PARTY AUTONOMY LIMITATIONS IN SOVEREIGN LOAN CONTRACTS?

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ABSTRACT

It is argued that contracts entered into between sovereign states and the International Monetary Fund (IMF), or international development banks, do not satisfy party autonomy requirements that are otherwise expected in ordinary contracts. Sovereign loan agreements exhibit elements of compulsion, chiefly because of the imminent default, or actual default, of the borrowing state. This ultimately allows lenders and other states in alliance with lenders to impose conditions that are knowingly unconstitutional and injurious to the civil, political and socio-economic rights of the borrower's population. National courts should, at the very least, view the compulsory contracts in the same manner as ordinary contracts and assimilate the distressed sovereign to a distressed private party entering into a contract with a financial institution that is clearly the stronger of the two parties.

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I. INTRODUCTION

International, or sovereign, finance addresses the means and methods by which states create fiscal space to finance their budgetary needs. In this sense, one may point to means and methods whereby: the state is the direct recipient of funds or fiscal space, as opposed to those where the state is the indirect recipient. Indirect financing may come from the imposition of taxes, customs and similar duties, as well as from royalties and other proceeds derived from foreign direct investment (FDI). State financing determines how governments allocate funds for the fulfillment of rights as well as whether states are justified in limiting the enjoyment of certain rights on account of fiscal and budgetary restraints.[1] These types of indirect financing are beyond the scope of international finance law because they are subject to different legal regimes. The right to impose taxes and customs (and tariffs) against non-nationals is derived from regional economic integration agreements, such as the European Union (EU), or global trading arrangements, such as those under the World Trade Organization (WTO). Foreign investment itself is equally regulated by a plethora of bilateral investment treaties (BITs), several multilateral investment treaties and pertinent chapters of free trade agreements, as well as customary international law. These types of indirect financing means are relevant to this discussion on international finance only insofar as the sources of the latter impose restrictions on states in ways that affect fundamental human rights. In *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*,[2] the claimant, a multinational tobacco manufacturer, claimed that Uruguay's anti-smoking measures violated the Swiss-Uruguay bilateral investment treaty (BIT) because it led to a sharp decrease in sales. The tribunal, which was established under the International Centre on the Settlement of Investment Disputes (ICSID), ultimately dismissed the claim. However, this is an example of an otherwise profitable investment for the host state that nonetheless stifles human rights regulation.[3]

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1 *See generally* Lee Buchheit, *The Role of the Official Sector in Sovereign Debt Workouts*, 6 CHI. J. INT'L L. 333 (2005).

2 Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award (2016).

3 Dahl has posited the idea that international organizations exercise polyarchy (i.e., authority at multiple levels), yet their powers are virtually uncontrollable and are ill-equipped to channel collective and popular expressions of will. As a result, he opines that they are inherently non-democratic. Robert A Dahl, *Can International Organizations be Democratic? A Skeptic's View, in* DEMOCRACY'S EDGES 19, 19-36 (Ian Shapiro & Cassiano Hacker-Cordón eds., 1999). By way of illustration, it is now well entrenched that mandatory fair trial guarantees supersede contractual autonomy, and it should be stressed that from a fair trial perspective fairness aims to secure the

International finance is only possible on the basis of an agreement between a state and a financial institution, although financing may rarely be derived from other entities. The agreement is regulated by both domestic laws, and international laws.[4] Despite the fact that such agreements are entered into by at least one state entity, the infusion of international law is not self-evident. For one, the private bank or international financial institution (IFI) making the loan is not an investor, and hence, the loan is not protected under a BIT. Secondly, it is in the interests of the financier to clad the agreement in a contract that is confidential and not susceptible to parliamentary scrutiny and governed by a law that adheres strictly to the terms of the contract without venturing into public law. The last thing the financier wants are claims (either) challenging the constitutionality of the agreement or alleging its violation of human rights.[5] While the financier may entertain a plausible claim of party autonomy, especially given that a state must surely be competent to avoid the application of its own laws, this article challenges the notion that the law of contracts may override fundamental notions of human rights, whether these are derived from constitutional or treaty (human rights) law. this author argues that the cardinal principle of party autonomy in the law of contracts does not operate against mandatory rules, which include rules of a constitutional nature[6] as well as principles of justice. Although this argument makes sense from the lens of a hierarchy of obligations, in the sense that international law obligations trump all their other counterparts,[7] the very makers of international law prefer, at times, to circumvent this foundational principle by effectively contractualizing otherwise

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interests of the parties and the proper administration of justice. *See* Nideröst-Huber v. Switzerland, 25 Eur. Ct. H.R. 709, para. 30 (1997).

See also Dawisson B. Lopes, *Polyarchies, Competitive Oligarchies or Inclusive Hegemonies? A Comparison of 23 Global Intergovernmental Organizations based on Robert Dahl's Political Theory*, 29 CAMBRIDGE REV. INT'L AFFS. 1233, 1233-58 (2016).

4 RECONCEPTUALISING GLOBAL FINANCE AND ITS REGULATION 1-12 (Ross Buckley et al. eds., 2016).

5 John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT'L SEC. 5 (1994-1995); Andrew Moravcsik, *Is There a 'Democratic Deficit' in World Politics? A Framework for Analysis*, 39 GOV'T & OPPOSITION 336, 336 (2004).

6 *See* Transado-Transportes Fluviais do Sado v. Portugal, App. No. 35943/02 Eur. Ct. H.R. (2003); *see also* Case 102/81, Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co KG, 1982 E.C.R. 1095, where the CJEU held that the application of EU law cannot be limited by contractual exceptions or carve outs; *see also* Société Licensing Projets and others v. Société Pirelli & C SpA and others, Cours d'appel (Paris) (2011); *see also* CC art. 396(2), which allows a limited review of domestic arbitral awards where the claimant alleges a violation of the ECHR.

7 By way of illustration, it is now well entrenched that mandatory fair trial guarantees supersede contractual autonomy, and it should be stressed that from a fair trial perspective fairness aims to secure the interests of the parties and the proper administration of justice. *See* Nideröst-Huber, 25 EUR. CT. H.R. at para 30; *see also*, Ilias Bantekas, *Equal Treatment of Parties in International Commercial Arbitration*, 69 INT'L & COMPAR. L. Q. 991 (1998) (demonstrating the peremptory nature of the ECHR and ECtHR case law over and above contractual and arbitral undertakings).

international legal obligations.[8] This stance of powerful inter-governmental organizations, including IFIs, coincides with what political scientists in the 1970s called systemic anarchy. This theory suggests in an environment where states possess supreme authority (other than their sovereign territory), they behave in an anarchic manner. Hence, there can exist no world government, nor, of course, democratic rule.[9] This state of affairs puts in doubt the very concept of sovereignty. Scholars generally emphasize the existence of various strands of sovereignty. Krasner suggested the following: domestic, interdependence, international legal and Westphalian sovereignty.[10] This categorization is shared by Jackson, who argued that it is possible for a state to enjoy some but not all of these variants. Jackson went on to distinguish between 'positive' sovereignty, in the sense of a state's capacity to dictate its own affairs (e.g. food security, job creation, maintenance of an appropriate defense mechanism), and 'negative' sovereignty, which entails freedom of external interference and recognition.[11]

The following sections show the institutions and mechanisms of international finance and how this works in practice. It is only with a thorough understanding of these that the reader can then understand the linkages with human rights.

