

## 9.8 Baby Doc's Odious Debts and Haiti's Legal Defences

Sandrine Giroud

### Introduction

Haiti is the least-developed country in the western hemisphere. Comparative social and economic indicators show that Haiti has fallen behind other low-income developing countries since the 1980s. Haiti now ranks 148<sup>th</sup> out of 179 countries in the United Nations Human Development Index.<sup>1</sup> In practical terms, this means that 54 percent of Haitians live on less than one dollar a day and 78 percent on less than two dollars a day.<sup>2</sup>

The situation is not likely to improve soon considering the terrible year Haiti had in 2008. Soaring world prices for food and fuel, together with a series of four consecutive hurricanes that destroyed much of Haiti's infrastructure, have left the country in need of great support.

In April 2006, Haiti was added to the list of Heavily Indebted Poor Countries (HIPC) and became eligible for the HIPC Initiative of the World Bank (WB) and the International Monetary Fund (IMF). In June 2009 Haiti was granted USD 1.2 billion in debt relief by reaching the completion point under the enhanced HIPC Initiative. The HIPC Initiative and the Multilateral Debt Relief Initiative (MDRI) both resulted in debt service savings (USD 265 million and USD 972.7 million, respectively).<sup>3</sup> Nevertheless, Haiti still had to honour a debt service reaching USD 58 million in 2008, which, for the most part, goes back to the Duvaliers' dictatorship.<sup>4</sup> Indeed, having started with a total outstanding debt of USD 43 million in 1972, Haiti's total outstanding debt had reached almost USD 750 million by the end of the reign of Jean-Claude Duvalier in 1986.<sup>5</sup>

In light of these facts, the present article will analyse whether Haiti has a legal claim to the cancellation of the debts resulting from Baby Doc's era. The analysis will focus on the potential legal arguments that Haiti has under international law, leaving to others the task of supporting these arguments with figures and other evidence.

### I. Haiti's Debts: A History Spanning Almost Two Centuries

Three layers, related to three fundamental periods of Haitian history, have defined Haiti's external debt over the years. The first period (A) goes back to Haiti's independence from France in 1804, and to the bitter cost that came with it in the form of "independence debt." The second episode (B) refers to the devastating and brutal dictatorship of the Duvaliers – father and son – that lasted nearly thirty years and left the treasury's coffers empty (if not full of odious debts). Lastly, the third period (C) resulted from the political turmoil Haiti endured during the 1990s, which led the international community to impose an embargo on the country.

### A. The Independence Debt

In 1804, Haiti gained its independence from France, becoming the first black republic in the world. The new state, however, started off with a heavy burden to carry. Because both France and the United States refused to recognise its independent status, Haiti was forced, in 1825, to give 150 million francs-or to France to gain recognition and to repay slaveholders for their losses. In 1838, the indemnity was brought down to 90 million francs-or. The last instalment of this enormous debt was not paid until the beginning of the 20<sup>th</sup> century. To repay the "independence debt," Haiti had to take loans, followed by more loans. Though initially intended for the development of the country, these loans were mostly used to pay off the "independence debt", when the initiators of the loans did not misappropriate them.

### B. Baby Doc's Debts

Although the "independence debt" placed a heavy burden on Haiti, much of the country's current debt did not originate in the 19<sup>th</sup> century, but from the Duvaliers' dictatorship, especially from the time of Jean-Claude Duvalier (better known as "Baby Doc"), who was in power from 1972 to 1986.

In their multiple bank accounts in Switzerland, the United Kingdom, the United States and France, the Duvaliers held ever-increasing fortunes. In addition, Jean-Claude Duvalier owned a castle in Val d'Oise, France, two apartments in Paris, two in Neuilly, France, a condominium in the luxurious Trump World Tower in New York, and a yacht in Miami.<sup>6</sup> According to Transparency International, Jean-Claude Duvalier likely embezzled between USD 300 and 800 million during his dictatorship.<sup>7</sup>

Jean-Claude Duvalier's regime coincided with a period of rampant growth in Third World debt. This period of unprecedented credit availability propelled by the oil crisis of the 1970s allowed Haiti to contract numerous loans with western banking institutions. Unfortunately, the debt crisis of the 1980s left Haiti unable to service its debt and with nothing to show in exchange for it, given that most of the loans were used by Jean-Claude Duvalier and his family for personal purposes.

