# II. Economic Crisis, Civil Rights, and Penal Sciences

# Human rights based approach to international criminalization of odious and unsustainable debt

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**Introduction**

The aim of this paper is to sketch the basic contours of an international crime of intentional indebtedness. The criminalization rationale is based not on ordinary notions of international criminalization, but rather on a human rights-based approach. By this I mean that the harm which the proposed offence seeks to rectify is the violation of particular fundamental rights that are recognised as such by the entire international community, including the countries that incur 'bad' debt. Hence, the key criterion is not direct victimization, nor necessarily the heinous or injurious nature of the conduct in question under domestic or international law, although these (as well as the illegal nature of all or some of the conduct) might play some part in the process. Rather, as will be demonstrated, the persons responsible for incurring 'bad' debt utilize means that are generally lawful, albeit wholly illegitimate, while at the same time violating fundamental human rights.

With this in mind, persons that may incur liability for this (theoretical at the moment) international crime are those that possess the political and financial capacity to pass on or to accept such debt. The list is confined to a few natural persons, inter-governmental organizations, as well as corporations in the form of funds, banks and other financial institutions. Others have written more extensively about the civil liability of states and international financial institutions as both lenders and

borrowers for the creation of such 'bad' or unsustainable debt,[1] and hence the non-criminal liability of states and inter-governmental organizations will not be addressed here. The paper will seek to justify the promulgation of this offence on the basis of a human rights-based approach and at the same time demonstrate that justice considerations are essential in this process. It will also show that justice (including the rule of law, avoidance of impunity and others) is not a novel criterion for expanding international criminalization. In fact, it has been used in the course of the twentieth century in order to justify the creation of new offences in the absence of pertinent practice. Although it is the belief of the present author that the creation and repudiation of odious and illegal debt are best handled by means and processes other than criminal law, at the end of the paper I discuss the added value of criminalization and prosecution.

## The Three Processes of International Criminalization

The process of establishing substantive international crimes is typically undertaken through the three key sources of international law, namely treaties, custom and general principles. Treaties are the most common among the three, given states' preference for clarity and precision and crimes established by treaty can be international (e.g. piracy jure gentium)[2] or transnational in nature (e.g. organized crime).[3] In the latter case, treaties may set out the general framework of the criminal conduct in question and refer to domestic laws for particular aspects of liability. For example, treaties setting out transnational crimes rely on member states' domestic law in respect of the criminal liability of legal persons.[4]

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[1] See O. Lienau, *Rethinking Sovereign Debt: Politics, Reputation and Legitimacy* (Harvard University Press, 2014); R. Howse, 'The concept of odious debt in public international law', UNCTAD Paper 185 (July 2007).

[2] UN Law of the Sea Convention (UNCLOS) 1982, Art 101.

[3] Palermo Convention on Transnational Organised Crime 2000, Arts 2 and 5.

[4] See M. Pieth & R. Ivory, *Corporate Criminal Liability: Emergence, Convergence*

Although the criminalization of conduct through custom is now rare, chiefly because most international and transnational crimes have been set out in regional or global treaties, its utility remains significant. It should not be forgotten that the regulation of particular conduct by a treaty does not stop the customary regulation of the same conduct in parallel fashion. By way of illustration, the customary definition of crimes against humanity is different from the definition provided in the ICTY, ICTR and ICC statutes. Moreover, most treaties covering international crimes are to some degree antiquated and the elements of crimes therein have developed differently through the practice of states or international tribunals. For example, the 'public official' element in the UN Torture Convention has now been extended to cover also private actors. Hence, the interpretation of a treaty crime may indeed be derived from subsequent (to the adoption of the treaty) practice. Finally, it should be stated that with respect to some crimes states prefer the absence of a comprehensive treaty because several aspects of its regulation do not meet with global consent and as a result the definition of the offence under customary law is a much better option. This is true as regards a comprehensive definition of terrorism under international law, whereby states are divided on issues such as the level and nature of violence permitted to national liberation movements and what distinguishes the latter from a terrorist group.[5]

Finally, general principles stemming from the domestic criminal laws of states, which in most cases overlap with custom, provide evidence of a crime, but have never been used as an independent source of international criminalization. International criminal tribunals have used general principles as a methodological tool in order to extract principles of criminal procedure. In fact, the criminal procedure rules of international tribunals have developed almost exclusively on this basis. Exceptionally, the ICTY in the *Furundzija* case relied on general principles of criminal laws in order to determine the legal nature of forced

*and Risk* (Springer, 2011).

