ODIOUS DEBT AS A CLAIM UNDER INTERNATIONAL LAW: LESSONS FROM THE GREEK DEBT TRUTH COMMITTEE

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Introduction

Sovereign indebtedness has been approached from a twofold approach in the international law literature. The first, championed by international finance scholars, posits no questions as regards the legality of the debt and concentrates on debt management, chiefly, if not exclusively, as engineered by lending states and international financial institutions (IFIs).[1] The second approach examines the origins and legality of sovereign debt and its adherents comprise both human rights lawyers as well as general public international law scholars.[2] It is on the basis of the latter scholarship that the concept known as odious debt came to prominence.

This article, although inclined towards a human rights stance, is cognizant of the application of general international law rules to sovereign indebtedness, including international foreign investment law, in addition to international finance law. Indeed, the authors do not assume or imply that all debt is odious or that it suffers from some form of illegitimacy or illegality under international law. That odious debt is detrimental to fundamental human rights has been described elsewhere.[3] What is of interest here is an examination of the legal nature of odious debt as a claim under international law, as opposed to a mere substantive entitlement. This allows us to further briefly investigate the existence of this substantive right from the perspective of state practice, given its absence in treaty law.[4] The authors assess both the political and economic dimension of odiousness in order to demonstrate that it is not simply a financing phenomenon that is divorced from the political and economic spheres of international law. Debt, whether from the perspective of lenders or borrowers is

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[1] See, for example, R M Lastra, L Buchheit (eds.), *Sovereign Debt Management*, (Oxford University Press, 2014); PS Kenadjan, KA Bauer and A Cahn (eds.), *Collective Action Clauses and the Restructuring of Sovereign Debt* (de Gruyter, 2013); R Olivares-Caminal, *The Legal Aspects of Sovereign Debt Restructuring* (Sweet & Maxwell, 2009); A Rieffel, *Restructuring Sovereign Debt: The Case for Ad Hoc Machinery* (Brookings Institution Press, 2003).

[2] See, for example, O Lienau, *Rethinking Sovereign Debt: Politics, Reputation and Legitimacy* (Harvard University Press, 2014); C Esposito, Y Li, JP Bohoslavsky (eds), *Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing* (Oxford University Press, 2013); Y Wong, *Sovereign Finance and the Poverty of Nations: Odious Debt in International Law* (Edward Elgar, 2012).

[3] See JP Bohoslavsky, JL Cernic (eds), *Making Sovereign Financing and Human Rights Work* (Hart, 2014).

[4] But see below n11 for its indirect inclusion in treaty law and further references to the construction of financing arrangements on the basis of states' human rights obligations.

a potent policy tool, which allows states to define and shape broader or specific policy objectives.[5]

The Greek Debt Truth Committee constitutes a paradigmatic shift in the EU and international law of sovereign debt. Five years after the conclusion of the first adjustment program with the Troika (European Commission, European Central Bank and IMF), the then President of the Hellenic Parliament, Zoe Konstantopoulou, established the *Truth Committee on Public Debt* in April 2015, mandating the investigation into the creation and growth of public debt, the way and reasons for which debt was contracted, and the impact of the conditionalities attached to the loans contracted by Greece on the economy and the population. The decision to set up the Committee was predicated on Regulation (EU) No. 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability,[6] as well as the UN Guiding Principles on Foreign Debt and Human Rights[7] The UN Guiding Principles call upon states to undertake periodic audits of their public debts in order to ensure transparency and accountability in the management of their resources and to inform future borrowing decisions. The Committee released two reports (in June and September 2015), which demonstrated that Greece's adjustment programs were motivated by political not financial/fiscal criteria. The technical exercise surrounding macroeconomic variables and debt projections, figures directly relating to people's lives and livelihoods, has enabled discussions around the debt to remain at a technical level mainly revolving around the argument that the policies imposed on Greece will improve its capacity to pay the debt back. The evidence presented in these reports challenge this argument.

The Legal Nature of Odious Debt Doctrine

It should be stated from the outset that the term 'odious debt' is both an autonomous legal concept as well as an umbrella term for sovereign debts which possess one or more qualities that render them illegal or illegitimate in a broad sense. The Greek Truth Committee on the country's sovereign debt, for example, identified four types of odious debt, namely odious, illegal, illegitimate and unsustainable debt.[8] Such classifications carry a great deal of semantics, as do, for example, other significant legal concepts, such as crimes against humanity or genocide. But unlike, the latter categories of international crimes, whose primary

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[5] In *Postova Banka AS and Istrokapital SE v Greece*, ICSID Award (9 April 2015), para 324, it was held that: sovereign debt is an instrument of government monetary and economic policy and its impact at the local and international levels makes it an important tool for the handling of social and economic policies of a state

[6] Art 7(9) enjoins a member state subject to a macroeconomic adjustment programme to 'carry out a comprehensive audits of its public finances in order, inter alia, to assess the reasons that led to the build-up of excessive levels of debt as well as to track any possible irregularity'.

[7] UN Doc A/HRC/20/23 (July 2012), adopted by the UN Human Rights Council.

