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# On The Odiousness of Greek Debt

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**Abstract:** *Unlike the popular narrative, which suggests that the Greek debt crisis was the result of lavish spending, this article demonstrates that the 'crisis' was generated by a transformation of purely private debt into public debt. This finding is supported by the preliminary report of the Greek Parliamentary Committee on the Truth of the Greek Debt, which clearly showed that the exponential increase of private debt in Greece risked the collapse of the private financial institutions exposed to it, namely Greek, French and German banks. This resulted in pressure on the Greek government to recapitalise and nationalise Greek banks through Eurozone and IMF funding. This funding, which came to be known as 'bailout for Greece' was nothing more than the rescue of private banks through EU taxpayers' money, only 5% of which went into the Greek economy. The article shows that the process by which the debt was transformed, as well as the post-crisis bailout were odious, illegal and illegitimate and the ensuing debt itself was unsustainable and wholly against fundamental human rights.*

## I Introduction

In this article, we provide a constitutional and economic analysis of the Greek fiscal crisis on the basis of the economic and legal findings of the committee established in early 2015 by the Greek Parliament to audit Greek debt (the Greek Debt Truth Committee).

The Committee was mandated to consider the historical conditions under which the stock of Hellenic debt was cumulated, and in particular, the consequences that the post-2010 programmes of financial assistance to the Hellenic Republic have had on the Greek socio-economic structure. Despite the fact that the Committee was officially terminated before it could complete its work (a casualty of the convoluted process leading to the third programme of financial assistance to Greece signed in August 2015), its interim report of July 2015 should be of interest to both social scientists and legal scholars.

On the one hand, the report takes stock of the crystallisation and incipient operationalisation of the concept of 'odious debt' as a substantive and procedural legal category of international law. On the other hand, the report renders public the empirical and normative findings that the Committee made in its few months of operation. Such findings challenge not only the standard public and scholarly narratives of the Greek crisis (and, by extension, of the Eurozone crisis as a whole), but also the very narrative underpinning the 'government' of the Greek crisis, i.e. the actions taken and decisions adopted by

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European institutions to contain and overcome the fiscal crisis of the Greek state. In particular, the Committee ascertained that

- the key driver of the growth and accumulation of Greek sovereign debt was not 'excessive public spending', but rather the high real interest rates paid by the Hellenic state in the eighties and nineties;
- the factor triggering the Greek fiscal crisis, namely the massive difference between the deficit estimate of early 2009 (3.7% GDP) and the revised estimates of late 2009 and 2010 (12.7% GDP in October 2009, 13.6% GDP in April 2010 and 15.4% GDP in November 2010), was not so much the result of massive 'electoral cycle' overspending, but of statistically and legally problematic revisions of the way in which the costs of arrears in hospital spending, the losses of public enterprises and the liabilities stemming from derivative contracts were to be accounted;
- the liquidity crisis triggered by deficit estimates revisions created the conditions under which the nationalisation of the risks stemming from private cross border borrowing (feeding the geometrical growth of Greek public debt since the Hellenic State became a Eurozone Member) and the reconfiguration of debt legal relationships (with sovereigns replacing private parties both as creditor and debtor) could be undertaken without any significant opposition.

The Committee concluded that post-2010 Greek debt could be regarded as odious under international law. We may be tempted to think that such a finding became irrelevant the moment the third Greek economic programme was signed in August 2015. That would be a too quick by half conclusion. Debate on the binding character of Greek public debt is bound to revive once it becomes impossible to postpone acknowledging that Greece will not be capable of paying its debt back.

The article is structured in three parts. In the first section we analyse the doctrine of 'odious debt'. In the second section we consider the main economic and legal findings of the Committee, including the finding that post-2010 Greek debt is illegitimate, illegal and unsustainable. The last section holds the conclusions.

## II The Legal Doctrine of 'Odious Debt'

Sovereign indebtedness tends to be approached from two different and contrasting if not antagonic perspectives in the international law literature. On the one hand, we find those scholars that focus on issues of debt management, discussing chiefly, if not exclusively, the practice of international financial institutions and 'creditor' states.[1] These authors, many of which specialise on the law of international finance and in international investment law, tend to take for granted the legality and legitimacy of all sovereign debt, resulting not only from the force of contracts (*pacta sunt servanda*), but also from the doctrine of state continuity and, in a more economic key, from the reputation costs of not serving the debt. On the other hand, we find scholars that set the analysis of sovereign debt in its wider normative context. Debt is thus regarded not only as a contractual relationship and a means of funding state expenditure, but also as a powerful policy and political tool

[1] See e.g. R. M. Lastra and L. Buchheit (eds.), *Sovereign Debt Management* (Oxford University Press, 2014); P.S. Kenadjan, K.A. 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).

 

to define and shape policy objectives, and to operationalise fundamental economic and political choices,[2] the legality and legitimacy of which has to be determined, and not taken for granted, by reference to the whole set of relevant international law principles, including the right to self-determination and the protection of fundamental rights as enshrined in international treaties and covenants.

International human rights scholars, as well as 'general' international law scholars and practitioners following this second approach analyse not only 'debt management' issues, but also pay considerable attention to the origin and socio-economic impact and consequences of sovereign debt.[3]

This divide is not merely theoretical. At its pragmatic core is the question whether, as a matter not only of morality, but also of law, *all* sovereign debt should be repaid *in full*, or whether there are instances in which debt may not or even should not be repaid *in full* or *in part*. This pragmatic question was first posed in the aftermath of the First World War. The ensuing social, economic and political transformations and revolutions made the *legal* question of whether sovereign debt should be regarded as legally 'sacro-sanct' relevant. In particular, the collapse of empires resulted in many complex state successions, which implied, among many other issues, debt succession. Moreover, political change in Russia resulted in the open and express repudiation of all debts contracted by the Russian state. It was in this socio-economic and political context that the concept of 'odious debt' was first coined, with a view to forge criteria by which to determine which sovereign debt should be repaid and which there was no legal obligation to repay.

The 'return' of the doctrine of 'odious debt' in the last three decades is largely the result of socio-economic and political conditions that render again highly conflictive and controversial the 'sanctity' of sovereign debt. The very concept of 'odious debt' is essentially contested. 'Odious debt' is rarely mentioned (except to deny the concept any legal validity) by the advocates of the first approach to sovereign debt referred at the beginning of this introduction. It is argued that the questioning of the 'sanctity' of sovereign debt is incompatible with taking international law seriously, especially international finance and international investment law. On the other hand, 'odious debt' is a key concept for those who approach sovereign debt from a wider and broader understanding of international law. Only by considering the limits of the obligation to pay sovereign debt is possible to fully consider the legal character of human rights treaties and self-determination which is a *jus cogens* entitlement. Quite obviously, the stakes are high in pragmatic terms, as we will see when reviewing the findings of the debt committee. The stakes are, however, also very high in terms of how international law, and even perhaps law, is understood.

In this article we follow the second approach to the analysis of sovereign debt because we regard the criticisms of the 'odious debt' doctrine as deeply flawed. Far from reflecting a one-sided and distorted analysis of international law, a human rights approach to sovereign indebtedness allows us to take seriously all relevant international norms at play, both the law of international finance and international investment law, as well as human rights treaties and covenants. It goes without saying, no matter what critics claim, that posing the

[2] In *Postova Banka AS and Istrokapital SE v. Greece*, ICSID Award, 9 April 2015, available at http://tinyurl.com/pvcycdg, 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.

[3] See e.g. O. Lienau, *Rethinking Sovereign Debt*: *Politics*, *Reputation and Legitimacy* (Harvard University Press, 2014); C. Esposito, Y. Li and J.P. 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).

 

question of whether *some* sovereign debt *may* be illegal and/or illegitimate is not the same as concluding that *all debt* is *odious* or that *sovereign debt is intrinsically illegal or illegitimate*. The concept of odious debt is not intended to foreclose the debate on the legitimacy of debt (or to put it differently, it is not a reverse mirror of the doctrine of the 'sanctity' of sovereign debt),[4] but its very point is to work out the criteria by which to determine whether specific sovereign debts are legal or morally legitimate.

In the following, we consider (1) the legal basis of the doctrine of 'odious debt'; (2) the typology of 'odious debts' and (3) the entitlements stemming from the characterisation of a debt as odious.

