

# **Haiti's Independence Debt and Prospects for Restitution**

By

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## **ABSTRACT**

This article examines Haiti's "Independence Debt" – levied by France as compensation for its slave-holding colonists' lost "property". We do so in the context of the recent trend toward fashioning legal remedies for historical injustices and analyze the prospects for recovering the Debt through an unjust enrichment claim.

The article first relates the story of the Independence Debt: France's imposition of the Debt in 1825; Haiti's repayment efforts through 1947; and the Debt's impact on Haitian development to the present day. Second, we analyze these facts within the framework of a claim for unjust enrichment. We find the Independence Debt meets all the elements of an unjust enrichment claim and makes a compelling case for restitution.

We next assess the potential for bringing a restitution claim in a US court. We compare the Independence Debt with other restitution claims and consider how to overcome procedural hurdles, such as standing and statutes of limitations. Further, the article recognizes the importance of non-legal strategies to a successful outcome. Taken as part of a broader political effort to address the Independence Debt, an unjust enrichment claim could prove an important and effective tool to address a serious historical wrong.

## **I. Haiti, France and the Independence Debt.**

### **A. The Pearl of the Antilles**

On the eve of its struggle for independence, only Haiti's reputation as the Caribbean's most lucrative colony rivaled its reputation as its most brutal slave regime. Since acquiring the colony from Spain in 1697, the French had overseen development of an economic powerhouse in Haiti, or Saint Domingue as it was then known.<sup>1</sup> Vast plantations output vast quantities of cash crops: sugar, coffee, rum, cotton and indigo. Saint Domingue led the world in production of each at one time or another during the eighteenth century.<sup>2</sup> Total exports to France exceeded the total exports of all thirteen American colonies to Great Britain.<sup>3</sup> By 1789, sixty percent of France and Britain's coffee and three-quarters of the world's sugar came from Saint Domingue.<sup>4</sup> It was the world's richest colony and the busiest trade center in the New World.<sup>5</sup>

Saint Domingue owed its profitability entirely to slavery. The success of plantation slavery on the island came from unimaginable cruelty. Between 1697 and 1804, the period of French rule, over 800,000 West African slaves were brought to work on Saint Domingue's plantations, accounting for over a third of the entire African slave trade.<sup>6</sup> The high demand grew out of the slaves' high death rate. Disease, overwork and the sadism of overseers accounted for most of the deaths. One rare written account illustrates the sadism of the Haitian plantation system:

Have they not hung up men with heads downward, drowned them in sacks, crucified them on planks, buried them alive, crushed them in mortars? Have they not forced them to eat shit? And, after having flayed them with the lash, have they not cast them to be devoured by worms, or onto anthills, or

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<sup>1</sup> Library of Congress – Federal Research Division, *Country Profile: Haiti*, 2 (May, 2006).

<sup>2</sup> Paul Farmer, *The Uses of Haiti* 63 (Common Courage Press, 1994).

<sup>3</sup> *Id.* at 71-74.

<sup>4</sup> Federal Research Division, *supra* note 1 at 2.

<sup>5</sup> Farmer, *supra* note 2 at 63.

<sup>6</sup> Federal Research Division, *supra* note 1 at 2.

lashed them to stakes in the swamp to be devoured by mosquitoes? Have they not thrown them into boiling cauldrons of cane syrup?<sup>7</sup>

Some planters found it more cost effective to work a slave to death and purchase a new slave than to invest in food and care.<sup>8</sup> A complete turnover in the slave population occurred every twenty years.<sup>9</sup>

## **B. Revolution**

By 1790, Saint Domingue's population totaled 520,000.<sup>10</sup> Slaves made up 425,000 of that number and the base of the pyramidal social order.<sup>11</sup> Other groups ranked according to wealth and skin color and included: freed slaves, mixed race "mulattoes", white small-holders, and white plantation-owners.<sup>12</sup> Outside of the status quo, a large number of escaped slaves – the maroons – had established communities in Saint Domingue's mountainous, heavily forested interior.<sup>13</sup> From there, the maroons posed a constant threat to the establishment – raiding plantations, freeing more slaves and instigating unrest. In the late 1780s, maroon insurrections combined with agitation by mulattoes for greater voting and property rights placed unprecedented pressure on the white colonists.<sup>14</sup>

In the meantime, the French Revolution swept away the ancien Bourbon regime, replacing with the rhetoric of emancipation and equality.<sup>15</sup> The Declaration of the Rights of Man, modeled on the American Declaration of Independence and adopted by the revolutionary National Assembly of France in 1789, proclaimed: "Men are born free and

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<sup>7</sup> Farmer, *supra* note 2 at 64 (quoting Robert Debs Heintz and Nancy Gordon Heintz, *Written in Blood: The Story of the Haitian People* 26-27 (Houghton Mifflin Co., 1978) (the source of the quote is Pompee Valentin, Baron de Vastey, a contemporary Haitian writer, educator and politician).

<sup>8</sup> Need citation...

<sup>9</sup> Federal Research Division, *supra* note 1 at 2.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

remain free and equal in rights.”<sup>16</sup> In 1790, however, the planters of Saint Domingue defied the National Assembly’s order to grant suffrage to freed blacks.<sup>17</sup> Wholesale violence erupted in Saint Domingue and the bloody struggle that gave birth to the Haitian Republic began.

The Haitian Revolution was fought over the ensuing decade along shifting lines of allegiance between autonomous armies of rebel slaves and those of intervening foreign powers – the Spanish, British and French. Faced with war in Europe and little in the treasury to finance it, France eventually withdrew her emancipation proclamation. In 1801, Napoleon launched a campaign to reconquer Saint Domingue and restore slavery.<sup>18</sup>

The French devised a strategy as simple as it was cold-blooded: the extermination of the entire adult male population of Haiti. Reasoning that a rebel slave could never be effectively returned to bondage, the plan called for repopulating the island with new African slaves and resuming agricultural production and export.<sup>19</sup> The result was a genocidal campaign that saw both sides seeking the total annihilation of the other through massacres, scorched earth tactics and escalating acts of terror. The decisive Haitian victory came in November, 1803. A French expeditionary force, led by Napoleon’s brother-in-law, General LeClerc, in the largest naval fleet ever to sail for the Americas, was defeated at the Battle of Vertieres.<sup>20</sup> Out of 33,000 French troops under LeClerc’s command, 30,000 died of tropical disease or enemy action. French losses in Haiti in the period 1801-1803 exceeded 52,000. During the same period, Haitian forces also successfully resisted invasions by British and Spanish forces seeking to capitalize on the upheaval of the revolution.

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<sup>16</sup> Citation to Declaration of Rights of Man.

<sup>17</sup> Federal Research Division, *supra* note 1 at 2.

<sup>18</sup> *Id.* at 3.

<sup>19</sup> Farmer, *supra* note 2, at ???

<sup>20</sup> Federal Research Division, *supra* note 1 at 3.

The victorious rebels declared the Republic of Haiti on January 1, 1804.<sup>21</sup> Haiti became the first independent republic in Latin America; the second in the Western Hemisphere after the United States.<sup>22</sup> Haiti was also the first modern state founded by blacks, the first to abolish slavery and remains the only state founded and sustained by slaves who won their freedom by force of arms.<sup>23</sup> The human cost of Haiti's independence amounted to 150,000 dead, or 40% of the population.<sup>24</sup> Only 170,000 of the original 425,000 slaves remained healthy enough to work and contribute to the rebuilding the economy of the new state.<sup>25</sup>

### **C. Independence and Isolation.**

Independence brought a new set of problems to embattled Haiti. The new state faced problems beyond its decimated economy and population. These problems led inexorably to the Independence Debt.

Haiti found itself alone in a region dominated by empire and reliant on slavery for its success and stability.<sup>26</sup> The story of Haiti's triumph spread across the Caribbean and as far as the American South. In Saint Domingue, the colonists' worst fear had come to pass. The prospect of slave rebellion terrified every slave-holding elite and now their own restless slaves had a bloody example to emulate. Consequently, the Western powers quarantined Haiti to prevent its freedom from escaping. Haitian ships and nationals were forbidden to enter foreign ports.<sup>27</sup> No foreign nation granted Haiti diplomatic recognition. Hostile

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<sup>21</sup> Farmer, *supra* note 2, at 71-74.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 75.