When Jean-Claude Duvalier's dictatorship ended in 1986, several lawsuits were launched in different countries to investigate the possible illegal use of public funds by the Duvalier family. One of these proceedings led the Swiss government, on 12 February 2009, to confiscate the assets of Jean-Claude Duvalier that were located in Switzerland (approximately CHF 7 million) and return them to Haiti.<sup>8</sup> This decision is being appealed and the final decision is still pending at the time of



writing. It is important to note, however, that the Swiss case remains an exception, as most of the attempts to recover Jean-Claude Duvalier's assets have so far failed.

### C. Embargo

A succession of governments and coups d'état followed Jean-Claude Duvalier's departure. In 1991, the international community attempted to put the democratic development of Haiti back on track with the imposition, through the UN, of an embargo aimed at restoring ousted President Jean-Bertrand Aristide. This embargo inflicted a strong blow on the country's already weak economy.

Though Aristide was quickly restored to office, the scepticism of the international community did not vanish. Doubts as to the legitimacy of Aristide's election in 2000 led the WB and the Inter-American Development Bank (IDB) to suspend most grants to Haiti. After Aristide left the country in 2004, the reengagement of international financial institutions remained conditioned on Haiti's payment of arrears owed to them.

## II. Baby Doc's Odious Debts

With the above historical overview in mind, I now turn to the question of the legitimacy of Haiti's external debt. For reasons of conciseness, I will focus on the debts accumulated under Jean-Claude Duvalier's regime, in particular on the multilateral loans entered into with the WB and the IMF.

### A. Nature of the Debts

Two main reasons explain the flow of foreign money to the Duvaliers' dictatorship. The first reason is geopolitical. Lying just across the Windward Channel from Cuba, Haiti was able to take advantage of political tensions during the Cold War. François Duvalier made clear that his loyalty to the United States was for sale and, in return, he received official loans to support his dictatorial regime.<sup>9</sup>

The second reason was of an economic nature. Following the first oil crisis in 1973, huge amounts of petrodollars flooded western banking institutions at a time when industrialised countries' demand for credit was depressed. Western banking institutions quickly found a new market for these petrodollars in the developing world. Benefitting from these new funds, many developing countries, such as Haiti, took the opportunity to contract loans to "officially" industrialise their economies. They borrowed heavily from banking institutions at relatively low interest rates, accumulating unprecedented levels of debt.

The 1980s, however, brought a dramatic shift in the economic policies of industrialised countries. As a reaction to rapidly unfolding inflation in the United States, global interest rates were increased. Worldwide, the total debt of developing countries increased by 1,500 percent between 1965 and 1980.<sup>10</sup>

According to the WB and the UN Office on Drugs and Crime (UNODC), Jean-Claude Duvalier may have stolen the equivalent of 1.7 to 4.5 percent of Haiti's GDP every year he was in office.<sup>11</sup> While the

country's debt amounted to approximately USD 40 million in 1970, by 1987, the first full fiscal year after Jean-Claude Duvalier's departure, it was USD 844 million, or 60 percent of the amount owed in 2004. Although estimates vary, it is alleged that the Duvalier family took USD 900 million in multinational and bilateral loans for their own purposes.<sup>12</sup>

The people of Haiti have neither benefited from these funds nor received them back, despite advocacy efforts. On the contrary, they have directly suffered from the ill-use of these loans, which helped fund the brutal regime put in place by Jean-Claude Duvalier to support his luxurious lifestyle through, for example, (1) the financing of repression forces and (2) the looting of the treasury's coffers.