### *A Odious Debt as Norm of International Law: Opinio Juris*

The concept of odious debt refers to sovereign debt which does not entitle the creditor to request repayment, on account of either how the debt was generated, how the funds resulting from the loan have been used, or the effect that repaying the debt would have on the fundamental rights of the people of the indebted state.

The doctrine of odious debt is part of international customary law.

Odious debt has neither a treaty basis[5] nor is it supported by clear state practice.[6] Still, the fact that odious debt has been sparingly claimed and even less frequently recognised and declared to govern the relations between a sovereign borrower and its lenders[7] has a straightforward explanation. 'Creditor states'[8] and international institutions tend to radically discourage 'debtor' states from making any direct claims before judicial or arbitral fora—or indeed in the form of extra-judicial unilateral measures. Indeed, discouraging odious debt claims is very consciously aimed at preventing state practice from even emerging.[9] It is largely for this reason that 'creditor' states have set up informal debt relief mechanisms, such as the Paris Club, or enter into bilateral or multilateral agreements towards debt alleviation.[10] Whatever the method, the objective always remains the same.[11]

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[4] See J.P. Bohoslavsky and J.L. Cernic (eds.), *Making Sovereign Financing and Human Rights Work* (Hart, 2014).

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

[6] See H. Thirlway, *The Sources of International Law* (Oxford University Press, 2013), at 63.

[7] This has not, of course, prevented scholarly and judicial/arbitral declarations in the past. See A.N. Sack, 'The Judicial Nature of the Public Debt of States', (1932) 10 *New York University Law Quarterly*, 127–56 and 341–59.

[8] While all states issue sovereign bonds and thus are debtor states in a literal sense, it makes sense to speak of debtor and creditor states by reference to the larger question of whether the financial institutions established in a given state tend to play a major role as exporters or importers of capital, to the extent that this contributes to shape the position that the state takes in international law and in international fora regarding the obligations of creditors and debtors in international loans. It seems to us that a good indicator of whether a state should be characterised as a 'creditor state' is its membership of the Paris Club. Present membership includes Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Ireland, Israel, Italy, Japan, the Netherlands, Norway, the Russian Federation, Spain, Sweden, Switzerland, United Kingdom and the United States of America, available at http://www.clubdeparis.org/en/.

[9] See S. Ambrose, 'Sovereign Debt Restructuring: Social Movements and the Politics of Debt Cancellation', (2005) 6 *Chicago Journal of International Law*, 267-280.

[10] For example, the Tsipras government entered into a Memorandum of Understanding with the EC Commission and ESM on 19 August 2015, followed by a financial assistance facility agreement (loan agreement) a little later. See the second report of the Truth Committee on Public Debt, released in September 2015, available at http://cadtm.org/IMG/pdf/7AEBEF78-DE85-4AB3-98BE-495803F85BF6-Mnimonio_ENG.pdf.

[11] 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, as already pointed out, 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.

 

Lack of clear state practice does not disqualify odious debt as a customary principle of international law. The fact that public and private lenders have taken a very hostile stance against its invocation by indebted states is not evidence that, as is rather frequently claimed, there is no such thing as odious debt under international law, but, rather, it is proof that the concept of odious debt is full of massive economic and financial implications.[12] A customary rule of international law may well develop—and its existence accordingly be proven—not only by means of positive practice, but also through a uniform and sustained *opinio juris*.[13] In that regard, the very fact that debt relief mechanisms are promoted by lenders in order to preempt the non-desired practice of claims of odiosity of debt clearly suggests that there is a critical mass of *opinio juris* supporting 'odious debt'. It must of course be shown that the *opinio juris* is widespread, substantial and uniform.[14]

There are indeed many indirect instances of odious debt claims that have been expressed through several mechanisms.[15] As much as international financial institutions and lenders try to avert unilateral sovereign insolvency as a legal possibility, unilateral insolvency was pretty much extensive right up until World War II.[16] 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. Moreover, the rise of human rights, both in treaty and customary form, clearly gives rise to a duty to construe debt arrangements from the lens of individual freedoms and corresponding state obligations. Where the repayment of debt jeopardises human lives or leads to unnecessary deaths, malnourishment, the spread of diseases, widespread poverty, lack of access to essential services, including education and health, or the infringement 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.[17] Any other result would immediately relegate human rights law to a *lex specialis* regime that is fragmented from and unrelated to the other obligations of states.[18] States have the

[12] See below.

[13] Otherwise, 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.

[14] 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), available at http://www.un.org/ga/search/view_doc.asp?symbol = A/69/L.84&referer=/english/&Lang = E.

[15] See below, n. 25.

[16] See M. Waibel, *Sovereign Defaults before International Courts and Tribunals* (Cambridge University Press, 2011).

[17] 'UN Guiding Principles on Foreign Debt and Human Rights', UN Doc A/HRC/20/23, 10 April 2011, available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-23_en.pdf.

[18] 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 recognise the importance of human rights obligations of host states. See *Saluka Investments BV v. Czech Republic* (ICSID) (2006), available at http://tinyurl.com/j3rvtas, 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'.

 

obligation to give precedence to respect of human rights over other contractual obligations such as debt payment. The primacy of human rights has been clearly enshrined in Article 103 of the UN Charter, as well as in states' human rights treaty and customary obligations.[19]

The normative basis of the concept of 'odious debt' is founded in economic and fiscal self-determination, which in turn is a manifestation of self-determination *tout court*.[20] Any debt contracted in the name of a people, but in breach of the principle of self-determination, should be regarded as legally, and not only politically or morally, problematic. Whether or not problematic and contested debt should be repaid depends on one's assessment of the conflict between self-determination and state continuity (according to which the acts of prior governments may not be revoked by successive governments) on the other hand and *pacta sunt servanda* on the other. Self-determination should prevail over (or at the very least limit) state continuity when the government which contracted the debt acted in breach of its explicit constitutional (and treaty) obligations, and/or in a manner contrary to its role as guardian and agent of the common good of the polity. In such cases, the creditor should not be entitled to enforce her rights given the unconscionable character of the underlying contract.[21] To sum up, odious debt highlights the strong connection between self-government and public finances. Because the actual capacity to self-govern may be undermined through artfully concocted debt agreements, there needs to be a limit to the obligation to repay sovereign debt in full, or alternatively, there should be means of redress against odious debt contracted and repaid.

Odious debt, predicated on the basis of the *jus cogens* principle of economic self-determination, has found expression in the work of truth committees and has been relied upon in several well-known arbitral awards.[22]

It perhaps bears repeating what was already summarily said in the introduction, namely, that raising the question of odiousness does not lead to characterising all debt as odious, or calling for a general debt jubilee, in the same way that taking seriously the notion of vice in the formation of contractual will does not imply a general call against contracts. Indeed, the UN Guiding Principles on Foreign Debt and Human Rights[23] 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. Moreover, one of the two regulations making up the 2013

[19] According to Article 103 of the UN Charter, 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail. These obligations include the promotion of universal respect for, and observance of, human rights for all'.

[20] A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, 1995), at 56.

[21] 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.

[22] 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.

[23] UN Doc A/HRC/20/23, July 2012, adopted by the UN Human Rights Council, available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-23_en.pdf.

 

'Two-Pack' reforming European economic governance[24] requires states to carry out a comprehensive audit 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.

## B Types of Problematic Sovereign Debt

The contestation of the obligation to pay back sovereign debt has been based on different grounds, reflecting not only different *problématiques* (succession of states, repudiation of debt after independence from imperial rule, transition from dictatorship to democracy, revolutionary political change) but also the different legal, political and economic traditions from which the issue has been considered. Consequently, different types of contested debt have been distinguished.[25]

We find that the four-fold distinction (between illegitimate, illegal, odious and unsustainable debt) followed by the Greek Debt Truth Committee adds clarity and precision to the legal debate; at the same time that the categorisation translates into clear concepts the relevant socio-economic (and constitutional!) concerns underpinning the contestation of public debt.

Before we consider briefly each of the four types of debt, it is important to stress that the types are not exclusive, but overlapping.