[5] See I. Bantekas & L. Oette, *International Human Rights Law and Practice* (Cambridge University Press, 2nd edition, 2016), chp 17.

oral penetration, namely whether a mere sexual offence or a species of rape.[6]

**A Fourth Process Based on Justice**

The three aforementioned processes of international criminalization have as their hallmark the element of consent. Indeed, it is because of such content that the regulation of particular conduct as a crime is possible. Nonetheless, there are several notable instances whereby states have unilaterally criminalized detestable conduct without first seeking universal or regional consent. Such unilateral action has been predicated on justice demands and before we highlight several notable examples it should be pointed out that justice has also been the basis for the post facto criminalization of conduct in several instances of history, as was the case with crimes against peace and crimes against humanity in the Charter of the Nuremberg Tribunal.[7]

From a unilateral perspective, several states in the aftermath of the Yugoslav crisis in the early 1990s indicted and convicted individuals of grave breaches, war crimes and crimes against humanity, even though the conduct in question had taken place in a non-international armed conflict. In the 1990s, as indeed now (although which much less force), crimes taking place in the context of non-international armed conflicts were deemed domestic crimes, rather than international ones, and attracted solely criminal liability under domestic laws. Hence, the attribution of international criminal liability was a radical departure, which however met the subsequent consent of the international community.

Several countries have, in addition, unilaterally (through their criminal laws) expanded the definitions of treaty crimes in order to encompass a broader range of perpetrators. The Ethiopian Criminal Code, for example, following the defeat of the Derg regime, added 'po-

[6] See *ICTY Prosecutor v. Furundzija*, Trial Chamber Judgment (10 Dec. 1998), 38 ILM (1999), 317, paras 180-184.

[7] Art 6, 1945 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 UNTS 279.

litical' groups to the range of groups that could be the target of a genocidal campaign, despite the fact that this particular group was excluded in the definition of the 1948 Genocide Convention.[8]

Moreover, the doctrine of command responsibility was adopted by US military commissions in occupied Japan, and later in Axis-defeated territories, to try those with control over others who failed in their duty to prevent or punish. This was at a time well before the doctrine of command responsibility attained customary status, its aim being to avoid granting impunity to those in senior positions of command who claimed that persons under their authority committed offences which they had not ordered.[9] In equal measure, the 'control over the act' theory of perpetration expounded by Claus Roxin and which was later employed by German courts in the *DDR Borderguards* case exemplifies in what manner domestic courts are willing to expand the boundaries of existing international crimes or indeed create new ones in the interests of justice.[10] This is also the case with the so-called Radbruch formula, which was specifically designed to avert injustice to victims of Nazi atrocities as well as to deny impunity to perpetrators.[11] Had it not been for such an expansion of criminal liability many of the pertinent

[8] Article 281 of the Ethiopian Penal Code included political groups as possible targets of genocide and the country's former president was charged as such for his role in the so-called "Red Terror" campaign between 1977 and 1978. *Special Prosecutor v. Mengistu Hailemariam and Others*, (Ethiopia) (2006). See F. K. Tiba, 'The Mengistu Genocide Trial in Ethiopia', (2007) 5 *Journal of International Criminal Justice* 513. In the *Jorgić* case the German Federal Constitutional Court accepted that article 220(a) of the Criminal Code in force in 1997 was consistent with international law, despite encompassing within its ambit of group destruction "a group as a social unit in its distinctiveness and particularity and its feeling of belonging together". The relevant passages are cited in *Jorgić v. Germany* (ECtHR) (2008), paras. 18, 23, 27 and 36.

[9] See G. Mettraux, *The Law of Command Responsibility* (Oxford University Press, 2009)

[10] See C. Roxin, Straftaten im Rahmen organisatorircher Machtapparate, (1963) 110 *Goltdammer's Archiv fur Strafrecht* 193-207.

[11] See S. L. Paulson, 'Radbruch on Unjust Laws: Competing Earlier and Later Views?' (1995) 15 *Oxford Journal of Legal Studies* 489.

crimes would have lacked a culpable perpetrator.

A central motive underlying this section is to emphasise that where the interests of justice are indeed legitimate and the state in question (and its pertinent institutions) is acting in good faith, unilateral criminalization is an acceptable feature of international relations. Indeed, there was no international outcry, let alone voices of concern, against any of the unilateral acts of criminalization or expansion of criminal liability mentioned in this section, despite the fact that they expanded the ambit of the law significantly and had an impact on personal liability. If anything, such innovations were welcome and in some cases provided impetus to other states to act likewise (e.g. international criminalization for crimes committed in non-international armed conflicts) and ultimately solidify such criminalization through subsequent inter-state action in the form of a multilateral treaty; in the case at hand, the International Criminal Court (ICC) Statute.

