

An International Debt Arbitration Mechanism Under the United Nations System: Issues and Prospects

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1 INTRODUCTION

Almost a decade ago, United Nations Secretary-General Kofi Annan (as he then was) called upon donor countries and the international financial institutions to consider cancelling all official debts of the heavily indebted poor countries. Stressing that debt relief for these countries must be 'an integral part of the international community's contribution to development', Mr Annan stated:

I would go a step further and propose that, in the future, we consider an entirely new approach to handling the debt problem. The main components of such an approach could include immediate cancellation of the debts owed by countries that have suffered major conflicts or natural disasters; expanding the number of countries in the HIPC scheme by allowing them to qualify on grounds of poverty alone; pegging debt repayments at a maximum percentage of foreign exchange earnings; and establishing a *debt arbitration*

process to balance the interests of creditors and sovereign debtors and introduce greater discipline into their relations¹ (emphasis added).

The need for an approach that can deliver a durable solution to the debt crisis has also been recognized by others within and outside the UN system. In 1998, the Trade and Development Board of the United Nations Conference on Trade and Development (UNCTAD) concluded that ‘innovative approaches (to the debt problem) involving the affected countries (were) required’.² In the Monterrey Consensus, heads of State and Government, after emphasizing that ‘debtors and creditors must share the responsibility for preventing and resolving unsustainable debt situations’, stated that they encouraged ‘exploring innovative mechanisms to comprehensively address debt problems of developing countries’.³ In similar vein, the First Conference of African Ministers of Economy and Finance held in Dakar, Senegal in 2005, called for the establishment of a new mechanism outside the Paris and London Club frameworks for dealing with Africa’s debt problem.⁴

More recently, differences on the underlying causes of the debt crisis and how it should be resolved, as well as the limitations of creditor responses to the crisis have led to calls by debt campaigners and others for an independent and impartial international mechanism under the auspices of the United Nations vested with the authority to make binding decisions concerning debt claims.⁵

¹ United Nations, *‘We the Peoples’: The Role of the United Nations in the 21st Century*, Report of the Secretary-General of the United Nations, Kofi Annan (New York: United Nations, 2000) [the Millennium Report], 38.

² Action Taken by the Trade and Development Board 1998, United Nations New Agenda for the Development of Africa in the 1990s: Prospects for agriculture, trade and industrialization, Agreed Conclusions 454 (XLV), 23 October 1998, par 4.

³ See *Report of the International Conference on Financing for Development*, Monterrey, Mexico, 18-22 March 2002 (A/CONF.198/11, chapter 1, annex), pars 47 and 52.

⁴ See *Report of the First Conference of African Ministers of Economy and Finance (CAMEF)*, 7 May 2005, Dakar, Senegal (AU/CAMEF/Rpt 1).

⁵ See, for example, Afrodad, *Fair and Transparent Arbitration on Debt*, Issues Paper No. 1/2002; Afrodad, *The Efficacy of Establishing an International Arbitration Court for Debt*, Technical Paper No. 1/2002; O Kapijimpanga, *A Further Call for the Establishment of an International Arbitration Court on Debt*, 2005; K Raffer ‘Debt Workout Mechanisms: Debt Arbitration’, in Helsinki Process Secretariat (ed), *Helsinki Papers on Global Economic Agenda*, Helsinki Process Publication Series 3/2005 (Helsinki: Ministry of Foreign Affairs, 2005) 187-211; K Raffer ‘Internationalizing US

While creditors insist that the measures they have implemented thus far to address the debt problem are delivering results, debt campaigners have raised concerns about the perceived lack of 'fair and transparent global governance', manifested in the dominance of creditors with regard to the decision making concerning resolution of the debt crisis and the lack of debtor protection.⁶

It is worth noting at the outset the International Monetary Fund (IMF) has also previously proposed an institutional framework for resolving debt crises under its Sovereign Debt Restructuring Mechanism (SDRM) which envisaged a voluntary negotiation between the debtor country and its creditors taking place in the Sovereign Debt Dispute Resolution Forum although the idea never took off. A settlement would require a 'supermajority' approval by each class of creditors. However, the IMF's proposal explicitly excluded debts owed to the IMF and other multilateral institutions - a situation that would be unlikely to find support among civil society organizations and debtor countries.⁷

What is clear however is that the available evidence indicates that there is cause for concern about the effectiveness and durability of the current creditor-driven initiatives. Further, the likelihood of increased sovereign borrowing as countries attempt to mitigate the impact of the current global economic crisis underscores the urgent need for concerted efforts under a credible international institution to find a long-term solution to the debt problem.