<sup>27</sup> Thomas Madiou, *Histoire d'Haiti Tome VI, 1819-1826* 473 (Editions Henri Deschamps 1988).

navies continually menaced the Haitian coast. And in France, the surviving colonists incessantly pressured their government to extract revenge.<sup>28</sup>

#### **D. The Independence Debt.**

Haiti's fragile new government eventually took the only available route out of isolation and succumbed to a Hobson's Choice. On April 17, 1825, in one of history's tragic ironies, Haitian President Jean-Pierre Boyer signed the Royal Ordinance of Charles X.<sup>29</sup> The Ordinance promised Haiti French diplomatic recognition in exchange for a 50% tariff reduction on French imports and a 150,000,000F indemnity, payable in five annual installments.<sup>30</sup> Ostensibly, the indemnity would compensate the French planters in cash for their lost property – land and slaves, although the amount demanded exceeded estimates of their actual losses by 50,000,000F.<sup>31</sup> Haitian President Boyer signed the agreement under more than simply the pressure of diplomatic isolation. A flotilla of French warships cruised just out of sight of the Haitian coast, with orders to blockade Haiti if negotiations failed.<sup>32</sup>

Haiti could not meet the schedule of payments. 150,000,000F represented over ten times the annual revenue of the Haitian government at the time.<sup>33</sup> The first payment of 30,000,000F fell due on December 31, 1825 and Haiti had to borrow the money. In fact, the Ordinance included a provision compelling Haiti to borrow only from a French bank.<sup>34</sup> Representatives of the French banking establishment attended the Ordinance negotiations

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<sup>28</sup> Heintl, *supra* note 7, at 167.

<sup>29</sup> Farmer, *supra* note 2, at 76.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Jean Metellus, *Abolition de l'Esclavage 2* (L'Humanité, 1989).

<sup>34</sup> Gusti-Klara Gaillard, *L'Experience Haitienne de la Dette Exterieur 18-19* (Impremiere Henri Deschamps, 1988).

and began devising the loan scheme simultaneously with Haiti's acquiescence to the indemnity.<sup>35</sup>

The Independence Debt formally began with Haiti's loan from the French bank, Ternaux Grandolpe et Cie. The terms included a principal of 30,000,000F, from which the bank automatically deducted 6,000,000F in fees.<sup>36</sup> The remaining 24,000,000F made its way from the bank's vaults to the French treasury – a short trip across Paris that began Haiti's long spiral into impoverishment.

The impact of the Debt burden immediately impacted ordinary Haitians. President Boyer imposed a series of tax policies to generate revenue to pay the indemnity. All failed. They included a wholesale restructuring of the rural tax base, a direct Independence Debt tax and, the nationalization of the debt – an announcement by Boyer that the debt belonged to all Haitians, not just their government.<sup>37</sup> Boyer's efforts met with several assassination attempts and his eventual ouster.<sup>38</sup> Nonetheless, a second loan was needed to finance the second installment. This time, French bankers Lafitte Rothschild Lapanonze, who had also acquired the first debt, provided the capital.<sup>39</sup> Haiti again borrowed 30,000,000F, but agreed to repayment in thirty-five yearly installments of 6,500,000F - a total repayment of 227,000,000F over the life of the loan.<sup>40</sup> Haiti could not complete the scheduled indemnity payments and defaulted after the first two 30,000,000F installments. The Independence Debt had drained the Haitian treasury of its capital. The Haitian economy – ravaged by war and long cut off from export markets – could not generate enough revenue to support the

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Mildred Aristide, *L'enfant en Domesticite en Haiti, Produit d'un Fosse Historique* 108-10 (Imprimerie Henri Deschamps, 2003).

<sup>38</sup> B. Ardouin, *Etudes sur l'Histoire d'Haiti* 29 (Dezobry, E. Magdaleine et Cie, 1860).

<sup>39</sup> Thomas Madiou, *Histoire d'Haiti Tome IV, 1819-1826* 30-31 (Edition Henri Deschamps, 1988).

<sup>40</sup> *Id.*

Debt. Attempts to do so by over-producing and taxing cash crops created a vicious spiral. Haitian agriculture remained undiversified and the population's basic needs unfunded.

### **E. Renegotiation**

After Haiti's default, efforts to renegotiate payment of the Independence Debt began between the two governments. In 1834, and in preparation for the renegotiations the French government commissioned the law firm of Dalloz, Delagrangé, Hennequin, Dupin, Jeune, et al to review the original Ordinance. The Dalloz Report declared the original Ordinance unlawful and placed liability for the colonists' losses with the French government itself.<sup>41</sup> The government bore responsibility for the colonists' lost land and slaves because it had relinquished sovereignty of Saint Domingue.<sup>42</sup> Furthermore, the report found the French government culpable in entering into an agreement it knew Haiti could not fulfill.<sup>43</sup>

Nonetheless, in 1838, negotiations concluded with the (ironically named) "Traité D'Amite".<sup>44</sup> The new treaty revised the remaining balance down to 60,000,000F, payable in thirty annual installments.<sup>45</sup> Again, loans from designated French banks would finance the payments with exorbitant fees.<sup>46</sup> Again, the French navy ensured Haiti's acquiescence by deploying warships off her coast throughout the negotiation of the treaty.<sup>47</sup>

The momentum of Haiti's vicious spiral of payment and debt continued. The final payment to the French government took place in 1883.<sup>48</sup> Haiti had remitted over 90,000,000F in reparations to its former colonial masters – although the French government

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<sup>41</sup> Dalloz, *Consultation de MM. Dalloz, Delagrangé, Hennequin, Dupin, Jeune, et al., pour les anciens colons de St. Domingue* 16, 26-27 (Imprimerie Mme Veuve Agasse, 1829).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at \_\_\_\_.

<sup>44</sup> Heintz, *supra* note 7, at 170-71.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Gaillard, *supra* note 34, at 23.



disbursed much less than that amount to the colonists themselves.<sup>49</sup> To finance the indemnity payments and the early loans, Haiti borrowed over 166,000,000F between 1875 and 1910.<sup>50</sup> More than half of that money was returned to the lending banks under the rubric of commissions, fees and interest payments.<sup>51</sup>

## F. The Twentieth Century

1915 saw the beginning of the next chapter of Haitian history. In that year, the United States invaded Haiti in response to “political instability”.<sup>52</sup> The ensuing military occupation would last until 1935. The US occupation conclusively ended the European Great Powers’ competition over Haiti. The Great Powers era had consisted mostly of gunboat diplomacy and the extraction of trade concessions or reparations under one pretext or another. Haiti now took its place in the US’ Caribbean sphere of influence.

During the US occupation, American banks took control of Haiti’s financial system and institutions. The National City Bank of New York (known today as Citibank) acquired a controlling interest in the Haitian National Bank in 1919.<sup>53</sup> All of Haiti’s outstanding debts to French banks were acquired by the National City Bank in 1922.<sup>54</sup> Payments in service of those debts, begun in 1825, continued until 1947.<sup>55</sup>

It took Haiti 122 years to repay its Independence Debt. It did so 140 years after the abolition of the slave trade and 85 years after the Emancipation Proclamation. In the same

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<sup>49</sup> Madiou, *supra* note 39, at 30-31.

<sup>50</sup> Brenda Gayle Plummer, *Haiti and the Great Powers, 1902-1915* 145 (Louisiana State University Press, 1988).

<sup>51</sup> *Id.*

<sup>52</sup> Hans Schmidt, *The United States Occupation of Haiti* (Rutgers University Press, 1971).

<sup>53</sup> Francois Blancpain, *Un Siecle de Relations Financieres Entre Haiti et la France (1825-1922)* 166-67, 171 (L’Harattan, 2001).

<sup>54</sup> *Id.*

<sup>55</sup> Schmidt, *supra* note 52, at 229.

year the Nazis paid for their crimes, including slavery, at Nuremberg, Haiti still labored to repay in cash the freedom its founding fathers had won with their lives.

### **G. Today**

The poverty of modern Haiti is inextricably linked to the Independence Debt. After the failure of direct taxation, the revenues that paid the debt came from the same cash crops that had made Haiti such a lucrative colony. The Haitian economy remained shackled to the export of tropical hardwoods, sugar, and especially coffee. By 1900, 95% of government revenue came from export duties on coffee.<sup>56</sup> Even as late as 1915, 80% of the government's revenue was pledged to debt service.<sup>57</sup> The effects of such a drain on the treasury were crippling, if unsurprising. Education, healthcare and infrastructure went practically unfunded throughout the Nineteenth Century.<sup>58</sup> The dependence on cash crops made agricultural and economic diversification impossible. Food had to be imported. Over-farming and deforestation led to soil erosion and environmental catastrophe.<sup>59</sup> Economic instability engendered political instability. Haiti endured a series of despotic presidents in the Nineteenth Century, most of whom met their end through assassination, foreign-sponsored coup d'état or civil insurrection. The trend of dictatorship and repression continued throughout the twentieth century, most notably with the notorious Duvaliers, and persists today – the most recent violent coup took place in 2004.<sup>60</sup>

Today Haiti is by far the poorest nation in the Americas. Eighty percent of Haitians live below the poverty line.<sup>61</sup> Life expectancy is 51.<sup>62</sup> Infant mortality is also the worst in the

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<sup>56</sup> Michel-Rolph Trouillot, *Haiti State Against Nation Origins and Legacy of Duvalierism* 61 (Monthly Review Press, 1990).

