# African Sovereign Debt at a time of Pandemic: Legal justifications for suspension or cancellation

**By:**

Maria Adele Carrai

May 20, 2020

The economic impact of the COVID-19 pandemic is disastrous for the global south. The economic downturn will particularly affect Africa, which was already struggling with a massive financial gap in funding. Oxfam predicts that shutting down economies to prevent the virus from spreading could destroy vital industries and set back the fight against poverty in sub-Saharan Africa by up to 30 years. The African Union Commission estimated that Africa's gross domestic product (GDP) could shrink by up to 4.51 percent, resulting in the loss of 20 million jobs. The looming debt crisis further complicates the pandemic-induced economic shock, severely limiting governments' ability to repay their foreign loans and address the current crisis. From 2010 to 2018, the average public debt in sub-Saharan Africa increased by 40%-59% of GDP, making it the continent with the fastest-growing debt accumulation toward sovereign, private and multilateral lenders.

With the current pandemic, the cost of sovereign borrowing has increased drastically, and African countries are getting less money for export commodities and less access to foreign exchange, on which their economies depend. Export earning for some nations will decrease by up to 20% of GDP. The severe lack of liquidity and buffers for fiscal relief and monetary stimulus in times of crisis render African governments inadequate to provide financial relief to their populations, combat the economic downturn, or tackle the healthcare crisis.

The restructuring of the African sovereign debt, including its cancellation, is not something new, but the pandemic has transformed it into a top priority. There exists a growing recognition among the G20, the International Monetary Fund (IMF), the World Bank, and other multilateral development institutions that wealthier countries must act to lessen the debt burden of the global south. Besides ethical reasons, there are self-interest reasons to address the pandemic in the global south. As Ethiopia's Prime Minister Abiy Ahmed warned, if the virus is not defeated in Africa, "it will only bounce back to the rest of the world."

Various declarations were released in the past month to address the critical situation faced by the global south, including possible solutions to tackle the health crisis and the global economic downturn. The solutions varied from doing nothing to canceling the debt. For instance, in March, the finance ministers of African countries met as part of the United Nations Economic Commission for Africa. They suggested that African countries should coordinate a response with the logistics and delivery of testing equipment, support of the private sectors through a new liquidity line and promote an economic stimulus of $100 billion reached in part through a waiver of all interest payment (a total of $44 billion for 2020).

The position taken by the IMF, the World Bank, and members of the G20 was to suspend the payment of the debt interests of emerging countries so they can release funds to address the pandemic. The IMF and the World Bank called for debt relief for 76 of the world’s poorest nations that are eligible to receive the bank’s International Development Association funding, and the G20 offered lower-income countries a moratorium on bilateral government loan repayments

effective from May 1st until the end of 2020. David Malpass, the President of the World Bank, supported the suspension of debt repayment for the poorest countries and called upon multilateral development banks and G20 countries to suspend debt repayment. However, with the suspension might come conditions. Malpass, echoing the structural adjustment programs of the 1990s, remarked that "Countries will need to implement structural reforms to help shorten the time to recovery and create confidence that the recovery can be strong. For those countries that have excessive regulations, subsidies, licensing regimes, trade protection or litigiousness as obstacles, we will work with them to foster markets, choice and faster growth prospects during the recovery." Overall, there is no clarity about the conditions for such a moratorium and whether the debt will be relieved or simply rescheduled and under what terms. It is also not specified what will happen to other countries outside that criterion of the lower income that are also struggling with high debts and depleted resources.

On the other side of the spectrum are those that advocate for debt forgiveness, generally opposed by major creditors. On March 28th, representatives of the Economic and Monetary Community of Central Africa (CEMAC) suggested that member countries should collectively negotiate the cancellation of their external debts to give *budgetary margins allowing them to deal with the pandemic and relaunch their economies.* At the beginning of April, Senegal's President Macky Sall called for a new world order, the cancellation of Africa's public debt, and the restructuring of its private debt based on mechanisms to be agreed upon. Arguing that "Exceptional situations call for exceptional measures," for him, domestic efforts must be supported by global ones. Platforms calling for petitions for the cancellations of the debt have also emerged. The UK-based Jubilee Debt Campaign calls for the immediate cancellation of debt payments for the poorest countries and the petition to the IMF launched by Chancellor Rishi Sunak pushes the IMF to cancel the payments for countries suffering from the economic impact, and restructure their debt rather than bailing out the lenders. The Committee for the Abolition of Public Debt and one of his crucial voice persons, Eric Toussaint, also supported the cancellation of the debt in the face of the pandemic, arguing that the limited resources of the global south should be devoted to fighting the pandemic rather than reimbursing international creditors.

Some have even pushed for China to compensate for the pandemic. Following US politicization of the current pandemic which portrays China as bearing responsibility, some have also started to argue that not only should China, the biggest lender to Africa (between 2000 and 2017, it lent more than $143 billion to the African continent), cancel the debt, but China should also pay reparations. Obiageli Ezekwesili, the former vice president for the Africa region at the World Bank and the former minister of education for Nigeria, argued, "The continent must be accorded damages and liability compensation from China, the rich and powerful country that failed to transparently and effectively manage this global catastrophe." Given the economic downturn produced in Africa by the pandemic caused by China, "it is time to make offending rich countries pay the poor ones a global risk burden tax for delaying their rise out of poverty."