### a) Illegitimate Debt

Illegitimate debt is 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.[26]

The key standard to determine whether a debt is illegitimate is a *moral one*. The paradigmatic case of an illegitimate debt can be a loan which has been concluded in a legally sound way, but (1) the terms and conditions of the loan itself are unfair, unreasonable or unconscionable; (2) other conditions attached to the loan are unfair, unreasonable or unconscionable and (3) the use at which the monies borrowed were put or are to be put is in breach of morality or public policy.

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[24] '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', OJ L 140, of 27 May 2013, at 1–10. Art 7(9) requires member states subject to a macroeconomic adjustment programme to 'carry out a comprehensive audit of [their] 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'.

[25] 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, available at http://unctad.org/en/docs/osgdp20074_en.pdf.

[26] 'Truth Committee on Public Debt of the Hellenic Parliament', *Preliminary Report,* June 2015, available at http://cadtm.org/IMG/pdf/Report.pdf, at p. 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, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N09/455/68/PDF/N0945568.pdf?OpenElement, paras. 8–22.

 

It is very important to stress that in order to pass judgement on the legitimacy of debt, it is important to consider not only the terms of the loan itself, but also any other condition attached to the loan. 'Conditionality', or the subjection of the disbursement of the whole of the loan or tranches thereof, to the 'implementation' of policies only partially related or totally unrelated to the loan reflects[27] the realisation that debt is a powerful instrument that can be used by the creditor to shape public policy.[28] Conditionality, as the Greek case illustrates, has become standard practice among creditors.

Illegitimate debt also comprises debt that was wholly unnecessary because its use or intended use was clearly unrelated or at odds with the public interest, as recognised in international practice.[29]

### *b) Illegal Debt*

Illegal debt is 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.[30]

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[27] See above, n. 2. On conditionality, J.E. Stiglitz, *Globalization and its Discontents* (Norton, 2003), 44–46 was prescient about the potential uses of conditionality.

[28] 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.

[29] 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. UN Doc A/HRC/14/21/Add.1, 21 April 2010, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.21.Add.1_en.pdf. 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. See Norwegian Ministry of Foreign Affairs, 'Norway defends unilateral debt cancellation in the Paris Club', 25 Oct 2006, available at https://www.regjeringen.no/en/aktuelt/norway-defends-unilateral-debt-cancellat/id448731/. 'Report of the 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. Mission to Ecuador and Norway' 21 April 2010, A/HRC.14.21.Add1, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.21.Add.1_en.pdf. The independent UN expert highlighted that the Norwegian Parliament produced a white paper on the Ship Export Campaign which described the campaign as 'an effective tool to alleviate an acute crisis in the shipbuilding industry which was affecting many workplaces in [Norway]'. The white paper concluded that the campaign 'had limited importance as development aid'. Report to the Storting, No. 25 (1988–1989), quoted in p. 8 of the report.

[30] Debt Committee, *Preliminary Report,* above, n. 26, at 10.

 

The key yardstick to determine whether a debt is illegal is quite obviously the law in force. This entails that the concept is more straightforward than that of illegitimate (and odious) debt, but also more narrow. Debt is illegal on account of (1) its being offered and accepted in violation of legal procedures; (2) the tender using illegal means to obtain consent to the loan and (3) the loan, or the conditions attached to it, being in breach of the law.

As is well known, a key principle of international law is that states cannot invoke their own domestic law as justification for breaching international law. However, that principle does not apply[31] when the lender intended to make use of international law to violate or bypass fundamental provisions of domestic law, particularly of a constitutional nature. International debt instruments, even if backed by the primacy of international law, cannot become instruments to bypass and undermine fundamental constitutional norms, breach fundamental rights standards and undermine third parties' legitimate expectations. Otherwise debt agreements could become instruments to undermine the rule of law and to act in bad faith.

### *c) Odious Debt*

Odious debt, as a matter of customary international law, can be defined as follows:

> '[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.'[32]

What makes the debt *odious* is what the lender *knows* or should have known about the conflict between either (1) the procedure through which the debt was contracted; (2) the use at which it has been put and (3) the consequences of contracting the debt has, and the key principles at the core of the ideal of the democratic state, comprising both substantive principles (fundamental rights) and procedural principles (consent, participation, transparency and accountability).

Quite clearly, the odious dimension of a debt brings into question two distinct but interrelated elements, namely the conflict between the debt contract as agreed and fundamental rights provisions and the unconscionable nature of the debt.

The concept of 'odious debt' is underpinned by the assumption that the existence of the state is derived from the will of its people. Consequently, 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 agent 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 against the people in question (through its government). Such a debt cannot have benefitted the people, but only a particular class of individuals, typically those involved in the original agreement. Given that the people derive no benefit from such a debt, the repudiation of the debt cannot result in unjust enrichment.

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[31] Article 32 of the International Law Commission Articles on State Responsibility.

[32] Debt Committee, *Preliminary Report,* above, n. 26, at 10.

 

### *d) Unsustainable Debt*

Finally, unsustainable debt is debt which cannot be serviced without seriously impairing the ability or capacity of the Government of the borrower State to fulfil its basic human rights obligations, such as those relating to healthcare, education, water and sanitation and adequate housing, or to invest in public infrastructure and programmes necessary for economic and social development, or without harmful consequences for the population of the borrower State (including a deterioration in the living standards).

The key yardstick to characterise a debt as unsustainable is its constitutional dimension. A debt is unsustainable when paying it would endanger fundamental rights, comprising both subjective rights and collective goods either immediately or by means of compromising the future capacity of the state to protect fundamental rights by rendering impossible necessary investments in infrastructure or social development.

Before concluding this section, it is important to add that the term 'odious' debt is ambivalent. It refers both to a specific type of controversial and contested sovereign debt (which we will refer as odious debt in a narrow sense) and to all types of sovereign debt that possess one or more qualities that render them illegal or illegitimate in a broad sense (a category that includes not only odious debt in the narrow sense, but also illegal debt, illegitimate debt and unsustainable debt). In brief, odious debt is both a specific type of contested debt and an umbrella term by means of which to refer to all of them.

## III From substantive claim to entitlement

If in the previous subsection we considered 'odious debt' as a substantive claim, in this section we will approach 'odious debt' as a procedural entitlement.

The pragmatic value of any legal concept is determined by what can be done with the concept, or what concrete entitlements and legal actions stem from the substantive content of the concept. Although remedies are usually the flip side of rights (*where there is a right, there is a remedy* has been a legal maxim since Roman days), it is also correct to say that the ultimate proof of the existence of the right is the availability of the remedy. Consequently, the key debates in international law and practice revolve around whether odious debt can indeed be invoked to extinguish a debt in full, to offset parts of the debt, or to seek redress or reparation.[33]

In this section we argue that odious debt gives rise to entitlements grounded in both treaty law (particularly as a result of its conflict with human rights obligations and with the right to self-determination) as well as customary international law.[34] However, we will also point that the relevant state practice is yet not easily discernible.[35]

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[33] 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 University Press, 2009).

[34] Debt Committee, *Preliminary Report,* above, n. 26, at 55–56.

[35] The entitlement itself is not always clear in this field. For example, in accordance with Art 7(9) of EU Regulation 472/2013, above, n. 24. 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 fulfil the obligation gives rise to a claim. In this manner, Art. 7(9) indirectly establishes a claim against odious debts.

 

### A Three Main Kinds of Claims

#### a) Extinguishing Debt

The first set of relevant claims comprises claims aiming to extinguish the underlying sovereign debt, in full or partially. These are by far the most common claims. These claims are typically pursued through a unilateral declaration of insolvency,[36] a 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[37] and others).[38]

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 derive, any unjust rewards or benefits from the debt in question. Unjust enrichment is primarily a matter of fact[39] 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.

#### b) Offsetting Debt

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 additional 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's 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 agreement to arbitrate does not grant tribunals authority to consolidate set-off claims in the proceedings there is a clear danger that the award may be set aside as *ultra vires* (i.e. that the arbitrators have exceeded their 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[40] and constitute general principles of law.[41] Article 817 bis of the Italian Code of Civil

[36] 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. See Lastra and Bucheit, above, n. 1, xx-xxiii; equally confirmed in the *Postova Banka AS* award, above, n. 2, paras. 322-24.

[37] See e.g., *BCB Holdings Ltd and Belize Bank Ltd v Attorney-General of Belize* [2013] CCJ 5 (AJ), available at http://tinyurl.com/hm49cor.