<sup>57</sup> Mark Schuller, *Break the Chains of Haiti's Debt* 2, <http://www.jubileeusa.org/resources/haitireport06.pdf> (May 20, 2006).

<sup>58</sup> *Id.*

<sup>59</sup> Federal Research Division, *supra* note 1, at 10.

<sup>60</sup> *Id.* at 3-8.

<sup>61</sup> *Id.* at 11.

Western Hemisphere.<sup>63</sup> The United Nations ranks Haiti 153 out of 177 on its Human Development Index, which measures poverty; literacy; education; life expectancy; childbirth and other health factors.<sup>64</sup>

In 2002, Haitian President Jean Bertrand-Aristide announced his intent to pursue a claim against France to recover the Independence Debt.<sup>65</sup> The Haitian government estimated the amount of the claim as \$21 billion.<sup>66</sup> The French government rebuffed Aristide's claim, declaring the issue resolved in the 1838 *Traite D'Amite* and subsequent treaties.<sup>67</sup> Aristide and his government were overthrown in 2004 in a coup backed by the United States, Canada and France. The new military junta renounced the claim within its first week in power.

While Aristide's ill-fated efforts played out, however, other attempts to address large scale, historical injustices emerged around the world. The governments of South Africa, Chile and Cambodia instituted truth and reconciliation commissions to address the crimes of apartheid, the Pinochet junta, and the Khmer Rouge, respectively. New Zealand established special tribunals to reverse exploitative land transfers from the Maori people to European settlers in the early Nineteenth Century. In the United States, legislation compensated the Japanese-American victims of internment during the Second World War and courts heard claims by the descendants of African-American slaves against corporations who profited from slave labor.

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<sup>62</sup> United Nations, *Human Development Report 2005* page 250-53 [Link](#)

<sup>63</sup> *Id.*

<sup>64</sup> United Nations, *supra* note 62, at 219, available at: [http://hdr.undp.org/reports/global/2005/pdf/HDR05\\_HDI.pdf](http://hdr.undp.org/reports/global/2005/pdf/HDR05_HDI.pdf) (accessed August 26, 2006).

<sup>65</sup> Jose De Cordoba, *Impoverished Haiti Pins Hopes for Future on a Very Old Debt*, Wall Street Journal, Jan. 2, 2004, [need page number].

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

In this newfound willingness to examine past injustices, the Trans-Atlantic slave trade loomed large. In 2001, the United Nations Durban Declaration condemned the slave trade as tantamount to genocide and recognized its impact on the states and peoples affected. Consequently, the French government issued a formal apology for its role in the slave trade. The official pronouncement acknowledged the slave trade as a gross crime against humanity and one that should have been recognized as such at the time.

The story of Haiti's Independence Debt is unique and tragic. That slavery is at the story's heart makes it especially poignant and ironic. The direct connection between the Debt and Haitian poverty today makes the case for redress especially compelling. The growing willingness of the international community to face historical injustice is cause for hope. Recent successes by American tort lawyers converting historical facts into colorable claims provide a roadmap. The remainder of this article examines the bases of those claims and the prospects for an action brought by Haitians in an American court to recover the Independence Debt.

## **II. Unjust Enrichment as a Legal Basis for Recovering the Independence Debt**

In mass torts, the restitutionary theory of unjust enrichment is a powerful tool for reversing unlawful wealth transfers. Plaintiffs have alleged unjust enrichment in African-American slavery and Holocaust claims against corporations who profited from the free labor of slaves. In environmental, gun control and tobacco litigation, plaintiffs have alleged unjust enrichment of defendants where taxpayers have borne the costs of those businesses' negative externalities. We now consider the elements of a traditional unjust enrichment claim, examine it in the modern mass tort context and apply the theory to the case of Haiti's Independence Debt.

## A. Traditional Unjust Enrichment Claims

Unjust enrichment is the legally unjustifiable retention of a benefit for which the beneficiary must make restitution.<sup>68</sup> The doctrine's common law roots extend as far as 1760, when courts of equity required defendants to return money or property when required by "the ties of natural justice and equity" to do so.<sup>69</sup> Unjust enrichment recoveries are most common when courts award restitution in contract and tort cases. In particular, courts will order restitution whenever an agreement is void by reasons of duress, illegality or violation of public policy.<sup>70</sup>

Courts apply unjust enrichment when no enforceable contract governs the parties' dispute, or when no adequate legal remedy exists.<sup>71</sup> To prevail, the plaintiff must prove three elements: (1) a benefit conferred on the defendant by the plaintiff, (2) the defendant's knowledge of the benefit conferred, and (3) the defendant's acceptance or retention of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit.<sup>72</sup> A benefit means any form of advantage bestowed by a plaintiff on a defendant, either by enhancing the value of defendant's property or by saving defendant expense or loss.<sup>73</sup> Courts have found inequitable circumstances in cases of conversion, fraud, duress or an illegal contract.<sup>74</sup> Unjust enrichment, therefore, is not a cause of action in and of itself. A plaintiff must allege an underlying wrong as the basis for unjust enrichment.

Upon finding unjust enrichment, the court must then identify and quantify the benefit in question and set about reversing the wealth transfer from the defendant, back to

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<sup>68</sup> *Id.* at 1573.

<sup>69</sup> *Moses v. Macferlen*, 97 Eng. Rep. 676, 680 (K.B. 1760).

<sup>70</sup> Restatement (Second) of Contracts § 376 (1981).

<sup>71</sup> *Ball v. Johanns*, S-07-1190 LKK/DAD, 2008 U.S. Dist. LEXIS 9609, \*5-\*6 (E.D.Cal., Jan. 29 2008) (citing *McKesson HBOC, Inc. v. New York State Common Retirement Fund, Inc.*, 339 F.3d 1087, 1090 (9th Cir. 2003)).

<sup>72</sup> *Id.* (citing *Van Gemert v. Boeing Co.*, 590 F.2d 433 (2d Cir. 1978), *aff'd*, 441 U.S. 942 (1980))

<sup>73</sup> *W.S.S. Lines v. San Pedro Peninsula Hosp.*, 8 Cal. 4th 100, 108 (Cal., 1994).

<sup>74</sup> Dan B. Dobbs, REMEDIES 246 (West 1976)

plaintiff. Often, the remedy takes the shape of a constructive trust. Depending on circumstances, courts may award windfall profits or limit recovery to specific property.<sup>75</sup> The flexibility of the unjust enrichment doctrine allows the courts considerable latitude in crafting a remedy.

## **B. Unjust Enrichment in Modern Mass Tort Actions**

In recent years class action lawyers and states' attorneys general have adopted unjust enrichment doctrine to the mass tort context with notable success. In cases of historical injustice in particular, courts have seemed more receptive to unjust enrichment claims than to more obvious claims for kidnapping, torture or wrongful death.<sup>76</sup> We next consider the examples of the Holocaust Victims and Tobacco litigation to build our model for a Haitian claim.

### **1. Unjust Enrichment Claims by Holocaust Victims**

In 1996, a class action brought by Holocaust victims and their heirs appeared on the docket of the federal Eastern District Court of New York.<sup>77</sup> The cases represented attempts to recover funds from a number of Swiss banks. The lawsuit alleged three, distinct sets of unjust enrichment claims: that the banks refused to divest dormant accounts of Holocaust victims to their heirs; that the banks had accepted deposits of gold looted by the Nazis, and; the banks had laundered the profits of the Nazi slave labor regime.<sup>78</sup> The class demanded an accounting; restitution, disgorgement of profits, and punitive damages.<sup>79</sup>

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<sup>75</sup> *Id.*

<sup>76</sup> *In re African American Slave Descendants Litigation*, 375 F.Supp. 2d 721 (N.D.Ill., 2005).

<sup>77</sup> *In Re Holocaust Victims Assets Litigation*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000).

<sup>78</sup> *Id.* at 141.

<sup>79</sup> *Id.* at 142.

The plaintiffs anchored their unjust enrichment claims on common law contract, fraud and breach of fiduciary duty claims.<sup>80</sup> The class claimed federal subject matter jurisdiction based on diversity.<sup>81</sup> The complaints also alleged violations of Swiss banking laws and customary and treaty-based international law, namely aiding and abetting human rights violations.<sup>82</sup> The Alien Tort Claims Act provided the basis for federal jurisdiction over those claims.<sup>83</sup>

To demonstrate the wealth transfer and defendants' knowledge, the plaintiffs amassed records from the victims, the banks and the Nazi regime itself. The Volcker Commission – an independent body instituted by the banks under pressure from the US government to investigate the claims – provided additional evidence.