Municipal Insolvency: A Fair, Equitable, and Efficient Way to Overcome a Debt Overhang' (2005) *Chicago Journal of International Law* 6(1): 363. Raffer favours an ad hoc arbitration panel established by the debtor and creditors.

⁶ Kapijimpanga, n 5 above, 1.

⁷ See IMF, *The Design of the Sovereign Debt Restructuring Mechanism – Further Considerations*, November 2002, pars 183-208, available at <http://www.imf.org/external/np/pdr/sdrm/2002/112702.pdf> (accessed 24/03/09). See also 'Sovereign Debt Restructuring and Dispute Resolution', speech by Anne Krueger, First Deputy Managing Director, International Monetary Fund, to the Bretton Woods Committee Annual Meeting, 6 June 2002, Washington, DC, available at <http://www.imf.org/external/np/speeches/2002/060602.htm> (accessed 24/03/09).

Much has been written about the modalities of an international debt resolution mechanism. Consequently, I will focus on the challenges of establishing an international debt arbitration mechanism under the aegis of the United Nations. I begin with a brief overview of the initiatives implemented by creditors in response to the debt crisis. I then outline how various UN bodies, including the human rights mechanisms, have dealt with the debt problem. Finally, I briefly assess the prospects of establishing a debt arbitration mechanism under the UN system.

2 LIMITATIONS OF CREDITOR RESPONSES TO THE DEBT CRISIS

In response to the debt crisis, creditors have devised and implemented two main measures with the aim of reducing the external debt of poor countries pursuing IMF and World Bank adjustment and reform programmes and helping them achieve debt sustainability: the Heavily Indebted Poor Countries (HIPC) Initiative and the Multilateral Debt Relief Initiative (MDRI). The HIPC initiative, which was first launched in 1996 by the IMF and the World Bank and revised in 1999, links debt relief to poverty reduction, macroeconomic stability and structural reform. In order to qualify for debt relief under HIPC, a country must (1) have an unsustainable debt burden; (2) establish a track record of reforms and policies through World Bank and IMF-supported programmes; and (3) prepare a Poverty Reduction Strategy Paper (PRSP) through 'a broad-based participatory process'.⁸ Thus, debt relief is conditional on the progress made by qualifying countries in the preparation and implementation of social policies and strategies for reducing poverty.

The HIPC Initiative identifies 41 countries, including 34 from Africa, as eligible or potentially eligible for debt relief. As at the end of January 2009, 24 countries had

⁸ IMF, *Debt Relief Under the Heavily Indebted Poor Countries (HIPC) Initiative – A Factsheet*, January 2009. PRSPs describe a country's macroeconomic, structural and social policies and programmes to promote growth and reduce poverty, as well as related external financing needs. They are prepared by governments through a participatory process involving civil society and development partners, including the World Bank and the IMF.

reached completion point and had either received or were receiving debt relief from the IMF and other creditors; ten countries had reached decision point, with some receiving interim debt relief; and seven had been identified as potentially eligible for debt relief.

The MDRI, which was launched in 2005 to supplement the HIPC Initiative, provides for 100 percent relief on eligible debt from three multilateral institutions (the IMF, International Development Association (IDA)⁹ and the African Development Fund (AfDF) to heavily indebted poor countries and is ostensibly designed to help these countries progress toward the Millennium Development Goals (MDGs), which have the core objective of halving poverty by 2015.¹⁰ All countries that reach the completion point under the enhanced HIPC and those with per capita income below US\$380 and outstanding debt to the IMF as at the end of 2004 are eligible for the MDRI. In March 2007, the Inter-American Development Bank (IDB) joined the MDRI and decided to provide debt relief to the five HIPCs in Latin America and the Caribbean: Bolivia, Guyana, Haiti, Honduras and Nicaragua.

