UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/CN.4/Sub.2/2004/27
1 July 2004

ENGLISH
Original: FRENCH

COMMISSION ON HUMAN RIGHTS
Sub-Commission on the Promotion
and Protection of Human Rights
Fifty-sixth session
Item 4 of the provisional agenda

ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Effects of debt on human rights*

Working paper prepared by Mr. El Hadji Guissé

* The document was submitted late to the conference services without the explanation required under paragraph 8 of General Assembly resolution 53/208B, by which the Assembly decided that, if a report is submitted late, the reason should be included in a footnote to the document.

GE.04-14752 (E) 210704 220704

CONTENTS

Summary

At its fifty-fifth session, the Sub-Commission on the Promotion and Protection of Human Rights, by its decision 2003/109, of 13 August 2003, requested Mr. El Hadji Guissé to prepare, without financial implications, a working paper on the effects of debt on human rights for submission to the Sub-Commission at its fifty-sixth session.

This working paper highlights the adverse effects on human rights of the debt owed by third world countries, evoking its origins and the legal aspects of the question and emphasizing the inequitable, even illegal nature of debt, which contributes to extreme poverty and constitutes an obstacle to human development.

The burden of debt renders the numerous problems affecting third world countries insurmountable and is thus a serious impediment to the realization of all human rights.

Introduction

1. At its fifty-fifth session, the Sub-Commission on the Promotion and Protection of Human Rights, by its decision 2003/109, of 13 August 2003, requested Mr. El Hadji Guissé to prepare, without financial implications, a working paper on the effects of debt on human rights for submission to the Sub-Commission at its fifty-sixth session.

2. For almost half a century, the developing countries have been confronted with grave economic, political and social problems that pose a danger to the very existence of their populations and consequently prevent individual human rights from being realized or protected. These problems, and this situation as a whole, are the result of the debt owed by these countries and the related debt-servicing requirements.

3. Debt has thus become not only a means of pushing these countries into extreme poverty, but also a tool for domination and exploitation, phenomena that one might have supposed to have disappeared along with colonialism. Worse still, it has facilitated a transition from public to private colonization, virtually a return to slavery as we knew it in the nineteenth century.

4. Debt prevents any form of sustainable human development, political stability or security.

5. Debt, this scourge of the twenty-first century, obviously has an adverse impact on human rights, both collective and individual. Owing to its adverse effects, the debt of third world peoples remains an insurmountable obstacle to economic and social development. It is at the roots of the extreme poverty with which billions of individuals are struggling. It should be remembered that 20 per cent of the world's population possess and enjoy the world's wealth, while 80 per cent are mired in misery, famine and disease, held captive by negative debt management and chronic imbalances in the world economy.

I. HISTORY

6. The history of third world debt is the history of a massive siphoning-off by international finance of the resources of the most deprived peoples. This process is designed to perpetuate itself thanks to a diabolical mechanism whereby debt replicates itself on an ever greater scale, a cycle that can be broken only by cancelling the debt.

7. The problem of debt must be examined from a historical perspective while, at the same time, bringing out its legal aspects, particularly its origins as perceived in positive international law, which now sees the debt as illegitimate.

8. The developing countries' debt is partly the result of the unjust transfer to them of the debts of the colonizing States, imposed on the newly independent States when they acceded to international sovereignty: in 1960, the external public debt of these countries already amounted to US$ 59 billion. With the additional strain of an interest rate unilaterally set at 14 per cent, this debt increased rapidly. Before they had even had time to organize their economies and get them up and running, the new debtors were already saddled with a heavy burden of debt.

9. Thus, for example, the Lester Pearson Commission estimated that by 1977 debt-servicing alone, i.e. the annual repayment of principal and payment of interest, exceeded the gross amount of new lending by 20 per cent in Africa and 30 per cent in Latin America.

10. In other words, the new loans that a developing State felt obliged to enter into for development purposes could not be used for development and were not even enough to cover the servicing of existing debt.

11. Developing States will in future have regularly to take on new debt, not for investment, but for repayment. This situation is the result of the application of an unjust system of international law. The legal order created by the old international society may have appeared neutral or impartial, but in reality it led to failure of the law to intervene, enabling the strong to crush the weak. It was in fact a permissive legal system, a colonial system institutionalized at the 1885 Conference of Berlin on the Congo.

12. This conqueror's law recognized as valid the unequal and fundamentally oppressive treaties that the colonizers signed with the indigenous populations with the ultimate aim of carrying off all their movable and immovable property.

13. In this way, the European States projected their power on the world stage. The international law of the era was a law drafted, bestowed and applied by them and for them.

14. Bismarck, speaking in 1878 on behalf of the Congress of Berlin, said that Europe alone had the right to approve independence and that it must therefore ask itself under what conditions it would take that important decision. In short, Europe alone was entitled to draw up a State's birth certificate.