The banks responded to the complaint and moved to dismiss. The defense asserted failure to state a claim; lack of personal and subject matter jurisdiction; failure to join indispensable parties; lack of standing, and; forum non conveniens.<sup>84</sup> Rather than rule immediately on the motions, Judge Edward Korman deliberated slowly and made clear his preference for settlement.<sup>85</sup> In the meantime, political pressure from the United States and the threat of an economic boycott by influential fund managers continued to mount.<sup>86</sup> The banks settled before Judge Korman announced his decision on their motions.<sup>87</sup>

The resulting settlement purported to reverse the wealth transfer through a \$1.25 billion fund.<sup>88</sup> Five discrete classes of victim were entitled to a share: those who had lost

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<sup>80</sup> Stephanie A. Bilenker, *Do the US Courts Have Jurisdiction over the Lawsuits Filed by Holocaust Survivors against the Swiss Banks?*, 21 Md. J. Int'l L. & Trade 251, 260 (Fall, 1997).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Holocaust Victims Assets Litigation*, 105 F. Supp. 2d at \_\_\_\_.

<sup>85</sup> John Authers & Richard Wolffe, *The Victim's Fortune* ch. 7 (1st ed., Perennial 2003).

<sup>86</sup> *Id.* at ch 4-5.

<sup>87</sup> *In Re Holocaust Assets*, 105 F. Supp. 2d 139 at 143-44.

<sup>88</sup> *Id.*

assets deposited with the banks; those whose assets the Nazis had looted and deposited; two classes of slave laborers whose work had generated profits deposited with the banks, and; refugees denied entry into Switzerland during the Nazi era.<sup>89</sup>

Settlement of the Swiss bank litigation marked a turning point in the Holocaust restitution movement and a victory for proponents of unjust enrichment as a path to resolution. Similar large settlements followed. Another consolidated class action, this time against German corporations complicit in forced labor, medical experiments, “Aryanization,” and other illicit Nazi programs settled in 2000.<sup>90</sup> Again, the plaintiffs alleged common law claims and unjust enrichment. Along with cooperation from the German, US and Israeli governments, the parties agreed to establish a \$4.3 billion to compensate victims and fund programs to promote tolerance and Holocaust awareness. German and Austrian banks also settled claims similar to those against their Swiss counterparts.<sup>91</sup> \$30 Million of the \$40 Million settlement was earmarked for restitution.<sup>92</sup>

## **2. Unjust Enrichment Claims in Tobacco Litigation**

As a second remarkable example of a successful unjust enrichment claim, we look to suits by American states against tobacco corporations. In 1994, the Mississippi state Attorney General (in concert with thirteen private law firms) began legal action against the largest tobacco corporations in Mississippi Chancery Court.<sup>93</sup> The complaint included state common law claims for restitution-unjust enrichment; indemnity; public nuisance, and; injunction. The state sought monetary damages and injunctive relief as a *parens patriae* remedy to protect the future health and welfare of its citizens.

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<sup>89</sup> *Id.*

<sup>90</sup> *In Re Nazi Era Cases Against German Defendants Litigation*, 198 F.R.D. 429, 430 (D.N.J. 2000).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Doug Rendleman, *Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes?* 33 Ga. L. Rev. 847, 852-54 (Spring, 1999).



The plaintiff based its unjust enrichment claim on the Medicaid costs borne by the state for smoking-related diseases. The state argued those expenses rightly belonged to the companies whose products directly caused the illnesses. Rather than factor those costs into the price of cigarettes and accommodate their customers' ailing health, the tobacco companies let the state bear the burden. Consequently, the healthcare provided smokers by the state constituted a benefit conferred on the tobacco companies.

Mississippi argued the tobacco companies knew the harmful effects of their cigarettes but continued to sell cigarettes without disclosure. By concealing the addictive, damaging nature of their products as they continued vigorously promoting them to Mississippians, the tobacco companies acted unlawfully. Their deliberate nondisclosure, or outright deception, while the state continued to cover the costs inflicted by cigarettes made retention of the profits unjust.

To reverse the unlawful transfer, the Mississippi suit requested reimbursement of relevant Medicaid costs and that tobacco companies accept ongoing responsibility for the harm inflicted by cigarettes. The suit settled for \$3.3 Billion in 1997.

The success of Mississippi's unjust enrichment claim came after the failure of dozens of products liability suits against tobacco companies. Success in Mississippi inspired thirty-nine suits by other states attorneys general. These resulted in a \$206 Billion settlement in 1998.

### **III. Haiti's Unjust Enrichment Claim for the Independence Debt.**

Given the elements of traditional unjust enrichment claims and the successful adaptation of unjust enrichment to mass tort claims, an unjust enrichment claim by Haitian plaintiffs to recover the Independence Debt has merit. Such a claim could be brought against the French government itself, or against French, British and American banks that

financed the Independence Debt payments. While different defendants pose different procedural problems, as we discuss below, the unjust enrichment arguments will remain essentially the same.

We now examine Haiti's Independence Debt in that context and analyze how the tragic story fits within the legal construct of unjust enrichment. As we shall see, a massive wealth transfer took place with full knowledge of the governments and financiers involved. Moreover, the circumstances of the wealth transfer – payments to slave owners extracted through gunboat diplomacy and funded by usurious loans – were strikingly inequitable, even by contemporary standards.

**A. Benefit Conferred, by Plaintiff, on Defendants, with Defendants' Knowledge.**

The transfer of wealth from Haiti to the French government and from Haiti to the various banks that financed the Independence Debt is well established. Detailed claims, submitted by former slave owners for compensation, including the monetary value of the “lost” slaves, and which formed the basis for the French government's demands have been documented. Likewise, the terms of the 1825 Ordinance and accounts of its negotiation have survived. The French government acknowledges the payment of 90,000,000F. The story of the first payment - 24,000,000 gold francs – being transported across Paris, from the vaults of Ternaux Grandolphe et Cie to the coffers of the French Treasury was recorded in detail. Historians have traced loan documents from the time of the 1825 Ordinance, through the various refinancing efforts, to the final remittance to National City Bank in 1947.

The amount of primary evidence documenting the wealth transfer of the Independence Debt strongly supports an unjust enrichment claim. Financial records detail the payment of tangible sums in service of a single, cogent debt. Moreover, Haitian

President Boyer nationalized the debt, explicitly delegating the government's obligation to the Haitian people themselves. Given the amount and nature of the evidence supporting the Independence Debt, the benefit conferred and knowledge of the defendants can be shown.

## **B. Defendants' Retention of the Benefit Conferred Was Inequitable under the Circumstances**

As we have seen, an unjust enrichment plaintiff must prove underlying unlawful circumstances that rendered a defendants' retention of the conferred benefit inequitable. In Haiti's case there are three bases for such a claim. Each arises out of common law contract and tort principles. First, the centrality of slavery to the Independence Debt made the 1825 Ordinance and Debt void as against public policy or on grounds of illegal subject matter. Second, that the terms of the Ordinance and subsequent Debt were void on grounds of substantive unconscionability – namely, the terms and fees were so exorbitant as to preclude their enforcement. Third, the circumstances around negotiation of the Independence Debt – threats of blockade and the attendant display of French naval force – rendered the Ordinance and Debt void as a matter of procedural unconscionability. We now examine each of these theories, in turn.

### **1. Slavery Rendered the Independence Debt Void and Unenforceable as Against Public Policy and on Grounds of Illegal Subject Matter**

At common law, courts will not enforce any contract whose subject matter is either illegal or against public policy.<sup>94</sup> A contract based on such subject matter is rendered void

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<sup>94</sup> *Restatement (Second) of Contracts* § 178 (1981).

and the offending beneficiaries must make restitution, often on a theory of unjust enrichment.<sup>95</sup>

In Haiti's case, slavery lay at the heart of the Independence Debt. The French colonists demanded compensation for the lost value of their slave plantations. Those demands included line item detail accounting for the value of the slaves "lost" to the Haitian Revolution. To a modern observer, a contract pertaining to slavery would be unthinkable, let alone enforceable. Indeed, the Thirteenth Amendment forbids all forms of slavery – the only Amendment to regulate private as well as government action.

The Independence Debt, however, predates the Thirteenth Amendment. Signed in 1825, the Ordinance of Charles X was prepared in an era when slavery still flourished and was legal in the United States and all the European empires. How then, can a Haitian plaintiff show the invalidity of the Independence Debt on public policy or illegality grounds at the time of its signature?

