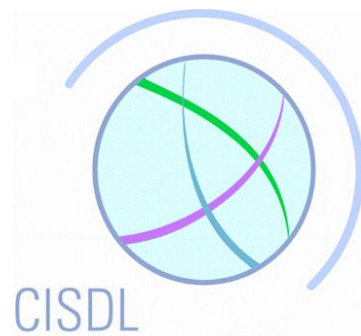


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CISDL WORKING PAPER:

Advancing the Odious Debt Doctrine

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Preface

This study commenced in February 2000 for the Canadian Ecumenical Jubilee Initiative, with a view to assisting the various movements, both in the North and South, that advocate the cancellation of illegitimate Southern debt. The study is primarily, though not exclusively, concerned with legal avenues for cancelling odious debts, and addresses the following objectives:

- To define what constitutes odious debt
- To craft a solid argument for the cancellation of odious debt under international law
- To examine the economic and social rights approach towards debt cancellation
- To examine the various institutions that may be used to cancel illegitimate debts
- To analyse possibilities for the cancellation of odious debt from the lens of international public policy

In Chapter One, Jeff King assesses previous definitions of the term ‘odious debt’ and set out procedures for applying the doctrine to a number of foreseeable situations, in a manner that is internally consistent and which accords with public policy. He further examines the status of the odious debt doctrine under international law.

In Chapter Two, Ashfaq Khalfan considers the various procedural options that are available to Southern states and to civil society groups campaigning for debt relief, in the political and judicial realm. He also examines the option of presenting a case for encouraging debt reduction to the Committee on Economic, Social and Cultural Rights, and examines likely arguments that may be made.

In Chapter Three, Bryan Thomas assesses the likely operation of the odious debt doctrine in relation to the structure of international financial markets. A number of critical issues are assessed including: the likely effect of odious debt repudiations on future lending, the means to establish subjective awareness of the odious nature of loans in relations to private bank lenders and international financial institutions and the means to reconcile the operation of the doctrine with the complexities of restructuring agreements and secondary markets for sovereign debt.

Given the innovative nature of this issue, there is a need for further research and collaboration among those working in this field. As a working paper, this document is being circulated both to advance knowledge among advocates of debt cancellation and to solicit critique. All substantive commentary to the paper will be acknowledged and appended to the working paper. It is expected that this working paper will be updated on a continuing basis and will be provided upon request to all members of the international NGO community supporting debt cancellation.

Having read the widely available information carefully, it appears that these papers will be the most thorough recent legal study on the subject. We will be exploring options to make these papers available on an accessible website. In addition, we will look into publishing this research in an academic source.

It should be noted that this work does not deal with all illegitimate debt issues in the legal field. Some of the critical work that remains to be done includes:

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- Examination of non-odious debt and its effects on economic, social and cultural rights
- Case studies on how the odious and other illegitimate debt doctrines would apply in the cases of specific countries
- Examination of the treatment of illegitimate debts under domestic laws of creditor states, where loan contracts are governed by such domestic laws.

We invite those working on debt issues to collaborate with the CISDL and to draw on the work in this paper. We believe very strongly in the importance of the work you are doing, and would be happy to contribute further in any way we can. Feel free to contact us at the addresses listed on the title page.

Acknowledgements

Several people must be thanked for their assistance in this project. Professor Stephen Toope, Faculty of Law of McGill University, gave generously of his time in providing in-depth criticism. Kirsten Mercer of the Primate's World Relief and Development Fund (PWRDF) and KAIROS: Canadian Ecumenical Jubilee Initiatives (formerly the Canadian Ecumenical Jubilee Initiative) provided useful input on developments within, and the needs of, the Jubilee movement. Jennifer DeLeskie should be credited with initiating this project with the Canadian Ecumenical Jubilee Initiative. Professors Stephen Smith, Adelle Blackett and Lionel Smith, of the McGill University Faculty of Law, also provided very useful input on substantive legal issues and on the overall structure of the project. Sandra Dos Santos, Derek McKee and Bradley Thompson helped edit this draft and also provided input on substantive issues.

Executive Summary

Chapter One: The Odious Debt Doctrine Under International Law: Definition, Evidence and Issues Concerning Application (Jeff King)

I. Introduction

This Chapter is concerned with three distinct projects: (1) defining the doctrine as it has been presented in the literature thus far; (2) examining the support for the doctrine under international law; and (3) examining problematic aspects of applying the doctrine under legal settings, and proposed solutions thereto. This executive summary is intended to provide the reader with an introduction to the main discussions under each section, and to provide a background to the research as well as further suggestions for improving it. Throughout it should be recalled that applying the doctrine in a legal manner requires that it be defined precisely. Doing so may result in a more restrictive definition than some activists may wish rightfully to adopt. Finally, one may wish to skim through the table of contents of the paper before or while reading this summary.

The odious debt claim involves two assertions: (1) a *definitional claim* that ‘odious debts’ exist under certain conditions, and (2) a *legal claim* that ‘odious debts’ are not enforceable against the alleged debtor state under international law.

II. Definition of Odious Debt

As we are concerned with making a legal argument, the very definition of the doctrine is tailored to suit the requirements of a judicially enforceable claim. The activist may well want to adopt a less restrictive definition, but would be advised to keep the comprehensive one offered when considering legal avenues. In defining the doctrine, I have read all of the relevant accessible legal literature on the doctrine, and synthesized the relevant comments such that the views of each of the authors are taken into account. Therefore, the definition is not my own, but rather a synthesis of existing ‘legally recognizable’¹ opinions. That investigation yields the following conclusion:

‘Odious debts are those contracted against the interests of the population of a state, without its consent and with the full awareness of the creditor.’