**The 'Directness' Element in International Criminalization**

A feature of international criminalization that generally goes unnoticed is the directness of the conduct to its impact or harm (to the victims or other protected interests). The crime of murder, for example, involves: a) a direct link between the killing of the victim by the perpetrator, which in turn warrants some kind of culpability and; b) the death of the victim. In equal measure, the robbing of another ship on the high seas has a direct impact on the property and safety of the persons on the targeted vessel. Some international crimes, however, or conduct that could be labeled as repugnant, do not produce direct harm, at least in temporal terms. The impact of psychological forms of torture do not mature immediately on their intended victims. Moreover, the deprivation of food, water and other life-sustaining resources from a population by its leadership, whether because of corruption, misappropriation, intentional deprivation, or other reasons, produces effects on the victims' lives (whether life threatening or other) once the deprivation reaches a particular threshold. This may be months or

even years after the deprivation has taken place. In between this time, people perish from natural causes, diseases, crime and other causes. The length of time between the initial deprivation and the ill-health or death of the victims will make it difficult to link the initial conduct with the harm to the victims. Yet, there can be no doubt that if one were to eliminate those conditions that are un-connected to the initial conduct, which are not contributory causes, then the initial conduct (i.e. the deprivation) is the sole (or more potent) cause of the victims' demise. This legal construct (a species of sine qua non or 'had it not been for the deprivation') has been applied by theorists in order to explain in what manner otherwise illegal or repugnant conduct produces indirect harm to a large number of victims (such as institutionalized grand corruption by state leaders) in such a way that it amounts to a crime against humanity.[12]

Indeed, law-makers give far less weight and ascribe almost minimal, or no, culpability to state conduct that has no direct criminal impact, while at the same harm to socio-economic rights by reason of inter-governmental conduct is viewed as acceptable. This is particularly true in an age of austerity, where deep spending cuts which lead to restriction of access to public goods, such as food, water, healthcare and welfare are directed by states and intergovernmental institutions. Yet, limited or wholesale restrictions to such public goods have been known to lead to ill health, death, suicides, high infant mortality rates and lack of access to choices and opportunities, which is the quintessence of multidimensional poverty and in fact its very definition.

Quite clearly, the deprivation of public goods from the general public, which in turn culminates in the life-threatening conditions identified in the previous paragraph encompasses the same criminal qualities as other any other conduct that produces the same results or outcomes. Hence, an intentional deprivation of healthcare or food which leads to the death of 20 per cent of a state's elderly population, as well

[12] I. Bantekas, 'Corruption as an international crime and crime against humanity: an outline of supplementary criminal justice policies', (2006) 4 *Journal of International Criminal Justice* 466-484.

as the deterioration of the health of 40 per cent of the population is effectively the same as if those very segments of the population were targeted by other means, such as direct killings, beatings or deprivation of liberty in poor conditions. Moreover, there can be no doubt that besides the *actus reus* of the offence, under the conditions described above, the *mens rea* dimension is not all that elusive. The culprits understand and accept the impact of their conduct. No policy maker deprives people of their fundamental socio-economic rights by means of large contracts with lenders and IFIs and then passes detailed laws without knowing exactly the impact of such measures on the population. The niceties of determining the type of mens rea required in this eventuality should not bother us too much, given that they are acting either under direct intent or *dolus eventualis*/indirect intent. While it is true that many types of defences have arisen under both domestic and international laws in order to negate culpability, in the case at hand the principal offenders are policy makers, leaders of IFIs, top politicians representing multilateral and bilateral lenders and the leaders of borrowing countries which impose on their peoples such conditions. Given that all these actors identify, dictate and ultimately implement these policies while clearly understanding and knowing full well their impact on civilian populations, their culpability should be without question.

Despite the considerations above, we have yet to define what type of crime we are talking about and whether it resembles with mass criminality type of crime, such as crimes against humanity, or whether it is simply a conduct-type of crime, such as corruption. This will be attempted in the following sections.

## Some Problems with the Human Rights-based Approach to Criminalization

We have already stated that the element of 'directness' both in time and place simply facilitates prosecution but is not the sine qua non criterion for the existence of criminal conduct. For the purposes of this study, there are several issues that at first glance render the human

rights-based approach to international criminalization problematic. However, after closer scrutiny such apprehensions are of a legalistic nature only and are overcome by reference to ordinary notions of criminal laws or the application of justice.