[38] 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 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 and C. Lumina (eds.), *Sovereign Debt and International Human Rights* (Oxford UP, 2017, forthcoming), on file with the authors.

[39] See generally P. Birks, *Unjust Enrichment* (Oxford University Press, 2005).

[40] Art. 22 UNCITRAL Arbitration Rules.

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

 

Procedure, for example, grants the arbitrator authority to decide set-off claims, irrespective of whether the set-off arises from the parties' arbitration agreement.[42]

### *c) Seeking Redress or Reparation*

Claims for redress or reparation are more complex because they 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 International Law Commission Articles on State Responsibility, 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 debt 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.[43]

A claim for redress arising from odious debts may include the following:

- extinction of the debt;
- acknowledgment that it never existed;
- 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.[44]

## *B Time Limits*

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 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

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[42] See also Art. 377 Swiss Code of Civil Procedure, applicable to domestic arbitration, but no reason why it cannot be extended to international arbitration. Equally, section 29 Swedish Arbitration Act 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.

[43] Art. 8 of the International Law Commission Articles on State Responsibility. See also Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v USA*), Merits, (1986) *ICJ Rep* 14.

[44] By way of illustration, Greece's sovereign bonds were reduced to junk following the collapse of its financial system and in addition Greece 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 and the rise of energy prices that resulted in many unnecessary deaths and a sharp decline in the use of environmentally friendly heating systems.

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: (1) 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);[45] (2) its objective character and its *jus cogens* nature means that it is not subject to prescription or time limitations[46] and; (3) its subsequent characterisation as legitimate (removal or criminalisation) under domestic law is irrelevant as regards its legal nature under international law.[47]

## IV Is the Greek Sovereign Debt Odious? Debt, Lies and Pen Drives

International and European law require states to undertake periodic reviews of their debt and to 'detect' possible irregularities. The relevance of odious debt is bound to be higher and more intense when states experience fiscal crises. On the one hand, not all, but far from few fiscal crises are related to stocks of odious debt piling up and making repayment (and renewing of expiring loans) impossible. On the other hand, the way out of fiscal crises tends to involve the partial non-payment of previous debts. Finding if and which of the standing debts are odious seems the fairest possible selection criterion.

The Hellenic Parliament established a Truth Committee on Public debt on 4 April 2015. As was already pointed in Section I, both international and European law encourage states undertaking periodic reviews of their sovereign debt. More specifically, the Greek Parliament mandated the Committee to determine how the stock of sovereign debt had been accumulated and, in particular, the ways in which debt was contracted, the reasons why it was issued, how it was used, its impact on the Greek socio-economic structure and the life chances of residents in Greece, as well as the conditions attached to the release of funds by the creditors, in particular in the framework of the 'financial assistance' agreements signed in 2010 and 2012.[48] After the signature of the third programme of financial assistance in August 2015, the Greek Prime Minister called a snap election, which was held

[45] 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.

[46] 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), available at http://tinyurl.com/yhbbrop, para 157, in respect of torture; cf. also *Chumbipuma Aguirre and Others v Peru* (Barrios Altos case), IACHR judgment, 14 March 2001, available at http://tinyurl.com/zcnzzh9, para. 41.

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

[48] First preliminary report of June 2015, above, n. 26; second report, September 2015, above, n. 10.

the following month. The change in the composition of the Parliament, and especially the change of speaker led the Greek Parliament to formally terminate the Committee and its mandate.

In the few months in which the Committee was operative, two reports were released. The second report, published in September 2015, contains an analysis of the third economic programme signed the previous month. It is the first report that will be analysed here, as it contains the extremely relevant preliminary economic and legal findings of the committee. Such findings contest the standard narrative that largely underpins Eurozone policy versus Greece. If, as we hold, the findings of the report are sound, it is impossible to avoid the conclusion that the stance of Eurozone governments was flawed from an economic, legal and political perspective.

In the following we present the main findings of the committee, both (1) the economic findings, that challenge (A) the standard claim that Greece has systematically been an indebted state; (B) that the stock of Greek sovereign debt is the result of fiscal profligacy; (C) that the Greek fiscal crisis was triggered by excessive levels of public debt; (D) that the financial assistance programmes aimed at 'rescuing' the Greek state; and (2) the legal findings, revolving around the characterisation of the debt contracted by Greece after 2010 as immoral, illegal, illegitimate, odious and unsustainable.

## *A Economic Findings*

### *a) A Historically Profligate State?*

The standard narrative on the Greek fiscal crisis tends to assume that the modern (post-independence) Greek state has been not only constantly burdened with high levels of debt, but that this has been largely the result of a predisposition, even 'keenness' to overspend. To use a catch phrase that has gained wide circulation in public discussion, Greece would have had a pathological tendency to 'live beyond its means'. Such tendency would have been only aggravated when Greece became a member of the Eurozone, because becoming a member made it easier (at least for a while) for the Greek state to go deeper into debt.

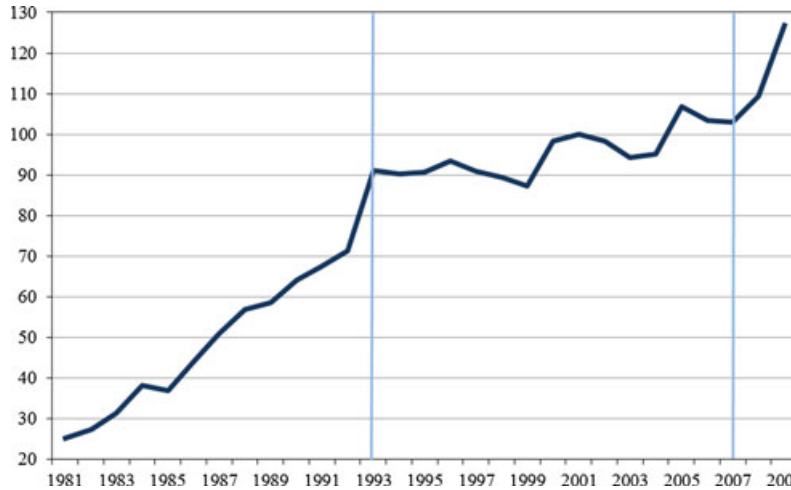
There is an element of truth in such narrative: For quite a long time after independence, the weight of Greek sovereign debt relative to the size of the economy was very high. However, it is simply not true that such high levels of debt were the result of public profligacy.[49]

As regards contemporary Greece, the Committee made three fundamental findings. For one thing, it is simply false to assume that contemporary Greece has been one of the most indebted states in Europe. When Greece joined the then European Communities, its debt to GDP ratio was 25%, among the lowest in the Communities at that time. Indeed, secondly, Greece *became* a highly indebted country *after* joining the Communities. The relative weight of debt almost quadrupled in the first twelve years of membership. By 1993 public debt represented 91% of the GDP. Thirdly, public Greek debt increased much more slowly from 1993 to 2008: from the already quoted 91% of 1993 to 103% GDP in 2008.[50] It is

[49] The claim that there is a historical propensity of the Greek state to be in debt (which is explicitly or more frequently implicitly associated with some alleged cultural traits of the 'Greeks') distorts the fiscal history of Greece. It is correct to say that the Greek state was deeply in depth when it was established as an independent state, but it is pertinent to add that such debt would have qualified as 'odious debt'. On this, see E. Touissant, 'La Grèce indépendante est née avec une dette odieuse', 12 April 2016, available at http://cadtm.org/spip.php?page=imprimer&id_article=13309.

[50] Debt Committee, *Preliminary Report,* above, n. 26, at 11.




Source: Ameco.

Figure 1: Greece's Debt to GDP Ratio (1980–2009)

important to notice that the quasi-stabilisation of the levels of debt precedes by almost a decade Greece joining the Eurozone.

Consequently, the high levels of public debt in Greece are not the result of a historical pathological dependency, but of the rapid growth of the stock of debt between 1981 and 1993 (Figure 1).