II. THE WORLD BANK GROUP

The World Bank Group (WBG) is responsible for states' finances and fiscal affairs, even if they do not possess the resources to act as lending institutions.[12] Even so, the various entities of the WBG possess sufficient authority so that private or public banks, as well as wealthy states, can be convinced to lend or finance projects requested by developing states that possess little or no capital. To make this possible, the WBG effectively imposes upon indebted states a series of measures (e.g. austerity, privatization) as pre-condition for loans or financing. It is the direct and indirect effect of such measures/conditions on human rights that is the subject matter of this entry.

The World Bank Group is composed of several entities, each of which possesses a distinct international legal personality through a founding treaty. The International Bank for Reconstruction and Development (IBRD) was one of the

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8 Ilias Bantekas, *The Contractualisation of Public International Law*, 17 INT'L J. L. IN CONTEXT 100 (2021).

9 HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS 1-8 (1977).

10 STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 9 (1999).

11 ROBERT H. JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD 1-12, 27-29 (1990).

12 CHRISTOPHER L. GILBERT & DAVID VINES, THE WORLD BANK: AN OVERVIEW OF SOME MAJOR ISSUES 10-36 (Christopher L. Gilbert & David Vines eds., 2000).

founding institutions of the WBG[13] Although it does possess funds of its own, its status as a solid inter-governmental institution with the financial backing of the world's strongest economies means that it can borrow money from private financial institutions and lend to qualifying member states or public sector institutions in respect of identified projects. The IBRD charges interest slightly above its own borrowing rate, but its rates are still substantially lower than those of the private sector. As will be shown, however, these loans come with extensive conditions and monitoring, something not originally envisaged in the Bank's lending activities.

The original purpose of the IBRD was to secure the appropriate financial resources and subsequently fund the reconstruction of Europe – although in reality, such reconstruction was available to all Bank members. As Europe's financial woes began to give way to a new phase of industrialization, the Bank's development role was questioned. This eventually led the IBRD to re-examine its purpose and find new objectives, thus steering its focus towards poverty alleviation and poverty reduction to tackle the problems of the developing world.[14]

Following the Mexican financial crisis of 1994, the IMF's Executive Board adopted a decision to establish the New Arrangements to Borrow (NAB).[15] The NAB essentially creates a set of credit arrangements between the IMF and predominantly industrialized States with the purpose of doubling the amount of assets held by the IMF under the GAB.[16] Following the financial crisis of 2008, the IMF decided to enter stand-by-arrangements with Iceland, Ukraine, and Hungary to address short-term balance of payment shortages. These are not contracts,[17] however, but merely decisions of the IMF's executive board and are typically disbursed within a period of twelve to twenty-four months. The repayment period

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13 *See generally* IBRAHIM SHIHATA, THE WORLD BANK IN A CHANGING WORLD: SELECTED ESSAYS AND LECTURES VOLUME II (1991); KATHERINE MARSHALL, THE WORLD BANK: FROM RECONSTRUCTION TO DEVELOPMENT TO EQUITY 1-7 (2008).

14 *See generally* SIGRUN I. SKOGLY, THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND 60-72 (2001).

15 IMF, *New Arrangements to Borrow*, EB/11428-(97/6) (Jan. 27, 1997). Similar arrangements were not unknown prior to the NAB, however, since the IMF had in fact proceeded to create various facilities in the past to deal with particular economic woes of its members. Thus, the Compensatory Financing Facility (FCC) was aimed at addressing export instability in developing countries. For a survey of its operations, *see* GRAHAM BIRD, INTERNATIONAL FINANCIAL POLICY AND ECONOMIC DEVELOPMENT: A DISAGGREGATED APPROACH 43 (1987).

16 *See* BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE 127 (2003); IBRAHIM SHIHATA, *Issues of Governance in Borrowing Members: The Extent of Their Relevance Under the Bank's Articles of Agreement, in* THE WORLD BANK LEGAL PAPERS 245 (1990).

17 Under Art XXX(b) of the IMF Articles of Agreement, a stand-by-arrangement is defined as "a decision of the Fund by which a member is assured that it will be able to make purchases from the General Resources Account in accordance with the terms of the decision during a specified period and up to a specified amount." *See* Joseph Gold, *The Legal Character of the Fund's Stand-by-Arrangements and Why it Matters*, IMF Pamphlet Series No. 35 (1980).

is substantially longer with all such arrangements subject to a range of conditionalities that are contingent on the design of comprehensive fiscal policies by the borrowing State. In the case of the three aforementioned borrowers, this involved the adoption of a series of legislative measures, particularly with respect to the banking sector and fiscal management with an emphasis on addressing financial sector liquidity and solvency, as well as the reduction of inflation.[18]

Besides the IBRD and the International Monetary Fund (IMF), whose mandate focuses on monetary stability, the Bank's second component is the International Development Agency (IDA). IDA funding is not available to all World Bank member states, but only to those that have a very low GDP. Unlike normal IBRD loans, IDA loans involve a significant degree of concessional funding (*i.e.* their biggest component comes in the form of a grant that excludes any sort of repayment or interest) that is subject to long-term payment of up to forty years. As a result, the resources for IDA concessional lending cannot be derived from private sources, but rather from World Bank profits and grants provided by developed member states' General Conditions Applicable to Loan and Guarantee Agreements (1985).[19]

Another component of the World Bank Group is the International Finance Corporation (IFC), which functions similarly in private banking terms. The IFC provides loans to private institutions and buys into equity shares thereof. The IFC also offers investment, advisory, and asset-management services to encourage private-sector development in less developed countries. There is no limit on the types of projects it finances.

In 1988, the Bank created the Multilateral Investment Guarantee Agency (MIGA) through a multilateral treaty. The principal aim of MIGA was to minimize insurance premiums in the developing world (and thus render investment therein more attractive) by guaranteeing private sector investments against expropriation and other political risks that might otherwise arise from host state hostile actions.

ICSID is equally a member of the World Bank Group, albeit it is not part of the discussion on international finance as it is an institution. ICSID was established through the 1967 Washington Treaty and is devoted to the resolution of investment disputes. Its subject matter pertains to the field of foreign investment law.[20]

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18 Press Release, IMF Press Release, IMF Set to Lend Ukraine $16.5 Billion, In Talks with Hungary (Oct. 26, 2008); Press Release, IMF Press Release, IMF and Iceland Outline $2.1 Billion Loan Plan (Oct. 24, 2008).

19 The World Bank, General Conditions for Loans (as amended through Oct. 16, 2006); The World Bank, General Conditions Applicable to Development Credit Arrangements (Jan. 1, 1985, as amended Dec. 2, 1997).

20 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159.