### 1. Financing of the Paramilitary Forces

On 5 December 1980, the IMF gave Jean Claude Duvalier USD 22 million in aid. Within weeks, USD 20 million were withdrawn from the Haitian government's account. According to the IMF, USD 4 million went directly to fund the *Milice de Volontaires de la Sécurité Nationale* (MVSN) – a militia force, also known as *Tontons Macoutes*, responsible for as many as 30,000 killings during the Duvalier years. The remaining USD 16 million seemingly disappeared into Duvalier's numerous personal accounts. In a report, the IMF almost euphemistically defined "excessive unbudgeted spending as the most important cause of Haiti's financial crises."<sup>13</sup>

### 2. Looting of the Treasury's Coffers

From at least 1975 onward, Jean-Claude Duvalier set up a system of extra-budgetary accounts provided with funds from the Public Treasury and revenues from public institutions. By doing this, Duvalier and his family allegedly misappropriated up to USD 70 million from the state.<sup>14</sup>

Additionally, it is attested that Haiti's budget contained several items that, despite their misleading names, were headed toward Jean-Claude Duvalier's pockets. This system provided Duvalier with allowances amounting to approximately USD 8 million, coming from contributions to "Social Assistance," the item named "Without Justification," and other budget items.<sup>15</sup>

### B. Odious Debts

When analysing potential defences available to annul part or all of the "odious" debts contracted by Duvalier with multinational institutions (i.e., the WB and the IMF), we need to consider: (1) the forum available to address this issue; (2) the legal nature of the relationship from which the debts arose, and, finally, (3) the existing legal arguments that support debt cancellation.

#### 1. Available Forum

In their Articles of Agreement, both the WB and the IMF have provisions concerning the ability to institute legal proceedings and have legal proceedings brought against them.<sup>16</sup> However, both institutions enjoy general immunities from adju-

dication in national courts.<sup>17</sup> Therefore, litigation before domestic courts seems improbable.

It is very likely, though, that the loan agreements contain an arbitration clause.<sup>18</sup> In that case, Haiti could bring its case before an arbitral tribunal constituted by arbitrators chosen by the WB or the IMF, respectively, and Haiti itself.<sup>19</sup>

The WB Inspection Panel (WBIP) could also, though only to a very limited extent, constitute an appropriate forum for claims brought by a claimant regarding “an act or omission by the Bank [concerning] its operational policies and procedures.”<sup>20</sup> It is the first body established before which parties can seek to hold an international organisation accountable for its actions. Nevertheless, considering the limited references to human rights in the WB’s operational policies, the scope of action possible within the WBIP appears to be very narrow, and perhaps even inexistent when it comes to questioning the “odious” character of the loans contracted by Haiti.<sup>21</sup>

## 2. Nature of the WB and IMF Loans

Any loan agreement entered into by the WB and its members must be made in accordance with the Articles of Agreement and the Bank’s Loan and Guarantee Regulations. Such agreements usually contain a so-called de-nationalisation clause. The WB’s official view (also shared by most commentators)<sup>22</sup> is that, therefore, such agreements are governed by international law.<sup>23</sup> This conclusion is also supported by the status of the WB as a subject of international law.<sup>24</sup> The same conclusions hold true for IMF loans.<sup>25</sup>

Due to the international law nature of the loan agreements concluded by Haiti with the WB and the IMF, any argument in support of cancelling part or all of the debts contracted under these agreements must be found in international law.

## 3. Available Defences

### a. The Traditional Odious Debts Defence

In international public law, there exists a widely accepted presumption that debts incurred by a state pass on to the succeeding state.<sup>26</sup> This assumption, however, may lead to morally unjustifiable results. Scholars and practitioners have long tried to come up with creative solutions to solve this dilemma, which burdens the future of new states. The traditional doctrine of odious debt is one of these proposed solutions.<sup>27</sup>

From a purely legal point of view, the doctrine of odious debt does not rest on a stable foundation.<sup>28</sup> The absence of international instruments, lack of recent state practice, inconsistent *opinio iuris*, and controversy among scholars all shed doubt on the doctrine’s existence under international law, all the more so in cases dealing with a change of government and not with state succession.<sup>29</sup> Nevertheless, the debate is still very much alive, as discussions on the cancellation of the debts incurred under Saddam Hussein’s dictatorship show.<sup>30</sup>

