and content of the loans in order to demonstrate the contextual weaknesses of the whole lending process as it involves the Sub-Saharan borrowers, also, the place of standard contract format in the transactions; in section IV, I examine the applicability of the 'odious debt doctrine' in combination with other rules to much of the debt situation and in section V, I make my concluding remarks.

## II. APPLICABLE CONTRACT RULES.

### **The contract duty.**

According to Treitel 'Law of Contract' (1987), 'A Contract is an agreement giving rise to obligations which are enforced or recognized by law'. At the heart of Anglo-American jurisprudence is the 'freedom of contract' out of which flows the rule that the courts must give effect to the terms and agreements, which the parties have entered into. This doctrine also has roots

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<sup>25</sup> See generally Sylvester, *supra* 293 & Lothian *supra* 455; see also Odiadi Tony 'Security Enforcement in International Finance' MPJFIL p. 128 (2001)

in the Civil Law rule of *'Pacta sunt servanda'* which has regulated not just domestic legal relations but also the international and transnational dealings as well through the ages. There is, as is generally agreed, a moral duty to keep promises freely entered into<sup>26</sup>. And so, it has been argued that 'a promise is not therefore merely an assurance which one gives to help another, just as it is not merely an expression of a resolution to perform an action. It is indeed to underwrite any endeavor the other party to the transaction may choose to launch'<sup>27</sup>. There is compulsion to act or perform along the lines the promise made, which is what separates a contract from forms of agreements such as non-reciprocal promises, social promises, etc, which the law will typically not hold the promisor bound.

Despite that well-established position in the law of contract, several rules and doctrines known generally as 'excuse rules' have equally evolved to help secure the ends of justice in contractual relations. For above all, the essence of contract, it has been argued, is 'volition, that free exercise of will by parties who are on a relatively equal economic footing and who are brought together in the dynamic market by their needs and desires'.<sup>28</sup> In which case, there is always the presumption of 'equality' between the contracting parties. Several instances therefore exist where some of the promises so made are not considered legally binding, or enforceable, contrary to the expectation that where a party fails to perform he should be liable for breach. And so, a failure to perform is in several circumstances

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<sup>26</sup> Goetz C.J & Scott R.E 'Enforcing Promises: An Examination of the Basis of Contract' 89 Yale L. J. p. 1261 (1979-1980) quoting Pound's Promise or Bargain' 33 Tul. L. Rev 455, 1959

<sup>27</sup> Goetz et al supra note 1 quoting Melden A. 'Rights and Persons 46, 47-54 (1977)

<sup>28</sup> See MURRAY ON CONTRACT 1990 (Murray Jr, JJ. E) p.481

generally excused, leading to a discharge on the contract rather than breach<sup>29</sup>.

Excuse rules of this nature, exist, as part of the functions of law, to facilitate a fair balance in the scheme of things within legal relations by prescribing those instances and situations, which must disable a party from otherwise seeking performance of the terms already agreed upon with the other party in the event of apparent breach. These rules and doctrines under the law are used to give relief to a party, to prevent involuntary hardship, when it is felt that the contract had either not been fair, or insisting on its performance, will be unjust and inequitable. The court of Equity ‘has long history of refusing to enforce oppressive provision of contracts.’<sup>30</sup>

These excuse rules are by no means mutually exclusive. They necessarily inter-phase and reinforce one another, as it were, with much the same effect, when in a contract, the law intervenes to adjust or discharge the parties of their obligation. For example, where can the line be drawn between mistake as to state of affairs and impossibility of performance arising from that state of affairs; or abuse of a fiduciary relationship and undue influence; or duress

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<sup>29</sup> Although some scholars are exploring a framework for contractual liability in the absence of consent Ben- Shahr O. ‘*Contract Without Consent: Exploring a New Basis for Contractual Liability*’ 152 U. Pa. L. Rev. p.1831 (2004)’. When two parties attach different but equally plausible, meanings to their agreed-upon contractual obligation, the absence of consensus would not negate any liability. Instead, under the no-retraction principle, each party should have a right to enforce a contractual obligation according to the meaning intended by the other’ see also an interesting reaction by Mann R. J ‘*Contract only with Consent*’ 152 U. Pa. L. Rev 1873 (2004)

<sup>30</sup> See *Campbell Soup C. v Wentz* 75 Supp. 952 ED. Pa 1948, the court said the contract provisions were too harsh on the weaker party “That equity does not enforce unconscionable bargains is too well established to require elaborate citation”; also, see CHITTY ON CONTRACT ‘In America. Unconscionability is now a well established principle of the law entitling courts to refuse to enforce contracts, or contractual clauses, which are harsh, exorbitant or unconscionable’ p541

and unequal bargaining power? In all these, the excuse rules and doctrines come to have practically the same effect.

### **Immunity conundrum**

The question exists as to the jurisdictional validity of using domestic legal rules to regulate transactions involving sovereigns and sovereign entities. Why should a sovereign submit itself to any domestic jurisdiction in the light of the principle of *par imparem non habet imperium*? This is surely one of the legal developments in the last century. It is more so as a result of the paucity of authorities and absence of jurisprudential clarity on the issue, particularly in the domain of public international law. ‘The law regulating defenses to sovereign loan agreements- be they treaties or contracts- is not as clear as it is for domestic contracts’.<sup>31</sup> The truth though is that, through several statutory enactments by the more dominant states such as the United States of America and much later Britain and Canada<sup>32</sup> the legal rules evolved through the centuries to protect sovereigns such as Sovereign Immunity and Act of State, *rebus sic stantibus* rule, etc have all been whittled down in their legal effect. The grand pronouncements of Chief Justice Marshall in *Schooner Exchange v M’ Faddon*<sup>33</sup> that ‘*this full and absolute territorial jurisdiction being alike the attribute of every sovereign and being incapable of extra territorial power would not seem to contemplate foreign sovereigns nor their rights as it’s objects*’. Or the equally magisterial one by Chief Justice Fuller<sup>34</sup> that ‘*the court of one*

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<sup>31</sup> See Manulala M.M ‘The Legitimacy of Sovereign Debt: A Case Study of Zambia’ S.J.D Dissertation 2001 Univ. of Notre Dame, USA, citing Delaume, Legal Aspects of International Lending

<sup>32</sup> See United States Foreign Sovereign Immunity Act (FISIA) 1976; United Kingdom State Immunity Act, 1978; Canada State Immunity Act, 1982.

<sup>33</sup> 11 US (7 Cranfdt) 116 (1812)

<sup>34</sup> *Underhill v Fernandez* 168 US 250 (1897)

*country cannot sit in judgment on the acts of another done within it's own territory'* has all been drained of legal force<sup>35</sup>. In the case of the act of state doctrine, its resilience continues to manifest as it does feature as a defense in practically every debt litigation involving a sovereign. Often the court is left to laboriously pick its way around it, unable to deny its validity but seeking a justification for its inapplicability in each succeeding case.

In this connection, not even the judicial efforts in cases like *Allied Bank Intn'l V Banco Credito Agricola de Cartago*<sup>36</sup> and *Libra Bank v Bank Nacional de Costa Rica*<sup>37</sup> has been able to endure for long. What came out from both cases, though, is that the '*Act of State*' doctrine was employed as a justification to deny liability by the defendants (sovereign debtors). However despite the largely similar set of facts, within and connecting the same jurisdiction, each of the courts showed disparate considerations on the interpretation and application of the principle.<sup>38</sup> But the doctrine will surely continue to prove its relevance regardless of judicial or policy effort to deny that<sup>39</sup>.