### *b) A Profligate Eurozone Member State?*

If the standard narrative tends to present the Greek state as a historically indebted state, the same narrative overemphasises the extent to which joining the Eurozone would have radicalised the tendency of the Greek state to live beyond its means. The stricter controls of public income and expenditure that would have been part and parcel of European economic governance must have necessarily been circumvented by the Greek authorities through a persistent practice of blatant falsification of public accounts. The 'Great Recession' would have put an end to easy access to credit at the same time that public expenditure increased. The 2009 elections and the subsequent change of government would have been the 'accident' triggering the Greek day of reckoning. Instead of covering up the 'real' deficit figures, the new government chose to publish the 'real' ones. As the real state of Greek public finances was revealed, the credibility and creditworthiness of the Greek state were definitely lost. The day of fiscal reckoning had come.

The preliminary report of the Committee shows that the cause of the growth (1981–1993) and accumulation of Hellenic public debt (1993–2009) was not 'excessive' and 'lavish' public expenditure. Contrary to the myth of the lavish Greek state, actual figures reveal that public expenditures (and especially social expenditures) were lower in Greece than in the rest of the Eurozone (see Table 1). The only exception was defence expenditure, which was markedly higher in Greece, pressing social expenditure downwards (Figure 2, which can be found in page XX).[51]

If debt was not fed by excessive expenditure, by what was it fed? The key factors explaining the growth (1980–1993) and accumulation of debt (1993–2009) were (1) the

[51] *Ibid,* 12–13.

Table 1: Evolution of Factors Contributing to Greece's Debt-to-GDP Ratio

| | 1980–1993 | 1993–2007 |
|---|---|---|
| Snowball effect | +40.6% | +13.5% |
| Primary balance | +22.4% | −25.1% |
| Stock-flow adjustment | +7.4% | −23.5% |
| Total: change in the debt-to-GDP ratio | +70.4% | +11.9% |

Source: AMECO

growing cost of financing the stock of debt, resulting from the rates at which the Greek state borrowed (interest payments, simple and compound); (2) the means of the state being chronically and unnecessarily beyond its needs, as a result of tax revenues being much lower than was needed.

As concerns the first key factor, it is pertinent that we disaggregate the stock of debt into its main components, namely:

- The primary budget balance, that is the difference between revenue and non-financial expenditures
- The stock flow adjustment, that is the difference between the change in government debt and the government deficit/surplus for a given period.
- The snowball effect, or the effect that the difference between the rate at which the economy grows (nominal GDP growth rate) and the rate which the state has to pay for its standing debt (the implicit interest rate paid by the state)

Table 1 summarises the contribution of these different factors to the evolution of Greece's debt to GDP ratio.

Between 1980 and 1993, the debt-to-GDP ratio increased by 70.4 percentage points of GDP: the 'snowball effect' contributed 58% to this change, the cumulated primary balance 32%, and stock-flow adjustments a further 10%. For the period 1993–2007, the contribution of the 'snowball effect' itself is higher than the change in the debt-to-GDP ratio.

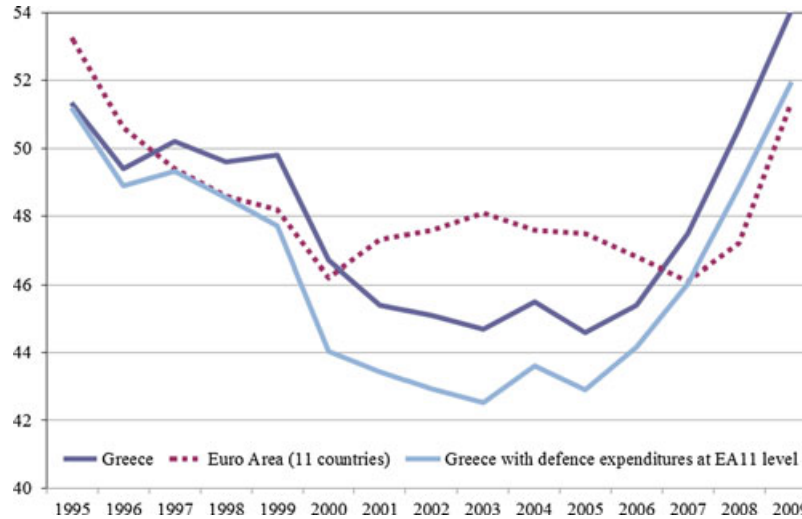
It is important to stress that the steep increase of the rates at which the Greek state borrowed money was the combined result of credit liberalisation (leading to the ending of administered interest rates) and the phasing out of both compulsory acquisition of Treasury bills by private banks and the role of the Bank of Greece as buyer of last resort of public debt.[52] The (then) European Communities played a far from secondary role in triggering both developments.[53] The result was a dramatic increase in the 'real' interest rates paid by the Greek state. As higher interest rates kicked in, the financing of and refinancing debt came to represent a growing burden on public accounts.[54]

[52] See e.g. G. Pagoualos, *Greece's New Political Economy* (PalgraveMacMillan, 2003), at 123 ff.

[53] Outstandingly through the two loans made to Greece through the old 'balance of payments' facility. See 'Council Decision of 9 December 1985 concerning a Community loan in favour of the Hellenic Republic', OJ L 341, of 19 December 1985, at 17; and see 'Council Decision of 4 March 1991 concerning a Community loan in favour of the Hellenic Republic', OJ L 66, of 13 March 1991, 22–24.

[54] The role played in the 'divorce' between the Treasury and the Central Bank in the growth of the stock of debt has been quantified in the case of France; see 'Que faire de la dette? Un audit de la dette publique de la France', 2014, available at http://tinyurl.com/nhkf8he. As regards Italy, see A. Bagnai, *Il tramonto del Euro* (Imprimatur, 2012), 184 ff.




Source: Eurostat, COFOG, ESA 95.

Figure 2: Comparative Evolution of General Government Expenditure in the Eurozone (1995–2005), as % of GDP

Three conclusions can be drawn:

- The stock of Greek debt in 2007 had been largely accumulated in the period 1980–1993.
- The snowball effect was the main contributor to this change. This effect was triggered by high interest rates combined with a decrease in the exchange rate of the drachma.
- Fiscal deficits were not the main driver of the growth of Greek debt (even if they played a role in such a growth) The results are summarised in Figure 1: between 1980 and 2007, the debt-to-GDP ratio increased by 82.3 percentage points of GDP. Two thirds of this change (65.6%) is attributable to the 'snowball effect' and only a third (33.4%) to the cumulative deficits, including stock-flow adjustments.

### *c) The Elephant in the Greek Pottery Shop: Private Debt*

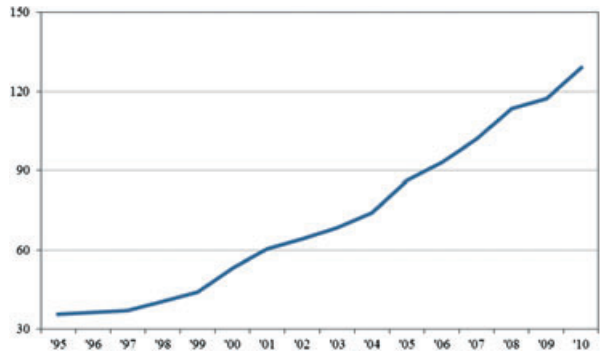
A missing but fundamental piece in the standard narrative of the Greek crisis is the fact that it was a private, not a public debt, that expanded rapidly the moment Greece joined EMU.

From the extremely low level of 104.9% of GDP in 2000, private debt raised exponentially, reaching 129% in 2009. For reasons that will become clear later, it is important to add that the growth of private debt came hand in hand with the growth of external debt. The spectacular growth of Greek private debt was rendered possible by incoming flows of foreign capital into Greece, mainly originating in France, Germany and the Netherlands. By 2009, private banks (Greek and non-Greek) found themselves exposed to almost 100 billion euros worth of private debt (Figures 3–6).[55]

Why are levels of private debt relevant when discussing sovereign debt? As the Greek case illustrates, because it is not infrequent that private debt is partially nationalised during

[55] Debt Committee, *Preliminary Report*, above n. 26, at 14–15.




Source: Eurostat.

Figure 3: Evolution of Greek Private Debt Private Debt in Greece (as % of GDP, 1995–2010)

financial crises, especially if the growth of private debt is combined with the growth of external debt.