Although it is recognised that some HIPCs, including 21 from Africa, have benefited from debt relief through reduced debt-service payments and a corresponding increase in social expenditures, the impact of these measures appears to be limited and of short duration.¹¹ Despite some savings from debt relief, debt repayments remain high for many developing countries, particularly in the light of a reduction of official development assistance (ODA), lower export earnings and meagre resource flows. In 2007, the 29 decision or completion point HIPCs had debt service savings of approximately US\$1.25 billion, but in the

⁹The concessional branch of the World Bank.

¹⁰ See IMF, *The Multilateral Debt Relief Initiative (MDRI) – A Fact sheet*, March 2008, available at <http://www.imf.org/external/np/exr/facts/mdri.htm> (accessed 31/08/08).

¹¹ See Recent developments in external debt, Report of the United Nations Secretary-General, General Assembly, Sixty-second session, 26 July 2007, par 33 (A/62/151), where the Secretary-General raised concern that 'debt relief has been too slow and has not been additional as planned'.

same year their total debt service to the IMF, World Bank and AfDB was US\$1.43 billion.¹²

Several studies indicate that some countries are spending more each year on servicing debt than they do on national programmes aimed at reducing poverty and improving a variety of social conditions, including healthcare, education, nutrition, and life expectancy. For example, in 2005, Lebanon spent 52% of its budget on debt service as compared with 23.1% on health and education; Jamaica spent 27.9% on debt service and 16.1% on health and education; Bulgaria spent 23.0% on debt service and 11.6% on health and education.¹³ The MDG Gap Task Force has recently reported that:

The MDG target of dealing comprehensively with the debt problems of developing countries has not been achieved in full. Despite HIPC and MDRI debt relief and corresponding increases in social expenditures, a large number of developing countries still spend more on debt servicing than on public education or health. In 2006, 10 developing countries spent more on debt service than on public education, and in 52 countries debt servicing amounted to more than the public health budget.¹⁴

It is clear that excessive debt burdens continue to constrain development prospects and the realisation of human rights, particularly economic, social and cultural rights, in many developing countries, as well as the attainment of the Millennium Development Goals (MDGs).

¹² See Eurodad, *Multilateral debt: one step forward, how many back?* April 2007.

¹³ See S Mandel, *Debt relief as if justice mattered* (London: New Economics Foundation, 2008) 11. Between 1992 and 1997, the portion of the budget dedicated to basic social services and to debt service for some countries was: Cameroon – 4.0% on social services and 36.0% on debt service; Cote d'Ivoire – 11.4% on social services and 35% on debt service; Kenya – 12.6% on social services and 40.0% on debt service; Zambia – 6.7% on social services and 40.0% on debt service; Niger – 20.4% on social services and 33.0% on debt service; Tanzania – 15.0% on social services and 46.0% on debt service; and Nicaragua – 9.2% on social services and 14.1% on debt service.

¹⁴ United Nations, *Millennium Development Goal 8: Delivering on the Global Partnership for Achieving the Millennium Development Goals*, MDG Gap Task Force Report 2008 (New York: United Nations, 2008) x.

The impact of debt relief is often diluted by reform policies¹⁵ that indebted countries are often required to implement as well as unfavourable terms of trade in what is essentially an unequal global trading environment.¹⁶ Debt service reductions are further offset by an equivalent reduction in future concessional loans from the IDA.¹⁷ It should be noted that concessional finance is only available on the basis of demonstrable 'good' policy performance assessed in terms of the contentious Country Policy and Institutional Assessment used to both allocate IDA resources and to guide IDA grant allocation decisions.