[8] The Committee was set up by a decision of the President of the Greek Parliament on 4 April 2015. It issued its first preliminary report as Truth Committee on Public Debt, Preliminary Report (June 2015), available at: http://www.hellenicparliament.gr/UserFiles/8158407a-fc31-4ff2-a8d3-433701dbe6d4/Report_EN_final.pdf.

function is a 'sign-posting' one – because there exist alternative crimes under which the perpetrators may be charged, such a mass murder, extermination, grave breaches etc – there is no serious alternative to the types of claims encompassed under the odious debt doctrine, as will be demonstrated shortly.

Given that the concept of odious debt (in its umbrella dimension) has until recently been approached from academic angles and was characterized as a 'doctrine', it is not surprising that its practical legal nature has been given little attention. Of course, the limited practice in which odious debt claims have been raised renders such a state of affairs comprehensible. First of all, it should be emphasized that odious debt is a substantive, as opposed to a procedural, claim that belongs to states. The fact that it is a claim does not necessarily make it an entitlement as such, although claims are typically the flip side of entitlements.[9] In the case at hand, it is a matter of investigation whether a claim for the existence of an odious debt is also an entitlement recognised under international law. The following sections argue that it is indeed a state entitlement that is grounded in both treaty law (particularly as a result of its conflict with human rights obligations and self determination) as well as customary international law,[10] even though the pertinent state practice is not easily discernible.[11]

For the purposes of this section we shall assume that the entitlement against the accumulation of odious debt (whether contractually, trust-based, unilateral or other) derives from economic and fiscal self-determination.[12] This in turn belongs to peoples who go on to exercise it through elected representatives, typically in the form of government. This means that the right against the accumulation of odious debt is exempted from that part of general international law whereby states are responsible for the acts of prior governments (state continuity principle). No doubt, if the people of a state vote overwhelmingly in favor of a government or a policy that clearly produces odious debt, this outcome may not subsequently be relied upon as a claim that said policy contravened the right to economic self-determination. As a result, if a government were to enter into an agreement giving rise to odious, illegal or illegitimate debt, it would not only be breaching its constitutional and treaty obligations, but the other party would not be entitled to enforce the agreement with a subsequent government because of its unconscionable character.[13] The

[9] One of the leading treatises on investment claims, for example, takes the concept of a claim to be self-evident and does not even attempt to explain its legal nature. See Z Douglas, *The International Law of Investment Claims* (Cambridge UP, 2009).

[10] Greek Truth Committee preliminary report, above n8, at 55-56.

[11] The entitlement itself is not always clear in this field. For example, in accordance with Art 7(9) of EU Regulation 472/2013 of the Parliament and Council (21 May 2013) member states are under an obligation to undertake debt audits of their public finances. Such an obligation naturally requires that where an audit reveals serious irregularities in the accumulation of debt, remedial action needs to be taken, lest the obligation is rendered meaningless. By extension, the action required to fulfill the obligation gives rise to a claim. In this manner, Art 7(9) indirectly establishes a claim against odious debts.

[12] A Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge UP, 1995), 56.

[13] Such an analogy exists also under general principles of contract law. Under the common law, for example, credit agreements that are highly prejudicial in favour of the lender, further imposing unconscionable conditions that interfere with the borrower's personal sphere and life choices are contrary to public policy. *Horwood v. Millar's Timber and Trading Co Ltd* [1917] 1 KB 305. Principle 7 of UN Doc A/69/L.84 (29 July 2015) requires that all actors involved in debt restructuring refrain from exercising any undue influence.

veracity of this argument has been explained elsewhere more fully in respect of the Greek debt instruments prior to the Tsipras government assuming power in February 2015.[14]

The objective of an odious debt claim may be manifold. Given that it may be raised in a judicial/arbitral or extra-judicial setting we bypass in this article the issue of legal standing and jurisdiction. Three broad categories of claims may be identified here by reference to their objective, namely: claims which aim to extinguish a debt wholly or partially; claims which seek some kind of set-off and; claims which demand reparation or redress from the accumulation of an odious debt. Each of these will be analysed in turn, albeit briefly.

Claims that seek to extinguish a debt, wholly or partially, are the most common. They are typically pursued through a variety of means, such as unilateral insolvency,[15] unilateral repudiation of the debt as such, or repudiation of the instruments that gave rise to the debt, such as unconscionable concession contracts, arbitral awards on the basis that they violate public policy[16] and others.[17] In order for such claims to be successful it must be demonstrated, besides the illegal, odious or illegitimate character of the debt that the borrower state did not derive, nor will it derive, any unjust rewards or benefits from the debt in question. Unjust enrichment is primarily a matter of fact[18] and if it is proven that such benefit has accrued to the borrowing state, it may either be off-set against its debt as a whole or weaken its overall argument/claim.

Claims that seek to off-set parts of one's debt as a whole are equally legitimate subject to the conditions stipulated in the previous paragraph. However, several considerations are pertinent. A set-off claim is essentially a counter-demand by A against a claim for payment made by B against A. By means of the set-off claim, A demands that B's claim against him be consolidated (or set-off) against B' original obligation. Although the rationale underlying set-off claims is reasonable and without significant hurdles in the context of litigation, it may be problematic in arbitral proceedings where the set-off claim is not encompassed in the agreement to arbitrate. If the *lex arbitri* (or the agreement to arbitrate) does not grant tribunals authority to consolidate set-off

[14] I Bantekas, Exceptional Recognition of Governments and Political Parties in respect of Sovereign Loans: The Greek case, (2013) 82 *Nordic J Int'l L* 317; KH Anderson, International Law and State Succession: A Solution to the Iraqi Debt Crisis? (2005) *Utah L Rev* 401.