III. SOVEREIGN ACCESS TO PRIVATE FINANCING

Sovereign financing through the private sector is typically achieved through *syndicated* and *bonded* loans. In syndicated loans, several banks pool financial resources in favor of a single borrower state, not only to diversify the risk but also because a single bank may not have sufficient resources. The lenders (or holders of the loan) may subsequently sell their portion of the loan to the secondary market, whether through novation or assignment. The exposure of banks involved in syndicated loans with severe non-performance requirements necessitated a change in the financing of states. This came about through the process of bonded loans. There are two types of bond issuance: direct placement through an auction, and indirect placement by means of an international issuance. Investment banks play a key role in the latter because the loan possesses an international character, with banks possessing the attributes of foreign investors protected under bilateral investment treaties (BITs).

Bonded and syndicated loans, however, presuppose that the state in question has access to private finance, mainly because it is able to service existing debts and is considered creditworthy. Most developing states are unable to access private financial markets. A good sovereign credit score, which typically involves an assessment made by private credit rating agencies, allows states not only to access private financial markets, but also to borrow under decreased, preferential interest rates.[21] As a result, industrialized nations always borrow with low interest rates, whereas developing countries borrow with high rates, assuming that private banks are willing to lend them in the first place in fear of the attendant risks.[22] Besides bonded and syndicated loans, however, states usually use other means by which to create fiscal space. This domestic resource mobilization is an excellent way to avoid dependency from IFIs and the anti-human rights conditions that are attached thereto. Export credits, bank guarantees (usually by multilateral investment banks), political insurance (e.g. through MIGA), international development assistance, debt reduction, and national resource mobilization involve arrangements devoid of liquidity, but which create ample political and fiscal space for states, and allow them to access both private and public funds. In conclusion, access to international finance creates a fiscal state but also brings about severe dependencies that are difficult to overcome. It is exactly such dependencies and the onslaught of indebtedness that are ultimately detrimental to the enjoyment of human rights.

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21 Frank Partnoy, *What's (Still) Wrong with Credit Ratings?*, 92 WASH. L. REV. 1407 (2017).

22 *See generally,* ALINE DARBELLAY, REGULATING CREDIT RATING AGENCIES (2013).

IV. INDEBTEDNESS AND DEBT RELIEF MECHANISMS

While debt relief may appear to mitigate the human rights woes arising because of budget cuts, it also comes with conditions that are usually more detrimental in the long run, particularly a loss of fiscal self-determination. When states are unable to raise finances through the private financial markets because of their excessive and non-performing debts, or where other actors are unwilling to create ample fiscal space, three multilateral forums exist for debt relief, namely the London Club, the Paris Club[23] and the International Monetary Fund (IMF). The IMF commenced a practice as early as 1976 of providing concessional financing to low-income countries by lending the profits generated from the sale of part of its holdings. This was later followed by the establishment of a Structural Adjustment Facility (SAF), whose aim was to recycle the resources loaned. A year later, an Enhanced SAF came into being with the additional aim of putting in place stronger adjustment and reform measures.[24] In 1991, this became known as the Enhanced SAF to the Poverty Reduction Growth Facility (PRGF).[25] These initiatives disbursed assets to beneficiaries in the form of highly preferential loans.

The London Club[26] is an informal group of private financial institutions that control sovereign debt, whereas the Paris Club is an informal grouping of states that control sovereign debt in either a bilateral or multilateral capacity. The Paris Club deals with the debt relief of middle and low-income countries, whereas the IMF has devised a program known as Highly Indebted Poor Countries (HIPC) Initiative, later supplemented by the Multilateral Debt Relief Initiative (MDRI). The MDRI is an additional debt relief mechanism for countries that have completed the HIPC and allows for 100 percent debt relief in respect of 'eligible debts' owed to the IMF, IDA, and the African and American Development Banks. Debts that qualify for the stringent HIPC criteria are excluded from the ambit of the Paris

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[23] The Paris Club is an informal grouping of states that own/control sovereign debt of middle-income and those low-income countries that do not qualify for HIPC debt relief. The Paris Club proclaims its commitment to debt relief programmes through two general avenues: (1) longer repayment period (the maximum repayment period is now twenty-three years including six years of grace for commercial loans and forty years (including sixteen years of grace) for ODA loans); (2) debt cancellation, where for the poorest and most indebted countries the level of debt cancellation may reach 67 per cent. Despite these significant initiatives, the Paris Club's instruments and terms make no reference to the HDI, the MDGs or human rights in their assessment of debt sustainability. *See Club de Paris*, www.clubdeparis.org/en/.

[24] IMF, *Special Disbursement Account: Review of Structural Adjustment Facility and Establishment of the Enhanced Structural Adjustment Facility*, EB/8757-(87/176) SAF/ESAF (Dec. 18, 1987); IMF, *Establishment of the Enhanced Structural Adjustment Facility Trust*, EB/8759-(87/176) ESAF (Dec. 18, 1987).

[25] IMF Interim Committee, *The Poverty Reduction and Growth Facility (PRGF)—Operational Issues*, EBS/99/193 (Oct. 14, 1999).

[26] The London Club, known also as the Bank Advisory Committee, is an informal grouping of private banks controlling sovereign debt.

Club. Debt relief under the HIPC results only in debt reduction for countries that have satisfied all requirements and completed it, while the Paris Club results in either debt reduction or debt rescheduling.[27]

V. HUMAN RIGHTS ISSUES: THE IMPORTANCE OF LINKAGES

Given that socio-economic rights require some degree of funding, it makes sense that liquidity is a pre-requisite to enhanced human rights protection. Undoubtedly, while liquidity and wealth facilitate the promotion of socio-economic rights, they can also advance civil and political rights, particularly in the absence of democratic institutions. Nonetheless, liquidity is the tool by which IFIs and industrialized states force indebted states to accept undemocratic institutions (*e.g*. external fiscal governance) and regress on their human rights obligations.[28] The absence of liquidity is not necessarily linked to the incapacity to produce wealth. Iraq and Venezuela, for example, are resource-rich, but this does not translate into wealth and liquidity. The modalities of sovereign finance were certainly not meant to violate sovereignty or impose grave restrictions on fundamental rights. Even so, the absence of liquidity, sufficient solidarity and economic coercion, has allowed states, either independently or through private and public IFIs to use sovereign finance mechanisms in a manner that is antithetical to the interests of borrowing states and their people. The linkages with human rights are not always clear because, outwardly, the process is seemingly unconnected to any human impact.[29] Yet, it is now well documented that creditor/lending states typically act in conflict with their other obligations under international law. There are several examples of countries being effectively administered by foreign powers, especially in the event of default, as was the case with Egypt and Morocco, which were incorporated into existing empires.

In the case of modern post-2010 Greece, since entering into its ‘bail out’ agreements in 2010, a supervisory authority known as the ‘troika’ and composed of the EU (Commission), the European Central Bank (ECB), the IMF (and subsequently re-baptized ‘institutions’ in 2015) and later the European Stability Mechanism (ESM) was imposed by Greece’s multilateral creditors.[30] The primary

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[27] POVERTY AND THE INTERNATIONAL ECONOMIC LEGAL SYSTEM: DUTIES TO THE WORLD’S POOR 25-42 (Krista N. Schefer ed., 2013).