It goes without saying that the formulation of a human rights-based approach to international criminalization requires consensus as to the meaning of human rights and in addition the content of the (human rights) obligation must be binding on those incurring criminal liability. The former will be explored in the next section, so here we shall focus on the bearers of the obligation. The human rights-based approach must correspond to existing fundamental human rights. These are articulated in both customary international law, treaties of a universal nature (such as the ICCPR and the ICESCR) and to a much lesser extent in general principles of law. Having identified our sources we must now address those incumbent with the pertinent obligations. Human rights obligations are addressed to states and increasingly inter-governmental organizations assume the same obligations, either: a) by becoming parties to existing treaties (eg the EU acceding to the UN Disabilities Convention);[13] by adopting new specifically designed treaties (eg. The EU Charter of Fundamental Rights) or; c) by adopting internal bylaws, which become part of the institutional law of the organization.

While states are generally obliged to adhere to the obligations contained in international human rights treaties to which they are parties – these have an extraterritorial effect[14] – they have carved out unacceptable (and certainly null and void) exceptions for themselves in the

[13] This is rare, however, and the EU is exceptional in this respect. In practice, the EU typically issues a declaration which determines whether the particular obligations referred to in the treaty are to be conferred upon it by virtue of the EU treaties, or whether they remain with the states themselves. See Declaration concerning the competence of the EC with regard to matters governed by the CRPD, Annex II to Council Decision 2010/48/EC, OJ L 23 (27 January 2010), 55-60.

[14] See para 9 of Principles on Extraterritorial Obligations of States in the Area of ESC Rights [Maastricht Principles].

event of bilateral and multilateral lending or other debt-creation agreements. Loan agreements, broadly understood, are complex and involve a variety of actors in diverse capacities, functions and liabilities. Sovereign financing may be classified as involving: a) private lenders lending to states; b) sovereigns lending to sovereigns and; c) sovereigns (including IFIs) and private lenders lending to sovereigns. There are two formal types of loan/financing agreements between private lenders and sovereigns, namely syndicated and bonded loans. The former involve the mobilization of resources by a number of commercial banks in favor of a single sovereign borrower.[15] Syndicates may be classified into direct and participation syndicate, although it is not impossible for loans to be granted by individual banks or a small group without recourse to a syndication process (so-called 'club deals').[16] Bonded loans refer to the issuance of sovereign bonds by states and their purchase by private parties (banks, funds, institutional investors, etc), whereby upon maturity of the bond the sovereign pays bondholders both the capital spent as well as the agree yield or interest. Although these agreements are of a private nature, the inability of the state to repay its debts raises the prospect of litigation in several jurisdictions. In practice, the interpretation of the bond transaction and the loan agreement is construed solely in its commercial capacity and the courts (in industrialised nations) take no notice whatsoever of the pressing human rights obligations of the borrower state. Vulture funds, specifically, pursue litigation outside the framework of any PSI (haircut) agreement entered into by the borrower state and its other creditors. In this manner, the human rights obligations of the borrower state play absolutely no role in the ensuing litigation and judgments may be enforced against the commercial property of the state abroad as it is not subject to any immunity limitations.

Loans, co-financing, adjustments and other financial agreements

[15] See A, Mugasha, *The Law of Multi-Bank Financing* (Oxford University Press, 2007), 88-91.

[16] See M. Megliani, 'Private loans to sovereign borrowers', in I. Bantekas & C. Lumina (eds), *Sovereign Debt and Human Rights* (Oxford University Press, 2017).

that create debt between sovereigns, whether bilaterally or multilaterally, would ordinarily give rise to the treaty and customary obligations of the states involved. Lending states would be obliged to respect the human rights commitments of their counterparts, due to the extraterritorial effect of such obligations, while on the other hand borrower states would be forced to provide said rights to their own people. This means that inter-sovereign lending cannot lead to an artificial fragmentation between the regime of human rights and that of sovereign financing. Yet, in practice, bilateral and multilateral lending agreements are framed either in non-binding terms (such as memoranda of understanding) or their applicable law is the private law of a particular nation.[17] Several loan facility agreements entered into between sovereign borrowers and the IMF in particular were specifically drafted in a manner that avoids contractualisation.[18] The exclusion of the treaty format to these transactions is suspicious at first glance, particularly since the parties are sovereign actors. Although it is beyond the scope of this paper to explain the 'hidden' benefits of non-binding accords over a treaty, it should not go unnoticed that treaties are governed by international law, whereas private agreements are governed by any law chosen by the parties. International law encompasses also international

[17] Many recent sovereign loan agreements designate English law as the parties' choice of law. For example, all the loan facility agreements entered into between Greece and its creditors, from 2010 until 2015.