This requires three conditions:

1. *Absence of Consent*: The population must not have consented to the transaction in question. This is so because it is unlikely that the law would forbid a person from willingly entering into a contract that is detrimental to him or her. With dictatorial regimes this requirement presents few problems, while with democratic ones it could pose one. That issue is considered in Section IV.
2. *Absence of Benefit*: According to the applicable writings, there must be absence of benefit to the population in two ways: (1) in the purpose of the transaction and (2) in fact. The purpose requirement refers to the fact that creditors should not be

¹ By ‘legally recognizable’ I mean that the sources are the kinds that may be cited before tribunals. There is an informal hierarchy of such sources, which roughly amounts to (1) treaties, (2) state practice, (3) judicial decisions, (4) writings of recognized publicists, namely, those writing recognized legal texts or in recognized academic journals, and (5) the general principles of law common to many nations.

punished for good faith loans that were misspent by corrupt governments, and the fact requirement refers to the principle that populations that benefit in fact from bad faith loans are still required to repay them (unjust enrichment).

3. *Creditor Awareness*: This requirement stipulates that the creditor must be aware of the absence of consent and benefit. There are several standards that may be employed for measuring ‘awareness’, and luckily domestic law provides a sufficiently broad definition of ‘awareness’ to capture those creditors that shut their eyes to the obvious. That issue is discussed in Section IV.

A. Types of Odious Debts

Three types of odious debts have been identified by the authors:

1. *Hostile Debts*: debts that are actively aggressive against the interests of a population (e.g. conquest, colonisation, war, suppressing secessionist attempts).
2. *War Debts*: debts contracted by a state for the purpose of funding a war, which it eventually loses. The victor is not considered obliged to repay.
3. *Third-World Debts Not in the Interests of the Population*: This title refers to the new category of debts that were neither hostile nor war debts, but were simply harmful burdens assumed by a state but for which the population received no benefit. It is this category with which we are primarily concerned.

III. Evidence Under International Law

A. Type of Claim

The first point to note is that one should not claim that odious debts are illegal under international law. Such a claim would imply that states are legally bound to annul these debts, and that those governments that repaid them in the past were breaking the law when doing so. Rather, one should argue that odious debts are unenforceable under international law. That is, the doctrine of odious debt carves out a qualification to the generally accepted rule of repayment. It is in the form of the following statement: ‘IF the government had contracted a debt under the following conditions, THEN it is not obliged to repay it.’ Legal shorthand for this is that the debt is unenforceable under international law. Practically, this means trying to show that in cases of odious debts, there is no settled international law requiring repayment.

B. Categories of Recognised Sources of International Law

International law recognises the following sources:

Treaties: There is little support for the doctrine under treaties. The doctrine was considered for inclusion in an important Convention on state succession (i.e. when a state’s sovereignty is passed from one entity/government to another), but was ultimately rejected. This is a double-edged sword: on the one hand, it shows that the doctrine was accepted widely enough to make it into a draft, while on the other it was determinedly struck from the final Convention. Another problem is that the adopted Convention was itself highly unpopular, and still does not have the number of ratifications required to bring it into force.

Customary International Law: A quick skim over the table of contents of this section indicates eleven examples in which state practice seems to support directly or indirectly the doctrine of odious debts. It is important to note that there are at least two missing examples, namely, the Ethiopian and Iranian cases of debt repudiation. The latter is a particularly direct contemporary application of the doctrine, and would probably be well supportive of the doctrine. Not all of the examples are without difficulties, however. In several of them, I wrestle with issues that might be deemed fatal to finding them supportive. In order to evaluate their weight as evidence, it will be necessary to consult international lawyers with extensive experience in litigation.

Another issue dealt with under this category is the question of whether states that *have* repaid their 'odious debts', did so because they felt obliged by law, or rather because they were too concerned about the fallout of not doing so. If it were the latter, then the *opinio juris* would not accompany repayment and the existence of a settled rule of repayment in those cases can be challenged.

Judicial Decisions and Writings of International Law Experts: This section of the paper is brief because the views of the authors and arbitrators have generally been taken into account in defining odious debt. I propose to categorize them to some extent, so that the potential plaintiff cites the correct source for a particular point.

Regarding judicial decisions, the Federal Court of Argentina recently declared that part of the former regime's debts were odious for the population. That decision should be obtained and reviewed (perhaps translated). Also, one may note that the book, "Odious Debts" by Patricia Adams is not listed. The reason for this is that her book does not purport to be a declaration of the state of law, but rather a description of dictators' debts that conform with Sack's doctrine. The book therefore does not appear to add weight to the doctrine's legal status.

General Principles of Law: Here I consider the legal doctrines of unjust enrichment and abuse of rights. Unjust enrichment is the claim that one cannot receive a benefit at another's expense without conferring a reciprocal benefit. The doctrine of abuse of rights stipulates that one cannot exercise one's rights in an excessive and unreasonable manner, such that it harms the rights of another. Both doctrines have a settled history in domestic law and international law, but the extent to which they are applicable to cases of odious debts may be questioned. I suggest that they are better viewed as supplementary arguments upon which less emphasis should be placed. (It is implicit in this claim that a tribunal may find it quite far-fetched to try to justify the odious debts doctrine on these bases).

Another argument that is far more convincing, however, is the law of domestic agency. Domestic law contains provisions that govern the way in which one person can create legal obligations for another. This arrangement is similar in international law, where the government creates legally binding obligations for the state, the latter of which includes its population. Agency law is useful in that the very power of making binding commitments for another is considered to carry with it the special responsibility of acting in the interests of that person. This is known as a fiduciary obligation under the common law, and has its equivalent under the civil law. A fiduciary obligation is an obligation that exists when one person has the legal obligation to act for the benefit of another. Classic relationships include doctors and patients, lawyers and clients, corporations and shareholders and principals and agents.

Even more promising in this respect is that under domestic law, a third party can be held liable for assisting an agent in the breach of his obligations toward his principal. So if a bank were to knowingly assist an executive defraud a corporation, that bank can be held liable for the losses of the principal. The law requires that the

third party 'know' of the breach of obligation, and thus defines 'knowledge' for this purpose. This definition includes actual awareness and wilfully shutting ones' eyes to the obvious. This domestic law analogy is probably the single most convincing argument in favour of odious debt that we have yet come across, and the section should be read carefully notwithstanding the admittedly difficult legal nature of the material.