[28] Ilias Bantekas, *The Contractualisation of Fiscal and Parliamentary Sovereignty: Towards a Private International Finance Architecture?*, 11 GLOB. CONST. 139, (2021).

[29] *See* Ilias Bantekas & Cephas Lumina, SOVEREIGN DEBT AND HUMAN RIGHTS (Ilias Bantekas & Cephas Lumina eds., 2019); Noel Villaroman, *The Loss of Sovereignty: How International Debt Relief Mechanisms Undermine Economic Self-Determination*, 2 J. L. & POL. 3, 3-5 (2009).

[30] Euro Area Loan Facility Act 2010 (Act No. 7/2010) (Ir.), http://www.irishstatutebook.ie/eli/2010/act/7/schedule/1/enacted/en/html; World Bank Group, *Heavily Indebted Poor Countries (HIPC) Initiative*, THE WORLD BANK (Jan. 11, 2018), https://www.worldbank.org/en/topic/debt/brief/hipc.

issue was Greece's inability to service its debt, which in turn gave rise to a serious systemic risk to the single European currency and the insolvency of numerous lenders who were unable to recover their capital in the case of sovereign default.[31] This led to several relatively short, albeit intense, negotiating rounds between the aforementioned actors, which culminated in the adoption of two loan facility agreements with Greece: the first in May 2010[32] and the second in March 2012.[33] These were, not surprisingly, subject to several conditions.

Moreover, conditions that IFIs and other entities attach when providing credit impair the entrenched human rights of borrowing nations. Despite the seemingly state-centric nature of sovereign finance, its architecture is largely dictated by informal institutions and private rules, such as credit rating agencies, the use of private law in agreements with states, and the protection afforded to so-called vulture funds.[34] To counter these concerns, efforts have been made to align human rights considerations with international financial processes. The majority of these efforts, have been sidelined by powerful creditor states and IFIs, namely: the introduction of hard and soft law on responsible lending and enhanced transparency; oversight mechanisms set up by IFIs to ensure that private contractors adhere to IFI policies; and the invocation of odious and illegal debt by national truth commissions and NGOs.

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[31] Ilias Bantekas & Renaud Vivien, *The Odiousness of Greek Debt & Findings of the Greek Debt Truth Committee*, 22 EUR. L. J. 539 (2016) (the authors argue that this inability was the result of the nationalization of private-related debt incurred by Greek banks, which subsequently passed to the Greek state as owner of the banks).

[32] 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) (Sept. 20, 1968); decision No 6056-(79/38) (Mar. 2, 1979). In particular, para 7 of the 1968 Decision stated that "in view of the character of stand-by-arrangements, language having a contractual flavour will be avoided in stand-by-documents". *See* GOLD, *supra* note 17.

[33] By 8 February 2012 when Greece requested an additional loan, EU member nations had already set up the European Financial Stability Facility (EFSF), which was now the vehicle for disbursing assistance loans on behalf of the EU and individual sovereign lenders. On 14 March 2012 a Master Financial Assistance Facility Agreement was entered into between Greece and the EFSF, which is known as the second loan agreement, for an amount of EUR 109 billion. The IMF made an additional contribution worth a further EUR 28 billion. The agreement further facilitated a debt exchange with the holders of Greek sovereign bonds.

[34] John Muse-Fisher, *Starving the Vultures: NML Capital v. Republic of Argentina and Solutions to the Problem of Distressed-Debt Funds*, 102 CAL. L. REV. 1671 (2014).

VI. CONFLICTS OF INTEREST

Conflicts of interest are regulated in a piecemeal fashion. The regulations depend on various circumstances. There is no general principle of conflict-of-interest avoidance under international law, and the issue does not generally arise in literature.[35] The Vienna Convention on the Law of Treaties does not mention conflicts of interests because states possess all kinds of interests. Thus, such conflicts are taken for granted in international rule-making and transactions. International law only regulates conflicts of interest arising from transactions involving non-state actors in private, public and transnational spheres. This includes, for example, arbitration,[36] public procurement, foreign investment and all contractual transactions that place one party at a gross disadvantage against its counterpart.

Lenders (IFIs, states acting as guarantors, the ECB and others) serve several functions that raise insurmountable conflicts of interest. They serve as lenders, guarantors and decision-makers in institutions with relevant liquidity and currency fluctuations arising from lending conditions (*e.g.* IMF Board) and impose conditionalities that are usually beneficial for themselves, among others. By way of illustration, Greece was asked by its creditors to privatize its island airports, all of which were successful monopolies, as a condition for continued liquidity. The Fund that was established[37] to sell Greece's immovable assets was effectively controlled by the lenders. When TAIPED decided to sell the airports to the public German company FRAPORT, it turned out that it did not have the requisite capital for the purchase, leading the Greek government to step in as the guarantor.[38] The

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[35] Intergovernmental organizations typically set out internal rules in respect of discreet fields such as procurement, but there is no body of law as such. An extensive body of law and practice exists in respect of arbitral appointments, but overall, even blatant conflicts in other spheres of regulation are ignored. *See* Ilias Bantekas & Alexander Ezenagu, *Ethical Considerations in Financial (Tax) and Non-Financial Corporate Human Rights Reporting*, 28 U. MIAMI INT'L & COMPAR. L. REV. 267 (2021).

[36] This is mandatory and not subject to agreement by the parties. *See* U.N. COMM'N ON INT'L TRADE L. MODEL L. ON INT'L COM. ARB., Art. 12(1), Sales No. E.08.V.4 (2006). English courts are generally in agreement that the appropriate test for impartiality is that of "real possibility of bias", as per the judgment in AT&T Corp. v. Saudi Cable Co. [2000] 2 Lloyd's Rep 127 (2000); the IBA Rules of Ethics, on the other hand, provides that prospective arbitrators should disclose all facts or circumstances that may give rise to "justifiable doubts" as to their impartiality.

[37] TAIPED was set up by Law 3986/2011. *See* Ioanna Sagounidou-Daskalaki, *TAIPED: An Instrument for the "Sell-Off" of Public Property and for the Abolition of National Sovereignty of Greece* (2nd ed. 2014).

[38] *See* Marios Dionellis & Chara Tzanavara, *German Investors of the Air*, EFIMERIDA SYNTAKTON (2017), http://www.efsyn.gr/arthro/germanoi-ependytes-toy-aera (Greece). The same company was found to have corrupted Philippine officials under similar circumstances. *See Fraport v Philippines*, Award on Merits, ICSID Cases No. ARB/03/25 and ARB/11/12 (2014).

outrageous conflicts of interest in this case give rise to loss of fiscal and economic self-determination for the Greek people.