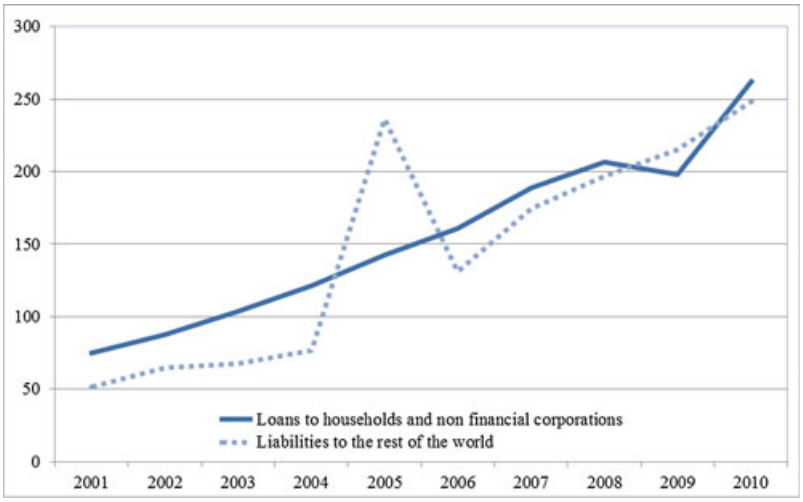
Private debt is by definition debt that has not been incurred by the state. However, private debt may well end up having a major incidence on the finances of the state, especially during financial crises, as states are not unlikely to step in and act as insurers, lenders and shareholders of last resort of financial institutions, something which entails the 'nationalisation' of private debt, or otherwise the conversion of private into public debt.

When private debts are not repaid, the lending institution incurs a loss. If losses are many, there comes a point at which losses exceed the capital of the bank. At such a point, there is a serious risk of the bank going under. Because of the key role that financial institutions play in modern economies, the impact of the collapse of a financial institution is not limited to its shareholders or to those depositing their money in the bank. The fall of a bank will cast doubt on the solvency of other banks (as banks routinely engage into inter-bank lending) and of other financial institutions, including insurance companies, which would be immediately exposed to losses. This typically leads, as it led from 2008 onwards, to massive state intervention to uphold the solvency of financial institutions in the name of avoiding the collapse of the financial system. Formally speaking, it was said that state intervention was limited to upholding financial institutions by means of assuming *contingent* risks. Such *contingent* risks became quite rapidly actual losses in far from few cases. Private debt thus became public debt, either directly (state recapitalisation of financial institutions, acquisition of toxic assets by the state of public financial institutions) or indirectly (guarantees extended to banks being acted upon).[56]

State intervention and the ensuing 'nationalisation' of debt is even more likely if, as was the case in Greece, the growth of private debt comes hand in hand with the growth of external debt. The states in which the foreign lending institutions are established will have a major incentive to exert pressure on the state to which the private capital has flowed so that it acts as guarantor of last resort of the debtors, for the simple reason that otherwise they are likely to be forced to act themselves as guarantors of last resort of 'their' financial institutions.

[56] In the mid run, the *nationalisation* of private financial risks may well result in the nationalising state losing the trust of financial capital, a rise in the rate at which it borrows, and consequently, a reduction of its actual borrowing capacity.




Source: Bank of Greece. Financial Accounts.

Figure 4: Financial Liabilities Broken Down by Holding Sectors, End of Period Stocks in EUR Million

### *d) 'Saving Greece'?*

We come to what is perhaps the core question. The standard narrative of the Greek crisis assumes that the three programmes of financial assistance would have been aimed at transforming what by all accounts was a fiscally failed state into a solvent state. Indeed, the unvarying premise of the three programmes of financial assistance to Greece has been that, provided full compliance with the programmes, Greece was and will remain a solvent state. Mistakes might have been made (there is by now clear and undisputable evidence that the IMF knew that Greek debt had become by May 2010 unsustainable).[57] The programmes, no doubt, entailed massive economic and social costs. But not only the task of the Eurozone was unprecedented, but resistance against the European programmes was widespread within the Greek state and the Greek population at large.

This narrative is hard to reconcile with the facts. As the figures show, the provision of financial assistance to Greece did not release funds with which to cover the ordinary costs of the Greek state, but actually produced the funds with which to prevent financial institutions and investors bearing the consequences of their past credit decisions, the decisions that fueled the unsustainable growth of private debt in Greece. To put it differently, 'Financial assistance' largely funded the nationalisation of the financial risks resulting from the massive growth of Greek private debt during the previous ten years. Of the loans granted to Greece under the so-called 'bailout' programme between 2010 and 2014, less than 8% was earmarked by the creditors for public expenditures, the rest being directed to debt repayment. There was a double transformation. The Greek state replaced Greek banks as debtor, while the Eurozone and the IMF replaced international banks as

[57] 'IMF Document Excerpts: Disagreements Revealed', *Wall Street Journal*, 7 October 2013, available at http://tinyurl.com/p2egneq. There is also evidence that the German Chancellor admitted (in private) in November 2011 that Greece will not be able to pay back its debt. See 'Merkel Bugged While Pondering Greece Crisis', *Wikileaks*, 1 July 2015, available at http://tinyurl.com/j47mmx9.

creditors. The agreement provided both the time and the resources necessary for private banks to 'disinvest' from Greek private debt, which was recycled into Greek sovereign debt underpinned by the Eurozone and the IMF.[58] Upon transformation of Greece into a 'state' debt, not only were the private banks effectively re-capitalised with the Eurozone taxpayers' money, but the cost of the re-capitalisation could subsequently be demanded further from Greece and its population. The 'economic programme' imposed upon Greece promised not only to radically change the structure of the Greek economy, but also to be capable of placing the Greek economy in a path of sustainable and enduring growth. Such an assessment, which was based on unsound premises when it was made, proved to be not only wrong, but tragically wrong. The austerity measures imposed upon the Greek people utterly failed to increase productivity and investment, leading to an unprecedented peace-time collapse of economic activity (GDP shrinking by a stunning 25%, unemployment going over 30% at some points in time). Successive primary surpluses have come hand in hand with a constant and unstoppable increase in the relative weight of debt, caused by the collapse of the economy (as GPD collapsed, the relative weight of the cumulated stock of debt increased).[59] By late 2014, Greece's debt-to-GDP ratio had risen to 190%. The catastrophic results of the 'economic programmes' were not regarded as a good enough reason to waive the significant fees for this service (legal, financial and other) that the Greek state had to pay for these 'services'.

In particular, the parliamentary debt committee focused on what was by all accounts the trigger of the Greek fiscal crisis, namely the successive revisions of the 2008 deficit figures from the original 3.7% GPD to 12.5% GDP,[60] then to 13.6% GDP,[61] finally to 15.4% GDP.[62] Of this, the key one was the revision decided immediately after the elections of October 2009 and the coming to power of a new government led by George Papandreou. The new government revised and increased both the public deficit and debt for 2009 in a manner hard to reconcile with both Greek and European law. European authorities, after some initial reticence, ended up accepting the methodology underlying the revisions of the official statistics (and indeed revising even higher the deficit estimates at the very same time that the first financial assistance programme was being negotiated).[63]

The successive 'austerity' measures announced by the new Greek government failed to recover the goodwill of actors in sovereign debt markets, while rendering rather less credible that the Greek economy would avoid a major recession. By March 2010 Greece reached a state of fiscal quasi-asphyxia. One month later, the Hellenic State had been forced out of international lending markets. Two alternatives were left by then: default or external financial assistance. The Greek government opted for the latter and negotiated with the Eurozone and the IMF an economic programme which came hand in hand with a set of substantive and procedural 'conditionalities' making up the first economic programme.

It is usually taken for granted that the 'jump' was caused by cumulated excessive public debt that should have been accounted for, and was not so. But was it? The committee found

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[58] Debt Committee, *Preliminary Report,* above, n. 26, at 15.

[59] *Ibid*, 33–36.

[60] T. Barber, 'Greece Vows Action to Cut Budget Deficit', *Financial Times,* 20 October 2009, available at http://tinyurl.com/zcgpr6b; see also 'Report on Greek Government Deficit and Debt Statistics', of 8 January 2010, COM (2010) 1, at 3.

[61] J. Strupczewski, 'Greek 2009 Deficit Revised Higher, Euro Falls' *Reuters*, 22 April 2010, available at http://tinyurl.com/zrxzqz8.

[62] H. Smith, 'Greek Deficit Much Bigger than Estimate', *The Guardian*, 15 November 2010, available at http://tinyurl.com/jmmwcua.