IV. Problematic Aspects and Proposed Solutions

Here I attempt to pre-empt what I view as the chief arguments that will be offered in response to the legal claim. The opponent may argue that even if the foregoing were true, the doctrine would be impossible to apply in practice because of problems assessing consent, benefit and awareness, and because of the cardinal importance of the difference between state succession and government succession. The conclusions may be summarized briefly as follows:

Absence of Consent: Once the absence of benefit to the population has been proved, the burden shifts to the creditor to prove that there was in fact consent to the transaction in question.

Absence of Benefit:

Purpose: Five categories of loans for specific 'odious' reasons are given. In cases where the loans are for no particular reason at all, the question turns to the nature of the regime. Where it is dictatorial or quasi-dictatorial, it is presumptively without benefit to the population. Where democratic or quasi-democratic, the reverse presumption operates.

Fact: The debtor state bears the burden for establishing absence of benefit. Four categories of disbursements are given as prima facie cases of spending that is not in the interests of the population. Where the loaned funds were applied to general government revenue, the government budgets for the respective years must be classified according to spending on (1) oppressive, (2) neutral and (3) beneficial institutions. The issues of the indeterminacy of this procedure and absence of governmental records are addressed.

Creditor Awareness: Three standards are borrowed from the common law of Canada and the United Kingdom: (i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; and (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make.

Conclusion

Altogether, the paper is long and somewhat technical, as it aims to be suitable for academic legal writing. It is meant to define and support the doctrine in a sufficiently legal way, and will likely be a better reference paper than an inspiring description of the doctrine. Nonetheless, it is sincerely hoped that this research will assist you to advocate the doctrine in support of the unjustly indebted countries to which it applies.

The analysis contained in Chapter I indicates that the doctrine of odious debt can be clearly defined, has a fair bit of support under the traditional categories of international law, and can be modified to withstand *prima facie* theoretical objections. The results are almost surprising. Upon hearing of the doctrine, anyone familiar with

public international law is likely to be virtually certain that the doctrine could never be applied in practice. However, after examining the state practice, general principles of law and writings and judicial decisions, it seems that there is much more material available to make such an argument than one would initially think. If nothing else, I hope that this paper has succeeded in establishing that there are *legally* persuasive arguments in favour of the morally compelling doctrine of odious debt.

Chapter Two: Sites and Strategic Legal Options for Addressing Illegitimate Debt (Ashfaq Khalfan)

Introduction

This Chapter outlines various legal avenues open to civil society organizations and Southern states for advancing the odious debt campaign and the campaign against debts that violate economic and social rights. It assesses the value of each of these approaches. One should note at the outset that one must separately address the debts of Southern states owed to other states, to international financial institutions (IFIs) and to private banks located in other countries. Each of these categories of creditors raise different issues in relation to the possibilities for redress.

The paper analyses the relationship of political efforts and their relationship to legal approaches. It then examines a variety of judicial approaches to address odious debt issues. Finally, it addresses the utility of addressing illegitimate debt through the prism of economic and social rights and of using the UN Committee on Economic, Social and Cultural Rights (CESR). This summary lists the main issues and some of the conclusions reached.

I. Political Approaches

It is theoretically possible for debtor states to unilaterally and collectively cancel illegitimate debts. The main obstacle to such action is the ability of creditor states and organizations to suspend foreign aid and lending. This danger may be mitigated in two ways. First, the assessment of odious and other illegitimate debt must be seen to be fair and to follow consistent principles. Second, it is necessary that there be a high degree of international acceptance of the odious debt doctrine among most Southern states and at least some Northern states.

It is suggested in this paper that the decision of an influential judicial body in favour of the odious debt doctrine may have influence beyond its jurisdiction so as to legitimize the general application of the doctrine. Such a decision could have a significant effect on the bargaining dynamic between creditor and debtor states, possibly leading to debt write-downs. In addition, by increasing the prospect of further repudiations, it could create an incentive for the creation of an international tribunal to assess illegitimate debt claims. Finally, by setting out the parameters of acceptable policy, such a decision would facilitate efforts by Southern states to develop common stances on this issue.

In this Chapter, I examine the ways in which civil society groups may play a role in generating and popularizing principles that influence the understanding and development of international law. An example can be taken from the civil society effort to declare the use or threat of use of nuclear weapons as illegal, using popular

tribunals, mass mobilization and eventually taking the case to the International Court of Justice.

II. Judicial Approaches

This Chapter demonstrates that there are many possible sites for litigation. This situation should be seen as an opportunity for advocates of debt cancellation. It is necessary to identify the best venues in which to create precedents that will lead to the resolution of disputes in political fora and to potentially stimulate the creation of an international tribunal on this issue. In selecting the first test case(s), the following questions should be considered:

- 1). The possible risks involved in terms of economic retaliation against the plaintiff and the effect of a negative decision,
- 2). The procedural rules which limit certain disputes to certain fora, and
- 3). The extent to which a particular jurisdiction will be favourable to the odious debt doctrine.

The dispute resolution body that may be approached in relation to a particular dispute will depend on the nature of the lender – whether it is a state, an international financial institution (IFI) or a private institution – and also on whether the loan agreement includes a choice of forum clause (such clauses attempt to specify which court can decide this issue).

An important related issue will be which body of law will be applied – this may be international law or the domestic law of any state. This issue is important since there is more known support for the doctrine in international law than in domestic law. However, as noted in Chapter One by Jeff King, some doctrines that are common to most domestic laws show promise in supporting the odious debts doctrine. There is therefore a significant need for more research on the treatment of odious debt by the domestic laws of a number of key states.