As stated by Bryan Thomas, “[t]here is little doubt that some portion of developing country debt con-



The Duvalier Foundation in Port-au-Prince, Haiti on 14<sup>th</sup> April 2007. As a rule, former dictatorial clans can preserve their political and economic influence beyond regime changes. Picture: Keystone





Woman selling rice in Port-au-Prince, Haiti. Picture: Reuters/Eduardo Munoz

tracted with the World Bank is odious. Because World Bank officials were often well aware of the end-uses of their loans, subjective awareness of odious lending may be relatively easy to establish. World Bank officials have, in recent years, essentially confessed that much of the post-war lending was odious.<sup>31</sup> This case, however, seems more difficult to make regarding IMF loans.<sup>32</sup>

Under the doctrine of odious debt, debts that are incurred by an undemocratic regime, without the consent of the population, and against its interests cannot be reclaimed if the lender was aware of these deficiencies. This is even truer when the money borrowed was used to commit serious human rights violations. In light of the facts described above, the doctrine of odious debt undoubtedly applies to the debts incurred by Jean-Claude Duvalier when he was in power.<sup>33</sup> Nevertheless, taking into consideration the controversial nature of this doctrine, this defence strategy appears rather weak.

#### b. The Private Law Defence

Some scholars and practitioners have tried to come up with defences that originate in private law.<sup>34</sup> Private law defences, however, are confronted with one major obstacle: they require that the legal relationship that created the “odious” debt, i.e., the loan agreement, be subject to private law, i.e., domestic law. But, multinational loan agreements – such as those contracted by Duvalier – or bilateral state-to-state agreements are international law agreements against which private law defences are useless, absent the existence of an equivalent defence in international law.<sup>35</sup>

It is true that precedents exist in international law that provide justification for the non-performance of treaty obligations, freeing the debtor state of its responsibility, such as state of necessity, impossibility, force majeure, or similar concepts.<sup>36</sup> These grounds, however, only refer to ex-post events that justify the termination of a binding agreement, and do not refer to the “odious” nature of the debt at the time the agreement was concluded.

It should be noted that ideas have been expressed regarding the application of agency law to the relationship between a government, a population, and a third party (i.e., the lender).<sup>37</sup> Again, this would amount to an application by analogy of a theory arising from domestic law, which has not yet proven convincing under international public law.

#### c. The Vienna Convention Defence

The 1969 Vienna Convention on the Law of Treaties (Vienna Convention) provides certain grounds for the invalidation of a treaty, but none of the grounds mentioned from Article 46 to 52 (invalidity of treaties) of the Vienna Convention apply to the debts contracted by Jean-Claude Duvalier.<sup>38</sup>

Furthermore, it is worth noting that the Vienna Convention only applies to states and that the 1986 Vienna Convention on the Law of Treaties between states and international organisations or between international organisations, which provides the same grounds for invalidating treaties, is

not yet in force.<sup>39</sup> Therefore, any defence arising out of the Vienna Convention regarding the invalidity of a loan agreement must be recognised under other sources of international law, such as customary international law.

The principle stating that the violation of a norm of *ius cogens* invalidates a treaty, such as that provided in Article 53 of the Vienna Convention, arguably forms part of customary international law and, as such, extends beyond the Vienna Convention.<sup>40</sup> Thus, Article 53 seems to offer a valid defence against the obligation to repay the loan debts contracted under Duvalier's presidency, as will be explained below.

#### d. The *Ius Cogens* Defence

Based on the principles contained in the Vienna Convention, particularly Article 53, some scholars and practitioners have argued that loan agreements that contribute to a *ius cogens* violation are invalid.<sup>41</sup> This echoes the position taken by Special Rapporteur Mohammed Bedjaoui, who suggested that debts that are not contracted in conformity with international law should be considered odious and thus invalid.<sup>42</sup> To meet this test, however, one has to establish a causal link between the loan and the *ius cogens* violation at the time the loan was contracted.