In all cases of debt relief, the key beneficiaries are the lenders, both private and public. As such, whether through neo-colonial involvement in the economies of indebted states, the diversion of 'bail out' funds to their private banks, or even by making a direct profit, creditors have significant financial interest in being involved in debt relief processes. Powerful member states of IFIs, whether because of their significant drawing rights or their liquidity, conflate their roles and powers with the IFI or other intergovernmental organizations in question, and hence, act in conflicting capacities. A powerful EU lending state or the EU itself may be limited to act as lender or guarantor by EU law (*e.g.* on account of state aid rules) and the Charter of Fundamental Rights of the European Union. However, it may bypass these rules by acting through an IFI or an informal body not subject to said rules, such as the Paris Club. It may, moreover, act as an overseeing guarantor of an indebted country's assets and use this role to dispose the borrower's assets at preferential rates to its own corporations. In this manner, international finance becomes a vehicle for profit at the expense of fundamental constitutional rights of the borrower's population.

By way of illustration, although formally the Paris Club is distinct from the IMF, Paris Club members own the bulk of the special drawing rights in the IMF and hence control its operations. In practice, no debt relief is possible before the Paris Club if the applicant has not entered into an agreement with the IMF. As a result, the requirements of the IMF and the Paris Club's seal of approval are necessary, an eventuality that renders the two institutions inextricably linked. Debt relief under the Paris Club results in either debt reduction or debt rescheduling.[39] During the process from pre-decision to the completion point, the Paris Club and the IMF impose several conditionalities on applicant states. Unlike the conditionalities imposed by IFIs, everything done under the Paris Club framework is shrouded in secrecy. That a state is granted significant debt relief is meaningless if its assets are mortgaged for the foreseeable future and its people are thrust into poverty. In certain circumstances, states that defy debt relief proposals from the IMF or the Paris Club are coerced to succumb. Greece's resounding 2015 referendum against debt restructuring and conditionalities was effectively annulled by the relentless pressure against its government.

The conduct of European institutions is sometimes 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. Article 9 of the TFEU, and Article 51 of the Charter of Fundamental Rights of the European Union. The Inter-Creditor Agreement of 8 May 2010 between the IMF/EU and Greece foresaw that the EC Commission would require Greece to take measures to reduce

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[39] *See* Mauro Megliani, *Paris Club*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L. L. (2015).

its deficit.[40] Even if the Commission was formally acting based on the powers granted by a legal instrument outside EU law, the Commission should have acted in full compliance with EU law, including the Charter of Fundamental Rights. In its second program of financial assistance to Greece, the Commission negotiated with Greece not only as an 'agent' of the intergovernmental European Financial Stability Facility but also as an institution responsible for the European Financial Stability Mechanism, constituted under EU law.[41]

VII. HOW CONDITIONALITIES UNDERMINE FUNDAMENTAL HUMAN RIGHTS

Conditionalities are now an integral part of loan agreements granted or guaranteed by inter-governmental development banks, as well as all debt relief mechanisms. These should aim at improving governance and minimizing the reach of the (corrupt or overly bureaucratic) state in the financial or other resources provided by creditors, while at the same time ensuring that conditionalities are not retrogressive or impede the fulfillment of fundamental human rights. The Paris Club and the IMF impose several conditionalities on applicant states. Conditionalities imposed under the Paris Club and HIPC have been classified as structural or quantitative. Structural conditionalities require the applicant state to undertake political, legislative, and institutional reforms, whereas their quantitative counterpart demand the achievement of macroeconomic targets, such as the reduction of fiscal deficits and the accumulation of international reserves.

The self-interest and conflicts associated with lenders and IFIs in the design of conditionalities renders them antithetical to the very values they aim to serve. Conditionalities can be beneficial where they ultimately strengthen democratic institutions, augment growth, and enhance human rights. Few conditionalities have ever been geared to fulfill such objectives. Given their severe human rights impact, the imposition of conditionalities should either be subject to a referendum or, at the very least, to strict parliamentary approval under conditions of full transparency. Unfortunately, there is no case of an indebted state whose people freely consented

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[40] Art 5(1)(e) of the (Consolidated) Inter-creditor Agreement (12 December 2012) stipulated the following condition for the disbursement of funds by the EFSF: 'The entry into and performance by it of, and the transactions contemplated by, this Agreement (including the Facility Specific Terms or any Pre-Funding Agreement) and the MoU (and the transactions contemplated therein) does not and will not (i) violate any applicable law, regulation or ruling of any competent authority or any agreement, contract or treaty binding on it or any of its agencies'.

[41] It was only in *Eugenia Florescu and Others* v *Casa Jude ̧teana ˇde Pensii Sibiu and Others*, Case C-258/14, Judgment of the Court [GC], ECLI:EU:C:2017:448, para 36 (Jun. 13 2017) that the CJEU came to the conclusion that MoU concluded under EU financial assistance mechanisms and balance-of-payment processes qualified as EU acts under Art 267(1)(b) TFEU, and hence susceptible to interpretation by the Court. *See* Menelaos Markakis, *Bailouts, the Legal Status of Memoranda of Understanding, and the Scope of Application of the EU Charter: Florescu*, 55 COMMON MKT. L. REV. 643 (2018).

to the conditions of an adjustment or bail-out program, in the knowledge that sovereignty would be lost, and human rights would be retrogressed (austerity). In all cases of indebted nations, many structural conditionalities either led to: (a) the appointment of a supervisory authority, which was effectively endowed with power to ratify all or crucial laws in defiance of constitutional democracy; (b) effective withdrawal of parliamentary sovereignty because the authority over certain matters had become a matter of contract; (c) powers vested in the people and exercised by the government had been assigned to or conferred upon a third parties by virtue of contract (public utilities becoming the subject of compulsory privatization), or; (d) conferral of effective policy-making to a third entity (typically an IFI or the political organ of an intergovernmental organization, such as the Eurogroup) because the debtor is assessed periodically, has become wholly dependent on the lenders' conditions, and is unable to refuse or resist the conditionalities 'suggested'.[42] In the case of Greece, the Eurogroup was effectively the institution that coordinated most actions on the Greek debt crisis, including conditionalities and funding approval. Hence, the EuroGroup effectively replaced the authority of the Greek government to adopt policy and laws in a sovereign manner, even though it was found not to be accountable under EU law and hence not subject to the EU Charter of Fundamental Rights.[43]

VIII. CONTRACTUALIZATION OF CONDITIONALITIES

Even more alarming is the practice of instruments employed to provide credit or debt relief from the perspective of their impact on human rights and democratic governance. Paris Club creditor and debtor countries usually sign an Agreed Minute at the end of a negotiation session. The Agreed Minute is not a legally binding document; rather, it is merely a recommendation by the heads of delegations of participating creditor countries to their governments, urging them to sign a bilateral agreement implementing the debt agreement for implementing the debt treatment. When there are only a few creditors concerned, the Paris Club agreement is exchanged through mail between the Chair of the Paris Club and the government of the debtor country; this is called terms of reference. In some cases, the multilateral debt agreement is implemented (in addition) through a MoU.[44] In contrast, non-Paris Club creditors, typically enter into bilateral agreements with

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[42] *See* BANTEKAS, *supra* note 31.

[43] Joined Cases C-105-109/15 *P, Konstantinos Mallis and Others v European Commission and European Central Bank*, EU:C:2016:702, the CJEU found that the Eurogroup is an informal grouping of the euro area finance ministers and as a result its acts could not be attributed to the Commission or the ECB.