A. The International Court of Justice

The ICJ may be used where the lender is a state and where the loan contract does not specify any particular forum (which is the norm in state to state contracts). The ICJ is probably the ideal eventual forum; its judges are relatively independent of any one state and more likely to be open to non-traditional arguments. Its decision would be extremely influential; although ICJ judgments do not create law to the same extent as customary international law and treaties, they are a subsidiary source of international law and are seen in some instances as authoritative evidence of the law.

Another advantage of the ICJ is that it can provide an Advisory Opinion. This decision would not be binding in itself, but would provide legitimacy to the odious debt doctrine, thereby allowing it to be applied to individual situations. An Advisory Opinion can be framed in general terms, thereby entailing less risk on the part of any one debtor state and allowing the Court to address the validity of the doctrine itself, rather than any one particular dispute.

Recourse to the Court is limited. The states involved must normally consent to the ICJ jurisdiction. The exceptions are where all the states before the court have accepted in advance the ‘compulsory jurisdiction’ of the ICJ, or where a treaty between them specifies recourse to the ICJ. There are four strategic options that civil society can attempt to utilize (not in order of preference):

'Sweetheart' Litigation: A creditor state, whether developed or developing, could be approached to allow a case to proceed against it, so as to set a precedent. This is most realistic in situations where the debts were lent by a previous regime within the creditor state (loans by states such as South Africa or Brazil would be appropriate where these have not yet been cancelled). However, this option on its own may affect the international credit rating of the debtor. This approach may be combined with option (iv) below.

Advisory Opinion requested by General Assembly: This is probably the most desirable option. However, it would require the support of a majority of states in the General Assembly (UNGA), who choose to vote on the issue. This would require the active support of roughly 60 states. The campaign against nuclear weapons succeeded in gaining such a UNGA request, mainly by cultivating certain key states as allies and by originally raising the issue within a political body that was insulated from diplomatic pressure of nuclear states.

The debt cancellation movement should consider using bodies such as the Non-Aligned Movement and the G-77 for this purpose. Although many Southern governments will not be comfortable about the conditionality that necessarily accompanies the odious debt doctrine, this may be mitigated by emphasizing the doctrine's potential application to the apartheid debts of South Africa.

Advisory Opinion requested by U.N. Agency: UN bodies such as the FAO, ILO, WHO, UNESCO, the World Bank and IMF and ECOSOC have the ability to request an advisory opinion. By virtue of their institutional ethos, some bodies may be more willing than the General Assembly to make a request. It should be noted, however, that the UNDP and UNCTAD are not empowered to make such a request. However, the ICJ will only entertain such a request if it determines that the issue falls within the scope of the agency's duties. The World Health Organisation's request to the ICJ for an Advisory Opinion on the legality of nuclear weapons was rejected on this basis. However, it must be noted that the commencement of the campaign in the WHO created a momentum that convinced the General Assembly to make a successful request to the ICJ.

Joint Suit by a Group of States Against One Creditor State: This approach has the advantage of minimizing the risk taken by any one state. However, with a large number of states, each of the parties will need to have recognized the compulsory jurisdiction of the ICJ. Failing this, the consent of the creditor to the case is required. This will normally only be possible in a hostile context if some of the debtor states are large middle-income countries that can make credible threats of repudiation.

Barring unusual circumstances, only states can be parties to an ICJ case. ICJ cases will be judged under international law. A small proportion of inter-state loan contracts may specify that the case will be decided under the laws of a domestic state. It is an open question as to whether the odious nature of a contract allows a choice of law (or a choice of forum) clause in a contract to be struck down. Such situations are best avoided in the first test cases.

B. Arbitration

This type of dispute resolution will be the norm in contracts with International Financial Institutions (IFIs). It is also possible in contracts with states or private bodies. Arbitration always rests on the consent of both parties, expressed in the contract or at the time of the dispute. The advantage of such tribunals is that they are faster, are less public (thereby reducing somewhat the exposure of the debtor to retaliation) and are

low-risk – that is to say, a negative judgment rendered here would not be as much of a setback as a negative ICJ judgment. An arbitral venue may be used so as to indicate a way forward and to shed light on useful arguments for a future case.

The disadvantage is that both parties have more control over the choice of the arbitrators. This is less important for World Bank contracts where each party names one arbitrator, and these two arbitrators select the third arbitrator. In the absence of consensus, the third member of the court is nominated by the President of the ICJ, or the U.N. Secretary General. The creditor therefore cannot screen out certain arbitrators from the Tribunal.

Arbitration tribunals are less likely than the ICJ to adopt non-status quo decisions, but more likely do so than domestic courts, since loan contracts do not normally provide for appeals to arbitration. The law that is applied in arbitration is normally international law, where there is no choice of law clause specifying a domestic law.

C. Domestic Courts

The domestic courts and the laws of creditor states are selected in the majority of contracts with Southern debtors. New York and England are the most common jurisdictions selected. Some loan contracts may specify litigation within the debtor state. However, the ratification of a debt repudiation within such a court is unlikely to carry much weight among creditor nations and is best avoided. Nevertheless, debt litigation within debtor states, such as seen in 2000 in Argentina, may be useful for the purpose of identifying odious debt and putting pressure on a state to take action on it.

The primary question for debtor states with odious debts is to determine what the likely decision of the courts of that jurisdiction is likely to be. This should include firstly a determination of what the domestic laws treatment of odious debt is likely to be. Second, the extent to which international law is incorporated into the domestic law is relevant. Jurisdictions such as the U.S. and U.K. are less open to such incorporation than nations such as Italy. Should a court recognize odious debt doctrines, some states can legislate to exclude such determinations. Third, the general attitude of the courts of a jurisdiction should be considered. New York case law, for example, indicates that the courts self-consciously refer to the importance of maintaining New York as a centre of lending and that this requires them to safeguard the sanctity of contracts.