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<sup>35</sup> See Odiadi, for some analysis of the case principles

<sup>36</sup> 06 S.Ct 30 1985; 566 F. Supp. 1440 SDNY 1983

<sup>37</sup> 570 F. Supp. 870 SDNY 1983

<sup>38</sup> Odiadi, 'Security Enforcement in International Finance' supra p. 132

<sup>39</sup> see Diaz O. A 'The Territoriality Inquiry Under The Act of State Doctrine: Continuing the search for an Appropriate application of situs of Debt Rules in International Debt Disputes' 10 ILS.A J Intl & Comp. Law, 2004 'The Act of State Doctrine, thus, is squarely implicated by some of the potential debt litigation that may ensue given the proclivity of debtor nations to intervene the private banking sector to curb the devaluative effects of financial crises on domestic currency. While this measure appears extreme, even mitigated options such as exchange controls raise the same Act of State problems for international creditors'

On the other hand, the Vienna Convention on the Law of Treaties (1969 & 1986)<sup>40</sup> demands that parties to a debt agreement are bound by the legal rule of *pacta sunt servanda* and no state can make an internal law to override the obligations under the Treaty. In effect, for all intents and purposes, Sovereign loan contracts (since those protective doctrines no longer apply) are treated as purely commercial undertakings and several cases have come to settle that position.<sup>41</sup> The parties go into the contract agreed to be bound by the rules of a specified domestic jurisdiction<sup>42</sup>.

a. MISTAKE.

The basis of contract is mutual consent, that is, *consensus ad idem*, without more. If however, the parties conceive of the terms of their engagement differently, then there is no consent, therefore no contract exist that the law can give effect to<sup>43</sup>. In that kind of situation, when parties conceive the terms of the dealings differently, mistake is said to exist. According to Lord Atkin

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<sup>40</sup> International Organisations are considered to be multilateral financial institutions combining both public and private elements in their structure and functions, see note 109 in Munalula supra

<sup>41</sup> See *Rep. of Argentina v Weltover, inc.* 112 S. Ct 2160 (1992); also, *Trendtex Trading Corp v Central Bank of Nigeria*, 1988 1 ALLER 881, 892 per Lord Denning ‘a foreign sovereign has no immunity when it enters into a commercial transaction with a trader; see also, *Texas Trading & Milling Corp v Fed. Rep. of Nigeria* 105 S.Ct 784 1985; also *Thai- Europe Tapioca Svc. Ltd v Govt. of Pakistan*, 1973 ALLER 961

<sup>42</sup> It’s usually New York and London courts, in *Allied Bank supra* ‘The United States has an interest in maintaining New York’s status as one of the foremost commercial centers in the world’; but the evolution of this practice has been on for much of last century ‘Today, the idea that state contracts can be subject to a legal system other than municipal law, and in particular the law of the contracting state, has made considerable progress. Contemporary attempts to insulate, by appropriate stipulations, state contracts, and more generally contracts between international persons and private individuals or entities, from the consequences of municipal law show that a reconsideration of the respective spheres of application of the two systems of law into which the rules of international intercourse are traditionally divided is now in order’ *Delaume R.D ‘The Proper Law of Loans Concluded by International Persons: A Restatement and a Forecast’* 1962 *The Am. J. of Intl Law* p. 63 quoting Mann ‘*The Proper Law of Contracts Concluded by International Persons*’ 21 *Br. Yr. Bk. of Intl Law. Law* 11 (1944)

<sup>43</sup> Although some scholars are exploring a framework for contractual liability in the absence of consent Ben- Shahr O. ‘*Contract Without Consent: Exploring a New Basis for Contractual Liability*’ 152 *U. Pa. L. Rev.* p.1831 (2004)’. When two parties attach different but equally plausible, meanings to their agreed-upon contractual obligation, the absence of consensus would not negate any liability. Instead, under the no-retraction principle, each party should have a right to enforce a contractual obligation according to the meaning intended by the other’ see also an interesting reaction by Mann R. J ‘*Contract only with Consent*’ 152 *U. Pa. L. Rev* 1873 (2004)

‘If mistake operates at all, it operates so as to negative or in some cases nullify consent’<sup>44</sup>. It is to be mentioned that this doctrine is often given a strict interpretation. Yet, when, as in a number of cases, parties operate under a ‘mistaken’ situation it means they have operated at cross-purposes and under such a situation none of the parties is legally speaking obliged to the other in the contract.<sup>45</sup> For example, if in the course of lending transaction between country 'A', and a lending entity, certain facts operated in their minds on which the contract was entered into, which turned out false, *post contractus*, then this mistake as to the *true* state of affairs will necessarily operate to discharge the parties of any liability. The House of Lords in *Bell v Lever Bros., Ltd* was emphatic on the fact that the mistake ‘must relate to something which both must necessarily have accepted in their minds as an essential and integral element of the subject-matter’.<sup>46</sup>

Accordingly, it has been argued in this regard that ‘the loans made to sub-Saharan debtor nations, like all true loans, were made based on the shared assumption that repayment could and would occur. Subsequent developments have proved this assumption false. Under the doctrine of mutual mistake, however, the question is whether the assumption of future ability to repay was false *at the time it was made*. In other words, have these subsequent developments rendered the assumption invalid, or have they merely demonstrated that the assumption was invalid *ab initio*?’<sup>47</sup> A

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<sup>44</sup> See *Bell v Lever Bros. Ltd*, 1932 A.C, quoted in Treitel supra 213

<sup>45</sup> See Ben-Shahar .O ‘Contracts Without Consent: Exploring A New Basis for Contractual Liability 152 U. Pa. L. Rev. 1829 for an interesting discussion of an instance contractual liability may indeed exist where ‘two parties attach different but equally plausible meanings to their agreed upon contractual obligation, the absence consensus would not negate liability’; see also Mann R. J ‘Contracts Only With Consent’ 152 U. Pa. L. Rev. 1873 for an equally interesting counter-point.

<sup>46</sup> supra, p. 235 per Lord Thankerton, quoted in Trietel supra

<sup>47</sup> Sylvester supra 313

distinction will surely lead to somewhat different legal effects, for an assumption that was false when it was made is different from an assumption that became false due to subsequent events. Now, to stretch the argument a little further, if the very premise upon which the contract was entered into turned out to be false, what effect should it have on the contract in question? Logically and by legal reasoning, the contract stands discharged because the substratum of the contract no longer exists; there is nothing else the transaction can stand on. This is trite in common law jurisprudence. The fact that the assumptions turned out false relieves the parties of any further liability under the contract. This very point had been accurately underscored earlier in a celebrated judicial intervention. The court was of the opinion that *‘where parties enter a contract in a state of conscious ignorance of the facts, they are deemed to risk the burden of having the facts turn out to be adverse, within very broad limits...If, by contrast, the parties both mistakenly believe – a fact that later proves untrue, the case is said not to be not one of conscious ignorance but one of mutual mistake.’*<sup>48</sup> That was the rationalization that led the court to adjust the long-term contract in the light of severely changed circumstance.

There were other instances where debtor countries had been previously led to believe that they were getting grants, aids, etc, with no real further or future financial implication only to find out that they had been in error all along. The offer of a loan package connotes the obligation to pay back, but aids, grants, usually an initiative of the donor is easily situated in the context of outright financial assistance, but in several cases it turns out a mistaken

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<sup>48</sup> Aluminum Company of America v Essex Group (ALCOA) 499 F. Supp. 53, quoted by Sylvester supra 313

assumption. ‘Aid in the context of external finance is a misnomer because it gives the impression that it is free. Economic aid is in fact not free as nationals of developing countries are led to believe both by their own governments and by the donor.’<sup>49</sup> In the course of time citizens and even government officials become embarrassed when they find the accrued financial obligations what had been passed on as aid previously.

One of the major mistakes in the Sovereign loan contracts made by both parties case was belief that the Borrower-country’s economy will respond to investment and grow to generate repayment income. However, serious balance of trade deficits which ensued from largely external events regardless of the lending; local currency devaluation as a conditionality of multi-lateral lending against such currencies as the dollar and the sterling and also, ‘*the revolving door*’ scenario in which so called borrowed funds found their way almost immediately back to private bank accounts in lending countries as private external assets of public officials<sup>50</sup> contributed to the structural economic incapacitation of the debtor nations. In effect, the essential premise of the lending, were different from the economic realities and viability of the countries.