[15] This right to unilateral insolvency is further corroborated by the ILA's Sovereign Insolvency Study Group whose 2010 report proposed four policy options for debt restructuring, one of which was in fact full bankruptcy. R M Lastra, L Buchheit (eds.), *Sovereign Debt Management*, (Oxford University Press, 2014), xx-xxiii; equally confirmed in *Postova Banka AS and Istrokapital SE v Greece*, ICSID Award (9 April 2015), paras 322-324.

[16] See, for example, *BCB Holdings Ltd and Belize Bank Ltd v Attorney-General of Belize*, [2013] CCJ 5 (AJ).

[17] Bantekas has identified six mechanisms for unilaterally repudiating odious sovereign debt, namely: (a) unilateral insolvency; (b) repudiation or non-enforcement of arbitral awards on public policy grounds; (c) denunciation on grounds of executive necessity and/or the right to fiscal/tax sovereignty; (d) direct unilateral repudiation on the basis of reports by national debt audit committees; (e) repudiation of contracts when creditor/investor violates human rights and of unconscionable concession contracts; (f) re-negotiation of bilateral investment treaties and concessions. See I Bantekas, The Right to Unilateral Denunciation of Odious, Illegal and Illegitimate Sovereign Debt, in I Bantekas, C Lumina (eds), *Sovereign Debt and International Human Rights* (Oxford UP, 2017, forthcoming).

[18] See generally P Birks, *Unjust Enrichment* (Clarendon, 2005).

claims in the proceedings there is a clear danger that the award may be set aside as *ultra vires* (i.e. that the tribunal has exceeded its authority). Some arbitral statutes make provision for the availability of set-off claims and given that very few statutes expressly disapprove them, they may be considered as satisfying the demands of justice[19] and constitute general principles of law.[20] Article 817 *bis* of the Italian Code of Civil Procedure, for example, grants the arbitrator authority to decide set-off claims, irrespective of whether the set-off arises from the parties' arbitration agreement.[21]

A claim for redress or reparation is more complex because it will typically arise independently of a claim for relinquishing or setting-off an existing debt. In fact, the claimant need only establish the existence of a debt incurred through a violation of international law (which suffices if it was incurred in an odious, illegal or illegitimate manner), which is known as a 'wrongful act' for the purposes of the ILC Articles on State Responsibility (ASR), and the attribution of said act to the state against which the claim for reparation is made. Although the element of 'damage' or 'harm' is not required in order to establish the liability of the culprit state, it is otherwise necessary in order for the injured state to seek individual reparation. A claim for reparation arising from odious need not arise solely from the actions of the state or its instrumentalities as such, but also by way of indirect attribution from the actions of private actors which are either approved by the state in question, or in respect of which the state enjoys effective control.[22] A (theoretical) claim for redress arising from odious debts may include the following: a) extinction of the debt; b) acknowledgment that it never existed; c) demand for specific performance, such as return of sovereign bonds, removal of pertinent claims before courts or tribunals, lifting of circumstances that impair the borrower's international creditworthiness and others. In addition to these, it is not out of the question for the claimant to seek monetary compensation for specific damage caused to its finances as a whole or particular aspects of its economy. By way of illustration, the value of Greece's sovereign bonds were reduced to junk following the collapse of its financial system and in addition it was forced to borrow money at far higher rates on account of its latent un-creditworthiness. Moreover, the crisis culminated in a serious under-funding of its healthcare[23] and the rise of energy prices that resulted in many unnecessary deaths and a sharp decline in the use of environmentally friendly heating systems.

Finally, it should be noted that there is no general rule under international law as regards time limits for raising sovereign claims. The only sensible limitation is that a claim is time-barred if this was stipulated in a treaty or private agreement, or if the conduct of the claimant was such as to give rise to a legitimate expectation that the subject-matter of the claim was no longer

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[19] Art 22 UNCITRAL Arbitration Rules.

[20] See I Bantekas, *Introduction to International Arbitration* (Cambridge University Press, 2015), 112-13.

[21] See also Art 377 Swiss CCP, applicable to domestic arbitration, but no reason why it cannot be extended to international arbitration. Equally, s 29 Swedish AA implicitly suggests that set-off claims are admissible. Specifically, it provides that a claim invoked as a defence by way of set off shall be adjudicated in the same award as the main claim.

[22] Art 8 ASR; *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v USA), Merits, (1986) ICJ Rep 14.