It may be possible for a debtor state to avoid its case being heard in an inhospitable forum in spite of a choice of forum and law clause. In order to do this, it will have to find another forum that has a reasonable relationship to the contract and which is willing to overturn the terms of the contract either on public policy grounds, the fraud of the creditor or on the basis that the choice of forum or law clause in an odious loan is itself 'odious.' Some jurisdictions, such as England, will refuse to hear cases where England was chosen as jurisdiction so as to avoid mandatory rules of public order in another forum. However, it should be noted that such defences are exceptional.

Another possibility is for a debtor state to assert doctrines of sovereign immunity, act of state and comity, all of which refer to the principle that courts of one state cannot judge the acts of another state. In the US, and in most Northern states, such doctrines are often not interpreted to apply to loan contracts, which are seen as commercial rather than state acts. However, sovereign immunity is relevant at the time of seizure of assets. It would not be advisable for debtor states to rely on these defences on their own, since this would harm international confidence in its ability to meet its legal commitments. However, such defences may be used so as to force the dispute to a more neutral forum, including international tribunals.

Civil society organizations have a major role to play in using the courts of debtor states to force debtor governments into action, including as litigants where the procedural rules permit. They may also mobilize support and resources for cases internationally and in creditor states. They may be able to submit *amicus curiae* briefs to such courts. However, on procedural grounds, it is unlikely that they will be able to themselves bring such cases to international and creditor courts.

III. Treaty Monitoring Bodies: The Committee on Economic, Social and Cultural Rights (CESCR)

The Committee on Economic, Social and Cultural Rights asks for a report from states that are party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) every 5 years on the measures that they have taken to implement the Covenant. The Committee has tended to actively solicit parallel reports from civil society organisations from the country in question and to hear their oral opinions. It would be useful for the debt relief movement to engage this process and make representations indicating whether a lender country's debt collection policies for specific countries undermines or reverses progress towards the realisation of economic, social and cultural rights in such debtor countries. Such efforts would assist in the collection of useful data on this issue and it can be expected that the report of the CESCR will receive significant coverage in the media.

The CESCR has previously commented on the possible need for debt relief initiatives so as to protect economic, social and cultural rights in developing states. The Covenant lays an obligation on states to engage in international cooperation to the maximum of their available resources. This does not necessarily translate into a concrete obligation to give aid. However, in certain circumstances, it may be possible to identify an obligation on a creditor to cancel debt where to not do so would necessarily lead to severe setbacks to the realisation of basic economic and social rights in a debtor state. If this issue was brought to its attention, the CESCR could encourage the state whose performance it is reviewing to cancel certain debts and may even term the failure to do so a violation of the Covenant.

Conclusion

This essay demonstrates that there exist a large number of strategic options for the debt cancellation movement to pursue a legal approach, in judicial, political and human rights treaty bodies. Careful analysis will be required before selecting any of the judicial fora. For a large number of debts, this choice will be limited for procedural reasons and due to the terms of the contract. However, this is of lesser concern given that positive determinations on odious debt are only required in some of these fora in relation to some contracts. Once the odious debt doctrine has greater legitimacy and acceptance, there are likely to be more negotiated settlements and possibly a specialized international tribunal.

The odious debt and economic and social rights approaches must be seen as parallel, but complementary, since they have different justifications, often address different debts and will have different effects. Both approaches should be pursued simultaneously.

Chapter Three: The Odious Debt Doctrine and International Public Policy: Assessing the Options (Bryan Thomas)

Introduction

This essay examines the applicability of the doctrine of odious debts to LDC debt of the 1970s and early 1980s. The essay is divided into two parts. Part one focuses on private lending from commercial banks; part two focuses on lending from International Financial Institutions (IFIs). The paper has two aims:

1. To examine the doctrine of odious debts from the point of view of international public policy;
2. To provide a preliminary assessment of the viability of applying the doctrine of odious debts to LDC debts from the period of 1971-1982.

On the first question, it is argued that the doctrine, if made a fixture of international law, might help to avert future debt crises. On the second, it is suggested that attempts to invoke the doctrine will face considerable legal obstacles, which may or may not be surmountable.

I. Private Lending: Past, Present and Future

Debt crises are nothing new. For centuries, sovereigns have over-borrowed, private lenders have over-loaned, and crises have arisen as a result. What *is* new, in the modern era, is that lenders are now far better equipped to ensure that their loans are used for legitimate purposes. As such, lenders can now be held to a higher standard of responsibility for their actions. The doctrine of odious debts requires that lenders be subjectively aware of the odious end-uses of their loans. This requirement is more easily met in the modern era than in past centuries.

According to the conventional explanation, the 1970s surge in lending to developing countries was triggered by a dramatic surge in oil prices. OPEC nations deposited their newfound riches into commercial bank accounts, and commercial banks subsequently loaned these funds to developing countries. In time, predictions of developing country economic growth were disappointed and lenders backed out, prompting the 1982 debt crisis. This explanation is controversial, however.

Commercial banks drastically over-extended themselves throughout this period. Often, it seems, commercial banks turned a blind eye to obvious corruption. Local bank officers (within borrower countries) were held to a low standard of accountability, and so tended to rubber-stamp loans, comfortable that their careers would have advanced by the time any problems arose. Senior bank officials were pleased to extend loans: substantial front end fees were often paid by lenders, and the value of the loan appeared as an asset on the banks' current balance sheets.

Commercial lenders from this period no doubt expected that their loan contracts were legally enforceable. The doctrine of sovereign immunity – the immunity of states from the jurisdiction of the courts of other states - has steadily eroded over the course of the past century, and moreover, most of the loan contracts from the period in question contained explicit waivers of sovereign immunity. Still, commercial lenders for the most part have chosen not to sue on developing country debt, for fear that doing so would only drive Southern states into a bunker mentality, making matters worse for lenders.