Debt relief conditions – which typically require cutbacks in public spending, promote economic liberalization, investment deregulation and prioritise debt service over provision of basic social services - limit investment in health and education in many low-income countries. For example, a 2006 study by the United Nations Development Programme's (UNDP) International Poverty Centre, which examined the effect of debt relief on fiscal space in Zambia, found that 'the net fiscal gain from debt relief had been marginal because of the external policy conditionalities linked to the relief and associated ODA'.¹⁸

Concerns have also been raised about the debt sustainability framework under the debt relief initiatives. Although ostensibly designed to prevent debt relief beneficiary countries from falling into unsustainable debt situations, the framework is based on the primacy of debt service and does not include an assessment of the needs to realise human rights or the MDGs.

¹⁵ According to a recent study by Eurodad, the IMF imposes an average of 13 conditions per low-income country loan. Most of these conditions entail privatisation and liberalisation with serious consequences for the poor and other vulnerable groups in the recipient states. See N Molina & J Pereira, *Critical conditions: The IMF maintains its grip on low-income governments*, April 2008, 4.

¹⁶ A recent World Bank report notes: '[M]ost policy advice given to poor countries over the last several decades – including by the World Bank has emphasized the advantages of participating in the global economy. But global markets *are far from equitable*, and the rules governing their functioning have a *disproportionately negative effect* on developing countries' (emphasis added). World Bank, *World Development Report: Equity and Development* (New York: Oxford University Press, 2006) 16.

¹⁷ Eurodad, n 15 above.

¹⁸ J Weeks & T McKinley, *Does Debt Relief Increase Fiscal Space in Zambia? The MDG Implications*, Country Study No. 5 (Brasilia: UNDP International Poverty Centre, 2006) 2.

Another problem with the HIPC and MDR initiatives is that they exclude many heavily indebted and poor countries on the grounds that their debts are 'sustainable'.¹⁹ Illustratively, in 2004, Ecuador's total external debt was US\$16.9 billion. The same year, the country spent a total of US\$3.7 billion in debt repayments, and public spending on debt service was more than six times the amount spent on healthcare. Despite this, the World Bank considers Ecuador's debt to be 'sustainable' because its debt to GDP ratio in 2006 was relatively low. This situation is inconsistent with the Millennium Declaration's commitment to 'deal comprehensively and effectively with the debt problems of low- and middle-income developing countries, through various national and international measures designed to make their debt sustainable in the long term'.

It is therefore apparent that the response of creditors to the debt crisis has thus far been inadequate. It is also doubtful whether the current creditor-driven initiatives can deliver a long-term solution to the debt overhang.

3 THE UNITED NATIONS AND THE DEBT CRISIS

3.1 A brief overview of the United Nations

Before exploring the challenges concerning the establishment of an international debt arbitration mechanism under the auspices of the United Nations, it is instructive to briefly examine the role of the organization in global governance. The United Nations was established by its Charter of 26 June 1945. Based on three mutually reinforcing pillars of peace and security, human rights and development, the UN is central to global efforts to solve problems confronting humanity. According to article 1(3) of the Charter, one of the purposes of the organization is:

¹⁹ Countries excluded from the MDRI include Kenya, Lesotho, Ecuador, Peru, Vietnam, Indonesia, the Philippines and Bangladesh, to mention a few.

To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

The UN currently has 192 Member States, virtually all the states of the world. Based on the principle of sovereign equality of all its Members, the UN is the only universal and most representative global body.²⁰

The UN has six principal organs: the General Assembly, the Security Council, the International Court of Justice, the Economic and Social Council, the Trusteeship Council (now defunct) and the Secretariat. For the purposes of this paper, I will focus on the workings of the General Assembly.

The General Assembly consists of all Members of the United Nations, each having one vote. It is the main deliberative, policy making and most representative organ of the United Nations.²¹ Decisions on all matters (with the exception of internal matters such as the budget) are taken by a simple majority of those voting. Unlike the Security Council and the Court, the General Assembly has no power to make decisions that are legally binding, nor can it compel action by a Member State. Except for decisions on internal issues, its resolutions are mere recommendations, although over time the substance of some resolutions may be accepted as reflecting customary international law. Nevertheless, General Assembly resolutions serve as an important indication of global opinion on particular issues.

