LEBANON AND THE ODIOUS DEBT DOCTRINE

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The ruling Power is still talking about incurring additional indebtedness even as the Lebanese economy is collapsing; the sovereign debt is nearing 100 billion dollars; the overall net foreign currencies position of Banque du Liban is negative according to Fitch Rating's last report (18 February 2020); vulture funds have started descending on the Eurobonds; corruption runs rampant; the recovery of stolen public funds is still nothing more than a distant mirage; thousands of ghost public servants and those recruited in violation of the salary grid Law No. 46 of 2017 continue to unduly collect their salaries; the national currency is close to losing two thirds of its value; bank deposits are *de facto* frozen; very strict *de facto* capital control is strangling imports; thousands of jobs are being cut; the members of Parliament who unscrupulously voted for higher and higher taxes have yet to make the slightest personal effort by lowering their salaries for instance; the International Monetary Fund and the World Bank have been, for years, reminding Lebanon that it must help itself so that others may help it.

ANY NEW LOAN IS UNACCEPTABLE

To borrow more money today, before the implementation of deep and real reforms supervised by international organizations, is absolutely unacceptable. Neither the need to import raw materials nor the need to ensure a bridge-loan pending the restructuring of the sovereign debt can justify the borrowing of a single dollar. The borrower, who is the ruling Power, has exhausted its credibility credit; and the provider of new loans will be guilty of improper credit maintenance; the debt will be considered odious.

We will demonstrate that if, for legal and financial reasons, the odious debt doctrine cannot serve as the basis for a refusal to reimburse the debt already incurred, it can, on the other hand, justify the refusal, by a new Power, to repay any new debt that would be incurred starting today. The United Nations considers that granting loans when the level of debt is already high and without any restructuring of this debt violates the principle of responsible lending, according to which lenders should not consent to grant loans beyond the borrower's reasonable repayment capacity. Since this capacity has long been exceeded in Lebanon, any new loan will be unreasonable in the eyes of the United Nations and odious in the eyes of the population. Lebanon is a poor country that is already very deeply indebted, and its lenders will find it difficult, from now on, to plead good faith or ignorance.

THE ODIOUS DEBT DOCTRINE ACCORDING TO A.N. SACK

When Alexandre Nahum Sack, a Russian lawyer established in France, formulated the odious debt doctrine in 1927 in his founding book "*Les Effets des transformations des Etats sur leurs dettes publiques et autres obligations financières*" ("*The Effects of the Transformation of States on their Public Debts and other Financial Obligations*"), he opposed *in fine* two main principles of public international law: on one hand, the classic position that sovereign debt must be repaid in the name of the "*Pacta sunt servanda*" principle, which requires the State to fulfill its commitments; and on the other hand, the need to respect the "*Jus cogens*", the body of binding standards that allow certain rules to be set aside. Hence the "*Pacta sunt servanda*" principle could be set aside in the presence of a peremptory norm falling under the "*Jus cogens*", a solution which is currently enshrined in the

1969 Vienna Convention on the Law of Treaties. Sack considered that a sovereign debt, even one regularly incurred, can be considered odious by the new Power if it meets two conditions: if its use by the former Power was contrary to the interest of the population, and if the creditors were aware of this illegitimate use. Today, it is admitted that Sack did not add a third condition, one requiring that the Power have been despotic or that the debt have been as such (a regime can be odious but use the debt wisely; conversely, a regime may not be illegitimate but still use the debt odiously – which could be the case in Lebanon). If these two conditions are met, then the new Power can, according to Sack, qualify *post ante* (after its creation) this debt as odious (illegitimate or criminal) and repudiate it. A few years before Sack, in 1923, President Taft, acting as arbitrator in the Tinoco affair, declared that borrowed funds were to be used for legitimate government purposes and not for personal ones.

The weakness of Sack's doctrine is that, since there is no neutral world authority that could *post ante* qualify a sovereign debt as odious, it is up to the debtor State itself to do so to justify its default. Just like the succession of States, the change of Power cannot justify unilateral repudiations; State debts are said to be "adhesive" and are transmitted without discontinuation. It is for this reason that Sack's doctrine has not penetrated international law as a rule of law (no international convention has enshrined it; it has not become a custom or *"Opinio juris"*, nor a general, recognized principle of law; no court decision or arbitral award has primarily used it). No defaulting State has expressly referred to it, for reputational reasons alone: there is a strong fear of becoming a pariah, of being excluded from world financial markets. In 2003, after the fall of Saddam Hussein, the United States looked into it, but did not go further, to study whether it would be possible to use this doctrine to free Iraq from the burden of the 125 billion dollars debt incurred by a regime whose creditors could not but recognize the odious nature, a debt which had not been used in the interest of the population. In 2008, the President of Ecuador used this doctrine to urge creditors to negotiate debt restructuring. In 2006, in a totally chivalrous initiative, Norway declared itself an odious creditor, to erase the debts owed to it by five different countries (including Egypt).

THE NEW LEBANESE DEBT WILL BE ODIOUS *EX ANTE*

Analysis of Lebanese sovereign debt shows that it is not unworthy of being classified as odious. Indeed, even if it was incurred by a Power that may, on paper, qualify as a democracy, this debt only marginally benefitted the population (it was swallowed up, almost in equal thirds, by the excessively large, clientelist, and useless public sector; the inefficient electricity sector; and the debt service burden). The creditors, who took advantage of the debt service, could not ignore this, especially the Lebanese banks among them; as for foreign lenders, they can no longer pretend to ignore Lebanon's disastrous position in the various world rankings of corruption, lack of transparency, inefficiency, etc. The lender has the duty to inform itself, under penalty of being considered negligent – the negligence here consisting of the granting of a loan without any serious prospect of repayment. The most basic credit file would have sufficed for the most accommodating lender to know who it was lending to and how its money was going to be used. Besides, nothing prevents a new Power in Lebanon from requesting the courts of New York (which are the courts having jurisdiction under the Eurobond contracts' terms) to apply American regulations (New York law being the chosen governing law) based on, for example, the unclean hands doctrine which, like the *Nemo Auditur* rule, prohibits the creditor who participated in corruption or allowed the squandering of public money to avail itself of its own turpitude.

If it is therefore not possible to qualify a debt as odious after its creation (*post ante*), except by doing so in court, it is totally possible to do it *ex ante*, i.e. before its creation. The Lebanese can make it known from now, before new debts are incurred, that any debt which will henceforth be granted to the Power currently in place will be considered odious. Anyone who will still lend money to Lebanon before structural reforms are implemented will not be able to plead ignorance and will be complicit in the squandering of funds that it would have lent; this lender would not be reimbursed.

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