There is a serious concern that the doctrine of odious debts, even if successfully invoked to cancel the debt of the 1970s, would cause more problems than it solves. The concern is that any country invoking the doctrine will be punished by international financial markets. However, there is a risk of overstating this point. First, Southern countries frequently pay out more to service their debts than they borrow on international financial markets, so they may be wise (from a strictly economic perspective) to simply repudiate their debts unilaterally and endure the 'punishment.' Second, successful invocation of the doctrine of odious debts is not equivalent to unilateral repudiation. Legitimate creditors need only fear the latter.

Any attempt to invoke the doctrine of odious debts is seriously complicated by the emergence of debt restructuring agreements and secondary markets for debt.

Restructuring agreements were entered into consensually by developing country governments and private lenders. These agreements consolidated outstanding loans, and typically contained *cross-default clauses* and *sharing clauses*. Briefly, *cross-default clauses* stipulate that a default vis-à-vis any single creditor (party to the restructuring agreement) constitutes a default vis-à-vis *all* creditors. *Sharing clauses* stipulate that payments made from the debtor to any single creditor be shared (on a pro-rated basis) with all creditors. In effect, creditors had their legal interests consolidated by restructuring agreements. Debtors were likewise consolidated by these agreements. Typically, private and public debtors would participate, and a nation's debt would be rolled into one (lengthy) new contract.

Obviously, these restructuring agreements complicate matters from the perspective of the doctrine of odious debts: odious and non-odious debts may now be rolled together. Tracking which loans (of any given country) were odious will be extremely difficult.

Restructuring agreements had the effect of making Southern debt fungible: one lender's \$100 of debt from, say, Mexico is worth as much (i.e., involves the same risks) as any other lender's \$100 of Mexican debt. As a result, a speculative secondary market in developing country debt emerged in the 1980s. This also complicates things from the point of view of the doctrine of odious debts. It appears that the legal mechanism by which debts are sold on the secondary market may have the effect of extinguishing the original loan contract and creating a new one in its stead. Thus, it may be that those original odious debt contracts from the 1970s are now extinguished, replaced by new (potentially non-odious) ones. This is a complicated legal matter that may present substantial difficulties for those attempting to invoke the doctrine. Where debts have been converted into bonds - which is common - these difficulties become even more substantial.

II. *International Financial Institutions (IFIs)*

It is plain that IFIs possess juridical personality, and so may be brought before the courts by countries wanting to invoke the doctrine of odious debts. IFI loan agreements, however, stipulate that disputes be resolved by an International Arbitration Tribunal (See Section B. 2 of Chapter II).

The World Bank is composed of five sub-groups: *The International Bank for Reconstruction and Development (IBRD)*; *The International Development Agency (IDA)*; *The International Finance Corporation (IFC)*; *The Multilateral Investment Guarantee Agency (MIGA)*; *International Centre for Investment Dispute Settlement (ICSID)*. The IBRD is the most important, from the point of view of Southern state borrowing. The World Bank is the single largest creditor, accounting for 1/7th of developing country debt.

World Bank lending is and has always been, from a legal perspective, carefully monitored and orchestrated. Nevertheless, World Bank officials, in recent years, have

conceded that in the latter part of the 20th Century, officials with the Bank turned a blind eye to corruption. There is little doubt that some portion of developing country debt contracted with the World Bank is odious.

Because World Bank officials were often well aware of the end-uses of their loans, subjective awareness of odious lending may be relatively easy to establish. World Bank officials have, in recent years, essentially confessed that much of the post-war lending was odious. Furthermore, World Bank loans have not been sold on the secondary market, so the forensic problems involved in applying the odious debt doctrine to private lending may be less acute with IFI lending. Indeed, World Bank loans may offer a promising test-case for the resurrection of the doctrine of odious debts.

Loans from the other major IFI, the IMF, offer a far less promising target for the doctrine of odious debts. IMF loans are intended to serve a strictly macroeconomic function—i.e., to correct balance of trade problems—and so IMF officials had less direct involvement in the end uses of loans. Creditor's subjective awareness (of odious end-uses) may therefore be difficult to establish. However, IMF lending forms a far smaller proportion of debt owed to the IFIs.

Chapter One: The Doctrine of Odious Debt Under International Law: Definition, Evidence and Issues Concerning Application

by Jeff King

Introduction

The purpose of this paper is to define and examine the legal support for the doctrine of odious debt. Odious debts are those contracted against the interests of the population of a state, without consent, and with the full awareness of the creditor. The doctrine stipulates that in such cases, the debt is odious under international law and unenforceable against the alleged debtor state. The study concludes that the doctrine may be defined coherently, that it has a long history in international relations, is relatively well supported under international law, and can be modified to accommodate some of the problems one would expect to encounter in trying to apply the doctrine to real situations.

Accordingly, the paper has been divided into sections corresponding to these issues. In the first section, I define the doctrine as it appears in the existing literature on the subject, and synthesize the contributions of the various authors to produce a working definition of what it entails and in what contexts it has been invoked. In the second section, I undertake to examine support for the doctrine under international law. In an effort to create an argument that fits appropriately into the categories of the accepted sources of international law, I examine the state practice, international conventions, general principles of law and the writings of recognized publicists and judicial decisions that are relevant to the doctrine of odious debt. In section three, I take up some of the difficulties that can be envisaged when attempting to apply the theory in practice, namely, how one determines factors such as absence of consent, benefit, creditor awareness and other problems that may fairly be associated with the doctrine.

I. The Definition of Odious Debt

The purpose of this section is to define the contours of the doctrine of odious debt as it currently exists in literature and state practice. The section is intended to provide a coherent account of the meaning that authors and states have already given to the doctrine. First, I give a general portrait of it, and highlight its essential features. Second, I examine each of the main elements more closely, and analyze the constituent parts. Finally, I examine three basic categories into which odious debts are said to fall.