The General Assembly has played a leading role in the development of international law by establishing the International Law Commission (ILC),

²⁰ Indeed, the Millennium Declaration acknowledges the UN as 'the most universal and representative organisation in the world' and emphasises that it must play the central role in the management of global economic and social development (par 6).

²¹ See the Millennium Declaration, par 30.

adopting multilateral treaties (usually called 'conventions') mainly drafted by the ILC or committees of the General Assembly, and convening diplomatic conferences to negotiate conventions.

These are important issues to bear in mind since the decision to establish a debt arbitration mechanism under the UN would ultimately have to be taken by the General Assembly.

3.2 The United Nations and the issue of debt

The issue of the excessive indebtedness of developing countries has been on the agenda of various UN bodies for over two decades.²² Notable among these are UNCTAD and the various human rights bodies. UNCTAD is the principal organ of the UN General Assembly dealing with trade, investment and development issues. In regard to debt, its work focuses on debt management capacity building for developing countries.

United Nations initiatives concerning debt include the Programme of Action for African Economic Recovery 1986-1990 (UNPAAERD), adopted by the General Assembly in June 1986 (A/RES/S-13/2); the New Agenda for the Development of Africa in the 1990s (UN-NADAF) adopted by the General Assembly in December 1991, as a successor to UNPAAERD, in which the international community committed itself to take 'innovative and bold' measures for a durable solution to Africa's debt crisis; the UN Millennium Declaration; the International Conference

²²Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Study on the new international economic order and the promotion of human rights: Final report by Mr Raul Terrero (Peru)*, E/CN.4/Sub.2/1983/24, 2 August 1983. See also Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Realization of economic, social and cultural rights: second progress report prepared by Mr Danilo Turk, Special Rapporteur*, E/CN.4/Sub.2/1991/17, 18 July 1991 (a detailed study on structural adjustment programmes and the policies of the international financial institutions). The Sub-Commission was a subsidiary body of the former Commission on Human Rights. It was abolished following the replacement of the Commission by the Human Rights Council in 2006.

on Financing for Development in 2002 and the Follow-up International Conference on Financing for Development to Review the Monterrey Consensus in 2008.²³

Although all of these initiatives have acknowledged the gravity of the debt crisis and included commitments by the international community to tackle it, very little has been achieved in terms of finding a durable solution to the crisis. This is evident from the marginal attention paid to the debt issue in the Doha outcome document.

3.2 The UN human rights bodies and foreign debt

Since the early 1980s, various UN human rights bodies have attempted to address the debt problem. In 1983, the Special Rapporteur on the new international economic order and the promotion of human rights of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities expressed concern over the serious external debt problem of the developing countries.

Beginning in the 1990s, the Commission on Human Rights and, its successor, the Human Rights Council,²⁴ have in numerous decisions and resolutions referred to the challenges that excessive external debt burdens and IFI-prescribed economic reform policies pose to the realisation of human rights in the developing countries.²⁵ It is also notable that the various human rights treaty bodies have, in their concluding observations on the State party reports

²³ See *Report of the International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus*, Doha, Qatar, 29 November – 2 December 2008 (A/CONF.212/7).

²⁴ The Commission on Human Rights was replaced by the Human Rights Council in accordance with General Assembly resolution 60/251 of June 2006.

²⁵ See Commission resolutions 1998/24 of 17 April 1998, 1999/22 of 23 April 1999, 2000/82 of 26 April 2000, 2001/27 of 20 April 2001, 2002/29 of 22 April 2002, 2003/21 of 22 April 2003, 2004/18 of 16 April 2004, 2005/19 of 14 April 2005; and Council decision 2/109 of 27 November 2006.

submitted to them noted that excessive debt burdens and high dependency on foreign assistance pose a significant obstacle to the realisation of human rights in many developing countries undermining states' human rights obligations. For example, in its concluding observations on the report submitted by Honduras in 2001, the Committee on Economic, Social and Cultural Rights took note that 'the efforts of the State party to comply with its obligations under the Covenant (were) impeded by the fact that it (was) classified as a highly indebted poor country and that up to 40 per cent of its annual national budget (was) allocated to foreign debt servicing.'²⁶ The Committee on the Rights of the Child²⁷ and the Committee on the Elimination of Discrimination Against Women²⁸ have made similar observations with respect to the capacity of States parties to fulfil their obligations under the treaties which these bodies supervise.