[23] Greek Debt Committee preliminary report, above n8, at 38.

contested or was otherwise satisfied. The latter constitutes a form of conduct-based estoppel and is not strictly speaking concerned with procedural time limits for bringing a claim, but is certainly relevant to this discussion. In the case of sovereign debts the situation is complicated by several factors. The first is that all states are indebted in one way or another to private and sovereign lenders and that the distinction of odious and lawful debt is indistinguishable. Moreover, in order to dissuade borrowers from raising odious debt claims, lenders routinely renegotiate, extinguish, re-finance, provide aid or enter into other mechanisms with indebted governments. In this manner, it is not clear if the borrower has accepted the debt as legitimate in its entirety or is otherwise reserving (tacitly) to counter that part of its debt that it considers odious. In the opinion of the authors such considerations are without merit. This is because of our aforementioned foundational observation whereby government continuity is irrelevant to odious debt creation and accumulation on account of economic self-determination. An odious debt shares many characteristics, mutatis mutandis, with core international crimes, such as crimes against humanity and genocide, namely that: a) the illegal character of the conduct (crime/odiousness) is objective and may not be de-characterised by the relevant parties (i.e. victim/perpetrator or lender/borrower);[24] b) its objective character and its *jus cogens* nature means that it is not subject to prescription or time limitations[25] and; c) its subsequent characterization as legitimate (removal or criminalization) under domestic law is irrelevant as regards its legal nature under international law.[26]

Odious Debt

It is perhaps prudent at this stage to briefly examine the various contours of odious debt and its sub-categories. There are several definitions, to be sure,[27] but for the purposes of this article we shall make use of those articulated in the preliminary report of the Greek Debt Truth Committee because it is most recent, was drafted by a broad array of actors, namely academics from across the globe, civil society and political figures and the definitions therein were not disputed, despite the fact that the Committee itself came under sustained political pressure both from within and outside Greece.

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[24] This of course follows from the international character of the conduct in question but also from its *erga omnes* character, which render it non-contractual (i.e. it does not only affect the immediately concerned parties) in nature. *Barcelona Traction, Light and Power Co Ltd*, (Belgium v Spain), Merits, [1970] ICJ Rep 44.

[25] See 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity; *Barbie* case, judgment (26 January 1984), 78 ILR 132 in respect of crimes against humanity; *ICTY Prosecutor v Furundzija*, Trial Judgment (10 December 1998), para 157, in respect of torture and equally *Chumbipuma Aguirre and Others v Peru* (Barrios Altos case), IACHR judgment (14 March 2001), para 41.

[26] This is usually associated with the legality under international law of amnesties granted under domestic law. See I Bantekas, *International Criminal Law* (Hart, 4th ed, 2010), 467-70.

[27] In addition, a report consistently cited as formulating the customary elements of odious debt contains pertinent definitions. See R Howse, *The Concept of Odious Debt in Public International Law*, UNCTAD Paper 185 (July 2007).

The Greek Truth Committee went on to define odious debt, as a matter of customary international law, as debt:

> which the lender knew or ought to have known, was incurred in violation of democratic principles (including consent, participation, transparency and accountability) and used against the best interests of the population of the borrower state, or is unconscionable and whose effect is to deny people their fundamental civil, political or economic, social and cultural rights.[28]

Quite clearly, the odious dimension of a debt brings into question two distinct but inter-related elements, namely its unconscionable nature and its conflict with fundamental human rights. It assumes that the very existence of the state is derived from the will of its people and that governments merely articulate that will in both the domestic and international spheres as representatives of the people. It is a fundamental principle of representation or agency, that the latter is obliged to perform his duties in the best interests of the principal. Consequently, a debt that is incurred in a manner that is antithetical to the interests of the borrowing state (or the lending state for that matter) or which is in conflict with the fundamental rights enjoyed by the people of that state, cannot reasonably or legally be demanded by the people in question (through its government). Such a debt cannot have offered any benefit to the people as such, only to a particular class of individuals, typically those involved in the original agreement. Given that the people derive no benefit from such a debt, there can be no claim of unjust enrichment. Although this idea of odious debt, which is predicated on the *jus cogens* principle of economic self-determination, has found expression in the work of truth committees and several notable arbitral awards,[29] public and private lenders have, not surprisingly, taken a very hostile stance against its invocation by indebted states. This attitude will be explored in a following section.

Illegitimate Debt

The second type of odious debt is illegitimate debt. This was defined by the Greek Debt Truth Committee as:

> Debt that the borrower cannot be required to repay because the loan, security or guarantee, or the terms and conditions attached to that loan, security or guarantee infringed the law (both national and international) or public policy, or because such terms and conditions were grossly unfair, unreasonable, unconscionable or otherwise objectionable, or because the conditions attached to the loan, security or guarantee included policy prescriptions that violate national laws or human rights standards, or because the loan, security or guarantee was not used for the benefit of the population or the debt was converted from private (commercial) to public debt under pressure to bailout creditors.[30]

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[28] Truth Committee preliminary report, above n8, at 10.

[29] In the *Tinoco* arbitration [Great Britain v Costa Rica], (1923) 1 RIAA 371, it was clearly stated that knowingly providing a loan to a government that will not be beneficial to its people constitutes a hostile act and merits no entitlement for repayment.

[30] Debt Committee preliminary report, above n6, at 10; see also Report on 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, UN Doc. A/64/289 (12 August 2009), paras. 8–22.