A. General Outline

International law scholar Alexander Nahum Sack was the first to popularize the doctrine of odious debt. He defined such debt as follows:¹

When a *despotic regime* contracts a debt, not *for the needs or in the interests of the state*, but rather to strengthen itself, to suppress a popular insurrection, etc, this debt is odious for the people of the entire state. This debt does not bind the nation; it is a debt of the regime, a *personal debt* contracted by the ruler, and consequently it falls with the demise of the regime. The reason why these "odious" debts cannot attach to the territory of the state is that they do not fulfil *one of the conditions* determining the *lawfulness* of State debts, namely that *State debts must be incurred, and the proceeds used, for the needs and in the interests of the state.*

Odious debts, contracted and utilised, for purposes which, *to the lenders' knowledge*, are contrary to the needs and the interests of the nation, are not binding on the nation - when it succeeds in overthrowing the government that contracted them - *unless the debt is within the limits of real advantages that these debts might have afforded.* The lenders have committed a hostile act against the people, they cannot expect a nation, which has freed itself of a despotic regime, to assume these odious debts, which are the personal debts of the ruler. Even if one despotic regime is overthrown by another, which is as despotic and which does not follow the will of the people, the odious debts contracted by the fallen regime remain personal debts and are not binding on the new regime.² (emphasis added).

This basic articulation of the odious debt doctrine has been recognized by other writers, including Ernst Feilchenfeld,³ D.P. O'Connell,⁴ Foorman and Jehle⁵ and Frankenberg and Kneiper.⁶ Sack's doctrine consists of two essential assertions: (1) a claim that the doctrine is part of positive international law and (2) the conditions under which it may be applied. While the legal status of the alleged duty to spend the proceeds of debts in the interests of the nation will be examined in section 3 below, the conditions under which this applies can be elaborated immediately.

Sack claims that there are three necessary conditions for a debt to be considered odious: (1) the debt has not received the general consent of the nation, (2) the borrowed funds are contracted and spent in a manner that is contrary to the interests of the nation, and (3) the creditor lends in awareness of these facts.

B. Absence of Consent

¹ A. N. Sack, *Les effets de transformations des États sur leur dettes publiques et autres obligations financières*, (Paris: Recueil Sirey, 1927).

² *Ibid.* at 127.

³ E. Feilchenfeld, *Public Debts and State Succession* (New York: Macmillan, 1931) at 450 *ff.* and 860*ff.* It is noteworthy that while Feilchenfeld uses the terminology of 'odious debts' he does not refer to Sack's formulation of the doctrine. It may be in part that Sack's work was published shortly before Feilchenfeld's work, which the latter acknowledges in the preface to his work. Nonetheless, the same elements are present, and are dealt with under the section "Considerations Concerning the Population of the Debtor State" at 701-714. It is also very important to note that Feilchenfeld never wholly endorses the odious debt category as a legal exception, though he gives it thorough treatment as a moral one. This point is considered at greater length below.

⁴ D.P. O'Connell, *State Succession in Municipal and International Law* Vol. I (Cambridge: C.U.P, 1967) at 458-461.

⁵ J. Foorman & M. Jehle, "Effects of State and Government Succession on Commercial Bank Loans to Foreign Sovereign Borrowers" (1982) Ill. L.R. 9 at 21-25.

⁶ G. Frankenberg & R. Kneiper, "Legal Problems of the Overindebtedness of Developing Countries: The Current Relevance of the Doctrine of Odious Debts" (1984) 12 Int'l J. of the Sociology of Law 415.

This aspect of the doctrine is not elaborated in Sack's work, but it is implicit in the terms employed in his definition. Since he is concerned with *despotic regimes*, it is clear that Sack contemplates a situation where the people of a state do not will the transaction to occur. This aspect of the criteria is explained more thoroughly by Feilchenfeld, who notes a number of problems with the requirement.⁷ The absence of consent was also a key justification in the first international legal application of the doctrine, by the American Commissioners in the Cuban debt controversy.⁸ It is submitted that the underlying rationale for this requirement is that international law cannot prohibit states from consenting to agreements which may turn out to be detrimental to them, or even those which are on their face detrimental to them, provided that consent was given in a legitimate manner. Therefore, when a state consents properly, that consent eliminates the application of the odious debt doctrine.

Sack does not specify whether there should be a process for obtaining consent, or whether he simply believes that the doctrine should only be applied to despotic regimes. Feilchenfeld, on the other hand, is categorical in claiming that a finding of an odious debt must include a finding of lack of consent,⁹ but that it is clearly not limited to dictatorial regimes.¹⁰ Therefore, we may conclude that in order to establish an odious debt under international law, absence of consent must be presumed or proved. In practice, most contemporary cases in which activists invoke the doctrine concern "dictators' debts."

C. Absence of Benefit

The absence of benefit requirement is the main thrust of the doctrine. It must be clear that there are two aspects of the requirement, both of which must be present: (1) that the *proceeds are spent* against the interests of the state, and (2) that the debt is *contracted* against the interests of the state. The first of these requirements is that a debt contracted in a manner that is contrary to the interests of the population but where the proceeds are eventually spent on its interests, is one to which the odious debt doctrine does not apply. For example, one could imagine a debt contracted by the former government of South Africa to strengthen the apartheid regime, but whose proceeds were subsequently used to benefit most of the population. In such cases, the doctrine does not apply. The creditor would be entitled to restitution under unjust enrichment,¹¹ thereby precluding the application of the odious debt doctrine.¹²

On the other hand, it is equally conceivable that a debt could be contracted for the benefit of a state and with general consent, but subsequently spent on items that are in fact of no benefit to the population.¹³ In such cases, Sack seems to suggest that

⁷ Feilchenfeld, *supra* note 3 at 702-705.

⁸ *Ibid.* at 337 and following.

⁹ *Ibid.* at 714.

¹⁰ *Ibid.* at 704. Among other scenarios, he considers a representative body not elected by the application of fair and normal rules.

¹¹ See C.H. Schreuer, "Unjustified Enrichment in International Law" (1974) 22 A.J. Comp. L. 281.