Since 1997, the Commission and the Council have attempted to address the issues of foreign debt and economic reform policies through the establishment of thematic special procedure mandates which have undergone a number of changes over the years. Initially, the Commission established two separate mandates: the Independent Expert on structural adjustment policies in 1997 and the Special Rapporteur on the effects of foreign debt on the full enjoyment of economic, social and cultural rights in 1998.²⁹ In 2000, the Commission merged the two mandates under a single mandate: the Independent Expert on the effects

²⁶E/C.12/1/Add.57. See also E/C.12/Add.71 (Algeria); E/C.12/1/Add.55 (Morocco); E/C.12/1/Add.63 (Syria); E/C.12/1/Add.48 (Sudan); E/C.12/1/Add.78 (Benin); E/C.12/1/Add.62 (Senegal); E/C.12/1/Add.106 (Zambia); E/C.12/1/Add.60 (Bolivia); E/C.12/1/Add.100 (Ecuador); E/C.12/1/Add.66 (Nepal); and E/C.12/1/Add.49 (Nepal).

²⁷ See, for example, CRC/C/15/Add.156 (Tanzania); CRC/C/15/Add.190 (Sudan); CRC/C/15/Add.193 (Burkina Faso); CRC/C/15/Add.179 (Niger); CRC/C/15/Add.160 (Kenya); CRC/C/15/Add.174 (Malawi); CRC/C/15/Add.172 (Mozambique); CRC/C/15/Add.218 (Madagascar); CRC/C/15/Add.138 (Central African Republic); CRC/C/15/Add.204 (Eritrea); CRC/C/15/Add.130 (Suriname); CRC/C/15/Add.115 (India); CRC/C/15/Add.207 (Sri Lanka); CRC/C/15/Add.197 (Republic of Korea); CRC/C/15/Add.124 (Georgia); CRC/C/15/Add.152 (Turkey); and CRC/C/15/Add.186 (The Netherlands).

²⁸ See, for example, A/56/38 (SUPP), par 161 (Guyana); A/55/38 (SUPP), par 44 (Cameroon); A/57/38 (SUPP), par 149 (Uganda); A/56/38 (SUPP), par 227 (Jamaica); A/57/38 (SUPP), par 155 (Trinidad & Tobago); and A/56/38 (SUPP), par 227 (The Netherlands).

²⁹ The Independent Expert was requested to present a consolidated study on the effects of structural adjustment policies on economic, social and cultural rights and to elaborate draft basic guidelines on structural adjustment policies.

of structural adjustment policies and foreign debt on the full enjoyment of all human rights, particularly economic, social and cultural rights. In 2005, the Commission decided to replace the phrase 'effects of structural adjustment policies' with 'effects of economic reform policies' in the title of the mandate so that it became 'Independent Expert on the effects of economic reform policies and foreign debt on the full enjoyment of all human rights, particularly economic, social and cultural rights'.³⁰

In 2008, by resolution 7/4, the Human Rights Council redefined and renamed the mandate, 'Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights.' The Council requested the Independent Expert to pay particular attention to:

- The effects of foreign debt and the policies adopted to address them on the full enjoyment of all human rights, particularly economic, social and cultural rights;
- The impact of foreign debt and other related international financial obligations on the capacity of States to design and implement their policies and programmes, including national budgets that respond to vital requirements for the promotion of the realisation of social rights;
- Measures taken by Governments, the private sector and international financial institutions to alleviate such effects in developing countries, especially the poorest and heavily indebted countries;
- New developments, actions and initiatives being taken by international financial institutions, other United Nations bodies and intergovernmental

³⁰ The Independent Expert was requested to report annually to the Commission and to the General Assembly.

and non-governmental organisations with respect to economic reform policies and human rights; and

- Quantification of minimum standards to support the realisation of the MDGs.