The Committee's definition was dictated by the underlying conditions of the Greek debt and by that time the idea of illegitimate debt was more theoretical than practical. It was assumed that a debt was illegitimate where it had been incurred legally but which was ethically unconscionable, whether procedurally or substantially. As will be demonstrated in the section dealing with the economics of sovereign debt, the potential for illegitimate actions is much broader. However, it suffices here to state that it is now well recognised that debt constitutes a policy instrument to the same degree as its economic and fiscal dimension.[31] Borrowing states may incur cheap debt (i.e. with preferential interest or long repayment periods), where available, for fungibility purposes,[32] or with a view to attracting investment from particular countries, undertake infrastructure projects that secure their current levels of employment, etc. On the other hand, public works or public-private partnerships (PPPs) are money-intensive and constitute the primary financing projects for banks, hedge funds and other private financiers. They, in turn, urge industrialised nations to lobby on their behalf for funding. Thereafter, it is in the interests of the private funders and the states (which may and usually do contribute partly to large projects especially in the developing world) to make sure that repayment of the loans is prompt. Once a private bank whose finances are linked to a country is exposed to a toxic (non-repaid) debt, there is a domino effect on the banking sector and the state in question because of the inter-connectedness of the international private financing system, which in turn sustains the domestic job market, consumer spending and ultimately the availability and collection of taxes. As a result, lending states not only have a financial interest in the repayment of debt incurred by borrowing states, but may also find it expedient to offset such debt by using it as a political tool in order to achieve financial or political benefits.

It is precisely the pursuit of such financial and political benefits that is at the heart of the doctrine of illegitimate debt. In the case of the Greek debt, illegitimacy encompassed both a procedural and a substantive dimension. As to the first, Greece's multilateral lenders entered into actions or statements that either deteriorated the country's creditworthiness – which forced it to borrow under higher interest rates or be excluded from the private financing markets – or culminated in decreasing the value of its sovereign bonds.[33] Moreover, these very statements and actions had a very profound effect on the way that the Greek government entered into negotiations regarding the servicing of its debt, as well as in the way that the Greek people exercised their democratic right to address the country's debt issue. These actions have been held to constitute unilateral coercive measures. Given that powerful creditor states are able to interfere in borrower states' constitutional processes and enter into statements or other actions that knowingly culminate in harming the economy of the borrower and the livelihood of its population (unilateral coercive measures), reference to 'force' in Article 52 of the Vienna Convention on the Law of Treaties (VCLT) may be construed as including forms of economic coercion.[34] This type of

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[31] See above n5.

[32] JE Stiglitz, *Globalization and its Discontents* (Norton 2003), 44-46.

[33] REFERENCE FROM SEPTEMBER REPORT

[34] The Final Act of the VCLT includes a declaration, initially tabled by The Netherlands (in reaction to a request by developing countries that consent to a treaty under economic pressure

economic coercion qualifies, among others, as unlawful intervention in one's domestic affairs which, although does not invalidate consent, may nonetheless offer a basis for denouncing a loan agreement under Article 56(1)(b) VCLT.

When a heavily indebted country is under severe political pressure to repay its debt under severe conditionalities or face the prospect of bankruptcy with unknown – but significantly exaggerated – consequences, especially when its original debt is of dubious legality – is not permitted to negotiate in good faith and is contracting under a degree of coercion. Such coercion was documented by the Greek Truth Committee as regards the negotiation of debt restructuring, but also in relation to the referendum of July 2015 where the Greek people were effectively asked to vote whether they accepted the severe conditionalities (austerity) associated with the latest (proposed) loan agreement, or otherwise favoured fiscal independence, which may have encompassed the parallel use of a national currency, repudiation of the debt, or other measures.

Besides the procedural illegitimacy of sovereign debt, as described in the previous paragraphs of this section, substantive illegitimacy concerns the offer and consideration of a debt that is wholly unnecessary. The UN Independent Expert on debt and human rights issued a report on the purchase of ships at preferential rates by Ecuador in the 1970s, financed by Norwegian loans, through an aid program. These ships were of little, or no use, to Ecuador at the time and in the process was saddled with a significant debt. When interest rates later increased Ecuador's interest obligations increased manifold and the only entity that made a profit from this arrangement were Norwegian ship builders. Much later Norway acknowledged that this project was of no value to Ecuador and its people and went on to unilaterally extinguish the remainder of the debt.[35]

Illegal Debt

Although the concept of debt illegality shares some common features with odious and illegitimate debt, it is very much predicated on the violation of laws, whether domestic or international and hence is easier to identify. The Greek Truth Committee defined illegal debt as:

> debt in respect of which proper legal procedures (including those relating to authority to sign loans or approval of loans, securities or guarantees by the representative branch or branches of government of the borrower state) were not followed, or which involved clear misconduct by the lender (including bribery, coercion and undue influence), as well as debt contracted in violation of domestic and international law or had conditions attached thereto that contravened the law or public policy. [36]

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be considered as 'coercion'), stating that: 'The UN Conference on the Law of Treaties ... condemns the threat or use of pressure in any form, military, political, or economic, by any State, in order to coerce another state to perform any act relating to the conclusion of a treaty in violation of the principles of sovereign equality of states and freedom of consent' Draft Declaration on the Prohibition of the Threat or Use of Economic or Political Coercion in Concluding a Treaty, adopted by the Conference without a formal vote. Draft Report of the Committee of the Whole on Its Work at the First Session of the Conference, UN Doc A/Conf. 39/C. 1/L. 370/Rev. 1/Vol. II (1969), at 251-252.

[35] UN Doc A/HRC/14/21/Add.1 (21 April 2010).

[36] Truth Committee, preliminary report, above n8, at 10.