Additionally, it is true that the plea of *non est factum* have always had a very restricted application, it nonetheless still exist as an excuse rule of contract which the court can and does in fact invoke depending on the merit and the

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<sup>49</sup> Owasanoye B ‘The Problems of Sub-Saharan African Debt Negotiators’ 1999 UNITAR –DFM Training Manual No 7

<sup>50</sup> Boyce J. K & Ndikumana L supra

particular circumstance of each case<sup>51</sup>. Where, for example, there were poor exchange, documentation or execution of documents in the frenzy of lending and the parties operated on certain mistaken beliefs, for example, reducing to writing what was not their basic intention or contemplations regarding the contract, the plea suffices. *Non est factum* enables a party to avoid liability arising from a document once it is established that the content is in fact not the party's intention, regardless of his signature. Combined with other excuse rules, the plea proves more persuasive as it could then suggest an absence of volition or proper consent, and whatever exists in the documents must have been imposed by the other party.

One of the major lessons of the much-celebrated *Elliott's case*<sup>52</sup> is that no rule of contract should be foreclosed as incapable of new interpretations and applications in the light of ever changing circumstances. The law has oftentimes been shaped by exigencies of situations as judges adapt to new circumstances. Because of the hardship from misapprehension of intentions in several contracts evidenced by documents, this part of the law will profit from less restrictive interpretation.

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<sup>51</sup> See Treitel supra 250 for some elaboration

<sup>52</sup> *Elliott Associate L.P v Banco de la Nacion*, No 96 Civ. 7916 (RSW), 2000 WL 1449862 (S.D.N.Y) Sept. 29, 2000 where the court re-interpreted the *pari passu* clause to also connote a 'ratable payment' by the debtor to all existing creditors irrespective of position; see Buchheit L. C. & Pam J. S 'The Pari Passu Clause in Sovereign Debt Instruments' 2003 Working Paper – 'we believe that the ratable payment interpretation of the *pari passu* clause had an intuitive, almost an emotional appeal to some people because it only seems fair that debtors not discriminate among similarly-situated creditors when faced with financial difficulties.' See, also Eduardo Sandoval 'Sovereign Debt Restructuring: Should we be worried about Elliott? Harv. L. Sch Intn'l Fin. Seminar paper, May 2002 for an interesting discussion of the case.

## b. FIDUCIARY OBLIGATION.

On the whole question of contract, the court often seeks to find out how the parties consented to the transaction. Certain relationships may exist between the contracting parties prior to contract which impacts on the power equation, leading one of the parties to wholly trust in the other to the level of deference, dependence and/or complete submission, oftentimes to the knowledge of the other party, that his entire judgment, is being relied upon, by this other weaker party<sup>53</sup>. In this regard the law has enumerated certain relationships which imposes an obligation on the stronger party the abuse of which will lead to the contract being void. These include trustee/beneficiary, doctor/ patient, solicitor /client, director/corporation, etc<sup>54</sup>

But the categories of relationship are not closed; a colonial power and colony-state enjoys that kind of relationship. The colonies were the contraptions of the colonial masters who carved them out, defined and implanted their socio-political structure and economic configuration according the masters own imperial interests and agenda. Without more an unquestionable fiduciary relationship was fully in place between the two entities. In all such cases, the court will only be concerned with whether one party stands in this relationship to the other with a massive advantage of the sort, which it must have exploited to its own benefit. This would include, but not limited to, its ‘superior information, intellect, or judgment, in the monopoly he enjoys with regard a particular resource, or in his possession of a powerful instrument of violence or a gift for deception. In each of these cases, the fundamental question is whether the promisee should be permitted

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<sup>53</sup> See Flannigan R. ‘The Fiduciary Obligation’ 1989 9 Oxford Jnl. L. S, 3, 286

<sup>54</sup> supra 294

to exploit his advantage to the detriment of the other party, or whether permitting him to do so will deprive the other party of the freedom that is necessary from a libertarian point of view to make his promise truly voluntary and therefore binding'.<sup>55</sup>

As between the Sub-Saharan debtor countries and their creditor lenders (countries and institutions) at the material time of the loan transactions, the relationship founded on colonial heritage confers on the latter superior knowledge, information, expertise, coercive power, etc, as to put the former in no position, comparatively, with regards to voluntariness of its consent, to contract. In the loan transactions, the countries were effectively still under the influence of their previous masters, a relationship which typically embodies unfair persuasion. This (unfair persuasion) may result from the domination of the party exercising the persuasion resulting from a confidential relationship between the parties where the party reposing the trust is not on guard, i.e. he exposed and relies on the other, because he is justified in assuming that the other will act in a manner consistent with his welfare.<sup>56</sup> Throughout the colonial period and years thereafter, the colonies were totally dependent on their colonial masters economically, socially and all practical activities in the international sphere. The bureaucratic set-up during and after, was such that at from the middle to the upper levels key functionaries were made-up of officials of the colonizing country as advisors and decision makers. The erstwhile masters entered into several treaties on behalf of most colonies. Except in a few isolated instances, the colonies had no reason not to yield to, or be wholly dependent upon the dominant

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<sup>55</sup> Kronman supra 480

<sup>56</sup> MURRAY ON CONTRACT supra p.472

imperial entity. That trust extended to the international banking and other lending institutions that offered credit from the colonial masters and their allies. The fiduciary relationship was very much of the highest degree and without reservation.

An analysis of this relationship demonstrates how the colonial masters and the lending institutions operating in the arrangement had an advantage which ‘transmits into a form of relative contracting *power*, which that other (dominant) party either (a) consciously and affirmatively employs to secure the contractual assent of the disadvantaged party- a decidedly active process (of exploitation); or (b) knowingly, or with reason to know, desist from taking such positive steps for the benefit of the disadvantaged party as would have been necessary to correct the power imbalance existing between them- a comparatively passive process (of exploitation).<sup>57</sup> Abuse of fiduciary duty owed can be seen in conducts that manifests in utter indifference to the obvious conditions or situation of the other (weaker) party. This embodies, or can be interpreted to mean, unjust enrichment which ‘signifies the failure of the government, bank or industrial, to temper its interest in the obligation by respect or concern for the parties to whom it owes a fiduciary responsibility. Such violations of fiduciary responsibility can take many forms: from a government’s decision to undertake a series financial obligations compromising future social investment programs without any corresponding structural gain for the majority of the citizens; to the willingness to pay exorbitant fees to international banks or financial

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<sup>57</sup> Bigwood R ‘Undue Influence: ‘Impaired Consent’ or ‘Wicked Exploitation’ 1996 16 Oxford J. L. S 3, 508; see also Marsico, *supra*, for some discussion of the dangers in predatory lending to communities.

consultants in a setting of widespread poverty and domestic austerity measures<sup>58</sup>

Much of these loan contracts are already several decades old, so even today while the colonial powers are still very much paternalistic and imperious in their relationship and dealings with their previous colonies, e.g. France and Francophone Africa and Britain and Anglophone- Africa as well as the World Bank and International Monetary Fund – IMF working on the same pedestal with these powers, the situation was much more in the colonial and immediate post –colonial years. The situation may have admittedly started changing in recent years, nonetheless, a court, if an analogy is appropriate here, cannot refuse to void a contract entered into by a minor, by the mere reason that having attained majority subsequently, he should be in a position to fulfill his obligation.

### c. UNEQUAL BARGAINING POWER / INCAPACITY

When parties enter a contract, the law is often eager to know whether they did their bargain on a balance of power, so to speak, leading to the other party having an unfair advantage. ‘Inequality’ of bargaining power as it is sometimes called can mean ‘ignorance, vulnerability to persuasion, desperate need, lack of bargaining skill, or simply lack of influence in the market place’.<sup>59</sup> In a leading case<sup>60</sup> Lord Denning conceived of it as a

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<sup>58</sup> Lothian supra, 465.