The Council further requested the Independent Expert to participate in the process concerning the follow-up to the Monterrey Conference; to examine the linkages between foreign debt and other issues such as trade; to consult with a wide range of stakeholders in regard to the content of the draft general guidelines; and to present updated guidelines to the Council in 2010. The mandate is thus quite broad.

A key aspect of the mandate is the development of the draft general guidelines on foreign debt and human rights. In 2004, the Commission requested the mandate-holder to 'draft general guidelines to be followed by States and by private and public, national and international financial institutions in the decision-making and execution of debt repayments and structural adjustment programmes, including those arising from debt relief, to ensure that compliance with the commitments derived from foreign debt will not undermine the obligations for the realisation of fundamental economic, social and cultural rights, as provided for in the international human rights instruments'.³¹ An expert seminar organised by OHCHR in July 2007 culminated in the preparation of draft guidelines which were informally presented by my predecessor to the Human Rights Council in March 2008. I have been requested to continue consultations on these guidelines and to present an update thereon to the Council in 2010. I

³¹Commission on Human Rights resolution 2004/18 of 16 April 2004, adopted by a vote of 29 in favour (Argentina, Bhutan, Brazil, Burkina Faso, China, Cuba, Dominican Republic, Egypt, Eritrea, Ethiopia, Gabon, Guatemala, Honduras, India, Indonesia, Mauritania, Nepal, Nigeria, Pakistan, Philippines, Republic of the Congo, Sierra Leone, South Africa, Sri Lanka, Sudan, Swaziland, Togo, Uganda and Zimbabwe), 14 against (Australia, Austria, Croatia, France, Germany, Hungary, Ireland, Italy, Japan, Netherlands, South Korea, Sweden, United Kingdom, United States) and 10 abstentions (Armenia, Bahrain, Chile, Costa Rica, Mexico, Paraguay, Peru, Qatar, Saudi Arabia and Ukraine).

believe that the guidelines may proffer an opportunity for the issue of a debt arbitration mechanism to be brought onto the agenda of the Council and the General Assembly. However, to make a stronger case for inclusion of this issue, the mandate requires the support of civil society and other stakeholders, including right-holders in the affected countries.

It is clear from the above discussion that the various UN human rights bodies view foreign debt as a human rights issue. Whether this perspective would necessarily translate into support for an international debt arbitration mechanism under the auspices of the UN is the question that I will attempt to answer in the section that follows. However, it is important to note that there have been disparities in the voting patterns concerning the issue of foreign debt and human rights within the Commission and the Council with the developed (mainly, creditor) countries opposing consideration of the issue by the two human rights bodies were not the appropriate ones to deal with the issue and the developing countries supporting it.

4 A DEBT ARBITRATION MECHANISM UNDER THE UNITED NATIONS?

A review of the key political commitments made by UN Member States since 2000 indicates a degree of consensus on the need to address the debt problem but little by way of concrete action to find a lasting solution to the debt crisis. Nevertheless, I would suggest that these wide-ranging political commitments provide the basis for arguing for the establishment of an inclusive and equitable debt arbitration mechanism under the aegis of the United Nations which is the only international body with sufficient legitimacy to take a leading role in efforts to create an acceptable debt dispute resolution mechanism.

In the Millennium Declaration adopted by the UN General Assembly in September 2000, heads of State and Government, acknowledged that success in

meeting the objectives of development and poverty eradication depended on good governance at the national and international levels, as well as on transparency in the financial, monetary and trading systems. They further expressed their commitment to 'an open, equitable, rule-based, predictable and non-discriminatory multilateral trading and financial system' and their resolve 'to deal comprehensively and effectively with the debt problems of low- and middle-income countries, through various national and international measures designed to make their debt sustainable in the long term'.