The rule whereby states may not invoke their domestic law as justification for violating their obligations under international law[37] is inapplicable in situations where the lender intended to violate or bypass fundamental provisions of domestic law, particularly of a constitutional nature, through a debt instrument entered into with the borrower. This is because such an agreement violates the principle of legality, fails to satisfy good faith and breaches third parties' legitimate expectations. Surely, the superior character of an agreement under international law was not meant to be used in order to blatantly bypass and violate fundamental constitutional provisions, breach human rights and put third parties' legitimate expectations into doubt. The Greek case is emblematic of such practices by sovereign lenders. Under articles 28 and 36 of the Greek Constitution all international agreements must be ratified formally by parliament subject to special majorities and in any event they cannot violate fundamental rights and liberties. Following the debt crisis, the government passed Law 3845/2010, article 1(4) of which granted the Finance Minister authority to negotiate and sign the texts of all pertinent loan and financing agreements (including treaties, contracts and MoUs) but these had to be brought to parliament for formal approval and ratification under normal constitutional procedures. A few months later, article 1(9) of an obscure Law 3847/2010, modified article 1(4) of Law 3845 by stipulating that the term 'ratification' [by parliament] be replaced by 'discussion and information'. Moreover, all pertinent agreements (irrespective of their legal nature) were declared as producing legal effect upon their signature by the Minister. Hence, articles 28 and 36 of the Constitution were effectively abolished by a mere legislative amendment in complete defiance of the procedures for amending the Constitution.

The State Practice of Odious Debt

When trying to convince one's audience that a particular international law principle that is absent in treaty law really exists scholars typically turn to customary law and attempt to furnish as many instances of state practice they can possibly find.[38] This is not the case with odious debt. It has sparingly been claimed and even less so recognised and declared to govern the relations between a sovereign borrower and its lenders.[39] The reason for the absence of concrete state practice lies in the disincentive of lending nations and institutions in allowing their borrowing counterparts from making any direct claims before judicial or arbitral fora – or indeed in the form of extra-judicial unilateral measures – for the simple fact that it would give rise to a particular state practice that they deem undesirable.[40] It is largely for this reason that lending states have set up informal debt relief mechanisms, such as the Paris Club, or enter into

[37] Art 32, ILC Articles on State Responsibility.

[38] See H Thirlway, *The Sources of International Law* (Oxford UP, 2013), 63ff.

[39] This has not, of course, prevented scholarly and judicial/arbitral declarations in the past. See AN Sack, The Judicial Nature of the Public Debt of States, (1932) 10 *NYU Law Quarterly* 341.

[40] See S Ambrose, Sovereign Debt Restructuring: Social Movements and the Politics of Debt Cancellation. (2005) 6 *Chi.* J. *Int'l L* 267.

bilateral or multilateral agreements towards debt alleviation.[41] Whatever the method, the objective always remains the same. Even in the case of Greece whereby the Tsipras government sought a renegotiation of the country's debt, the very utterance of odious debt was never made. In fact, when the government had a change of heart following the referendum of July 2015 it decided to disband the parliamentary debt committee, which was the only entity in government describing part of the debt as odious.

Notwithstanding such intentional silencing, the very fact that it is undertaken by lending nations in order to suspend another non-desired practice, clearly suggests that the non-desired practice encompasses a critical mass of *opinio juris*. In international law a customary rule may well develop – and its existence accordingly proven – not only by means of positive practice, but also a uniform and sustained *opinio juris*. If this was not so, countries unable (technologically, financially, politically or otherwise) to undertake positive acts would always be excluded from rule-creation. Such an eventuality would be wholly antithetical to the *jus cogens* rule of states' juridical equality and would render a handful of states global legislators. It must of course be shown that the *opinio juris* is of itself widespread, substantial and uniform and in the case at hand it will not bind lending states.[42]

At yet another level, however, there exist indirect instances of odious debt claims that have been expressed through several mechanisms.[43] As much as IFIs and lenders try to avert unilateral sovereign insolvency as a legal possibility, despite the fact that unilateral insolvency was pretty much extensive right up until World War II.[44] In equal measure, developing states strive, although not always successfully, to repudiate or re-negotiate long-term concessions that drain their natural resources to the detriment of their populations. Such tensions cannot surely be dealt on the basis of the principle of contractual sanctity (*pacta sunt servanda*) because it would produce unjust results.

Finally, the rise of human rights, both in treaty and customary form, clearly give rise to a duty to construe debt arrangements from the lens of individual freedoms and corresponding state obligations. Where the repayment of a debt jeopardises or in fact culminates in unnecessary infantile deaths, malnourishment, the spread of diseases, widespread poverty, lack of access to essential services, education and a violation of other civil and political and socio-economic rights the arrangements in question are problematic. States, both lenders and borrowers, are under an obligation to conduct their international affairs by direct reference to their human rights obligations.[45] Any other result

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[41] For example, the Tsipras government entered into an MoU with the EC Commission and ESM on 19 August 2015, followed by a financial assistance facility agreement (loan agreement) a little later. See Truth Committee on Public Debt, Illegitimacy, Illegality, Odiousness and Unsustainability of August 2015 MoU and Loan Agreement (September 2015), available at:

[42] The availability of unilateral denunciation of odious, illegal and illegitimate debt is underscored in Principle 1 of a recent UN General Assembly resolution, which received 136 votes in favour, only 6 against and 41 abstentions (not surprisingly, all from creditor nations). UN Doc A/69/L.84 (29 July 2015).