<sup>59</sup> Beale H Oxf. Jnl. L. Stud. (1986) 123

<sup>60</sup> Lloyds Bank Ltd. v Bundy 1975, QB 326 cited by Beale supra, see also National Westminster Bank plc v Morgan, 1985 1 All ER per Denning ‘The English Law gives relief to one who without independent advice enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own deed or desires, or by his own ignorance or infirmity, coupled with undue influence or pressures brought to bear on him by or for the benefit of the other’

person ‘entering a contract on terms which are very unfair or for a consideration which is grossly inadequate’.<sup>61</sup> Also, it has been argued that to embody some measure of unconscionability ‘the bargain is infected with something more than substantive unfairness. It is typically mixed with an absence of bargaining ability that does not fall to the level of incapacity or with an abuse of the bargaining process that does not rise to the level of misrepresentation, duress or undue influence’<sup>62</sup> In general, the requirement of the law here is that one party must have knowingly taken advantage of the other weaker position and is exploited for money either on the basis of the others ignorance, lack of advise, inexperience, trust, poor bargaining skills, etc<sup>63</sup>.

Most Sub-Saharan countries lacked the necessary skills, information, and expertise to have participated effectively in the loan transactions. They trusted and relied upon the fair guidance and judgment of the lenders. The lenders being skilled and vast in the workings of international finance and capitalist system had better capacity to project and anticipate likely future scenarios, which their borrower counterpart never had. The lenders were at all material times operating in a position of superiority and unequalled power, which they maximally exploited to their advantage. First, they considered the lending to be high risk and gave out credit on unreasonably high premium; second, the lenders charged and included all manner of fees- administrative, agency, incidental, transfer, consolidation, etc- which all but further compounded the loan facilities; third, they used their superior

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<sup>61</sup> See Beale *supra*, 123

<sup>62</sup> Farnsworth (CONTRACT) cited by Sylvester *supra* 302

<sup>63</sup> Beale *supra* p. 128

position and knowledge to insert various clauses, warranties, representations, etc which left the borrowers completely and effectively divested of any protection which the law typically would have provided; fourth, amongst other reasons, they held complete control of the credit arrangements and dictated the tone and content of the entire transactions by denying the borrowers the capacity and opportunity of choice in the matter.

#### d. IMPOSSIBILITY OF PERFORMANCE

Of all the excuse rules of contract, impossibility of performance stands apart as it deals with the failure of performance by one of the parties. It has its roots in the civil law maxim *impossibilium nulla est*- impossibility nullifies all obligation. Yet, as with the other rules, impossibility of performance is not without a fair amount of doctrinal dispute as to its exact ambit in relation to similar concepts like frustration, *force majeure*, impracticability, etc. But it can be argued, and rightly so, that the differentiations in meanings between each and every one of the terms does not really matter, if as it does in fact suggest, such enterprise is an exercise in mere nomenclatural exposition<sup>64</sup>. The truth being that, reduced to its bare conceptualizations, the results are the same; which is, the excuse *not to perform the contractual obligation* by the party. Impossibility is the rubric used when the carrying out of a promise is no longer physically possible and ‘frustration of purpose’ occurs when performance of the promise is physically possible but the underlying purpose of the bargain is no longer attainable while impracticability means that though performance is possible, underlying

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<sup>64</sup> *ibid*, 87, reviewing texts on Contract viz. Corbin, A. L., Williston dealing with Impossibility, Frustration, etc

purpose achievable but due to an unexpected event enforcement of the promise will entail a much higher cost than contemplated originally<sup>65</sup>

Simply put, impossibility of performance is that situation when certain events come into play, which renders the fulfillment of the contractual obligations impracticable. When an event or a contingency occurs subsequent to contract formation but prior to its performance, rendering that performance impracticable, performance is said to be excused and the contract is discharged.<sup>66</sup> This rule of law is based on the fact that parties had certain specific circumstances in mind while making their contract, which was upset by a contingency whose nonexistence was a basic assumption of the parties with the result that obligations under the contract would be dispensed with or in the alternative modified in the light of the altered circumstances.<sup>67</sup> A statutory definition of this rule has been provided in Section 261 of the American Restatement (Second) of Contracts, it states that *'When after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary'*

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<sup>65</sup> *ibid*, 87, reviewing texts on Contract viz. Corbin, A. L., Williston dealing with Impossibility, Frustration, etc

<sup>66</sup> Walter *supra* citing Farnsworth E. CONTRACTS 9.5-9.9 (1982); Calamari J & Perillo J CONTRACTS 476-515 (2<sup>nd</sup> ed. 1977) Berman 'Excuse for Non-performance in the Light of Contract Practices in International trade' 63 Colum. L. Rev. 1413 (1963) Birmingham 'A Second Look at the Suez Canal Cases: Excuse for Nonperformance of Contractual Obligation in the Light of Economic Theory' 20 Hastings L.J 1393 (1969)

<sup>67</sup> *ibid*

None of the excuse rules of contract best captures the facts of the situation as it relates to the Sub-Saharan debt as much as the impossibility/impracticability doctrines. It must be mentioned that despite the rational basis of this rule the courts have been in the main very circumspect in applying it to contract cases. A number of cases<sup>68</sup> demonstrate the extant nature and ample judicial support of the rule. But it is in the case *Aluminum Co. of America v Essex Group*<sup>69</sup> in a sense, the *locus classicus* on the point, that we see the expansive jurisprudence that sought to show that the court can, in certain circumstances, adjust an existing contract for the parties and walk the tight rope of avoiding outright discharge of obligations, arguably because of the quantum of the res in issue, in place of some compromise arrangement that should serve the ends of justice in the light of the new reality. For example, as the argument, goes ‘rather than simply allowing avoidance of performance, some have proposed a more flexible right to withhold performance pending modification of the original contract to reflect a sharing of the benefits and burdens generated by the disruptive event’<sup>70</sup>. But of greater interest here is the fact that the parameters of equity, fairness and expediency must have guided the court in reaching the landmark decision and set a radical judicial precedent in the process.

Criticism of this form of intervention has been in the direction that the court by so doing can introduce uncertainty in otherwise settled expectations of the parties; that, at any rate, the court is ill equipped to provide contractual

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<sup>68</sup> See *Taylor v Caldwell* 1863 3 AB. & S 826, 836; *Krell v Henry* 1903 2 K.B. 740, B; *British Movietonews Ltd. v London and District Cinemas* 1952 A.C 166

<sup>69</sup> *supra* 499 F. Supp 53 (WD. Pa. 1980)

<sup>70</sup> Gillette C. P. ‘Commercial Rationality and the Duty to Adjust Long Term Contracts’ 69 Minn. L. Rev. 521, 522 cited by Sylvester J. H *supra* 318, but this is an argument that tries to strike a fair balance between two competing interests.

terms for the parties as it cannot objectively conceive their intentions. In the normal run of the rule, impossibility or impracticability of performance leads to outright discharge of contractual liability<sup>71</sup> but the court in the ALCOA case was a bit reluctant to go so far.