Although the boundaries of the *ius cogens* concept are debated, the current consensus seems to include the outlawing of wars of aggression, the prohibition of crimes against humanity, genocide, torture, slavery and apartheid, and the protection of the right to self-determination.<sup>43</sup> Accordingly, the numerous gross violations of human rights committed under Duvalier's regime (murders, summary executions, torture, forced disappearances,

etc.) should be considered violations of the rules of *ius cogens*.<sup>44</sup> The financing of the MVSN with IMF loans shows that such loans directly contributed to the persecution of the Haitian population and, as such, amounted to *ius cogens* violations.<sup>45</sup>

Based on the above, the *ius cogens* defence appears to be the most convincing argument in support of not repaying the loans contracted during Jean-Claude Duvalier's regime.

#### Conclusion

Jean-Claude Duvalier's dictatorial regime caused much suffering to the Haitian population. For the most part, the debt constituting the heavy economic burden resting on Haiti today originated from the many loans Jean-Claude Duvalier contracted with the WB and the IMF. Duvalier used these loans to maintain his dictatorship, exploit the Haitian population, and fill his pockets. These loans contributed to a regime of torture and other grave human rights violations.

There do not exist many available defences in international law against the obligation to repay these loans. Although scholars have proven creative in this area, many of the theories put forward have not passed the test of being recognised in international law. Thus, the *ius cogens* defence appears to be the most promising, given that it is in line with the trend in international law to enforce the consequences of *ius cogens* violations – be it through recognition of responsibility, allocation of damages, or invalidation of treaties. One could, therefore, reasonably submit before an arbitral tribunal that the multilateral loans contracted by Jean-Claude Duvalier while he was in power ought to be considered “odious debts,” and hence obtain a judgment that these loans are invalid.

1 UN Human Development Index 2006, updated in 2008.

2 WB, Haiti Country Brief, available at <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/LACEXT/HAITIEXTN/0,,contentMDK:21040686~pagePK:141137~piPK:141127~theSitePK:338165,00.html>.

3 WB News Release No. 2009/451/LAC, Washington D.C., 30 June 2009, available at <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/LACEXT/0,,contentMDK:22232346~pagePK:146736~piPK:226340~theSitePK:258554,00.html>.

4 Mark Schuller, Break the Chains of Haiti's Debt, at 11 (Jubilee 2006); see also, World Bank Estimated Debt Service Payment – Haiti, available at <http://web.worldbank.org>.

5 WB estimate, available at <http://ddp-ext.worldbank.org/ext/DDPQQ/member.do?method=getMembers&userid=1&queryId=135>.

6 Eurodad, The Time for Debt Cancellation is Now! Haiti: Fact Sheet on Illegitimate Debt, at 5 (2006).

7 World Bank & United Nations Office on Drugs and Crime, Stolen Asset Recovery Initiative (StAR) Report 2007, at 11. Note, however, that differences and even inconsistencies exist among the different figures advanced by the sources examined.

8 Press Release, Swiss Federal Office of Justice, Handover of Duvalier assets to Haiti ordered; Lawful origin of assets could not be proven (12 February 2009), available at <http://www.news.admin.ch/message/?lang=en&msgid=25272>. The Swiss Federal Office of Justice (FOJ) considered the Duvalier family a criminal organisation. Consequently, it applied to it the provisions of the Swiss Criminal Code on the confiscation of criminal organisation assets, which pro-