[63] See above, n. 61.

evidence that a fundamental part of the discrepancy between the original estimate and the later figures is the result of highly contestable decisions of the Greek Statistical Authority, originally in opposition to Eurostat, regarding the proper way of accounting for three liabilities, that resulted in the overestimation of the deficit figure for 2009 between 6 and 8% of GDP (and a 28 bn. euro increase in the stock of Hellenic sovereign debt). First, the Greek Statistical Authority revised the figure for arrears in hospital expenditure (extending back to 2005) from 2.3 bn. euro to 4.8 bn. euro (October 2009). Eurostat originally opposed, but in April 2010 it accepted a revision upwards to 6.6 bn. euro. A good reason to contest the revised figures was indeed that they were mere estimates; indeed, the Ministry ended up negotiating a 30% discount with the suppliers that was never reflected in the official figures. Second, the Greek Statistical Authority and Eurostat transferred the liabilities of the non-financial public corporations to the general government in 2010. This by itself increased public debt in 2009 by €18.2 billion. It is important to stress that this group of corporations had been classified as non-financial corporations after Eurostat had verified and approved their inclusion in this category. There were no changes on this issue in the European statistical methodology between 2000 and 2010. Moreover, the reclassification took place without carrying out the required studies.[64] Consequently, the institutionally established criteria for the classification of an economic unit into the General Government sector was infringed. Third, another case of unsubstantiated increase of public debt in 2009 is related to the statistical treatment of swaps with Goldman Sachs. The one-person ELSTAT leadership increased the public debt by €21 billion. This amount was distributed in a rather ad hoc fashion over the four year period between 2006 and 2009.

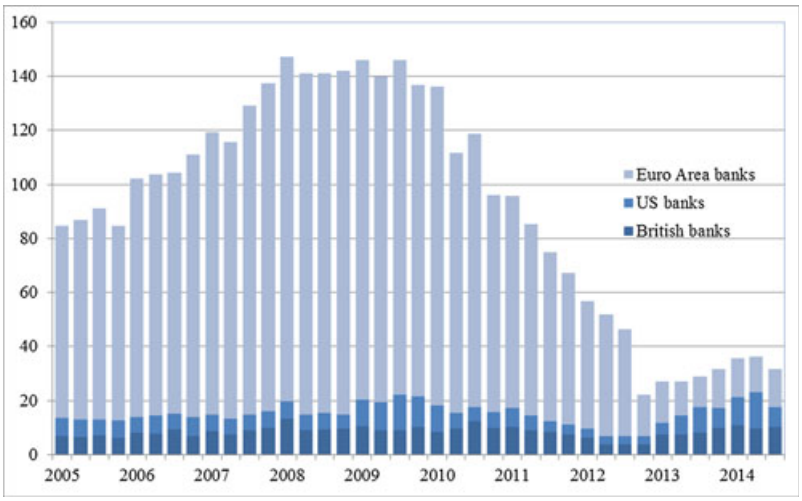
With the benefit of hindsight, it is hard not to conclude that while the successive revisions of deficit figures were in breach of both Greek and European law, they played a decisive role in persuading Greek and European public opinion that the ultimate and fundamental cause of the Greek fiscal crisis was excessive public spending. This allowed hiding in plain sight the fact that the Greek crisis was, above all, a crisis triggered by the growth of private debt, a growth which was an intrinsic part of the inbuilt asymmetries of Economic and Monetary Union as actually designed, and in which the financial institutions of core Eurozone states (in the Greek case, French and German banks) played a fundamental role. The narrative of the profligate Greek state, while hard to reconcile with facts, was instrumental to popularise acquiescence in order to provide financial support. It was easier to 'sell' to Eurozone taxpayers the 'rescue' of Greece than (another) rescue of financial institutions (which was unavoidable otherwise, and which would have been explosive if carried out by the Eurozone collectively). By the same token, binding Greece to the catastrophic conditionalities attached to the loans was facilitated by the 'living beyond your means' narrative.

### *e) Whose Involvement? The 2012 Private Sector Involvement*

The so-called 'private sector involvement' agreed in 2012 neither imposed a relevant part of the economic burden on creditors nor resulted in a relevant reduction of the debt of the Greek state.

[64] It also took place overnight after the ELSTAT Board was dispersed. In this way the president of ELSTAT was able to introduce the changes without questions from the board members. Thus, the role of the national experts was completely ignored, inducing a conflict with the ESA95 Regulations.




Source: Bank for International Settlements

Figure 5: Summary of Foreign Claims (Immediate Counterparty Basis), by Nationality of Reporting Bank

By the time the 'restructuring' was decided, most international financial institutions holding sovereign Greek debt had sold it. Moreover, those investors holding Greek debt issued under a choice of law other than Greek (mainly English law) were repaid in full. Greek banks were hit massively, but they were simultaneously recapitalised through the second programme of financial assistance (and later privatised, with relevant shares being acquired by international investors). The ultimate losers of the so-called 'restructuring' were public institutions (including pension schemes) and small bondholders.

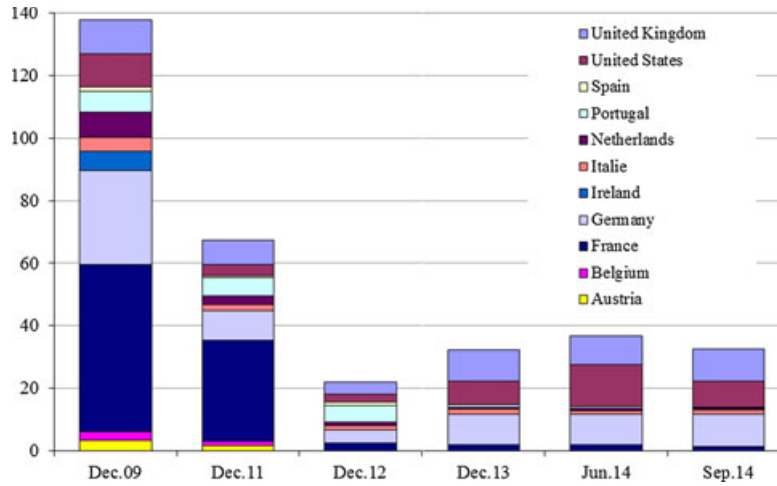
Consequently, it is unsurprising that the restructuring reduced the stock of debt only marginally. The restructuring of debt in the hands of public institutions, while providing further justification to engage into budgetary balancing policies, did not change one penny the level of public debt, while the haircut imposed on Greek banks resulted in new public liabilities, as the state had to borrow Eurozone and IMF money to immediately recapitalise the banks. This does not mean, however, that the restructuring was a matter of pure formality. While the debt in the hands of Greek banks was issued under Greek law, the debt that the Greek state contracted to recapitalise the banks was issued under English law. This was indeed an unnegotiable condition set by the creditors,[65] as was (rightly) believed that this would reduce the margin of maneouvre of future Greek governments. States can change at will the conditions under which debt issued under national law is repaid, something that is not the case if the debt is issued under foreign law, especially English law.

### *f) If Only Austerity Would Have Been Pointless…*

The several 'economic programmes' which have been imposed upon Greece have been based not on a considerate analysis of fiscal and economic data, but have been the result

[65] At the very same time that some European leaders engaged into City of London bashing rhetoric, the Eurozone forced one of its Member States (Greece) to issue debt governed by English law.




Source: Bank for International Settlements

Figure 6: Foreign Banks' Exposure to Greece

of the exercise of naked power. A 2013 IMF report[66] concluded that Greek debt should have been restructured from the outset; otherwise, the economic programme attached to the loan had no chance of succeeding. The report found that the IMF technical staff made that very clear at the time the decision was taken. The restructuring of the debt recommended by the IMF in 2010 would have reduced it by 80% and would have, according to the IMF, contributed to a speedy and feasible recovery.[67] On the contrary, the plans favoured by the French and German governments, based on the pretention that Greece could fulfil the programme and pay back the debt in full were bound to fail. As is well known, the IMF, despite the vocal disagreement of its staff and of some Member States, ended up following the French and Greek line (something that required an 'express' reform of the IMF Articles of Agreement, as the level of credit granted nominally to the Greek state exceeded several times the maximum amount it could have lent to Greece).[68] But if the technicians knew that the programme was designed to fail, it is impossible to avoid the conclusion that the technical exercise surrounding macroeconomic variables and debt projections, figures directly relating to people's lives and livelihoods, was the fancy wrapping of a damaged good. This 'technical' wrapping was of essence in pretending that the discussion was technical, that the aim was to improve the solvency and economic performance of Greece, when what the programmes could do (and actually did) was to save several financial institutions from the consequences of their dismal risk assessment.[69]

[66] Stemming from an internal audit regarding the involvement of the IMF in Greece since 2010.