### III. LOAN NEGOTIATION AND DEBT

#### **The Unregulated Field**

Loan negotiation as the term suggest is the process of acquiring credit or fund by one party from another based on a body of terms and conditions specifying various issues. This is what in sum is regarded as the loan agreement. The lender agrees to provide the fund on the basis of some conditions and the borrower takes the fund after agreeing to those conditions, usually, amount, disbursement pattern, tenure and date of repayment, interest on the loan, penalties, etc. This is far from being a straightforward process as every strategy to maximize self-interest is often the case. ‘Borrowers and lenders are natural enemies, more likely to conform to economic predictions of self-interest than human beings in most other relationships. Before the loan is made, the vulnerabilities lie in the borrowers side. The borrower needs the credit that the lender remains free to refuse. Once the loan closes, however, the vulnerability shifts.’<sup>72</sup> The parties prior

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<sup>71</sup> See Restatement Contract-2d s.261, -frustration, impossibility, impracticability leads to discharge; if it existed before the contract, then there was no duty, s- 266

<sup>72</sup> Bratton & Gulati supra 10; see also Siddiqi O. S. some Critical Issues in Negotiations and Legal Drafting’ p 44 in SOVEREIGN BORROWERS supra ‘In a sense, a Eurocurrency loan agreement, being geared primarily to provide safeguards from the point of view of lenders, is an unequal contract which

and during the process have certain expectations in mind, which ordinarily should bring them to a round table to avoid reducing the process to a contest of wits. At the international level the process is much the same. 'Every subsisting debt obligation of developing countries is founded on a loan contract otherwise popularly known as the international loan agreement. This covers collateral, bilateral and multilateral loan agreement irrespective of the political consideration which led to the conclusion of the agreement.'<sup>73</sup> This underscores the fundamental importance of the loan document, but above all the, the negotiations of the parties, as a process preceding the loan agreement.

A postscript on the external debt problem of most Sub-Saharan countries reveals that this has been the most critical stage where due to lack of technical knowledge, incompetence, over-reliance on lender initiatives and presumed goodwill, etc, the abuse of the loan process began to take place. The Sub-Saharan countries were essentially 'victims of aggressive salesmanship in the days when they were visited by hordes of foreign bankers with brief cases full of petro-dollars. Sovereign governments do not automatically have superior bargaining power over commercial entities. They too can be subject to tremendous pressure based on lack of expertise, urgent domestic need and the unavailability of meaningful alternatives'.<sup>74</sup> Lending is a serious business which even though much of it can be left to the market mechanism, strict regulation is always required to effect some

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appears to offer little opportunity to the borrowers lawyers to take the initiative in promoting the interests of the borrower. It is unlikely that even under European legal system, which take into account the degree of blameworthiness in determining a breach of contract could be other than to protect the lenders investment'

<sup>73</sup> Owasanoye supra UNITAR Manual

<sup>74</sup> Sylvester, supra 290 discussing Konz P. 'The Third World Debt Crisis' 12 Hastings Intl & Com. L. Rev. 527, 528 (1989)

control. As one commentator offered ‘sub-prime loans are loans available on more expensive terms to borrowers who have weak credit histories or repayment abilities. The growth in a pernicious sub-category of subprime lending, known as predatory lending. *Predatory loans* are characterized as loans with abusive terms, deceptive practices, and the inability of a borrower to repay the loan. The growth of subprime and predatory lending has prompted an important question about the Community Reinvestment Act (CRA): What is the relationship between subprime and predatory lending and a bank’s obligation under the CRA to meet the credit needs of its community?’ That engaging question has been answered earlier on<sup>75</sup>. It needs be mentioned that there are four federal regulatory agencies responsible for enforcing the CRA; the Comptroller of the Currency of the national banks; the Board of Governors of the Federal Reserve System for state chartered banks that are members of the Federal Reserve System; the Federal Deposit Insurance Corporation for state-chartered banks that are not members of the Federal Reserve System; and the Office of the Thrift Supervision for savings associations<sup>76</sup>. However, this leads to the further question: If domestic banking practices can be seen as needing some control in order not to be injurious to the financial health of the community, what insulates sovereign lenders from the financial injuries that international bankers and lenders can bring upon them, what agencies if not treaties replicating the role of the C.R.A on, for example banking cartels like the London Club?

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<sup>75</sup> Marsico R. D supra, at n.21, to enhance the financial health of the community.

<sup>76</sup> *ibid*

Sovereign creditors are increasingly becoming bondholders<sup>77</sup> as against bankers and other lenders, but that is only a recent trend. The bulk of the entire debt portfolio off Sub-Saharan debt which sum is in the neighborhood of \$250billion<sup>78</sup> is owed to the official lenders of the Paris Club and a consortia of banks and private lenders of the London Club. The Eurodollar lending was typically unregulated and the short-term use of the LIBOR (London Inter Bank Offer Rates) put the cost of funds unreasonably high and in that sense, systematically led to the increase in the debt portfolio of the borrowers. Unregulated predatory lending to Sub-Saharan nations, as argued earlier, led to some of the problems currently experienced in the debt issue.

### **Guided Negotiation.**

The fact that most sovereign loan agreements are based on standard form contract made the Sub-Saharan negotiators captive to already set clauses, all of which were, *a priori*, imposed, there being no room for negotiation as earlier mentioned. To be sure, several reasons have been advanced to underscore the importance of standard clauses as used currently in international loan agreement which includes a preclusion of lengthy negotiation, standardization of the contract documents, minimization of cost<sup>79</sup>, etc. These reasons, however, pale into insignificance against the fact that choice is generally denied the borrower from the onset, all the more so,

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<sup>77</sup> Choi S. J & Gulati M 'Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Bonds' 2004 G.J.I. L. p11

<sup>78</sup> Estimated figure, but the amount was stated to be \$209billion as at 2001 by the study of Boyce & Ndikumana supra p.1

<sup>79</sup> See Owasanoye, supra; see also Bradlow INTERNATIONAL BORROWING supra & Siddiqi SOVEREIGN BORROWERS supra, for more discussions.

for borrowers with the string of handicaps that the Sub-Saharan countries had several decades ago when much of the negotiations and contracts took place. The borrower's peculiar needs and circumstance were effectively precluded from the process. The result was that in the loan contracts, Sub-Saharan countries were completely stripped of potential as an effective contracting party. They were, thus, easily railroaded into very difficult positions in the transaction, the sort of which, as already discussed, regarding the C.R.A and BOFIA legislations, are subject to strict legal control in most jurisdictions. But more to the point, the fact that Sub-Saharan loan negotiators, amongst others, (a). lacked the technical financial expertise, knowledge and skills, (b). had no back-up institutions with ample profile on international finance that could provide information and data for informed choice (c). had poor documentation and lack of coordination of the lending and borrowing, (d). had also, the vulnerability of officials to inducements and gratifications, to contend with, all of which further compounded the debt situation for the countries.

A loan agreement can be made of a document from anywhere between fifty to two hundred pages. In the case of Eurodollar lending, the lead bank prepares the document, endorsed by the others and presented to the borrower-nation for perusal and signature. It is usually a tome filled with several clauses evolved and standardized by the creditors from years of domestic, transnational and international lending. 'The Eurodollar loan agreement often seem too one-sided, containing inordinate protection for the banks'<sup>80</sup> It was basically a take-it-or-leave-it situation for the borrowers. With some skill and expertise a borrower's familiar with the contents and

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<sup>80</sup> UNITAR Manual supra 'The Borrowing Process'

purport of each clause could go through the document sure to decide one way or another. But not so the Sub-Saharan negotiators nor their foreign consultants (usually a condition for the loan transactions prescribed by lenders). Such consultants were no doubt professional in their dealings, but more often than not, they only had fleeting understanding of the local situations of the borrower-country nor their vulnerability to external influences as rudimentary national economies. These limitations plus the framing of the contracts for profit maximization by the lenders, set the stage, in the subsequent years, for the debt complications, as the both the expectations of the creditors and the borrowers were fundamentally unrealistic from the onset.