**a. Slavery as a Violation of Nineteenth Century Law and Public Policy**

In fact, the slave trade, if not ownership of slaves, was illegal by 1825. The major European powers had agreed in principle on the abhorrence of slavery. France, Great Britain and the United States had deployed their navies to intercept slave ships on the notorious Middle Passage from Africa. By examining these events as well as France's domestic laws and treaty obligations, we can conclude that by 1825, participation in the slave trade was against contemporary French and international law and public policy. As such, an international agreement pertaining to the exchange of money for the value of slaves would constitute slave trading and be considered void.

**b. Abolition of the Slave Trade in the Nineteenth Century**

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<sup>95</sup> *Restatement (Second) of Contracts* § 376.

Human rights law considers certain acts unlawful on a *jus cogens* basis. *Jus cogens* means certain acts are “accepted and recognized by the international community” as criminal, regardless of specific treaties or laws.<sup>96</sup> Today, the list of *jus cogens* crimes includes genocide, piracy, slavery and the slave trade, murder as a state policy, torture, prolonged arbitrary detention, and systematic racial discrimination.<sup>97</sup> Only piracy on the high seas has an older pedigree than slavery as a *jus cogens* violation.<sup>98</sup> In fact, the history of the abolition of slavery during the Nineteenth Century illustrates the earliest development of international law and concerted action between states to address a particular crime.

The legal history of the international movement to abolish the slave trade began in Great Britain in 1807.<sup>99</sup> With the Abolition of Slavery Act, parliament outlawed slave trading by British ships or subjects and ordered the Royal Navy to patrol the West African coast and intercept slave ships. By 1814, Britain had amassed enough military and political capital in the Napoleonic Wars to put abolition on the agenda at the international conferences that concluded that conflict.<sup>100</sup> The First Treaty of Paris included a commitment by defeated France and the victorious allies (Britain, Austria, Prussia, Russia and Sweden) to work for the abolition of the slave trade.<sup>101</sup> The Second Treaty of Paris in 1815 and the Congress of Vienna followed. Both condemned the slave trade as inhuman and inconsistent with the practices of civilized nations. The signatories pledged to eradicate the trade and practice of slavery.<sup>102</sup>

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<sup>96</sup> Human Rights Treatise/Black’s Law Dictionary

<sup>97</sup> Restatement of Human Rights § 702 (1985).

<sup>98</sup> Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 Harv. Int’l L.J. 183, 186-87 (2004).

<sup>99</sup> National Archives, Abolition of the Slave Trade, <http://www.nationalarchives.gov.uk/pathways/blackhistory/rights/abolition.htm> (accessed August 26, 2006).

<sup>100</sup> Robert Jennings & Arthur Watts, *Oppenheim’s Intl Law*, vol. 1 (9th ed., Longman’s 1996).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

By 1823, French law unilaterally outlawed slaving by French ships and nationals.<sup>103</sup> France also established a naval squadron to patrol the West African coast and capture slave ships.<sup>104</sup> Around the same time, Britain and the United States passed laws equating the slave trade with that progenitor of all international crimes - piracy.<sup>105</sup> Consequently, naval commanders were empowered to hang captured slavers.

France continued to pass domestic anti-slavery laws in 1826, 1827, and 1831.<sup>106</sup> All forms of slavery were outlawed in French territory in 1848.<sup>107</sup> On the international scene, the 1841 Treaty of London bolstered international cooperation in the fight against slave-trading. The United States outlawed slavery by ratifying the Thirteenth Amendment in 1865. In 1885, the signatories of the Treaty of Berlin (France, Austria, Belgium, Denmark, Germany, Great Britain, Italy, the Netherlands, Portugal, Russia, Spain, Sweden and Turkey) agreed to outlaw all forms of chattel slavery within their empires.

### **c. The Independence Debt Violated Nineteenth Century Law and Public Policy**

By 1825, French foreign policy and domestic law prohibited the trade in slaves. The French government had explicitly condemned the practice of slavery as inconsistent with the practice of civilized nations. The French navy was committed to the eradication of the Trans-Atlantic slave trade, summarily imposing the death penalty on captured slavers.

The 1825 Ordinance of Charles X, imposing Haiti's Independence Debt, ran directly counter to these laws and policies. It represented an international transaction exchanging

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<sup>103</sup> Serge Daget, *France, Suppression of the Illegal Trade and England, 1817-1850*, in *The Abolition of the Atlantic Slave Trade*, (University of Wisconsin Press, 1981).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Daget, *supra* note 101.

<sup>107</sup> Jennings, *supra* note 95 at 229.

cash for human lives and their value as slave labor. French law and international treaties and norms condemned such an agreement.

In the years following 1825, French and international efforts against slavery redoubled. These efforts continued into the Twentieth Century with the League of Nations and the United Nations explicitly condemning slavery and its trappings as gross violations of human rights and international law.<sup>108</sup> Therefore, even if defendants can argue the 1825 Ordinance was within contemporary law, subsequent loans made and payments accepted in service of the same agreement were certainly not. Ironically, 1947 was the year that saw the United Nations' founding and the ratification of the Nuremberg Charter as well as Haiti's final payment on its Independence Debt.

## **2. The Doctrine of Unconscionability Renders the Independence Debt Void and Unenforceable Based on its Terms and the Circumstances Attending its Signature.**

Common law defines an unconscionable contract is one “such as no man in his senses and not under any delusion would make . . . and as no honest man and fair man would accept on the other.”<sup>109</sup> Unconscionable contracts fall under two categories: substantive and procedural. Generally, a plaintiff must demonstrate both types of unconscionability to invalidate a contract. A stronger showing of one type requires a lesser

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<sup>108</sup> Office of the UN High Commissioner for Human Rights, *Slavery Convention*, <http://www.ohchr.org/english/law/slavery.htm> (accessed August 26, 2006); Yale Law School, The Avalon Project, *Charter of the International Military Tribunal*, Article 6(c), <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm> (accessed August 19, 2006); United Nations, *Universal Declaration on Human Rights*, <http://www.unhcr.ch/udhr/lang/eng.htm> (accessed August 19, 2006).

<sup>109</sup> *Hume v. United States*, 132 U.S. 406 (1888).

showing of the other.<sup>110</sup> A successful unconscionability claim will support a restitutionary claim for unjust enrichment. Substantive unconscionability means a contract containing manifestly inequitable terms. Procedural unconscionability means a contract made by a party forced or induced to agree under inequitable circumstances. We shall analyze Haiti's Independence Debt claim under both standards, beginning with substantive unconscionability. A strong showing can be made on either basis.

**a. The Terms of the Ordinance and Subsequent Loans Constitute Substantive Unconscionability.**

To find substantive unconscionability, a court must find the terms of a contract so inequitable as to shock the conscience.<sup>111</sup> Terms that are “monstrously harsh” or “exceedingly callous” also meet the definition of substantive unconscionability.<sup>112</sup> Recent decisions have invalidated arbitration clauses as substantively unconscionable where they deprived one party of substantive and procedural rights or unduly favored the other party in their treatment of costs, class action rights and remedies.<sup>113</sup> In the Nineteenth Century, equity courts invalidated contracts mistakenly made for thirty-five times the value of a product.<sup>114</sup> Violation of state usury laws also supported invalidation of a contract on substantive unconscionability grounds.<sup>115</sup>

The Dalloz Report recognized the substantive unconscionability of the Ordinance as early as 1838. It found the French government negligent in knowingly concluding a treaty Haiti could not hope to live up to. The excessive amount of the indemnity – ten times

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<sup>110</sup> *Nichols v. Nat'l Union Fire Ins. Co.*, 509 F. Supp. 2d 752, 758 (D. Wis. 2007) (“Unconscionability refers to the absence of meaningful choice on the part of one party, together with contract terms that are unreasonably favorable to the other party.”) (internal quotation marks omitted).

<sup>111</sup> *Al-Safin v. Circuit City Stores, Inc.*, 394 F.3d 1254, 1259 (9<sup>th</sup> Cir. 2007); *Slaughter v. Stewart Enterts.*, 2007 U.S. Dist. LEXIS 56732, \*29 (D. N.Cal., Aug. 1, 2007) .

<sup>112</sup> *Al-Safin*, 394 F.3d at 1259.

<sup>113</sup> *Id.*

<sup>114</sup> *Hume*, 132 U.S. at 414.

<sup>115</sup> *Cope v. Wheeler*, 41 N.Y. 303 (N.Y. App., 1869)



Haiti's annual revenue and one and a half times the value of the colonists' lost "property" shocked Nineteenth Century French consciences even as they collected the Debt. Similarly, the terms of the bank loans included exorbitant interest rates and commissions deducted from the principal. Repayment of the loans far exceeded payments to the French government in money and length of time.