[43] See above n 17.

[44] See M Waibel, *Sovereign Defaults before International Courts and Tribunals* (Cambridge UP, 2011).

[45] UN Guiding Principles on Foreign Debt and Human Rights, UN Doc A/HRC/20/23 (10 April 2011).

would immediately relegate human rights law to a *lex specialis* regime that is fragmented from and unrelated to the other obligations of states.[46]

The practice of the ECB and the EC Commission in the course of the Greek debt crisis and their lending to Greece demonstrates a clear will to operate outside EU law. There are several reasons for this, such as the avoidance of human rights obligations under Article 51 of the EU Charter of Fundamental Rights (CFR) or the promotion of human dignity, freedoms and democracy under Articles 2 and 3 of the TEU, as well as Article 9 TEFEU. The European Commission, for example, in discharging the role assigned to it under the Intercreditor Agreement of 8 May 2010, acting under Articles 126(9) and 136 of the TFEU, should have required Greece to take measures for deficit reduction, but these should have been demanded within the framework of the CFR. As regards the second rescue plan presented to Greece, which was launched after the establishment of both the EFSF and the EFSM, to the degree that the EC Commission insofar as it assumes a role in the EFSF by negotiating the MoU with the borrowing Member State, there is no doubt that it is bound to ensure that all its actions comply with the Charter of Fundamental Rights.

Overall, therefore, the identification of customary law in the field of indebtedness and odiousness should be sought through other forms of practice that do not immediately reveal a direct link with these two concepts.[47]

The Financial Complexities of Odious Debt Arrangements

In June 2008 Greek public debt was about 252 billion Euros, which amounted to a debt-to-GDP ratio of 112 per cent. This was certainly sustainable, especially for a developed economy in the eurozone. If this is coupled with a decent credit rating, particularly where a state pays its monthly debt arrears in time and is considered creditworthy, the interest charged for its borrowing will remain comparatively low. When such creditworthiness exists and a country maintains a small deficit that is counter-balanced by a manageable debt-to-GDP ratio (i.e. the total amount of public debt as juxtaposed to the GDP), the total amount of a country's overall debt does not lead to a debt crisis; otherwise, it risks exclusion from the private lending markets and subsequently the value of its sovereign bonds will be reduced to junk.

For reasons that will become evident below, the Greek Statistical Agency intentionally falsified the country's debt figures in 2009 by discovering additional debt (which did not exist) and which the then government incorporated in the country's 2009 budget. Hence, whereas the deficit was in fact 9.3 billion Euros, equivalent to 3.93 per cent of GDP, the falsified deficit statistics

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[46] This debate is acute in the field of foreign investment law. Even so, the new generation of bilateral investment treaties (BITs), such as the preamble and Art 3(1) of the 2015 Norwegian Model BIT insert human rights clauses and investment tribunals recognize the importance of human rights obligations of host states. See *Saluka Investments BV v. Czech Republic*, (ICSID) (2006), para 262, which stated that: 'It is now established in international law that states are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare'.

[47] See Thirlway, above n38, at 83-86, who identifies the relevance of ethical principles in the formation of customary law.

reported it as being in the region of 24 billion Euros.[48] This automatically created tension in the private markets and effectively made borrowing for Greece much more expensive. As a result, it was unable to repay its otherwise sustainable debt and the value of its sovereign bonds was equally reduced to junk. Before the circulation of the preliminary report of the Greek Parliament's Truth Committee on Public Debt in June 2015, it was globally assumed that Greece's debt was the result of lavish public expenditures and living 'beyond one's means'. The Committee dispelled this myth and demonstrated how the debt had really been accumulated.

It was found that Greece's public debt had remained more or less the same from 1993 to 2009.[49] In fact, 2/3 of the debt's rise is attributable to interest payments alone (simple and compound). Public expenditures during this period were lower in Greece than in the rest of the eurozone, with the exception of defence expenditures.[50] However, what was less noticeable was that between 2000 and 2009 there was a sharp rise in private debt. This private debt-to-GDP ratio reached its peak at 129 per cent in 2009. Hence, Greek and European private banks found themselves exposed to almost 100 billion euros worth of private debt.[51] Quite clearly, this was not a debt incurred by the state, for which it was not liable. When private debts are not repaid there is a loss of capital for the lending institution. If the bank is not re-capitalised when losses from private debt are significant it is not only that its depositors risk losing their deposits, in addition to its own bankruptcy, but since banks lend among themselves, its other lenders are equally exposed to its losses. The same is true of its insurers and hence the prospect of contagion is clear. For the country whose banks are exposed to huge losses, in addition to the typical re-capitalisation of such banks through taxpayer funds, there is also a loss of trust in the state in the international financial markets and a rise in its spreads (effectively, its borrowing capacity).