The jurisprudence of these species of contract, based on a standard format, highlights their limitations as contract, *qua* contract using equitable parameters. Their efficiency, in some sense, in the market place may have won some admirers; they may also have exemplified, some aspects of the ‘freedom of contract’ policy. Yet many scholars and jurists have queried the ‘standard form contract’ and its bold assault on the very foundation of the contract process: bargain. In insurance, in transportation, distribution and retail of goods, banking, etc, standardized contract, as the name suggests, have come to operate, as the one template on which every individual transaction must be made. As argued sometime ago ‘standard contracts are typically used by enterprises with strong bargaining power. The weaker party in need of the goods or services is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intentions is but a subjection more or less voluntary

to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way<sup>81</sup>. Also, while the traditionally bargained out document was in itself evidence of the understanding, the same cannot be said of the standard form,<sup>82</sup> which is a document whose entire content and purpose is the wish of one party imposed on the other party without real choice. From the low-end retail shop through the company- to- person contract of insurance to the high volume loan syndication/transactions, contract have become a one sided affair. The superior power position of one party in relation to the other, more often than not, determines, whether a particular contract is form-driven or of the dickered type. The powerful party dictates the tone and content of the contracting process and in that sense, creates a private law for the contract to which the weaker party is invariably bound<sup>83</sup>. If, for example, the Wal-Mart chain is contracting with McDonalds or Coca Cola Inc. for some supplies or something, it will not present a written take-it-or-leave-it document to the other party. The balance of power will compel it to seat down with the other party to agree on each of the terms and conditions of the contract. It is no surprise therefore that due to their unarguably weak position, loan contract terms put before Sub-Saharan nations by the lending institutions and countries were mostly standard form-based instead of being one of thorough negotiation and bargain.

The formal validity, doctrinal consistency or otherwise, of standardized contracts, is not the exact concern here, as that much had been very ably

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<sup>81</sup> Kessler F. 'Contracts of Adhesion- Some Thoughts about Freedom of Contract' 43 Col. L. Rev. (1943)

<sup>82</sup> see Gluck G. 'Standard Form Contract: The Contract Theory Reconsidered' 1979 28 I.C.L.Q p. 74

<sup>83</sup> see Slawson, supra; also, Korobkin, supra p. 1204

examined by generations of eminent scholars.<sup>84</sup> Part of that examination has also helped to establish the fact that certain terms and clauses have acquired, from long usage something of a normative and stabilizing quality on the parties as they now deal in several aspects of sovereign loan contracts and bonds.<sup>85</sup> What is of key interest here is the inherent inequality wrought upon the market place where one party was denied the opportunity of effective bargain and informed choice and in consequence, a pattern of economic dependency came into being that has characterized the global economy today. As is so well put by a commentator ‘Freedom of contract demands freedom *from* contract, and just as no party has the ability to force another into a contract, no party should have the ability to force another party to accept specific terms’<sup>86</sup> It is no surprise that the courts would detour considerably from the earlier judicial thrust embodied in the classic statement of Sir Jessel, M.R that the public policy ought to be that men of full age and competent understanding should be free to contract as they choose and the court should not interfere in their freedom of contract.<sup>87</sup>

There has therefore been some judicial and legislative effort to rein in the ‘unconscionable’ effect of standard form contracts, despite the understandable attraction of the idea of freedom of contract. The equitable

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<sup>84</sup> See for example, Kessler, *supra*, Gluck, *supra*; Korobkin R. ‘Bounded Rationality, Standard Form Contracts, and Unconscionability’ 2003 70 U. Chi. L. Rev; Rakoff T. D ‘Contracts of Adhesion: An Essay in Reconstruction’ 1983 96 Hav. L. Rev; Slawson D. W. ‘The New Meaning of Contract: The Transformation of Contract Law by Standard Forms’ 46 U. Pitt. L. Rev. (1984-1985); Meyer A. W; ‘Contracts of Adhesion and the Doctrine of Fundamental Breach’ 1964 50 V. L. R,

<sup>85</sup> see generally Choi S.J & Gulati M ‘Innovations in Boilerplate Contracts: An Empirical Examination of Sovereign Bond’ 2004 GILJ, they argue for example that ‘Parties may not choose a term that maximizes the value of their contract, instead choosing a suboptimal but standardized term subject to network externalities. With standardized levels are lower and the resulting bond contracts are easy for the market to price, thereby reducing contracting costs’

<sup>86</sup> Korobkin, *supra*

<sup>87</sup> Printing & Numerical Registering Co. v Sampson L. R (1875) 19 Eq. Cases 462, p. 465

doctrine of ‘unconscionability’ is contained in Uniform Commercial Code s-2-302<sup>88</sup>, although, not really defined, the statute has left what is ‘unconscionable’ in each case to the discretion of the courts. And so, where the court perceives unfairness in the bargaining process and one-sidedness in the formulation of the contract terms, it has often invoked the excuse rules of ‘procedural unconscionability’ and ‘substantive unconscionability’ respectively, to deny enforcement of the contract<sup>89</sup>. A further analysis of this all-important doctrine states that the ‘procedural aspect (can be) manifested by .. “oppression” which refers to an inequality in the bargaining power resulting in no meaningful choice for the weaker party.... “Substantive” unconscionability, on the other hand, refers to an overtly harsh allocation of risks or costs which is not justified by the circumstances under which the contract was made... both procedural and substantive unconscionability must be present before a contract or clause will be held unenforceable’.<sup>90</sup> The courts evolved the rules of fundamental breach<sup>91</sup>- as a device for protecting consumers, but not restricted to consumer cases and when applied to commercial transactions negotiated at arm’s length it was liable to upset perfectly fair bargains for the reasonable allocation of contractual risk<sup>92</sup>; inequality of bargaining power<sup>93</sup>, *contra proferentem rule*<sup>94</sup>—which

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<sup>88</sup> provides that ‘If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may limit the application of any unconscionable clause as to avoid any unconscionable result’

<sup>89</sup> see Korobkin, *supra*, p.1256

<sup>90</sup> see SAMUEL WILLISTON, 15 WILLISTON ON CONTRACT, 3ED. (1972) quoted by Sylvester, *supra*, p. 302

<sup>91</sup> see *Suisee Atlantique Societe d’ Armement Maritime S.A v Rotterdamsche Kolen Centrale* 1967 1 A.C 361; *Photo Production Ltd. v Securicor Transport Ltd* 1980 A.C

<sup>92</sup> see Trietel, p.175

<sup>93</sup> see *Fujimoto v Au*, 95 Hawaii 116, 19 P3d 699, 739 (2001), *Shell Oil Co*, 307 A2d ‘where there is grossly disproportionate bargaining power... courts will not hesitate to declare void as against public policy grossly unfair contractual provisions’; *Llyod’s Bank Ltd. v Bundy*, 1974 3 WLR, Clifford Davis *Management Ltd. v W.E.A Records et al* 1975 1 WLR 61 CA per Lord Reid ‘In order to to determine whether this case is one in which that power ought to be exercised, what your Lordships have in fact been

prescribes strict construction of exemption clauses in a contract seeking to limit the liability of the party wishing to rely on it<sup>95</sup>; unreasonableness, etc, to subject to some control, such one sided contracts. What all of these demonstrates is judicial and legislative vigilance in closely supervising the domain of contract, but as much as these efforts has been deployed in the domestic jurisdiction, such has not been the case in international loan contracts.

The loan documents to Sub-Saharan borrower nations is full of clauses- terms and warranties drafted by lenders to limit their obligation as much as possible while imposing most of the risks on the borrowers. The lenders all too often provide an excuse from the primary obligation of the contract- to lend monies, or for accelerating the borrowers obligations where there are disruptions in the loans economic, political and financial environment. They also allow banks to modify key parameters of the loan agreement, such as, interest rates, repayment schedules, loan fees, etc in response to a changing environment. Other contractual devices are included in the loan contract that enables lenders terminate their obligation if they suspect a changing circumstance. Here they include yield protection clause to keep the profit high regardless, they can call for repayment before majority, if they consider continuing the loan contract no longer suitable to their commercial objective.