[18] These consisted of bilateral loans with EU member States through a single loan facility agreement, worth a total of EUR 80 billion and a stand-by- arrangement with the IMF at a value of EUR 30 billion. Although the loan facility may be described as a treaty under certain circumstances, stand-by-arrangements are regulated under Art XXX(b) of the IMF's Articles of Agreement, with the IMF having consistently described them as non-contractual in nature. In order to clarify that stand-by-agreements are not in fact contracts the IMF adopted two distinct decisions: Decision No 2603-(68/132) 20 Sep 1968 and Decision No 6056-(79/38) 2 March 1979. In particular, para 7 of the 1968 Decision stated that "in view of the character of stand-by-arrangements, language having a contractual flavor will be avoided in stand-by-documents". See generally, J. Gold, *The Legal Character of the Fund's Stand-by-Arrangements and Why it Matters*, (IMF Pamphlet Series No 35, 1980).

human rights law, whereas a private agreement can, and usually does, bypass international human rights obligations of all parties concerned. The particular choice of law means that the court or tribunal designated to hear a dispute arising from the agreement will be constrained by the parties' choice of law. Moreover, the private nature of the agreement means that governing elites will find it much easier to bypass parliamentary procedures that would otherwise force them to bring a treaty before parliament for scrutiny, public discussion and approval. Parliament is thus prevented from refusing to approve the agreement in question on constitutional and human rights grounds. Finally, the contractual nature of the agreements 'legitimises' the parties to forget their public dimension and the fact that they are merely representatives of their people and instead acts as purely private actors. This is achieved by the insertion of confidentiality clauses with the aim of bypassing constitutional scrutiny, something which is inconsistent with constitutionalism and key principles such as self-determination. Such privatisation of public life ultimately leads to the absence of the rule of law and breeds systematic corruption.

The purpose of this section was meant to demonstrate that both lenders and borrowers make a significant effort to bypass and indeed avoid any human rights obligations in the drawing of lending instruments. The instruments they enter into are sound under private law and in any event powerful states have a history of international law making which focuses on legality rather than legitimacy. A potent example is trade liberalisation, which has had detrimental effects on the livelihood of poor farmers in the developing world but has benefited the wealthy in the developed world and a few elites in poor countries. The pertinent WTO agreements are based on state consent, hence lawful, but lack all sense of legitimacy, because they favour the few at the expense of the many. The same is true with the creation of odious or illegal debt. Besides the instruments that create this type of debt, lenders do not even recognise the concept of odious and illegal debt. Although its practical dimension is clear it has only been invoked in a handful of cases and lenders put pressure on borrowers to avoid any invocation of

these concepts, even by offering concessions and debt relief.[19]

With the above considerations in mind, creditors generally pursue a twofold objective: a) to bypass any constitutional and international human rights obligations and; b) to avoid any link between debt and its adverse with human rights. As the next section on odious and illegal debt will demonstrate, such a link is the direct outcome of all forms of illegal debt, thus giving rise to human rights obligations as well as potential criminal liability for those responsible.

**Odious Debt as Illegal and Criminal Debt**

It is perhaps prudent at this stage to briefly examine the various contours of odious debt and its sub-categories. There are several definitions, to be sure,[20] but for the purposes of this paper we shall make use of those articulated in the preliminary report of the Greek Debt Truth Committee because it is most recent, was drafted by a broad array of actors, namely academics from across the globe, civil society and political figures and the definitions therein were not disputed, despite the fact that the Committee itself came under sustained political pressure both from within and outside Greece.

1. *Odious debt*

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

> which the lender knew or ought to have known, was incurred in violation of democratic principles (including consent, participation, transparency and accountability) and used against the best interests of the population of the borrower state, or is unconscionable and whose effect is to deny

[19] See I. Bantekas, 'Unilateral repudiation of odious and illegal debt', in I. Bantekas and C. Lumina, *Sovereign Debt and Human Rights* (Oxford University Press, 2017).

[20] 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).

> people their fundamental civil, political or economic, social and cultural rights.[21]

Quite clearly, the odious dimension of a debt brings into question two distinct but inter-related elements, namely its unconscionable nature and its conflict with fundamental human rights. It assumes that the very existence of the state is derived from the will of its people and that governments merely articulate that will in both the domestic and international spheres as representatives of the people. It is a fundamental principle of representation or agency, that the latter is obliged to perform its duties in the best interests of the principal. Consequently, a debt that is incurred in a manner that is antithetical to the interests of the borrowing state (or the lending state for that matter) or which is in conflict with the fundamental rights enjoyed by the people of that state, cannot reasonably or legally be demanded by the people in question (through its government). Such a debt cannot have offered any benefit to the people as such, only to a particular class of individuals, typically those involved in the original agreement. Given that the people derive no benefit from such a debt, there can be no claim of unjust enrichment. Although this idea of odious debt, which is predicated on the *juscogens* principle of economic self-determination, has found expression in the work of truth committees and several notable arbitral awards,[22] public and private lenders have, not surprisingly, taken a very hostile stance against its invocation by indebted states. It is clear, however, that the creation of odious debt is predicated on conduct that is unlawful on the part of both lender and borrower, with the conduct

[21] The Committee was set up by a decision of the President of the Greek Parliament on 4 April 2015. It issued its first preliminary report as Truth Committee on Public Debt, Preliminary Report (June 2015), available at: http://www.Hellenic parliament.gr/UserFiles/8158407a-fc31-4ff2-a8d3-433701dbe6d4/Report_EN_final.pdf. Henceforth it will be referred to as Truth Committee preliminary report, at 10.