[44] IMF, *Debt Relief under the Highly Indebted Poor Countries Initiative* (2007); IMF, *Enhanced HIPC Initiative: [Report on the] Status of Non-Paris Club Official Bilateral Credit Participation* (2007). https://www.imf.org/external/np/pp/2007/eng/091007.pdf

debtor states, either under the HIPC or independent of it. Numerous bilateral agreements have been concluded in this manner, whether as treaties or MoU.[45] In equal manner, as the case of Greece exemplifies, creditor states/IFIs and private creditors insist on the use of contracts, not treaties, with borrowing states. Moreover, they insist on the application of private law, typically English law, as the governing law of their contract, in addition to strict confidentiality.[46] It is also common for the use of memoranda of understanding or agreements lacking all the ingredients of contracts for the same purpose. The reason is the desire of creditors to avoid scrutiny of lending agreements by national parliaments, as well as the necessary transparency this entails.

Moreover, English law is notorious for its rejection of good faith (unless the parties expressly include it in their contract) in contractual undertakings, which means that the creditor may well impose conditions on the borrower that are wholly antithetical to its interests, as well as withhold critical information.[47] From a human rights perspective, this means that even if one or both parties are aware that the terms of their agreement violate a national constitution or international human rights obligations, the contract would not be void or voidable. Equally, the restrictive choice of law (i.e. English contract or banking law) is meant to exclude the application of the European Convention of Human Rights or other treaty-based agreements, and hence create an artificial fragmentation between the lending instruments and human rights. Finally, the use of MoU by which to impose austerity measures violating human rights was meant to avoid parliamentary scrutiny. MoUs are not formal contracts, and hence need not be discussed and adopted by parliament or transformed into law;[48] albeit the government is aware that implementation of the terms of the MoU is key to liquidity.

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[45] *Id*.

[46] Ilias Bantekas, *The Globalization of English Contract Law: Three Salient Illustrations***,** 137 L. Q. REV. 130 (2021).

[47] English contract law is at times wholly antithetical to fundamental tenets of Islamic law. A good example is the absence of good faith in English law (unless demanded by both parties), which is inconsistent with the prohibition of *maysir* in Islamic law. English courts have in practice accepted that good faith is part of English law through EU law and principles: *Yam Seng Pte v. Int'l Trade Corp. Ltd.* [2013] EWHC (QB), [119]–[154], but especially at [124], 1 All E.R. (Comm.) 1321. However, it should be recognized that, traditionally, English law has disfavoured repudiation of contractual obligations on the basis of bad faith. At the same time, it is beyond doubt that good faith exists in several contractual relationships, such as those requiring trust, as well as consumer relationships. The latter impose strict liability in the event of defects under implied terms and hence produce the same outcome as good faith obligations in continental civil law.

[48] *See* Ilias Bantekas, *Assemblies of States Parties to Multilateral Treaties and their Normative Authority*, 51 GA. J. INT'L & COMPAR. L. 462 (2023).

IX. THE HUMAN RIGHTS IMPACT OF THE PRIVATE SECTOR IN THE INTERNATIONAL FINANCIAL ARCHITECTURE

The international financial architecture comprises immutable rules set out in the treaties setting up IFIs and secondary rules of regional economic integration organizations, as well a plethora of private rules and practices imposed by private creditors. The latter is not always obvious, but the contractualization of sovereign finance has served to exacerbate the human rights of borrowing states.[49] Besides the direct impact of conditionalities on civil, political, and socio-economic rights, a contractually incurred debt, bond, or credit arrangement that is subject solely to private law (although this is a myth perpetuated by creditors and their home states) risks being assigned to new creditors by the original holder of title or credit.[50] Although this is natural in the life cycle of contracts, it creates anomalies where the debt or credit is owed by states. This is because the state may be sued by a private entity before a national court is willing to entertain such a case, leading to its assets being seized or confiscated on grounds of non-performance. As a result, the state will be unable to offer its people fundamental socio-economic rights, such as affordable healthcare or universal education.[51]

In fact, there exist private funds whose sole purpose is to purchase debt owed by distressed states at the lowest possible price, refusing to participate in debt restructurings. These private funds then aggressively pursue repayment with the aim of initiating litigation against said state in willing jurisdictions, chiefly the US. These are known as *vulture funds*. The principle of champerty traditionally prohibited the purchase of sovereign debt from original creditor with the intent of instituting court proceedings against the sovereign debtor.[52] However, this decision was reversed by the Second Circuit, which held that the defence did not apply if the creditor intended, when purchasing the debt, to be paid in full and only to resort

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49 *See* Rubén Arriazu & Mariana Solari, *The Role of Education in Times of Crisis: A Critical Analysis of the Europe 2020 Strategy*, 12 KEDI J. OF EDUC. POL'Y 129, 133 (2015). The EU Youth Report 2012 clearly emphasized that the financial crisis threatened to transform the continent's youth into a lost generation. *See* European Council & European Commission, 2012 EU YOUTH REPORT 144 (2012). *See* European Commission, et al., *Funding Education in Europe 2000-2012: The Impact of the Economic Crisis* (2013); *see also* cuts inflicted on education budgets in Spain ranged from 14.4 per cent to 21.4 per cent. Center for Economic and Social Rights, *Spain Factsheet*, CENTER FOR ECONOMIC AND SOCIAL RIGHTS, http://www.cesr.org/sites/default/files/FACT_SHEET_SPAIN.pdf.

50 Juan P. Bohoslavsky & Matthias Goldmann, *An Incremental Approach to Sovereign Debt Restructuring: Sovereign Debt Sustainability as a Principle of Public International Law*, 41 YALE J. INT'L. L. 13, 26 (2016) (who argue in favor of an emerging rule of customary international law whereby all debt should be structured in such a way as to be consistent with fundamental human rights and at the very least be sustainable).

51 *See* Ilias Bantekas, *Aligning the Right to Education with the Sustainable Development Goals: Is it Just about Finance?*, 45 HUM. RTS. Q. 62 (2023).

52 Elliott Assocs., L.P. v. The Republic of Peru, 12 F. Supp. 2d 328 (S.D.N.Y. 1998).

to litigation in the absence of payment.[53] In 2004, the State of New York officially abolished the defence of champerty. Both the United Nations and several states have reacted vehemently to the practice of vulture funds. Among these, is Principle 59 of the Guiding Principles on Foreign Debt and Human Rights (2011),[54] which provides that loan agreements should impose restrictions on the sale or assignment of sovereign debts to third parties by creditors without the prior informed consent of the relevant debtor state. Although Belgium and the UK have enacted legislation to prevent vulture funds from pursuing excessive claims against indebted countries before their courts, this is hardly enough to tackle this thorny issue.