It is at this point that the kleptocracy kicks in. As the Committee pointed out in its preliminary report, in their effort to avoid the bankruptcy of those private banks which managed to accumulate a private debt of 100 billion euros through irresponsible lending, the governments of France, Germany and Greece conspired to falsify the Greek budget of 2009 so that the country's deficit could appear far larger than it really was. Why? Because in this manner Greece could be forced out of international lending markets and thus go under fiscal supervision by the IMF and the ECB, and rely on both multilateral and bilateral creditors. Their ultimate purpose was to buy some time so that they (the sovereign states) could purchase all this private debt incurred by their private banks. Once they did so, the otherwise private (bank) debt that was now in their hands was presented as a state-to-state (sovereign) debt.[52] Hence, they transformed a private debt into a public one because the banks could not have forced the Greek state to pay it as it was not incurred by the Greek state. Upon transformation into a 'state' debt, not only were the private banks effectively re-capitalised with EU tax payers' money, but the cost of the re-capitalisation could

[48] Debt Committee preliminary report, above n8, at 18.
[49] Ibid, at 11.
[50] Ibid, at 12-13.
[51] Ibid, at 14-15.
[52] Ibid, at 15.

subsequently be demanded further from Greece and its population. At what cost? The imposition of the most austere conditionalities ever witnessed and an economic occupation of the country. Did they work? The austerity measures imposed upon the Greek people not only failed to increase productivity and investment, but even though Greece has succeeded in consecutive surplus budgets its GDP shrunk by 25 per cent and unemployment rose to more than 30 per cent.[53] By late 2014, Greece's debt-to-GDP ratio had risen to 190 per cent. Of the funds granted to Greece under the so-called 'bailout' program between 2010 and 2014, less than 8 per cent was earmarked by the creditors for public expenditures, the rest being directed to debt repayment. Yet, Greece was made to pay significant fees for this service (legal, financial and other), in addition to the accumulation of interest at exorbitant rates.

In a 2013 IMF report which was based on an internal audit regarding the facilities for the Greek debt, it was pointed out that the Greek debt was clearly unsustainable from the outset. The restructuring of the debt recommended by the IMF in 2010 would have reduced it by 80 per cent and would have made recovery feasible and speedy.[54] The French and German determination to avoid any haircut (restructuring) but only to force Greece into deep spending cuts was doomed to fail. The sole intention belying the Greek so-called 'bail-out' program was to save several private banks in Europe.[55] In this scheme, fundamental human rights played no role whatsoever.[56] It is not surprising, therefore, that under the weight of this evidence, the Truth Committee on the Public Debt found this part of Greece's debt to be odious, illegal and illegitimate.[57] It is telling that the representative of Greece to the IMF during 2010-12 under (public) questioning from the Committee stated that the IMF held training seminars for Greek journalists so that they could hide the truth and avoid anyone revealing the true extent of the fraud in favour of the banks!

Conclusion

A serious test case encompassing an odious debt claim has yet to be made before an international court or tribunal. The only potential fora that could entertain such a claim are the International Court of Justice (ICJ) and investment tribunals under the 1965 International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID). [58] This is because the parties submitting disputes to both of these only rarely restrict their applicable law, whereas it is unlikely that the parties (sovereign and private lenders) to a debt dispute will opt for ad hoc or institutional arbitration through a submission agreement that allows the tribunal to consider the odious debt

[53] Ibid, at 33-36.
[54] IMF, 'Greece: Ex Post Evaluation of Exceptional Access under the 2010 Stand-by Arrangement', IMF Country Report 13/156 (June 2013), available at: http://www.imf.org/external/pubs/ft/scr/2013/cr13156.pdf.
[55] Debt Committee preliminary report, above n8, at 26, 30-31.
[56] Ibid, at 38-43, for an analysis of the impact of the 'bailout program' on human rights.
[57] Ibid, at 45-50.
[58] 575 UNTS 160.

doctrine. Even so, courts and tribunals, depending on their mandate, need not specifically spell out debt odiousness, but can simply rely on states' obligation to protect and uphold fundamental human rights above other politico-financial considerations to the contrary.[59]

We have determined in this article that the range of unconscionable debts encompassed under the umbrella term of odious debt is meaningful in international law. They are creatures of customary international law, and particularly emanations of *opinio juris* (even absent positive practice), forced to remain in silence and inactivity through a series of incentives or scaremongering engineered by powerful lending states and IFIs. Odious debt is only meaningful as a sovereign entitlement against the country's lenders, whether public or private. Given that odious debt violates economic self-determination which itself is a collective entitlement that is delegated to a representative of the people (typically its government_ – but exercisable on their behalf and for their benefit – it is evident that it is not subject to the rule of government continuity and succession under international law. As a result, if a government conspires to transform private debt into sovereign debt, its successor (or the people of the country in question) is not responsible for the repayment of said debt. The debt is attributable solely to the persons of the parties that incurred it and not the state.

In this sense, the concept of odious debt becomes a claim, or a defence, in favour of the state and its people. This claim is very much of a substantive nature and may be exercised with a view to the partial or total extinction of the debt, acknowledgment of non-existence (declaratory relief), demand for specific performance, or other. The claim is legitimate only if the indebted state has not become unjustifiably richer or become the beneficiary of an undue advantage. Where a legitimate odious debt claim is found to exist, it may be declared and acted upon unilaterally. This means that no acceptance need be sought from the country's creditors, although undoubtedly this will give rise to considerable friction and may be followed by a series of countermeasures. Unilateral odious debt declarations may involve debt denunciation, elimination of debt from national budget, non-payment of arrears, confiscation or attachment of lender's assets, judicial proceedings against lenders and others.

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[59] Debt Committee preliminary report, above n8, at 59.