- vides for the reversal of the burden of proof, i.e., the Duvalier family had to prove the legal origin of the funds. Because the Duvalier family failed to do so, the FOJ decided to confiscate the assets and to return them to Haiti. For more details on the Duvalier case and the confiscation of assets in Switzerland, see Sandrine Giroud-Roth & Laurent Moreillon, *Restitution spontanée de fonds bloqués à des États défaillants: les cas Duvalier et Mobutu*, *Aktuelle Juristische Praxis/Pratique Juridique Actuelle* 3/2009, at 275-287.
- 9 Schuller, *op. cit.*, at 3.
- 10 *Id.*
- 11 WB & UNODC, *op. cit.*, at 11.
- 12 Schuller, *op. cit.*, at 4.
- 13 James Ferguson, *PAPA DOC, BABY DOC: HAITI AND THE DUVALIERS*, at 70 (Blackwell 1987).
- 14 Report of the Bank of the Republic of Haiti, Testimony of Leslie Delatour, 15 January 1987.
- 15 *Id.*, Testimony of Eddy Avin.
- 16 WB Articles of Agreement, Art. VII(2) and (3); IMF Articles of Agreement, Art. IX(2) and (3).
- 17 Sigrun Skogly, *THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND*, at 34 (Cavendish 2001).
- 18 For instance, Section 10.01 of the International Bank for Reconstruction and Development (IBRD) General Conditions Applicable to Loan and Guarantee Agreements (dated 1995, amended 2004).
- 19 Because the loans examined were contracted with international organisations and not with private investors, the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (ICSID Convention) is not applicable.
- 20 The WB Inspection Panel was established by Resolution No. IBRD 93-10 and Resolution No. IDA 93-6, 22 September 1993. The WBIP responds to complaints by affected people who believe that the WB has caused or will cause them harm as a result of a failure by the WB to follow its policies and procedures in a project supported by a WB loan, credit, guarantee etc. A complaint to the WBIP would have to focus on the specific project financed by the "odious" loans and on the harm that resulted, or will result, to people or the environment in the design, appraisal, and implementation of the project. The conditions under which the loan is granted to a borrowing government are not usually within the purview of the WBIP; however, in a number of cases petitioners have alleged human rights abuses resulting from a WB-financed project and, hence, from the failure of the WB to comply with its policies. For more information on this issue, see Inspection Panel Investigation Report Chad-Cameroon Petroleum and Pipeline Project (Loan No. 4558-CD); Petroleum Sector Management Capacity Building Project (Credit No. 3373-CD); and Management of the Petroleum Economy (Credit No. 3316-CD) of 17 July 2002, which explains in paragraph thirty-five: "It is not within the Panel's mandate to assess the status of governance and human rights in Chad in general or in isolation, and the Panel acknowledges that there are several institutions (including UN bodies) specifically in charge of this subject. However, the Panel is obliged to examine whether the issues of proper governance or human rights violations in Chad were such as to impede the implementation of the Project in a manner compatible with the Bank's policies."
- 21 For an extensive analysis of the WBIP's scope of action, see Skogly, *op. cit.*, at 182-185.
- 22 See August Reinisch, *STATE RESPONSIBILITY FOR DEBTS: INTERNATIONAL LAW ASPECTS OF EXTERNAL DEBT AND DEBT RESTRUCTURING*, at 51-54 (Böhla 1995); Skogly, *op. cit.*, at 29.
- 23 For instance, Section 10.01 of the IBRD General Conditions Applicable to Loan and Guarantee Agreements (dated 1995, amended 2004) provides that rights and obligations incurred in the agreement are enforceable in accordance with their term notwithstanding the law of any state to the contrary.
- 24 Skogly, *op. cit.*, at 64-71.
- 25 *Id.*
- 26 Ernst Feilchenfeld, *PUBLIC DEBTS AND STATE SUCCESSION* (Macmillan 1931).
- 27 For a detailed presentation of the concept of odious debts, see Robert Howse, *The Concept of Odious Debt in Public International Law* (UNCTAD 2007), available at [http://www.unctad.org/en/docs/osgdp20074\\_en.pdf](http://www.unctad.org/en/docs/osgdp20074_en.pdf).