The self-regulation exhibited by most, if not all, of the private stakeholders in the sphere of international finance is exemplary of a system that is driven solely by profit and financial considerations, and in which powerful creditor states bypass even their own (extra-territorial) human rights obligations. Credit rating agencies are key to this state of affairs. They provide, by a fee or otherwise, an account of the creditworthiness of states, state entities, and private corporations. In theory, this assessment/rating informs banks about the risks of lending to an entity. A good score ensures not just access to funds, but more importantly preferential interest rates. A bad score may signal that the entity in question is unable to secure financing in private markets, or can only secure financing at high interest rates, and may be forced to seek urgent financing (to pay existing foreign debt, public servant salaries, pensions and more) from IFIs, with all that this entails, as explained in previous sections of this entry. The absence of any real regulation of credit rating agencies (CRAs) allows the major ones to ‘make or break’ an economy, even though their assessment might give rise to serious conflicts of interests; e.g. the CRA’s assessment is the result of paid advice, or the CRA may have a financial interest (shares in government bonds) to see that one state’s rating is strong and another state’s ratings is weak.[55] Poor predictions or assessments from a CRA can have consequences on the economy, fiscal independence and the status of fundamental rights (of states?). Thus, it is irrational that CRAs are subject to little, or no, control or accountability. Credit ratings can operate as a tool to interfere in fiscal affairs of states and impose conditions detrimental to human rights. If poor ratings affect the value of a country’s sovereign bonds, the value of its currency and its ability to access private capital at preferential interest rates, the country will have to resort to IFIs for liquidity assistance, even if its fiscal governance is impeccable.[56] Hence, powerful states and institutions desirous of putting pressure

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[53] Elliott Assocs., L.P. v. Banco de la Nacion, 194 F.3d 363 (S.D.N.Y. 1996).

[54] G.A. Res. 20/23, at 17 (Apr. 10, 2011).

[55] *See* Tai-Heng Cheng, *Renegotiating the Odious Debt Doctrine*, 70 LAW & CONTEMP. PROBS. 7 (2007); Christoph G. Paulus, “*Odious Debts” v. Debt Trap: A Realistic Help?*, 31 BROOK. J. INT’L L. 83 (2005).

[56] This is clearly a form of coercion and the punitive outcome itself a quasi-sanction. Kris J. Mitchener & Marc D. Weidenmier, *Supersanctions and Sovereign Debt Repayment*, 29 J. OF INT’L

on a state (to do or abstain from doing something) may do so through the work of un-regulated CRAs. IFIs and powerful states then arrive as 'saviors' at the expense of human rights.[57]

X. IFIS AND ODIOUS/UNSUSTAINABLE DEBT

Whether provided by the private sector or inter-governmental IFIs, lending or debt relief should be predicated on ethical lending standards, susceptible to oversight mechanisms (*e.g.* World Bank Inspection Panel), consistent with fundamental human rights, and should not give rise to odious, illegal or unsustainable debt.[58]

In fact, human rights treaty bodies have made it clear that states cannot invoke their financial obligations to IFIs and private lenders in order to avoid satisfying their human rights obligations.[59] It should not be forgotten that states borrow for the benefit of their people and it is thus sensible to call this 'good debt' that is consistent with the collective right to economic self-determination. Such debt is of critical importance. Debt contracted by the state should not burden the people of that state if it is used for other private benefit with the knowledge of the lender. This naturally brings into question several principles of general international law, chief among which is *pacta sunt servanda*, whether in terms of treaties or private agreements.[60] For one thing, despite some contention, no state is 'required to execute pecuniary obligations if this jeopardizes the functioning of its public services, disorganizes its administration' or has a detrimental effect on fundamental rights.[61] Recent awards by investment tribunals have confirmed this standard. In the *LG & E* case, an International Centre for the Settlement of Investment Disputes (ICSID) tribunal held that Argentina's crippling financial situation justified an invocation of a state of necessity. This was evident from a 25 percent unemployment rate, 50 percent of the country's population living below the poverty line, the collapse of the healthcare system, and a 74 percent reduction

MONEY & FIN. 19 (2010) (noting that super-sanctions can also be viewed as a form of neo-imperialism). Supersanctions is an umbrella term denoting conditionalities imposed by IFIs so as not to declare sovereign insolvency, the effect of which are tantamount to sanctions.

57 Bantekas & Vivien, *supra* note 31.

58 G.A. Res. 67/198, (Dec. 12, 2012); G.A. Res. 69/319, (Sept. 10, 2015); G.A. Res. 70/275, (June 17, 2016).

59 Capital Bank AD v. Bulgaria, App. No. 49429/99, ¶ 90 (Nov. 24, 2005), https://hudoc.echr.coe.int/eng?i=001-71299.

60 *See* Odette Lienau, *Who is the "Sovereign" in Sovereign Debt? Reinterpreting a Rule-of-Law Framework from the Early Twentieth Century*, 33 YALE J. INT'L L. 63, 95-101 (2008).

61 Société Commerciale de Belgique (Belg. v. Greece), Judgment, 1939 P.C.I.J. (ser. A/B) No. 78 (June 15).

of per capita spending on social services.[62] Several investment awards and works of literature favor the idea that the outcomes of investment law must be consistent with and integrate, rather than reject, fundamental rights. In *SAUR International SA v. Republic of Argentina*, the tribunal stated that human rights in general, and the right to water in particular, constitute general principles of international law and thus form part of the applicable law of the dispute.[63] As a result, it is wholly illegitimate to construe loan agreements and debts outside the framework of international human rights.[64] Ultimately, states and investors must balance both investor protection and human rights.

In recent years, several national debt committees, such as those in Greece and Ecuador, have reinvigorated the concept of illegal and illegitimate debt.[65] In its June 2015 preliminary report, the Greek Debt Committee defined odious debt as any 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, economic, social and cultural rights.[66]

Sovereign debt not only hampers the global financial architecture, it is a serious impediment for the realization of all human rights and is a major underlying reason for mass phenomena, such as irregular migration.[67] A multilateral (as opposed to discrete unilateral) approach would require regional (or highly indebted countries as a grouping), or global efforts to arrive at a treaty based on five key pillars: (1) that debt be payable only when sustainable, calculated strictly on the basis of universally agreed human rights indicators;[68] (2) that debt is transparent and covered by a collective right to truth regarding its causes and origins; (3) that all parties involved in the accumulation of debt, namely lender states and

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[62] LG & E v. Arg. Republic ICSID Case No. ARB /02/1, Decision on Liability, ¶ 234 (Oct. 3, 2006).

[63] SAUR Int'l S.A. v. Arg. Republic, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, ¶ 330 (June 6, 2012).

[64] Comm. on Economic, Social, and Cultural Rights, General Comment No. 2: Int'l Technical Assistance Measures (Art. 22 of the Covenant), U.N. DOC. E/1990/23, para. 9 (Feb. 2, 1990).

[65] There are a variety of definitions and classifications of odious debt. See JEFF KING, THE DOCTRINE OF ODIOUS DEBT IN INTERNATIONAL LAW: A RESTATEMENT 4 (2016), who classifies odious debt in four categories, namely: war debts, illegal occupation debts, corruption debts and subjugation debts. The latter type is that which is explored in this paper. It should be observed that the part of the Greek debt that was not assumed by a loan or other agreement (as explained below) is far broader than the concept of subjugation debts stipulated by King.

[66] Greek Parliament, Truth Committee on Public Debt, 'Preliminary Report' (2015).