[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.

itself being unlawful under both domestic and international law. The fact that the conduct is legalized through an agreement is irrelevant for the purposes of criminal law.

2. *Illegitimate debt*

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

Debt that the borrower cannot be required to repay because the loan, security or guarantee, or the terms and conditions attached to that loan, security or guarantee infringed the law (both national and international) or public policy, or because such terms and conditions were grossly unfair, unreasonable, unconscionable or otherwise objectionable, or because the conditions attached to the loan, security or guarantee included policy prescriptions that violate national laws or human rights standards, or because the loan, security or guarantee was not used for the benefit of the population or the debt was converted from private (commercial) to public debt under pressure to bailout creditors.[23]

The Committee's definition was dictated by the underlying conditions of the Greek debt and by that time the idea of illegitimate debt was more theoretical than practical. It was assumed that a debt was illegitimate where it had been incurred legally but which was ethically unconscionable, whether procedurally or substantially. It suffices here to state that it is now well recognised that debt constitutes a policy instrument to the same degree as its economic and fiscal dimension.[24] Borrowing states may incur cheap debt (i.e. with preferential interest

[23] Debt Committee preliminary report, at 10; see also Report on Effects of Foreign Debt and other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, particularly Economic, Social and Cultural Rights, UN Doc. A/64/289 (12 August 2009), paras. 8-22.

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

or long repayment periods), where available, for fungibility purposes,[25] or with a view to attracting investment from particular countries, undertake infrastructure projects that secure their current levels of employment, etc. On the other hand, public works or public-private partnerships (PPPs) are money-intensive and constitute the primary financing projects for banks, hedge funds and other private financiers. They, in turn, urge industrialised nations to lobby on their behalf for funding. Thereafter, it is in the interests of the private funders and the states (which may and usually do contribute partly to large projects especially in the developing world) to make sure that repayment of the loans is prompt. Once a private bank whose finances are linked to a country is exposed to a toxic (non-repaid) debt, there is a domino effect on the banking sector and the state in question because of the interconnectedness of the international private financing system, which in turn sustains the domestic job market, consumer spending and ultimately the availability and collection of taxes. As a result, lending states not only have a financial interest in the repayment of debt incurred by borrowing states, but may also find it expedient to offset such debt by using it as a political tool in order to achieve financial or political benefits.

It is precisely the pursuit of such financial and political benefits that is at the heart of the doctrine of illegitimate debt. In the case of the Greek debt, illegitimacy encompassed both a procedural and a substantive dimension. As to the first, Greece's multilateral lenders entered into actions or statements that either deteriorated the country's creditworthiness – which forced it to borrow under higher interest rates or be excluded from the private financing markets – or culminated in decreasing the value of its sovereign bonds.[26] Moreover, these very statements and actions had a very profound effect on the way that the Greek government entered into negotiations regarding the servic-

[25] J. E. Stiglitz, *Globalization and its Discontents* (Norton 2003), 44-46.

[26] Greek Debt Truth Committee, 'Illegitimacy, illegality, odiousness and un sustainability of the August 2015 MoU and Loan Agreements' (25 September 2015), available at: http://cadtm.org/Illegitimacy-Illegality-Odiousness

ing of its debt, as well as in the way that the Greek people exercised their democratic right to address the country's debt issue. These actions have been held to constitute unilateral coercive measures. Given that powerful creditor states are able to interfere in borrower states' constitutional processes and enter into statements or other actions that knowingly culminate in harming the economy of the borrower and the livelihood of its population (unilateral coercive measures), reference to 'force' in Article 52 of the Vienna Convention on the Law of Treaties (VCLT) may be construed as including forms of economic coercion.[27] This type of economic coercion qualifies, among others, as unlawful intervention in one's domestic affairs which, although does not invalidate consent, may nonetheless offer a basis for denouncing a loan agreement under Article 56(1)(b) VCLT.

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

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

passed the parallel use of a national currency, repudiation of the debt, or other measures.