**b. The Threat of Military Force Compelled Haiti's Agreement to the Ordinance and Subsequent Loans' and Constitute Procedural Unconscionability**

To find procedural unconscionability, a court must find the party with superior bargaining power presented a "take it or leave it" proposition.<sup>116</sup> Whether parties have a fair chance to negotiate, availability of alternatives or whether a contract is offered as one of adhesion will determine procedural unconscionability.<sup>117</sup> Threat and duress constitute procedural unconscionability.<sup>118</sup> The "gun to the head" being the classic example.

Haiti signed the 1825 Ordinance under the explicit threat of French guns. Naval blockade and the implicit threat of reconquest and reenslavement loomed large over the conclusion of the agreement. French warships remained off the Haitian coast throughout the "negotiations". The French delegation refused any concessions and allowed no alteration of the Ordinance terms. Haiti succumbed and accepted the unfair terms of the Ordinance, the Independence Debt and the loan terms extended by the French banks even though it was clear that Haiti could never fulfill those obligations. The same circumstances replayed in 1838 at the signing of the *Traite D'Amitie*. For all its representation as a fair reworking of the original Ordinance, France employed the same tactics of gunboat

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<sup>116</sup> *Shroyer v. New Cingular Wireless Service*, 498 F.3d 976, 985 (9<sup>th</sup> Cir. 2007)

<sup>117</sup> *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1073 (9<sup>th</sup> Cir. 2007).

<sup>118</sup> *Maxwell v. Fidelity Financial Services*, 184 Ariz. 82, 89 (Ariz. 1995); Restat. 2d of Contracts, § 175(1)

diplomacy. Haiti's only alternative to the Independence Debt was war and blockade. Under those conditions, the Haitian government had no choice but acquiescence. Haiti's agreement to the original Ordinance and the *Traite d'Amitie* were obtained by the threat of force. As such, the Independence Debt was imposed under conditions making it unconscionable and therefore void.

### **C. Reversal of the Wealth Transfer**

Once plaintiffs establish the elements for an unjust enrichment claim, they must also demonstrate the feasibility of the court's reversing the inequitable transfer of wealth.<sup>119</sup> In mass tort actions this invariably represents a complex question distinct from the demonstration of unjust enrichment. For the purposes of this article, we need note only the discrete amounts and the well-documented nature of Haiti's Independence Debt. As such, reversal of the wealth transfer may prove less difficult than other cases, such as the Holocaust and Tobacco litigation. The Haitian government, in its ill-fated claim for restitution from France valued the wealth transfer represented by the Independence Debt at \$24,000,000,000 (twenty-four billion) in 2004 dollars.<sup>120</sup>

The settlement structures in the Holocaust and Tobacco cases are nonetheless instructive. The parties created funds intended to reimburse individual claimants as well as to address the broader social harms represented by defendants' actions. For example, the Holocaust settlement included funding for [museum/research/awareness].<sup>121</sup> The Tobacco Litigation settlement earmarked funds for [health education/anti-smoking campaigns].<sup>122</sup>

Like these settlements, the court could structure restitution of the Independence Debt to address the problems it engendered, namely economic underdevelopment, lack of

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<sup>119</sup> Burt C. Neuborne

<sup>120</sup> Haitian government claim.

<sup>121</sup> Holocaust settlement [Swiss banks and Austrian/German].

<sup>122</sup> Tobacco settlements.

basic services, or environmental damage. Like the Holocaust and Tobacco settlements, a cash award could be earmarked for specific projects, classes of plaintiffs or foundations and administered by professional fiduciaries. The goal of such a fund would be transparency and efficiency in disbursing funds where they will do most to benefit the Haitian people.

#### **D. Defenses to an Unjust Enrichment Claim**

Haiti's Independence Debt makes a compelling case for an unjust enrichment claim. The transfer of wealth is well-documented, as is the defendants' knowledge of the transfer. The amounts in question and the beneficiaries of the payments are readily identifiable. Haitian plaintiffs can also demonstrate the manifest inequity of the wealth transfer because of the centrality of the slave trade to the Debt and or the unconscionable terms and circumstances of the Charles X Ordinance.

Nonetheless, our would-be plaintiffs must prepare to answer difficult questions as to why an American court should address a transaction from 1825, between two foreign powers. Courts prefer to avoid questions of historical upheaval. Notwithstanding the success of the Holocaust plaintiffs noted above, those cases settled without adjudication on the merits. The courts rejected many earlier claims by Holocaust victims for lack of justiciability or under the political question doctrine. Others fell foul of the statute of limitations for the underlying tort claims. The most famous case to address slavery in the United States, *In re African American Slave Descendants Litigation* was also dismissed on grounds of standing; statute of limitations; non-justiciability; and, failure to state a claim for which relief could be granted.<sup>123</sup>

Despite seemingly long odds, however, there is reason for hope. Recent cases and a renewed interest in legal solutions for historical wrongs provide a blueprint for addressing

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<sup>123</sup> *In Re African-American Slave Descendants Litigation*, 375 F.Supp. 2d 721 (N.D. Ill. 2005).

procedural hurdles. We shall briefly assess potential obstacles and suggest some approaches for confronting them.

## 1. Foreign Sovereign Immunity

Under the political question doctrine, American courts generally avoid cases involving matters of foreign policy better handled through legislative or diplomatic channels.<sup>124</sup> Indeed the political question doctrine proved fatal to many early suits by Holocaust victims, where courts ruled the various treaties negotiated by the U.S. government at the conclusion of World War II rendered war crimes questions nonjusticiable. Likewise, German corporate defendants successfully invoked the Foreign Sovereign Immunities Act of 1976 (“FSIA”) to preclude liability for their use of slave labor during the Nazi era.<sup>125</sup> FSIA grants brought immunity to foreign states subject to certain, enumerated exceptions.<sup>126</sup> One of those exemptions is for cases involving “property taken in violation of international law.”<sup>127</sup> Federal courts have jurisdiction over any case involving a foreign sovereign that falls under an exemption to FSIA.<sup>128</sup>

In the case of *Republic of Austria v. Altmann*, however, the plaintiff successfully claimed federal jurisdiction over her claim to recover paintings confiscated during the Nazi era and expropriated by the post-war Austrian government.<sup>129</sup> The court affirmed denial of the defendant’s motion to dismiss under FSIA, reasoning the expropriation exemption of § 1605(a)(3) properly applied and applied retroactively – to conduct predating the legislation.<sup>130</sup>

The claim over Haiti’s Independence Debt also neatly fits the § 1605(a)(3) exemption. As we have seen, the French government acted to expropriate property from

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<sup>124</sup> *Bernstein v. Van Heyghen*, 163 F.2d 246 (1947); *Burger-Fischer v. Degussa*, 65 F.Supp. 2d 248 (1999).

<sup>125</sup> *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (1994)

<sup>126</sup> 28 U.S.C. § 1605 (2008).

<sup>127</sup> *Id.* at § 1605(a)(3).

<sup>128</sup> *Id.*

<sup>129</sup> *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

<sup>130</sup> *Id.* at 700.

the government and people of Haiti in violation of international law in 1825 and afterwards, throughout the life of the Debt. Federal jurisdiction over the claim is proper and not precluded by the Foreign Sovereignty Immunities Act.

## 2. Statutes of Limitations

Statutes of limitations preclude legal action after a certain amount of time has passed from the initial wrong. Statutes of limitations narrow the claims courts will hear, allow defendants “repose,” and limit courts’ cases to contemporary claims where evidence and memories are fresh. Typically the statute of limitations for a tort or contract claim is between three and six years. Such short windows of opportunity usually mean statutes of limitation are fatal to claims for historical wrongs. Yet exceptions to statutes of limitations exist and may apply in the Independence Debt case, as they do to other cases where the courts strive to ensure “for every wrong there is a remedy.”<sup>131</sup>

Well-established exceptions to statutes of limitations include accrual, discovery, ongoing harm and equitable estoppel. Equitable estoppel is particularly relevant to historical restitution cases. Under equitable estoppel, the statute of limitations cannot run so long as reasons of “good sense and fairness” support tolling it.<sup>132</sup> When a plaintiff cannot access the courts for good reason, or is delayed by a defendant’s concealment of evidence or stalling by false promises of settlement, equitable tolling applies.<sup>133</sup> In a recent reparations case, the court encouragingly tolled the statute of limitations on equitable estoppel grounds.