[67] Oscar Bernal et al., *The Importance of Conflicts of Interest in Attributing Sovereign Credit Ratings*, 47 INT'L REV. L. & ECON. 48 (2016); MAKING SOVEREIGN FINANCING AND HUMAN RIGHTS WORK (Juan P. Bohoslavsky & Jernej L. Černič eds., 2016).

[68] G.A. Res. 68/304 (Sept. 17, 2014).

international organizations bear responsibility, where due; (4) that banking practices worldwide are regulated in such a way that ensures responsibility and a ceiling on interest. It is unacceptable that most of global debt is interest-generated (dwarfing the initial capital lent), or predicated on unconscionable practices in which banks invest little, sometimes no, money but reap huge benefits to the detriment of entire populations; and (5) that foreign investment law and the law applicable to IFIs, such as the World Bank Group and the European Central Bank (ECB), cease to be fragmented from general international law and particularly fundamental human rights and international environmental law.

XI. LIMITATIONS TO PARTY AUTONOMY IN INTERNATIONAL CONTRACTS BY REFERENCE TO JUSTICE

As a result of the aforementioned considerations, it is imperative to apply sensible standards to international finance contracts. While domestic limitations to party autonomy are generally meant to protect the weaker party and/or to avoid prohibition of mandatory rules, such limitations find no equivalence in state finance agreements. States are not considered 'weak' parties in any contracts; in fact, quite the contrary. States cannot be equated to consumers in business to consumer (B2C) contracts. In equal measure, mandatory rules of the nature that exist in domestic legal systems are not encountered in international law. Domestic peremptory rules are generally those which private parties are not allowed to circumvent even on the basis of party autonomy. A poignant example is public policy and arbitrability. Although a contract between a state entity and a private financier may be based on the governing law of the state party, it would be considered abusive for that state party to uphold its own laws in a contract, which it can change and amend at any time.

No application of the law by independent justice-dispensing entities, such as the courts or tribunals, is deemed to be free from enforcing just outcomes.[69] Justice is an overriding consideration of the parties' chosen governing law, but only as regards fundamental justice concerns, as opposed to trivial or non-overriding justice concerns.[70] Even so, much of the thinking that permeates international arbitration tends to take a narrow view of justice, conflating it with commercial justice. Commercial justice, in turn, is conceived as an emanation of party autonomy and nothing more. This is not to say that commercial lawyers do not

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[69] See *Lochner v. New York,* 198 U.S. 45 (1905), where the US Supreme Court held that a New York employment law restricting the daily working hours of bakers was unduly favorable to one of the parties to a contract.

[70] Among the many possible conceptions of justice, it is worthwhile considering Rawls' first principle of justice as follows: "[e]ach person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all." JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 42 (Erin Kelly ed., 2001).

believe in the broader notion of justice; it is just that they feel it has no place in commercial disputes between private actors. This narrow conception of justice is unconvincing for a number of reasons. Firstly, it is now firmly recognized that human rights do in fact exist in the private sphere[71] and that private commercial actors are not free from human rights duties.[72] Secondly, even the narrow conception of commercial justice owes its existence to the broader notion of justice. It is absurd to argue that the narrow conception of commercial justice excludes its broader creator, because it would not exist in its absence. Thirdly, there is no plausible basis to suggest that international contracts and proceedings of any type are not amenable to just outcomes of a fundamental nature, even though all other contracts are subject to a sensible set of limitations, particularly by reference to fundamental human rights. This argument is confirmed in practice in most jurisdictions and is exemplified by the case law of the European Court of Human Rights as it regards arbitral proceedings.[73] Fourthly, one indirect dimension of this argument is that substantive laws are generally susceptible to change and even expungement at any time subject to the regulatory authority of states. Fundamental justice concerns should prevail over all contracts, irrespective of the parties concerned. The parties' autonomy to insert clauses that violate justice must be seen as curtailed by constitutional and international law.

XII. CONCLUSION

This paper has endeavored to demonstrate that international loan agreements and all types of contracts between states and international lenders (whether private or public in nature, including intergovernmental organizations such as the IMF) are subject to similar, mutatis mutandis contractual limitation rules as these apply in the domestic legal sphere. It cannot seriously be argued that such contracts can have the effect of undermining fundamental human rights on the simplistic argument that international law imposes no limitations on party autonomy. While there exists no body of discreet international law rules governing finance agreements between states and international organizations with respect to international loans, and while states cannot ab initio be considered weak parties and thus subject to a regime like that of consumers, any private agreement that effectively violates fundamental human rights and constitutional norms must be

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71 For an excellent contemporary overview, *see* Eli Bukspan et al., *Human Rights in the Private Sphere: Corporations First*, 40 UNIV. PA. J. INT'L L. 419 (2019).

72 *See* Ilias Bantekas, *The Globalization of English Contract Law: Three Salient Illustrations*, 137 L. Q. REV. 330 (2021) (explaining how private law is used by State entities to bypass the formalities of transactions that would otherwise be subject to public law).

73 *See* TOMS KRŪMIŅŠ, ARBITRATION AND HUMAN RIGHTS: APPROACHES TO EXCLUDING THE ANNULMENT OF ARBITRAL AWARDS AND THEIR COMPATIBILITY WITH THE ECHR (2020).

trumped by such norms.[74] The principle of sanctity of contracts and *pacta sunt servanda* is subject to these sensible limitations. The insertion of governing laws that bypass these limitations, particularly the literal application of English contract and banking law, should not be used as a guise to violate human rights. This paper takes the view that all loan agreements that violate such fundamental rights are void, as would be the case with any contract that violated mandatory laws and hence cannot be upheld by courts, whether domestic or international. Courts and tribunals assessing whether such contracts have been breached by states should particularly consider whether fundamental notions of justice have been eroded by the very insertion of unjust clauses, irrespective of a state party's consent.[75] States at the brink of survival, or those headed by grossly corrupt leaders are not given authority under international law to violate the fundamental rights of their people and the principle of *pacta sunt servanda* does not apply to such contracts. Even though some investment tribunals have taken a different approach, there is a steady line of jurisprudence in investor-state arbitration suggesting that host states' regulatory authority is not undermined by contracts with investors.[76]

74 Antonios Tzanakopoulos, *The Right to be Free from Economic Coercion*, 4 CAMBRIDGE J. INT'L & COMPAR. L. 616 (2015).

75 *See* Sean Hagan, *Designing a Legal Framework to Restructure Sovereign Debt*, 36 GEO. J. INT'L L. 299, 390-94 (2005) (who almost two decades ago argued in favor of a fair mechanism that deals with all debt issues holistically without hold-out creditors attempting to break away into other processes and mechanisms).

76 Article 6(5)(a) of chapter 17 of the EU-Singapore FTA states that nothing in the agreement 'shall prevent Singapore from adopting or maintain tax measures which are needed to protect Singapore's overriding public policy interests arising out of its specific constraints of space'. Moreover, a succession of investment courts has made it clear in cases alleging tax-related expropriation that if the economic benefit from the investment is reduced by taxation, in the absence of a specific commitment made by the host state to the investor, tax measures will not be expropriatory. *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award and Partial Dissent, ¶173 (Feb. 3, 2006).