15. In this era of triumphant Eurocentrism, Europe's common good was equated with the common good of humanity. For the purposes of applying European international law, the world's populations were categorized as civilized, half civilized and uncivilized, or according to Lorimer, as civilized, barbarian and savage. The law of the era was applied only to protect European States.

16. In 1780, in *An Introduction to the Principles of Morals and Legislation*, Jeremy Bentham stated that it would be more judicious to use the term "international law", rather than "the law of nations" to refer to the set of norms that then governed official relations among European States. Clearly, this law was international in name only. The conquering Europe of the nineteenth century was thus able to legitimize its subjugation and plundering of the third world, which it had decreed uncivilized.

17. Colonization took place within the framework of this system of international law, through the systematic application of the law of the strongest against the weak. It was this legal system, too, that allowed slavery, which reached fever pitch with the elaboration of the *Code noir* (Black Code), which institutionalized the Negro as a subhuman category and led, following the abolition of slavery, to colonization, which differed very little from slavery in its application.

II. ORIGINS AND WORSENING OF THE DEBT

18. At a time when they held the fate of the colonial peoples in their hands, the colonial powers contracted debts on their behalf, the liabilities on which were attributed directly to the new States once they had become independent.

19. This automatic transfer of the debt has been criticized by several authors, who maintain that succession to the liabilities of the predecessor State ought to be analysed and solved legally, rather than imposed.

20. The solution of non-succession appears to be the logical consequence of respect for the sovereignty of the successor State, which since it was not the original debtor, does not have to perform obligations to which it did not consent.

21. Regarding international jurisprudence, advocates of this negative solution like to cite the award made on 18 April 1925 by the Swiss arbitrator Eugène Borel in the case concerning the apportionment of the Ottoman debt among Syria, Lebanon and Iraq, which had been separated from the empire just after the First World War. According to a key passage of this decision, it is not possible, despite the existing precedents, to affirm that the cessionary power of a territory is liable as a matter of course for a proportionate share of the public debt of the State of which the territory was formerly a part. The successor State is a third State with respect to all treaties concluded by the predecessor State.

22. The law of treaties, particularly the fundamental rule concerning the relativity of treaties, imposes this solution of principle, and doctrine cannot but recognize its validity.

23. Since acceptance of a succession cannot be presumed, it is for the inheriting creditor to demonstrate that all the conditions authorizing it to claim payment from the heir are present. Manifestation of willingness to accept a succession does not follow clearly from the fact that the party entitled to succeed has been designated as heir.

24. The colonial power thus did not have authority to designate unilaterally the colonized country as heir to its liabilities, whether such designation was made in a written instrument or was understood as part of a set of established juridical events. The declaration of independence cannot of itself constitute a legal mechanism by which the liabilities of the predecessor State are transmitted. Simply put, under inheritance law, an individual cannot inherit a liability; he can only, at best, inherit an asset.

25. Even before they came into being, i.e. before they acceded to international sovereignty, the former colonies already had debts, repayment of which was immediately demanded. In order better to manage this debt, the affluent countries established two structures outside the framework of the International Monetary Fund (IMF) and the World Bank: the Paris Club and the London Club.

The Paris Club

26. The Club, which always meets in Paris, deals with public debt. Established in 1956 against the background of the Suez crisis, it is a group of creditor States that specialize in reorganizing the debts of developing countries with payments in default. The Paris Club has extremely close ties with IMF, as is apparent from the observer status of IMF at the Club's meetings, which take place behind closed doors. IMF plays a key role in the debt strategy employed by the Paris Club, which relies on the Fund's macroeconomic expertise and judgement

to implement one of the Club's basic principles: conditionality. In return, the actions of the Paris Club preserve the status of IMF as a preferential creditor and safeguard the application of its adjustment strategies in developing countries.

The London Club

27. The London Club consists of private banks that have claims against third world States and companies. During the 1970s, the deposit banks became the main source of credit for countries in difficulty. By the end of the decade, they were already allocating more than 50 per cent of total loans granted by all classes of lender. It was therefore in the interests of the London Club, during the 1982 debt crisis, to work with IMF to manage the crisis. These groups of deposit banks meet to coordinate the rescheduling of borrower countries' debt. These groups are known as "consultative committees". Meetings (unlike those of the Paris Club, which always meets in Paris) are held in New York, London, Paris, Frankfurt or elsewhere, as the countries and banks see fit. The consultative committees, established in the 1980s, have always advised debtor countries to adopt a stabilization policy with immediate effect and to seek the support of IMF before requesting the rescheduling of their debts or fresh money from the deposit banks. Only very rarely do the consultative committees go ahead with a project without IMF backing, if the banks are convinced that the country is implementing an appropriate policy.