Besides the procedural illegitimacy of sovereign debt, as described in the previous paragraphs of this section, substantive illegitimacy concerns the offer and consideration of a debt that is wholly unnecessary. The UN Independent Expert on debt and human rights issued a report on the purchase of ships at preferential rates by Ecuador in the 1970s, financed by Norwegian loans, through an aid program. These ships were of little, or no use, to Ecuador at the time and in the process was saddled with a significant debt. When interest rates later increased Ecuador's interest obligations increased manifold and the only entity that made a profit from this arrangement were Norwegian ship builders. Much later Norway acknowledged that this project was of no value to Ecuador and its people and went on to unilaterally extinguish the remainder of the debt.[28]

3. *Illegal debt*

Although the concept of debt illegality shares some common features with odious and illegitimate debt, it is very much predicated on the violation of laws, whether domestic or international and hence is easier to identify. The Greek Truth Committee defined illegal debt as: debt in respect of which proper legal procedures (including those relating to authority to sign loans or approval of loans, securities or guarantees by the representative branch or branches of government of the borrower state) were not followed, or which involved clear misconduct by the lender (including bribery, coercion and undue influence), as well as debt contracted in violation of domestic and international law or had conditions attached thereto that contravened the law or public policy.[29]

The rule whereby states may not invoke their domestic law as justification for violating their obligations under international law[30] is in-

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

[29] Truth Committee, preliminary report, at 10.

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

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

**The Fundamental Contours of a Crime of Intentional Indebtedness**

Any discussion as to the fundamental legal basis for an international crime of intentional sovereign indebtedness should begin with an identification of the value for which protection is sought. In the case at hand, this value concerns the enjoyment of fundamental socio-economic rights, particularly those encompassed in global human rights instruments such as the 1966 International Covenant on Eco-

nomic, Social and Cultural Rights (ICESCR). Despite the fact that sovereign indebtedness violates most, if not all, civil and political rights (eg threats to the economy by lenders inhibit the right to free and fair elections, democratic governance and others), the emphasis for the international crime under consideration is on socio-economic rights because these determine the living quality and physical survival of the person. Lack of access to fundamental medicines, healthcare, food and water ultimately results in death, sickness or an acute deterioration of living standards, which is incompatible with the ICESCR and other positive obligations of the state under regional instruments, such as the European Convention on Human Rights (ECHR). Equally, the crime of intentional indebtedness should include all those situations whereby the state is forced to resort to financial measures that violate economic self-determination, as is the case with privatisations of otherwise successful and profitable state enterprises or the sell-off of natural resources.[31]

Because the level of deprivation would always be hard to quantify, as indeed its length/duration, more objective criteria are required for grounding the offence as such. Although the aim of this paper is simply to provide a brief skeleton/sketch of the contours of such an international offence, it is perhaps appropriate to link deprivation of a fundamental socio-economic right with the ability of the state to satisfy such a right in two particular circumstances, namely: a) even under its current condition of indebtedness, or; b) if it is prevented from satisfying these rights as a result of a repayment scheme that does not allow it to finance fundamental public services. Hence, the state (and pertinent physical persons) are not liable only where: a) they have not committed a criminal act (as defined by domestic and international law) in the process of incurring a debt; b) there are no financial or other means to provide, protect and respect the pertinent fundamental public service to their people and; c) they are not precluded from providing these as a

[31] In the latest bank recapitalization of Greece in 2015 the banks whose share prices were very low, only private funds were allowed to participate, but not the general public through the normal purchase of shares through the stock market.

result of repayment scheme (to their lenders).

The *mens rea* of the offence must be predicated on intention/*dolus eventualis*. However, the assessment of such *mens rea* must be consistent with the context and background of the conduct as a whole. It is must also encompass a 'knowledge' component on the part of the pertinent actors. By way of illustration, the drawing of a budget that provides for deep cuts to healthcare and which has been shown, or is known to its drafters, to exclude the poorest strata and the elderly from affordable healthcare (and hence all the pertinent consequences, health-related or otherwise) constitutes an intentional or foreseeable act as to that population's living standards and ultimate health or social condition. In the contemporary world, such linkages are obvious and well known. For example, the absence of affordable healthcare has been shown to culminate in preventable deaths, still-births and pre-natal deficiencies, preventable elderly conditions and others. The *mens rea* concerns conduct involving a policy or widespread occurrence. Knowledge as to consequence must be predicated on non-rebuttable presumptions because of the notoriety of such consequences and sensible access to advisors, which governments and lenders are presumed to have. Equally, knowledge on the part of the 'lender' that a particular transaction is harmful to the state and its people, or that the debt is odious, would give rise to a criminal liability on the part of the 'lender'.[32]

As far as perpetrators are concerned, in most cases borrower governments are mere accomplices to the intentional sovereign indebtedness engineered by IFIs, private financial institutions and lending governments. This means any construction of criminal liability should take into consideration not only those implementing sovereign indebtedness policies but also those that engineer or impose it against borrowing governments and their peoples, even if the government in question