In *Alexander v. Oklahoma*, a class of African American plaintiffs brought suit against the City of Tulsa and state of Oklahoma for their complicity in a 1921 race riot.<sup>134</sup> Tulsa

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<sup>131</sup> Suzette M. Malveaux, STATUTES OF LIMITATIONS: A POLICY ANALYSIS IN THE CONTEXT OF REPARATIONS LITIGATION, 74 Geo. Wash. L. Rev. 68, 83.

<sup>132</sup> Source for “good sense and fairness”.

<sup>133</sup> Good general equitable tolling case here.

<sup>134</sup> *Alexander v. Oklahoma*, 391 F.3d 1155 (10th Cir. 2004).

police and the Oklahoma National Guard had supported the riot, which practically annihilated the black community in Tulsa. The City deputized and armed many of the rioters and the National Guard detained hundreds of African American men in “protective custody” effectively preventing them from protecting their community while the destruction ensued. After the riot, a “conspiracy of silence” frustrated victims’ efforts to pursue legal remedies. Inability to uncover evidence, find witnesses or obtain a fair hearing in the openly racist courts system in 1920s Oklahoma rendered pointless the lawsuits brought by the victims.

In 1997 the Oklahoma legislature instituted a formal inquiry into the Tulsa Riot. It condemned the riot and the role state government played in it. The report characterized the events of 1921 as an attempt by one community to eradicate another and to intimidate other black communities across the region. A systematic cover-up followed the violence, denying the victims any meaningful relief and ensuring the perpetrators escaped justice.

The *Alexander* lawsuit followed in 2001, five years after the Oklahoma legislature published its findings. The plaintiffs, surviving victims and their heirs, stated a claim based on violations of their civil rights under federal law. The statute of limitations on those claims expires after two years. The plaintiffs addressed the statute of limitations by referring to the “conspiracy of silence.” The District Court was sympathetic to the plaintiffs’ arguments, although they ultimately dismissed the motion. The Court accepted the argument that the plaintiffs had no meaningful access to the justice system in the years following the riot. The court went on to rule the environment of discrimination prevented the plaintiffs obtaining relief and equitably tolled the statute of limitations for forty-two years – until the end of the Jim Crow era in the South. The court also addressed plaintiffs’

arguments that their claims had not accrued until the publication of the legislative report by referencing a 1982 book, ‘Death in a Promised Land’ which had exposed the events of 1921.

The *Alexander* plaintiffs came maddeningly close to overcoming their statute of limitations hurdle – having the court accept the logic and force of their equitable tolling arguments, but not to the extent necessary for them to proceed.<sup>135</sup>

Another case of equitable tolling, *Hoang Van Tu v. Koster* involved a similar line of reasoning with an international element. There, Vietnamese victims of the My Lai Massacre, committed by US troops during the Vietnam War, pursued a claim in federal court. The court denied plaintiffs’ request to toll the statute of limitations for their Alien Tort and Torture Victim Protection Act for twenty-eight years. The court recognized “plaintiffs’ poverty, their status as subjects of a Communist regime, the Vietnam War, and their inability to travel” as valid reasons they had been unable to access the courts before the statute expired.<sup>136</sup> The extent of equitable tolling, however, did not reach the length of time plaintiffs needed to maintain their claims within the ten year statute of limitations.

In an example closer to home, Haitian plaintiffs prevailed against a former junta member hiding in the United States.<sup>137</sup> The plaintiffs brought Alien Tort Act claims alleging false imprisonment, torture and murder, by a Haitian army colonel between 1992 and 1994. The Eleventh Circuit reversed dismissal of the claims on statute of limitations grounds. The Court held equitable tolling applied until the colonel had been removed from power and the plaintiffs could gather evidence and prepare a complaint free from the threat of reprisals.

Using the guidance of these equitable tolling cases, a strong argument can be made for the Independence Debt claim. The facts of the Independence Debt were

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<sup>135</sup> The *Alexander* plaintiffs continue to pursue their claim. Having exhausted the American courts, they filed a claim with the Human Rights Commission of the Organization of American States.

<sup>136</sup> *Malveaux*, 108; *Hoang Van Tu v. Koster*, 364 F.3d 1196 (10<sup>th</sup> Cir. 2004)

<sup>137</sup> *Jean v. Delorien*, 2005 U.S. App. LEXIS 26160 (11<sup>th</sup> Cir. 2005)

unknown to average Haitians until recent research discovered them. A legal climate conducive to bringing claims for redress of historical wrongs did not exist until the 1990s in the United States when the first restitution claims were brought involving the crimes of the Second World War.

Moreover, a Haitian individual would have had no notice or compulsion to pursue a private claim given the Haitian government's pledge to pursue restitution from the French government as a matter of foreign policy. That effort ended in 2004, when the elected Haitian government was deposed by a military coup. The newly-installed junta abandoned the claim almost immediately upon seizing power.

Not until 2004, then, could a Haitian plaintiff have recognized the existence of a claim, expected to find effective redress through the judicial system and realized that effective resolution by negotiation between the governments of Haiti and France was futile. These facts make a strong case for tolling the statute of limitations in the Haitian Independence Debt case until 2004 at the earliest. The ten year statute of limitations on Alien Tort Act Claims would therefore give our plaintiffs until 2014 to file suit.

### **3. The Alien Tort Claims Act**

Plaintiffs must first establish the propriety of federal jurisdiction over their claim. The Alien Tort Claims Act grants federal District Courts original jurisdiction over alien (non-US) parties for torts committed in violation of the law of nations.<sup>138</sup> Congress passed the ATCA in 1789 with the aim of allowing merchants to pursue claims for ships and cargoes lost to pirates and privateers. In the 1980s, human rights lawyers 'rediscovered' the

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<sup>138</sup> *Filartiga v. Pena-Irla*, 577 F. Supp. 860, 861 (E.D.N.Y. 1984) (citing 28 U.S.C. § 1350)



statute and used it to sue foreign nationals in American courts. Under the ATCA, Holocaust survivors brought their claims against European corporations and governments.<sup>139</sup>

To successfully bring a claim under the ATCA, plaintiffs must show three elements: first, the claim must be brought by an alien. Second, the claim must allege a tort. Third, the tort must violate the law of nations or a treaty.<sup>140</sup> For example, in *Burnett v. Al Baraka Investment and Development Corporation*, victims of the September 11<sup>th</sup> terrorist attacks sued over 200 foreign entities that had materially supported the hijackers.<sup>141</sup> The court upheld jurisdiction under the ATCA, denying 29 defendants' motions to dismiss. The court found plaintiffs had easily met the first two elements and found the third met based on the long-standing condemnation of hijacking in international law. Based on plaintiffs' showing on those elements, the court found liability could be properly imposed under the ATCA on the defendant-private entities and under a theory of accomplice or aiding and abetting liability.

The claim for Haiti's Independence Debt would meet all of these elements. Firstly, a class of Haitian plaintiffs will meet the "alien" requirement. Secondly, the Independence Debt pertains directly to the numerous torts inherent in slavery – false imprisonment, conversion, torture and wrongful death. The claim will also allege tortious acts inherent in the use of force to conclude the treaty negotiations.

Thirdly, the claim is based on a clear violation of international law and treaties of the United States, cognizable under the ATCA. We have discussed at length the development of international law pertaining to the slave trade, and the Independence Debt's violation of those contemporary norms. By 1825, the international community had condemned the slave trade as inhuman and a crime. The United States, France and Great Britain were all parties

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<sup>139</sup> *In re Holocaust Victims, Austrian and German (alleging unjust enrichment)*.

<sup>140</sup> *Uthaiwan Wong-Opasi v. Tennessee State Univ.*, 2000 U.S. App. LEXIS 21242 \*5 (6<sup>th</sup> Cir. 2000).

<sup>141</sup> *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86 (D.D.C. 2003)

to treaties committing their naval resources to the eradication of Trans-Atlantic slavery. A contract pertaining to the slave trade, made relatively soon after the passage of the ATCA is “a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the eighteenth-century paradigms.”<sup>142</sup>

Based on the ATCA, federal courts have jurisdiction to hear a claim for the Independence Debt against the French government or banks operating solely in Europe or the United States. A claim based on the ATCA will allow an American federal court to exercise jurisdiction over a claim brought by Haitian plaintiffs against banks with operations in the US, hear the unjust enrichment claims pertaining to the Independence Debt and will entitle the plaintiffs to a ten-year statute of limitations.

#### **4. Standing**

Another critical procedural question to address is the constitutional requirement of standing. American courts may hear only disputes between an identifiable class of plaintiffs and specific defendants. A plaintiff must demonstrate an injury in fact that is both “concrete and particularized” as well as “actual or imminent, not conjectural”; a causal connection between the injury and defendants’ conduct must be shown; and, the likelihood of redress by a favorable decision must be shown.<sup>143</sup>

Standing proved fatal to the landmark reparations litigation brought by the descendants of African American slaves.<sup>144</sup> The court found plaintiffs had not shown a concrete and particularized injury or an injury fairly traceable to the conduct of defendants – seventeen corporations who had conducted commercial operations in the United States

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<sup>142</sup> *Sosa v. Alvarez Machain* 542 US 692, 724 (2004) (Cautioning lower courts to restrain application of the ATCA and to bear in mind the “eighteenth century paradigms” Congress intended it to address.