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doing is to assess the relative bargaining power of the publisher and the songwriter at the time the contract was made and to decide whether the publisher had used his superior bargaining power to exact from the songwriter promises that were unfairly onerous to him'. Quoted by Gluck, *supra* n. 30, p. 77

<sup>94</sup> see *New Castle County v National Union Fire Insurance Co. of Pittsburgh*, 243 F3d 744, 750; also, *Wallis, Son & Wells v Pratt & Hayes* 1911 A.C 394

<sup>95</sup> see Trietel, p. 171

The loan agreements never contain any such sweeping escape and favorable clauses for the borrower.<sup>96</sup>

In conclusion, therefore, the international loan contract imposed on the borrowers, the Sub-Saharan African nations, very “oppressive” and “unconscionable” conditions the kind of which cannot survive a legal validity test using the equitable doctrines. They offered no choice nor proper bargain, the power differential was so much in terms of political and economic position, knowledge of international financial environment and also, transnational legal issues that would govern the transaction in the event of any dispute. The compulsion in the light of the excuse rules earlier discussed as well as one sidedness of the transactions is to move the courts more in line with the active application of these rules to invalidate the contracts<sup>97</sup>.

### **‘Odious Debt’ doctrine to the rescue.**

Whenever the issue of a particular debt comes up for consideration, it is usual to try to establish the legitimacy of the debt itself. This is so because debt creates a ‘legal obligation upon a certain subject of law, called the debtor, to do or refrain from doing something, to effect a certain performance, for the benefit of a certain party called the creditor’<sup>98</sup> and because debt is viewed as something that “falls within the category of personal obligations” its transmission to, or inheritance by, another entity, is

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<sup>96</sup> see for more discussion Walde T. ‘The Sanctity of Debt and Insolvent countries: Defenses of Debtors in International Loan Agreements’ in Reiner et al LATIN AMERICAN SOVEREIGN DEBT MANAGEMENT 1990 p. 121

<sup>97</sup> see note 30, *infra*

<sup>98</sup> Ninth Report on Succession of States in Respect of Matters Other Than Treaties, quoted by Menon P.K ‘The Succession of States and the Problem of State Debts’ (1986) 6 Boston Col. Thirdworld L. J. 111

subject to added scrutiny. In the area of sovereign debt one parameter for this test of ‘legal’ validity, as it were, has been the doctrine of ‘odious debt’. Odious debts, are, simply put, those debts which arose, not for, but often times, against the peoples interest. The classic definition of International Law Scholar Alexander Sack totally encapsulates the basis and rationale of the doctrine. According to him –

*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. 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 a State debts must be incurred, and proceeds used, for the needs and in the interest of the state<sup>99</sup>.*

An analysis of this part of the thesis by Sack reveals the following, a. that a debt by the state does exist in fact, b. that the debt was incurred for purposes other than the interest of the State by the ruler or regime at the material time, c. that, not being in the interest of the State, the debt runs and dies with the rulers tenure. These are very compelling yardsticks and they would prove very useful for evaluating much of the sovereign debt in issue today, to see whether they can pass these tests enunciated long before the decades of the sixties and seventies when much of the Third world borrowings began. In elaborating the doctrine, Sack stated further, that-

*Odious debts, contracted and utilized for purposes which, to the lenders’ knowledge, are contrary to the needs and 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 personal debts of the ruler. Even if one despotic regime is overthrown by another, which is as despotic and*

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<sup>99</sup> ‘Les effets de transferts des Etats sur leur publiques et autres obligations financieres’ Paris, 1927, quoted in King J. ‘The Doctrine of Odious Debt under International Law: Definition, Evidence and Issues Concerning Application’ CISDL Working Paper ADVANCING THE ODIIOUS DEBT DOCTRINE, 2003

*which does not follow the will of the people, the odious debts contracted by the fallen remain personal and are not binding on the new regime*<sup>100</sup>.

Again, stated in the doctrine according to Sack is that lending to a regime which to the knowledge of the lender uses the funds for purposes other than the interest of the state constitutes a hostile act against the people and forms a reasonable and legitimate basis why the debt should be repudiated. Three conditions are, thus, generally, identifiable. First, the debt has not received the general consent of the people; second, the loan were contracted and the funds spent in a manner that is contrary to the interest of the people; and third, that the lender was aware of these facts in the course of the lending.<sup>101</sup>

Equally so, three categories of ‘odious debt’ has been articulated, and these are (1) *Hostile debts*- those contracted in an aggressive manner against the interest of the State, (2) *War debts*- those incurred by the losing State during war or when war was imminent, and (3) *Third-world debt*- generally those debts by dictators, reckless borrowings, not in the interest of the people.<sup>102</sup>

If these be the rules for identifying odious debt for the purpose of invalidation, the question then is, what is the place of the doctrine in International Law, how successful or otherwise has been its invocation so far in sovereign debt litigations as a defense? According to a commentator, the ‘doctrine is often cited for the proposition that the countries emerging from dictatorships can repudiate their debts, because those debts came about without the consent of the people. But since its invention and throughout the past century- rife with oppressive regimes, revolutions, reckless borrowings and debt defaults- the doctrine has languished in near complete disuse save

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<sup>100</sup> *ibid*

<sup>101</sup> *ibid*

<sup>102</sup> see O’Connell D. P. STATE SUCCESSION IN MUNICIPAL AND INTERNATIONAL LAW, 1967, quoted by King *supra*

for an occasional NGO campaign or a bout of parliamentary rhetoric.’<sup>103</sup>  
That indeed has been much the fate of the doctrine, sustained in public consciousness through the activities of Jubilee 2000 and very relentless activists.<sup>104</sup>

The repudiation of debt under the ‘odious debt’ doctrine touches upon core aspects of the theory of ‘state succession’ in International Law. It occurs when one regime takes over from an earlier one in a radical manner, or when ‘there is a definitive replacement of one state by another in respect of sovereignty over a given territory in conformity with international law’<sup>105</sup>. When this happens the succeeding States is expected to assume all existing obligations of the previous state entity, that is, the burdens and benefits of the entity. Some would like to see a distinction between the succession of a state and the succession of a regime, that, if boundaries are not redrawn, the state remains and whatever might have transpired can be seen as an internal policy matter of that state not affecting a third party.<sup>106</sup> But that is just one school of thought whose weakness is that it seeks not to recognize the reality and practical effect of changed circumstances within a state- *rebus sic stantibus*- affecting all its external relationships. For that reason others have also argued, stretching the ‘succession’ further to cover state and regime change since the same effect come into being in both cases. For such school of thought, if a new state or regime emerges from a radical process, a revolution as it were, to replace an existing state, then that new state is under

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<sup>103</sup> Gelpern, *supra* 393

<sup>104</sup> see <http://www.odiousdebts.org/odiousdebts/index> and Patricia Adams; see also, Adams. P, ODIIOUS DEBT, LOOSE LENDING, CORRUPTION AND THE THIRD WORLD’S ENVIRONMENTAL LEGACY, 1991

<sup>105</sup> Brownlie I. PRINCIPLES OF INTERNATIONAL LAW (1995) 654

<sup>106</sup> see *Rep. of Peru v Dreyfus Bros. & Co* (1888) 38 L. R.

no duty to recognize treaties and obligations such as debts of the ‘odious’ type, of the previous state or regime.

The position of the formers’ was well stated in a celebrated case that ‘changes in the government or the internal policy of the state do not as a rule affect its position in International Law. A monarchy may be transformed into a republic, or a republic into a monarchy, absolute principles may be substituted for constitutional or the reverse; but though the government changes, the nation remains with rights and obligations unimpaired’.<sup>107</sup> For the latter school views the matter quite differently, being the ‘opposing doctrine, which basically denied the transmission of rights obligations and property interests between the predecessor and successor sovereigns, arose in the heyday of positivism in the nineteenth century. It manifested itself again with the rise of decolonisation process in the form of the ‘clean slate’ principle, under which new states acquired sovereignty free from incumbrances created by the previous sovereign.’<sup>108</sup> It is within the context of these divergent opinions that we can begin to analyze the place of odious debt doctrine in sovereign debt obligations in Sub-Saharan Africa.