Considered immutable and eternally binding, debt has become a tool for imperial powers in the post-colonial world to enforce and perpetuate their dominance over the global south. To be bound by a loan contract, a state must give its free consent, from which it derives the legal obligation to repay the debt contracted according to the principle of *pacta sunt servanda*.[1] For domestic economies, where extraordinary measures were adopted to deal with the pandemic, such as the EU suspension of the rule of budgetary discipline (the annual deficit should not exceed 3% of GDP), why not applying a similar suspension of African loans and enable African government to better support their people? The principle of *pacta sunt servanda* is not absolute.

There are precedents in which a state obligation to repay its debt becomes conditional due to its fraudulence or other legal provisions limiting the obligations' fulfillment. Amidst the cacophony of options and opinions, the question remains: How could African countries legally suspend or cancel their foreign debts? In the specific case in question, many creditors have already announced their intent to defer the interest payment of the loans. However, the conditions and timeframe remain unclear. Debtors can find legal justification for their claims to unilateral suspension or possible cancellation for the repayment of the debt in at least three legal principles: *force majeure,* State of Necessity or *rebus sic stantibus* (fundamental change of circumstances). They comprise part of the international common law contained in the 1969 Vienna Convention

on the Law of Treaties and various national legislations. Regardless of the consent of the parties, or the legality or illegality of the debt, they can be applied to debtors and creditors.

The notion of *force majeure* has gained popularity in the past few months, as debtors have appealed to this principle to limit the enforcement of contracts. The United Nations International Law Commission defines force majeure as "an unforeseen or foreseen but inevitable or irresistible event external to the obligor, which makes it impossible for him to perform the obligation concerned." International jurisprudence explicitly recognizes this principle and legitimizes a suspension of debt repayment to both private and public creditors. The claim of force majeure operates as long as force majeure itself exists—"if force majeure disappears, the obligor must fulfill the obligation. Otherwise he will incur responsibility for non-performance." While in principle, force majeure is temporary, if the conditions that resulted in using the *force majeure* are long-lasting and the country definitively cannot meet its financial obligation, the suspension could result in the cancellation of debt. In the case of COVID-19, debtor countries could appeal to *force majeure*, as the pandemic was an unforeseeable situation, beyond the control of the state, that the state itself did not contribute to. The outbreak has proven catastrophic for these countries' economies, making it impossible for them to fulfill their debt obligations. This legal principle might even be able to support absolute debt cancellation if the conditions causing the pandemic are long-lasting.

The legal principle of necessity is used as a justification for a State's immediate suspension of its debt repayments and refusal of its conditions if it remains in a situation that endangers the fundamental existence of the State, whether through its political survival, economic well-being, or its population. According to the UN Commission for International Law, this legal principle can be utilized when the suspension of debt is the only way to save the State from grave and imminent danger. The underlying justification lies in the notion that there exist limits to what can be reasonably expected of a State with regard to debt repayment and contracts. Akin to *force majeure*, the state of necessity offers sufficient grounds for suspension or even the cancellation of foreign debts, should the state of necessity endure. States could easily plead a defense of necessity amid the current pandemic: The survival of many regimes—as well as

the lives of their people—remains under direct threat if they cannot finance urgent expenditures to save human lives and revive economic activities.

The legal doctrine of *rebus sic stantibus* renders a debt contract moot due to a fundamental change in circumstances beyond the debtor's control. This change must be significant and impact circumstances that were "an essential basis of the consent of the parties to be bound by the treaty." In the case of debt, this *rebus sic stantibus*provision permits a State to unilaterally suspend or cancel payments. As for the other two provisions, the suspension of the debt can be temporal or permanent. In the case of debt repayment by African countries confronting the pandemic, one could argue that circumstances have fundamentally transformed: An unforeseen pandemic has sent commodity prices plummeting and drastically reduced economic activities, both of which African countries rely upon to repay debts.

There is no doubt that African government resources must be urgently directed towards the health and economic needs of populations and not diverted to lenders. A debt moratorium would immediately inject liquidity and enlarge the fiscal space of African countries, helping them address the health and economic crises of the pandemic. Given the gravity of the economic downturns and the consequences for the sub-African continent, especially the poorest countries, one could also argue for debt cancellation, not only toward other countries and multilateral institutions, but also toward private creditors. As it was true in the pre-COVID-19 world, most of the debt cannot be repaid, and amid today's economic disaster wrought by the pandemic, we might need a new debt jubilee. At the same time, we are facing a universal disaster and in the current situation one has to weight in the fact that also the creditors have been hammered and are in peril. Most of the creditor countries and international institutions have spoken about the "suspension" of the debt, not their "cancellation." China, for example, seems willing to agree on a temporary freeze of the debt repayment. However, with the pandemic causing its slowest economic growth in nearly three decades, any debt relief agreement will cause China to bear the brunt of huge losses. Given due consideration to the fact that creditors have been imperiled too, African countries should nevertheless start to invoke the three provisions discussed above to not only suspend but also renegotiate the debt in more favorable terms. Whether the creditors accept

these provisions ultimately depends on sovereign, multilateral, and private creditors, their overall coordination and political considerations. If the solution might not be a new debt jubilee or a general agreement, there should at least be a renegotiation according to shared principles and a level playing field among different creditors that departs from ideas and practices of debt and development that have often left emerging economies worse off.

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*I would like to thank Linda Calabrese, Frederic D. Grant and James Gathii for their valuable comments.

[1] Article 26 of the 1969 Vienna Convention on the Law of Treaties.

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