[67] International Monetary Fund, '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.

[68] A. Bagnai and others, 'The Economic Consequences of Greece', *Project Syndicate,* 24 February 2015, available at http://tinyurl.com/jkzwg9y.

[69] Debt Committee, *Preliminary Report,* above, n. 26, 30–31, at 26.

## *B Legal Findings*

The interim report of the debt committee concluded that the debt contracted by Greece as part of the financial assistance programmes was odious, illegal, illegitimate and unsustainable.[70]

### *a) Illegitimate Debt*

Greece's post-assistance debt is illegitimate on both procedural and substantive grounds.

As was already pointed out, the debt was converted from private into public debt because of the enormous pressure exerted by creditors. This has been confirmed by a study conducted by the Berlin-based ESMT (European School of Management and Technology) that focuses on the analysis of the distribution of bailout funds lent to Greece since 2010.[71] Out of the 215 bn. euros of which Greece has been nominal recipient, only 9.7 bn. or 5% of the total was actually spent by the Greek state. The remaining 95% merely transited the accounts of the Greek Exchequer, to be immediately paid to creditors, directly in the form of repayments of interest payments, or indirectly, in the form of bank recapitalisation. The third financial assistance programme is designed to result in a similar pattern. Of a total 86 bn. euros that the Hellenic state will receive, 91% are earmarked for debt repayments, interest payments or bank recapitalisation. Thus, creditors, not Greek citizens and residents in Greece, have benefitted from the bailouts.

In that regard, it is also important to keep in mind that Greece's multilateral lenders uttered statements and acted in ways that either undermined the creditworthiness of the Hellenic state (pushing up the rates at which the Hellenic state could borrow, and, ultimately, rendering impossible for Greece to get funding from financial markets) or fostered the decline in value of Greek sovereign bonds.[72] As a result, the statements and the actions of the Eurozone and the IMF narrowed the options that the Greek government could follow, thus forcing the hand of the Hellenic executive when negotiating with its creditors and casting a long shadow over the democratic choices of the Greek people, both at general elections and at the July 2015 referendum.

In legal terms, the committee found that the utterances and actions of the lenders qualified as 'force' in the sense of Article 52 of the Vienna Convention on the Law of Treaties, according to which:

> 'A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations'

Lenders acted in ways that they knew would hurt the economy of Greece and would lead to the deterioration of living standards in Greece. Such actions amount to economic coercion.[73] Economic coercion qualifies as unlawful intervention in the domestic affairs of

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[70] *Ibid*, at 45–50.

[71] J. Rocholl and A. Stahmer, 'Where did the Greek Bailout Money Go?', *ESMT Working Paper* 16/02, available at https://www.esmt.org/where-did-greek-bailout-money-go.

[72] Debt Committee, *Second Report,* above, n. 10, 10–11.

[73] The Final Act of the Vienna Convention on the Law of Teaties includes a declaration, initially tabled by The Netherlands (in reaction to a request by developing countries that consent to a treaty under economic pressure 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), 251–252.

 

a state. Even if such form of coercion does not invalidate consent to the financial agreements, it may nonetheless offer a basis for denouncing the loan agreement under Article 56(1)(b) of the Vienna Convention on the Law of Treaties.[74]

Moreover, negotiation in good faith is simply impossible if one of the parties is a heavily indebted country and the other party is threatening with triggering bankruptcy (with unknown consequences)[75] unless severe conditionalities are attached to the provision of financial assistance. The debt committee documented that severe economic coercion was exerted both during the negotiation of debt restructuring and during the days before the July 2015 referendum. In the latter case, European institutional actors multiplied public statements depicting the options open to Greek voters as a matter of either accepting a new financial agreement to which even more draconian conditionalities were attached, or repudiate the agreement and favour financial autarchy, as a vote against the agreement would lead to Greece leaving the Eurozone, the reintroduction of a national currency and the unleashing of a major economic crisis.

### *b) Illegal Debt*

The post-2010 Greek debt is also illegal both under Greek and under European law.

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. Immediately after the signature of the first financial assistance programme, the Hellenic Parliament passed Law 3845/2010. For our present purposes, Article 1(4) of the said law is of essence, because such provision authorised the Greek Minister of Finance to negotiate and sign all the agreements related to the loan and financing agreements (including contracts, memoranda of understanding and eventually treaties). Still, the agreements had to be brought before Parliament so that the standard constitutional procedure of approval and ratification could be followed. Only a few months later, Article 1(9) of the not well-known Law 3847/2010 amended article 1 (4) of Law 3845. It was now stipulated that 'ratification' [by parliament] would from then onwards be replaced by 'discussion and information' to Parliament. By the same token, all pertinent agreements (irrespective of their legal nature) were declared as producing legal effect upon their signature by the Minister. Article 1(4) of Law 3845 foresees a ratification procedure which is clearly in breach of Articles 28 and 36 of the Hellenic Constitution.

As concerns European law, the practice of the ECB and the EC Commission in the course of the Greek crisis, especially as regards the provision of financial assistance to Greece, is also clearly at odds with EU law. The conduct of European institutions is hard to reconcile with the mandates to respect and promote human dignity, freedom and democracy, enshrined in Articles 2 and 3 of the Treaty on European Union and Article 9 of the TFEU, and with their obligation to comply with Article 51 of the European Charter of Fundamental Rights. The Inter-creditor Agreement of 8 May 2010 foresaw that the Commission would require Greece to take measures to reduce its deficit. Even if formally acting on the basis of powers granted by a legal instrument outside EU law, the European Commission should have acted in full compliance with EU law, including, quite obviously, the Charter of Fundamental Rights. The argument is even stronger concerning

[74] Article 56(1)(b) reads, 'A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (b) a right of denunciation or withdrawal may be implied by the nature of the treaty'.

[75] Although less dramatic than what the creditors claimed they will be.

 

the second programme of financial assistance, given that the European Commission negotiated with Greece not only as 'agent' of the intergovernmental European Financial Stability Facility, but also as an institution responsible for the European Financial Stability Mechanism, constituted under EU law.

The Greek debt is also illegal because the measures attached to the three loans to Greece (in the 2010, 2012 and 2015 memoranda) breached fundamental rights as protected not only under Greek and European law, but also in international treaties to which Greece is a party. The bailout programmes required the Greek government to adopt measures that had major detrimental effects upon the living conditions of all residents in Greece, resulting in the violation of several human rights as protected at the international level.[76]

### *c) Unsustainable Debt*

Finally, Greek sovereign debt is unsustainable. Greece cannot service its debt without seriously impairing its capacity to fulfil its basic fundamental rights obligation. As it has been shown in both reports of the Committee, several basic fundamental rights (enshrined not only in the Greek Constitution and in the Charter of Fundamental Rights of the European Union, but also in international human rights treaties) are breached due to a lack of public expenditures in social spending, thus preventing such violations would necessarily imply an increase of public spending.[77] And yet, the very terms of the programmes of financial assistance (and of the 'new economic governance' of the European Union) make it impossible for any Greek government to increase public spending. The massive budgetary primary surpluses that the Hellenic state has to achieve in the next two decades *have to* be used for the reimbursement of the debt. On such a basis, the Committee concluded that Greek debt is totally unsustainable.

## V Conclusion: Doing Things with Odious Debts

We have shown 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. The substantive concept of odious debt becomes fully 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

[76] Debt Committee, *Preliminary Report,* above, n. 26, at 36–43.

[77] Ibidem. See also 'Report of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of Human Rights, Particularly Economic, Social and Cultural Rights—Mission to Greece', 29 February 2016, available at http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A.HRC.31.60.Add.2_AUV.docx.

 

debt. The debt is attributable solely to the persons of the persons 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 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 the national budget, non-payment of arrears, confiscation or attachment of the lender's assets, judicial proceedings against lenders and others.

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