Across Sub-Saharan Africa, and indeed much of the Third-World, despotic and dictatorial regimes occupied the political landscape in the sixties, seventies, eighties and even nineties. The regimes of Idi Amin Dada, Mobutu Sese Seko, Emperor Jean Bedel Bokassa, Ferdinand Marcos,

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<sup>107</sup> *Lehigh Valley R. Co. v State of Russia*, 21 F 2d 396, 401 (2d Cir. 1927) (Manton J. opinion) (quoting Moore, DIGEST OF INTERNATIONAL LAW), also quoted in *Jackson v Peoples Republic of China*, 550 F. Supp, 872 (N.D Ala1981) in Feinerman, *supra*

<sup>108</sup> Black T INTERNATIONAL LAW 1997 P. 675; see Stanic A. ‘Financial Aspects of State Succession: The case of Yugoslavia’ (2001) 12 E.J.I.L for an interesting discussion of the complexities in the successor states of the old Yugoslavia

Surhato, Augustino Pinochet, Sani Abacha, etc exemplified the worst form of ruler-ship against the people. A case for repudiation or cancellation of debts based on the odious doctrine by these countries fits all the parameters enunciated so far. The fact that there has not been success cannot be attributed to the point that the doctrine lacks a sufficiently compelling legal character, instead, a more plausible reason would be that in a world of ‘hegemonic international law’<sup>109</sup> the odious debt doctrine is at the mercy of the ‘hegemons’ preferences in the global scheme of things. What are the hegemon’s own strategic interests and how far would it go in pursuit of it? These considerations have more determining effect on the potency of the doctrine than what may be its ‘legal character’. The lesson then of the Iraqi case and its sweeping success in having nearly all its external debt- over a hundred billion dollars- cancelled as being ‘odious’ having arisen under the Saddam Hussein regime, cannot be lost on the commentators in this field. It was to take just the active support of the United States of America to swing the case in favour of Iraq. Hegemonic International Law, surely has a normative quality to it, one that shapes *de facto* the practice of international law and ‘even publicists .... acknowledged the role that power, and disparities in power played in their subjects. In the scholarship of international relations power has been the central object of study ....that no law graces the hegemons universe..’<sup>110</sup>

In the light of the above, the Iraqi case would be appreciated for what it is: pure politics, the expediencies of national interest, and not law. And so, the decisions in cases like *Lehigh Valley* and *Jackson would* surely have been

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<sup>109</sup> see Vagts D.F ‘Hegemonic International Law’ 95 Am. J. int’l Law (2001)

<sup>110</sup> *ibid* 845

different, had another strategic interest been at stake, or, if they were decided, say, by a court in Belgium. The Iraqi's may have declined justifying their debt cancellation on the 'odious' doctrine,<sup>111</sup> but that would be simply this: that cancelled already, whatever *ex post facto* rationalization raised as its basis, turns out to be purely academic; national reputation, in that regard, would likely be the least consideration. The Argentine heavy default severely disrupted the market in 2001 and the fact that the bondholders were willing to discount the values of their instrument subsequently, only showed that the restructuring by that country was, in reality, a strategically disguised self imposed 'bankruptcy proceeding': accepting a ratio of what the debtor has to offer. Yet many creditors would rather have avoided such a messy, financially traumatic and legally complex situation for a more orderly and straightforward arrangement even if the loss turns out higher early on. The financial incapacity of Argentina would in part be traceable to the odious nature of the previous loans used for the sustenance of earlier dictatorships.

That being the case, the challenge, for all involved in sovereign debt management would be how to use the Iraqi case as a legal precedent. What that means is, how to remove it- odious debt doctrine- from the domain of shifting, opportunistic policies<sup>112</sup> to the settled realm of the legally

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<sup>111</sup> see Gelpert, supra, p. 407 'Assuming for argument sake that the decision not to invoke odious debt was Iraq's own, why would a country shun a doctrine that seems so hospitable to its cause? The cost of invoking Odious Debt to the country are roughly the same as with any other sovereign repudiation: the cost of dodging enforcement and damage to reputation'

<sup>112</sup> see Hoeflich M. H. 'Through a Glass Darkly: Reflections Upon the History of International Law of Public Debt in Connection with State Succession' "The behavior of the United States and Great Britain during the 19<sup>th</sup> century towards public debt of states conquered or annexed by them appears to be inconsistent, both theoretically and practically, with the positions those two governments took in response to similar acts by other states in the 20<sup>th</sup> century'; see for example the United States of America repudiation of Texan debts in 1850 & the rejection of the Cuban debts in 1898 both on 'dubious debt doctrine' and the British equal rejection of the Boer debt in 1900; also, Foorman J.L & Jehle M. E. 'Effects of State and

imperative position, such that, all the Third-world debtor nations, in similar circumstances as Iraq, would be subjected to the same rules and considerations, and in effect, have their debts cancelled.

## CONCLUSION

One of the major problems facing the external debt issue, is the fact that the debtor's position or predicament, has all along been taken as given. It is however a void of sorts, which needs to be filled through more perceptiveness by scholars and commentators, in other that some positive, collective progress can be achieved in the sovereign debt management efforts. The truth again is that government debts are never immune from politics<sup>113</sup> the loan contracts are, expectedly, mired in 'relational',<sup>114</sup> situations, where mutual cultivation and measures of reciprocal engagements exist between the individual creditor and the debtor-nation part of which has kept the field free from a maze of unproductive litigations. Even this has not kept the creditor from its fixation on the prize, that is, the regular income accruing from debt service and loan repayment, with the result that much of the creditor activities is focused on how to keep this income flowing, regardless of the debtor inability, into its coffers. Some clearly radical approach is inevitable to *defease* the debt problem in favor of the debtors. The necessary rules will sooner or later come into being and take a life of their own, for in 'redrawing the line, defining what counts as legal, rather than political or moral argument seems to be the recurring feature of

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Government Succession on Commercial Bank Loans to Foreign Sovereign Borrowers' (1982) 9 U. Ill. L. Rev

<sup>113</sup> Gelpern, *supra*

<sup>114</sup> See Palzer K. A. 'Relational Contract Theory and Sovereign Debt' 8 NW. J. Int'l & Bus for some discussion

doctrinal innovation. Each major change of substantive ideas in the modern history of law and legal thought has been accompanied by a redefinition of the boundaries of legal argument. What was previously defined as political or moral comes to be redefined as having legal relevance'.<sup>115</sup>

In all, it has never been the position of this paper that the lenders are solely responsible for the debt burden of the Sub-Saharan debtor nations. The governments share in the responsibility as well, in being selfish, less circumspect and showing lack of prudence in handling the funds received, and the people for long-suffering and subservience. Even these do not rise to the level of parity on the culpability scale. The whole argument therefore, has been premised on the fact that the 'Sub-Saharan debt crisis results, in significant part, from the predatory practices of, and extraordinarily poor collective judgment exercised by, international lenders. The lenders culpability is an important part of the background against which the fairness of any proposed solution should be considered'.<sup>116</sup> The fact that the debtor nations continue to make the effort to pay underscores the willingness to take responsibility. Many have long paid up the principal amount borrowed. Even the Argentine case was a heroic labor against the inevitability of default, as the country stretched itself to fiscal limits to avoid that difficult option.<sup>117</sup> The absence of a bankruptcy regime, unlike the corporate counterpart, leaves the sovereign debtor without a major legal protection.<sup>118</sup> In the final analysis, it is the courts that will take the lead in the challenge

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<sup>115</sup> Lothian, *supra*, 468

<sup>116</sup> Sylvester, *supra*, 262

<sup>117</sup> The Economist, March 5<sup>th</sup>, 2005 'Special Report: Argentine debt's restructuring' p.65; on repayment of principal while interest continues to grow disproportionately see J K Boyce et al n. 16 *supra*.

<sup>118</sup> See Bratton & Gulati, *supra*

and develop equitable rules for evaluating the present ‘onerous and unconscionable’ sovereign debt in order to appropriately adjust it.