These commitments and values were reinforced two years later in the Monterrey Consensus,³² which reaffirms the UN Charter. In paragraph 9 of the Consensus, heads of State and Government committed themselves 'to promoting national and global economic systems based on the principles of justice, equity, democracy, participation, transparency, accountability and inclusion'. In paragraph 51, they underscored 'the importance of putting in place a set of clear principles for the management and resolution of financial crises that provide for fair burden-sharing between public and private sectors and between debtors, creditors and investors' and encouraged the exploration of 'innovative mechanisms to comprehensively address debt problems of developing countries, including middle-income countries and countries with economies in transition'.

More recently, the Debt and Development Finance Branch of UNCTAD, which has been dealing with the issue of debt management for a number of years, has announced that it is starting a new project with the financial support of the Government of Norway under the heading of 'Promoting Responsible Sovereign Lending and Borrowing: including developing guidelines and criteria for assessing legitimacy of sovereign debt'.³³ In this regard, UNCTAD is establishing an Expert Working Group which will bring together all major

³² See Report of the International Conference on Financing for Development, Monterrey, Mexico, 18-22 March 2002 (A/CONF.198/11, chapter 1, annex), par 9.

³³ See 'UNCTAD to launch project on responsible sovereign lending and borrowing' available at <http://www.unctad.org/Templates/Page.asp?intlItemID=4778&lang=1> (accessed 26/03/09).

stakeholders in the area. UNCTAD has also expressed a desire to work with the mandate of the Human Rights Council's Independent Expert on foreign debt and human rights with a view to integrating a human rights-based approach into the project. This offers an opportunity to raise the issue of a debt arbitration mechanism under the auspices of the United Nations.

It has been suggested that an appropriate framework for debt resolution should be an institution established by treaty or by resolution of the General Assembly. In this regard, it is instructive to clarify a number of issues. First, treaties are based on the consent and are binding only on the states that have ratified them. In view of the reluctance of developed (creditor) countries to support consideration of the debt issue from a human rights perspective, one must be cautiously optimistic about their support for a treaty which would arguably threaten their interests. Further, given that arbitration depends on consent,³⁴ it is difficult to conceive of a situation where these countries (which have consistently opposed resolving the debt problem on the basis of a human rights framework) would enthusiastically support the creation of a tribunal to determine debt disputes on the basis of the human rights principles of equity, justice, participation and inclusion.

Second, the proposed mechanism would have to be established by treaty and have rules guiding its work. In this regard, it should be noted that the negotiation and adoption of a treaty is a lengthy process. Drafts are usually prepared by the ILC and presented to the General Assembly which then convenes a diplomatic conference to negotiate the text. But even where the text of a treaty has been adopted it can only enter into force once ratified by the specified number of signatory States, which could also be a lengthy process.

³⁴ The law to be applied, the make-up of the tribunal, any time limits must all be mutually agreed before the arbitration commences.

Third, as mentioned above, General Assembly resolutions do not typically create legally binding obligations and the Assembly cannot compel action by any Member State. Thus, a debt arbitration mechanism created by resolution would not be binding on any Member State. I doubt that this is an outcome that debt campaigners seek. Nevertheless, a recommendation by the General Assembly concerning the establishment of an international debt arbitration mechanism would be a significant reflection of global opinion on new approaches to the debt problem and would pave the way for preparatory work by the ILC on debt arbitration treaty.

5 CONCLUSION

Since the turn of the century, the international community has made numerous political commitments to address the debt crisis and although creditors have embarked on a number of 'initiatives' to address it, the debt crisis persists and continues to constrain the development prospects of many low- and middle-income countries. The persistence of the debt crisis, the limitations of the current creditor responses to it and the likelihood of increased borrowing by already heavily indebted countries as they seek to mitigate the impact of the global economic crisis all underscore the need for a new approach, based on human rights, which will deliver a durable solution to the debt problem. An international debt arbitration mechanism under the United Nations – the only universal and most representative international organization - to ensure fair and transparent resolution of debt disputes would be an important part of such a framework.

Finally, it is important that the indebted developing countries adopt a common position on the debt problem which they can advance within the various UN structures. These efforts should be supported by civil society. In my estimation, civil society groups – particularly those from the north – can play a crucial role in

applying pressure on their governments to support the establishment of an international debt arbitration mechanism under the aegis of the United Nations.