[32] The Greek Fund for Privatisations of State Assets (TAIPED) took paid advice from a German consultancy firm, which advised privatization and the sale of airports (at relatively low prices) to FRAPORT, which itself is a subsidiary of the consultancy firm. FRAPORT itself is a subsidiary of Lufthansa. A clear conflict of interest at all levels for the non-state actor and clear knowledge of the circumstances.

concurs or is complicit in the overall plan. In this manner, the aforementioned actors will be induced to become prudent lenders and will only involve themselves in sovereign financing on the basis of strict criteria and in a manner that respects fundamental human rights, which, it should be reminded, constitute fundamental obligations for states both under their treaty obligations as well as under their domestic constitutions.[33]

Although the matter needs further consideration, it is prudent to say that the international crime of intentional indebtedness should not be a results-based crime. If the objective criteria of the actus reus are satisfied and the pertinent actors were aware of these and consented to their materialization the crime should be deemed as have been realized. It would not only be absurd to wait for an impact on the population, but this would also be impractical and unjust. It would also provide incentives to the culprits, who after all yield politico-financial power – to hide the impact of their policies through multiple means. It should not be forgotten that some of the most serious international crimes do not require even a single victim and the elements of these offences is satisfied irrespective of victimization. This is true for example with respect to conspiracy (to commit any international crime) and incitement to commit genocide. The key criterion is the violation of fundamental socio-economic rights (and civil and political rights as the case may be) irrespective of the immediate depth of impact on the civilian population.

**Added Value of an International Criminal Dimension**

It is now common place in international decision-making to assess additional layers of protection, or law making on the basis of the *added*

[33] The criminal liability of corporations under both domestic and international law has been discussed for some time and some concrete steps have been taken. See C Wells, *Corporations and Criminal Responsibility* (Oxford University Press, 2001); MJ Kelly, *Prosecuting Corporations for Genocide* (Cambridge University Press, 2016).

*value* that such additional protection or law making will bring about.[34] Added value considerations involve financial criteria, as well as avoidance of duplicative efforts, enhanced and complementary protection and others. This section provides several reasons as to why an international criminal dimension might provide added value to the alleviation of the calamities associated with intentional sovereign indebtedness. It should be pointed out that at present there are very few efforts to address sovereign indebtedness comprehensively and lender states have made it clear states must honor 'commitments' even if this involves a gross violation of their human rights obligations.

a) This is important because a criminal investigation will provide a record of events and determine who has done what and how.
b) Moreover, it will give us an enforceable result. With a conviction and the characterization of assets as assets of illicit origin, the return of such assets to the country of origin becomes easier.
c) Equally, a criminal investigation allows the prosecuting state to secure attendance of witnesses, the accused and evidence situated abroad through bilateral arrangements.
d) Furthermore, although it will not stop corporate/banking/public fraud criminality, a criminal conviction is an excellent first step for the development of better banking codes, corporate codes of conduct and better monitoring by audit and other authorities.
e) It sensitizes the public to be aware of the relevant issues and not tolerate them. In Greece, for example, the general public did not care about the results of the Committee on the Truth of the Greek Debt.
f) Also, something that is ethically detestable may reach such public consensus as to become a crime (eg unconscionable contracts / concessions; making profit from interest rates; vulture funds)

[34] See A Hellum, *Women's Human Rights* (Cambridge University Press, 2015), 10.

## Conclusion

The aim of this paper was to set forth a paradigm for international criminalization that complements, rather than contradicts, existing criminalization process; namely, through a human rights-based approach. The case study for this process was the practice of intentional indebtedness by those persons in a position to make it happen. Traditional approaches are inapplicable to this practice because many of the discrete acts that comprise are clad under veils of legality and are pursued under the guise of private law. Moreover, the stated intention of these actors is to salvage the target country's economy and by doing so restore the living standards of its population. In this manner, the practice of indebtedness seems not only amply justified but benevolent. This paper is concerned only with odious, illegal, illegitimate and unsustainable debt. Not all sovereign debt is of this nature and in fact states often borrow to improve the lives of their people, raise employment, create infrastructure etc. However, 'bad' debt typically violates domestic law as well as international human rights law, which bind all pertinent actors. As a result, where a person in a position of authority (whether from the part of the lender or the borrower) agrees, and in fact undertakes, to incur a 'bad' debt in violation of international human rights obligations, in the knowledge of the violation, the proposed offence would be satisfied, irrespective of any immediate harm to a class of victims. Although it is supposed by the present author that harm is inevitable from a 'bad' debt, the offence is not results-based.