- 28 See Sabine Michalowski, *The Doctrine of Odious Debts in International Law*, at 1.1 Does International Law Recognise the Doctrine of Odious Debts in its Traditional Formulation?, in the present publication. See also, Sabine Michalowski, *UNCONSTITUTIONAL REGIMES AND THE VALIDITY OF SOVEREIGN DEBT: A LEGAL PERSPECTIVE*, at 41-43 (Ashgate 2007); Lee Buchheit et al., *The Dilemma of Odious Debts*, 56 *Duke L. J.* 1201, 1228 (2007).
- 29 *US v. Iran*, Iran-US Claims Tribunal Case No. B36, Award No. 574-B36-2, 3 December 1996 (indicating that the concept of odious debt was limited exclusively to cases of state succession).
- 30 The decision to grant Iraq substantial debt reduction was reached as part of a Paris Club deal that in no way took account of considerations related to those underlying the doctrine of odious debts.
- 31 Bryan Thomas, *The Odious Debt Doctrine and International Public Policy: Assessing the Options*, in *CISDL Working Paper: Advancing the Odious Debt Doctrine*, at 12 (2003), available at <http://www.cisd.org/pdf/debtentire.pdf>. Thomas also points out that "World Bank loans have not been sold on the secondary market, so the forensic problems involved in applying the odious debt doctrine to private lending may be less acute with IFI [International Financial Institution] lending. Indeed, World Bank loans may offer a promising test case for the resurrection of the doctrine of odious debts." *Id.*
- 32 *Id.* IMF loans are intended to serve a strictly macroeconomic function, i.e., to correct balance of trade problems. Consequently, IMF officials have less direct involvement in the end-uses of loans. Their awareness of odious end-uses may thus be difficult to establish.
- 33 See Amnesty International, *Haïti: Les visages de la répression* (1985); Inter-American Commission on Human Rights, *Annual Reports: 1971-1987*; Patrick Lemoine, *FORT-DIMANCHE, FORT-LA-MORT* (Fordi 9 2006). The IMF also reported on the ill-use of the loans by Jean-Claude Duvalier. See Ferguson, *op. cit.*, at 70.
- 34 Buchheit et al., *op. cit.*, at 1230.
- 35 For example, the *lex mercatoria*, as a set of norms, contains rules that are known under domestic systems but have also become generally recognised principles of international commercial relations. The violation of these norms implies a finding of liability with the resulting allocation of damages.
- 36 Reinisch, *op. cit.*, at 62-74.
- 37 Jeff King, *The Doctrine of Odious Debt under International Law: Definition, Evidence and Issues Concerning Application*, in *CISDL Working Paper: Advancing the Odious Debt Doctrine*, at 36-40 (2003), available at <http://www.cisd.org/pdf/debtentire.pdf>.
- 38 These articles contain the possibility of invalidating a treaty based on several grounds: provisions of internal law regarding competence to conclude treaties (Art. 46), specific restrictions on authority to express the consent of a state (Art. 47), error (Art. 48), fraud (Art. 49), corruption of a representative of a state (Art. 50), coercion of a representative of a state (Art. 51), and coercion of a state by the threat or use of force (Art. 52).
- 39 Art. 1 Vienna Convention.
- 40 Art. 53 Vienna Convention. Treaties conflicting with a peremptory norm of general international law ("*ius cogens*").
- 41 Michalowski, *op. cit.*, at 69-95.
- 42 Mohammed Bedjaoui, *Ninth Report on State Succession of States in Respect of other Matters than Treaties*, Document, A/CN.4/301, at para. 173. Although the ICSID Convention does not apply in the present case, it is noteworthy to point out the Phoenix case of 15 April 2009 (ICSID Case No. ARB/06/5, §78), in which the ICSID Arbitral Tribunal, in paragraph 78, wrote: "To take an extreme example, nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs."
- 43 See Sabine Michalowski, *The Doctrine of Odious Debts in International Law*, at 2. Odiousness of Debts Because of a Violation of International Law, in the present publication.
- 44 Note that the nullity of the loan agreements depends on the time when these violations were recognised as part of *ius cogens*, that is whether they were recognised as such at the time the agreements were concluded.
- 45 Ferguson, *op. cit.*, at 70.



# How to Challenge Illegitimate Debt



## Theory and Legal Case Studies

Max Mader and André Rothenbühler, Editors



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