<sup>143</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

<sup>144</sup> *In re African American Slave Descendants Litig.*, 375 F. Supp. 2d 721 (N.D. Ill. 2005)

during the slavery era.<sup>145</sup> Rather, the court characterized the claims as “derivative” and alleging only a “genealogical” connection between the plaintiffs and actual slaves and the defendants and actual slave-owners. The court did, however, acknowledge standing “can be supported by a very slender reed of injury.”<sup>146</sup>

More than a “slender reed” supports the standing of our Haitian plaintiffs. Standing arguments in the claim for the Independence Debt can be distinguished from those in *In re African American Slave Descendants*. The subject of the Independence Debt claim is a single, well-documented transaction – Haiti’s acceptance of the 1825 Ordinance. The claim does not encompass the unrelated stories of hundreds of slaves and slave-owners. Haitians today still feel the concrete and particularized impact of the Independence Debt. A direct line of causation connects the actions of the French government and banks to Haiti’s modern under-development. It is the difference between the tragic state of Haiti today and its relatively well-developed neighbors in the Caribbean.

The banks responsible for financing the Debt exist in essentially the same corporate forms today as they did at the time of their culpable action.<sup>147</sup> The same is true of the French government that imposed the Ordinance, renegotiated it in 1838 and continued to collect until 1875. The modern French government has acknowledged the debt and its role in its imposition. The lines connecting plaintiffs and defendants in a cause of action for Haiti’s Independence Debt are clearly drawn and easily identifiable. The standing problems encountered by slavery reparations plaintiffs are not present in Haiti’s claim. Moreover, no explicit attempts have ever been made to address the historical injustice of the Independence Debt. Indeed, the conclusion of the French government’s investigation into Haiti’s claim in

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<sup>145</sup> *Id.* at 752

<sup>146</sup> *Id.*

<sup>147</sup> Lafitte Rothschild and Citibank are the obvious examples. Barclays in the UK has been implicated. The history of mergers, etc may need to be traced for other defendant-banks like Chernaut.

2002 disavowed any responsibility. Rather, the French claimed any initial injustice from the 1825 Ordinance was remedied in subsequent negotiations, to wit, the 1838 *Traite d'Amite*. As discussed, above, all the illegitimacies of the 1825 Ordinance, and the attendant threat of military action, remained in the *Traite d'Amite*.

An American court could easily grant relief in an Independence Debt claim. The remedy would resemble that of any complex class action: calculating the amount of damages, managing restitution by establishing a fund to fairly disburse the award.

#### **IV. Strategic Considerations – Beyond Litigation**

As we have seen, a claim for the Independence Debt can be fashioned from well-grounded principles of unjust enrichment, unconscionability and the illegality of the slave trade. Recent successes by mass tort plaintiffs in Holocaust and tobacco litigation and possibilities for overcoming procedural obstacles offer further encouragement. Despite all this, a “pure” legal victory remains a difficult proposition. In our success stories, the plaintiffs never reached adjudication on the merits of their claims. Rather, the success of their claims relied on events outside the courtroom and the role of litigation as one facet of a multi-pronged effort at resolution. We now briefly consider the extra-legal events that would propel a claim for the Independence Debt to a successful conclusion.

##### **A. The Need for Extra-Legal Pressure**

Events outside of the legal context will do more than artful pleading to drive resolution of the claim. Fashioning a cognizable legal claim is only a small part ensuring success in any campaign for restitution. It is imperative to remember that no supportive legal precedent has been established for winning a historical restitution claims. Neither the successful, nor unsuccessful claims brought in the arena have been adjudicated on the merits. The key to success has been fitting a litigation component into a broader strategy.

The success of the Holocaust claims was hallmarked by the interplay of four distinct and interlocking components.<sup>148</sup> The Holocaust Victims lawsuits against the Swiss banks represented only one of these components. The suits confronted the defendants with strong claims for restitution and the prospect of lengthy and expensive discovery proceedings. Judge Korman's management of the case reflected not only his personal preference for settlement, however, but his awareness of events unfolding outside the courtroom that made settlement more likely.<sup>149</sup>

Those events included scrutiny and pressure from the U.S. State Department and Senate.<sup>150</sup> President Clinton and Republican Senator Alfonse D'Amato of New York forged a bipartisan commitment to resolving the claims. Senate hearings, support for the Volcker Commission and diplomatic pressure all grew out of this commitment.<sup>151</sup>

Economic pressure also proved critical.<sup>152</sup> Financial fund managers, including those responsible for the billions of dollars invested by the pension funds of New York City and the State of California, threatened to boycott the Swiss banks.<sup>153</sup>

An independent audit, conducted by the Volcker Commission, was the final element.<sup>154</sup> The commission's exposure of damning evidence augured ill for the banks' chances in court and did immeasurable harm to their public image.<sup>155</sup>

The cumulative effect of all four components – legal action; political and economic pressure; independent inquiry- created an atmosphere conducive to resolution, borne out of the sense that restitution for Holocaust victims was an idea whose time had come.

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<sup>148</sup> Garrett Perdue, *Holocaust Restitution Efforts: The Victim's Fortune: The Struggle for Restitution for Holocaust Victims*, 7 N.C. Banking Inst. 423, 441 (April, 2003).

<sup>149</sup> Victims Fortune, supra note \_\_\_

<sup>150</sup> Perdue

<sup>151</sup> Victims' Fortune ...

<sup>152</sup> Perdue

<sup>153</sup> Victims Fortune ...

<sup>154</sup> Perude...

<sup>155</sup> Victims Fortune

Similarly, in the tobacco litigation, public opinion and the momentum generated by other lawsuits contributed to a similar sense that the game was up for the cigarette companies. A \$209 Billion settlement would have been unthinkable in any other climate.

### **B. Extra-Legal Strategy in Haiti's Independence Debt Claim.**

How should the claim we have discussed fit into a broader strategy designed to obtain restitution for Haiti's Independence Debt? Let us consider the three additional strategic components and apply them to our claim:

#### **1. Political Pressure.**

The Holocaust plaintiffs numbered some of the largest political donors in the United States among their supporters. The large Jewish constituency in New York ensured the active support of Sen. D'Amato. The Haitian Diaspora in the United States is neither as large nor as influential as its Jewish counterpart. Nonetheless, certain members of Congress have advocated strongly for Haiti, Rep. Maxine Waters of California, for example. Congressional support for a recent bill that would cancel Haiti's current US debt indicates some sympathy in Washington for debt cancellation in general and Haiti in particular. If restitution of the Independence Debt could be tied to the growing movement in favor of addressing international debt, political impetus could be added to the litigation efforts.

#### **2. Economic Sanctions.**

In the Holocaust cases, money fund managers threatened millions of dollars in economic boycotts. In Haiti's case, some form of concerted consumer action against defendant-banks, like those of the apartheid-era, may be more feasible. Recent disclosure policies in municipalities in the United States would also dovetail with this component. Such policies are intended to create a public record of corporations' past

participation in slavery. By documenting corporations' past involvement in American slavery, city governments have recognized the importance of creating a record of corporate complicity as well as pressuring corporations to acknowledge and accept responsibility for past bad acts.

### **3. Audit Commissions.**

Efforts have taken place in France to investigate and make recommendations on the question of Haitian restitution. These were led by Representative Christiane Taubira in 2004, following passage of a French law recognizing the Atlantic slave trade as a crime against humanity and apologizing for France's role. The commission found that...

Although an order of magnitude less influential than the support harnessed by the Holocaust claimants, the four-pronged model can be adapted to serve the cause of Haiti's Independence Debt claim. The Haitian claim has the benefit of a narrow focus on a single, discrete and traceable event, rather than the diffuse claims of potentially millions of victims of a crime which was painstakingly concealed, with parties on both sides located across the globe.

## **V. Conclusion**

In the recent movement toward addressing historical injustice through legal and political action, Haiti's Independence Debt makes a compelling case. The historical background presents a sympathetic story of profound tragedy and unfairness. The story well fits the traditional elements of a cognizable unjust enrichment claim and presents strong arguments against dismissal on procedural grounds. As part of a concerted, multi-disciplinary approach, a claim for the Independence Debt could realize some relief for the modern-day people of impoverished Haiti and perhaps delivery justice for one of history's most tragic wrongs.