III. RATE OF INTEREST ON THE DEBT

28. This debt, which stood at US$ 59 billion in 1959, was assigned an interest rate of 14 per cent, set unilaterally by the international financial institutions for the benefit, needless to say, of those who held the purse-strings, who were also the colonial powers.

29. Many considered this rate usurious. In law, a usurious loan is any contractual loan granted at a global effective rate that exceeds by more than one third, at the time the loan is granted, the average effective rate applied by credit institutions in the preceding quarter. The rate applied to the third world States' debt was and remains excessively usurious if this statutory provision is taken into account. In criminal law, usury is an offence and offenders are liable to both punishment and payment of damages. This rate, which was subsequently reduced by half, remains usurious and was decided on unilaterally by the States of the North.

30. The proceeds of crime cannot be legitimized under any circumstances. Thus, in law and in logic, any gain resulting from the commission of an offence is null and void. This concept permeates all national jurisdictions. This is tantamount to saying that all the interest debtor countries have had to pay is void *ab initio* and must be returned.

31. Article 1235 of the French Civil Code reminds us that any payment presupposes a debt: whatever is paid without being owed is subject to restitution.

32. The worsening of the debt is due in large part to the application of this interest rate, which, according to the statutory provisions, remains an illegal source of gain.

33. Moreover, the law stipulates that when a contractual loan is usurious, the excess payments must automatically be set off against the normal interest outstanding and, if necessary, against the principal.

IV. LEGAL CHALLENGE TO THE DEBT

34. The economic challenge to this law of the affluent powers has gradually materialized thanks to decolonization. Professor Louis Henkin neatly summed up the position of third world States, declaring that international law cannot survive the decline of European domination; nor can it govern a community of nations the majority of which are not European, do not participate in the development of the law and whose interests differ from those of the other nations.

35. Addressing the sixth special session of the General Assembly, in his capacity as President of the Fourth Summit Conference of Non-Aligned Countries, the Algerian Head of State said in this regard:

> "It would be highly desirable to examine the problem of the present indebtedness of the developing countries. In this examination, we should consider the cancellation of the debt in a great number of cases and, in other cases, refinancing on better terms as regards maturity dates."

36. The main consequences of the practices described are a multiplication and exacerbation of the difficulties encountered by developing countries. The chief victims are of course the deprived social groups, whose means of subsistence are diminished; it seems that there is nothing to stop these populations from sinking into absolute poverty. There is every reason to believe that the perpetuation of the developing countries' debt is the result of a deliberate policy, the sole purpose of which is to stifle any effort to improve the economic and social situation of these countries and their populations.

37. There can be no doubt that the already frail economies of the developing countries will be hit harder still by international financial imbalances; these imbalances will increase so long as the structures of the world economy are characterized by unequal trade relations. Moreover, everything suggests that if the status quo is maintained, debt will become a formidable stick with which to bring developing countries to heel, while providing their ruling classes with a means of safeguarding their position and serving as advocates - if not architects - of economic policies that will have catastrophic implications for the vast majority of the world's poor populations.

38. The current debt management process will also enable the transnational corporations to put paid to any notions that the debtor countries might have about affirming their sovereignty and determining their own path to development. Because of the role it plays nowadays, debt is a terrifying instrument of domination that transnational companies wield against developing countries to dangerous effect. Mention must be made here of the failure of the Bretton Woods institutions to acquit themselves of their primary task of creating and maintaining a balance among the various actors in international economic life in the higher interests of humanity. This failure, coupled with the policies of the transnational corporations and the selfishness of the developed States, has led to the creation of two harmful and destructive practices, namely, structural adjustment programmes and, more recently, the devaluation of developing countries' currencies.

39. These are the conditions in which globalization of the economy is taking place, a process that, in addition to marginalizing the poor, is a source of imbalances constituting an insurmountable obstacle to the establishment of a new world economic and social order.

40. It should be recalled that cancellation of the debt of colonized countries was raised long ago in New Delhi, at the Second Session of the United Nations Conference on Trade and Development. At the 58th plenary meeting, Mr. Louis Nègre, Minister of Finance of Mali, said that many countries could legitimately have contested the legal validity of debts contracted under the auspices of foreign powers; adding that, beyond purely legal considerations and rightful claims, he wished to ask the developed creditor countries, as a test of their goodwill, to cancel all debts contracted during the colonial period by interests that were essentially not their own, and for whose servicing their States were unjustly responsible.

V. CONCLUSION

41. Burdened by debt, the third world States are unable to respond to the many demands of their peoples, who are confronted with such problems as disease, famine, underdevelopment, lack of education and unemployment, to name only a few, which constitute serious impediments to the realization of all human rights, whether collective or individual.