¹² See Feilchenfeld, *supra* note 3 at 711. However it may be desirable that bad faith creditors be denied the benefits of equity for the protection of their inequitable undertakings. Whatever the initial promise of this 'just-deserts' argument, it will not be argued herein.

¹³ Examples of expenditures on equipment, infrastructure and export-orientation that turn out to be of little value would fall into this category. See Feilchenfeld, *supra* note 3 at 711: "The situation is more complicated if the loan agreement or the authorizing law specifies the use of proceeds for benefiting purposes, and if subsequently the proceeds are used neither for the specified purposes nor for any other benefiting purposes. In this case the rights of creditors should not be affected, unless they have power to control the subsequent use of the proceeds." It is difficult to see what legal principle could justify this position unless it were that the debt must be *both* incurred and the proceeds spent contrary to the interests of the population. This is so because no claim in unjust enrichment could be made

that the debtor state would still be required to repay even in the absence of benefit, for the debts were in fact *incurred* for the benefit of the state. This requirement may perhaps be seen as a corollary to the requirement that the creditors be aware of the purpose of the loan, or aware that it will *in fact* be spent on items not in the population's interest.¹⁴

D. Creditor Awareness

This criteria is referred to by all of the authors,¹⁵ and was propounded most vigorously by Sack. Sack required that the creditors be subjectively aware of the odious purpose of the loan, and conclude the deal under that awareness.¹⁶ Frankenberg and Knieper note that "...French authors have...elevated the primacy of protection of creditors to the supreme rule..."¹⁷ and this may explain Sack's preoccupation with that criterion. Feilchenfeld also agrees with this form of protection of creditors, though he claims more weakly that they not be "...made to suffer for events for which [they were] in no way responsible."¹⁸ This concurrence of opinion may owe in part to their both being continental thinkers, where juristic opinion was said to have overwhelmingly supported the presumption that successor states always pay the debts of its predecessors.¹⁹

Whatever the suggested burden of proof intended by the use of the words 'subjective awareness', practice has made it clear that such awareness is easily imputable. In the Cuban loans case, the American Commissioners stated that the creditors "...must have appreciated the purpose of the loans..."²⁰ while in the celebrated *Tinoco Arbitration*,²¹ Chief Justice Taft held that the Royal Bank of Canada simply "knew" that the funds in question were to be used for the personal expenses of the retiring ruler, without any apparently complicated analysis of proof in this matter.²² In any event, the odious debt doctrine as advocated by all of its proponents includes the stipulation that the creditors be subjectively aware of the absence of benefit and absence of consent.

E. The Proposed Proceedings Before an International Tribunal

All commentators, Sack included, acknowledge the potential that a vague formulation of the odious debt doctrine would allow countries to invoke it for opportunistic

against a nation that did not benefit as a result of a debt. Therefore the position must be that the *legal obligation* is still valid vis-à-vis the debtor state.

¹⁴ Frankenberg & Knieper, *supra* note 6 at 428. They place particular emphasis on this aspect of the doctrine: "Odious debts are excepted from the obligation of fulfillment not because they are considered an excessive burden to the successor, but rather because they are contracted under abuse of rights. The abuse is constituted in a *purpose* which contradicts the interest of the attributable subject (the population)..." [emphasis added].

¹⁵ Feilchenfeld, *supra* note 3 at 714. O'Connell, *supra* note 4 at 459. Frankenberg & Knieper, *supra* note 6 at 429-430. Foorman & Jehle, *supra* note 5 at 24-25.

¹⁶ Sack, *supra* note 1 at 157.

¹⁷ Frankenberg & Knieper, *supra* note 6 at 427. In addition to Sack, *supra* note 1 at 29, they cite G. Jèze, *La partage des dettes publiques au cas de démembrement de territoire* (Paris: M. Giard, 1921) at 8.

¹⁸ *Supra* note 5 at 714.

¹⁹ M. Hoeflich "Through a Glass Darkly: Reflections upon the History of the International Law of Public Debt in Connection with State Succession" (1982) 1 Ill. L.R. 39 at 65.

²⁰ O'Connell, *supra* note 4 at 460.

²¹ *Great Britain v. Costa Rica*, (1923) 2 Ann. Dig. 34 [hereinafter *Tinoco Arbitration*].

²² *Ibid.* at 176.

ends.²³ Sack therefore proposes a process through which the doctrine could be applied practically in a manner that respects the legitimate interests of all parties:

- (1) The new government would have to prove and an international tribunal would have to ascertain the following:
 - (a) that the needs, which the former government claimed in order to contract the debt in question, were odious and clearly in contradiction to the interests of the people of the entirety of the former State or a part thereof, and
 - (b) that the creditors, at the moment of paying out the loan, were aware of its odious purpose.
- (2) Upon establishment of these two points, the creditors must then prove that the funds for this loan were not utilized for odious purposes - harming the people of the entire State or part of it - but for general or specific purposes of the State which do not have the character of being odious.²⁴

One can see that in requirement 1(a) and (b) the claimant must show that the debt was *incurred* against the interests of the population. Sack does not propose a strict test to show that the proceeds were *in fact* spent contrary to the interests of the population, but this aspect must be seen as implicit, and is treated as so in O'Connell's summary of this test.²⁵

Another interesting aspect of the test is the requirement in 1(b) that the creditors be aware of the odious purpose of the loan at the moment of paying it. It follows from this requirement that where a debt was contracted for one purpose, but subsequently applied to a different purpose that is odious, and the creditor is aware of this fact, the debt would be deemed odious. This would address the problem of loans that are paid in installments where the regime subsequently applies the funds to odious purposes with the full awareness of the creditors.

The requirement of consent is notably absent from Sack's test, but a prominent aspect of Feilchenfeld's treatment. It is likely that Sack either thought the criteria implicit, or simply never thought any population would consent to anything to its detriment, thereby making the criteria superfluous. This issue is not crucial, but is explained in greater detail below (Section 4.2). This 'test' subsumes the various elements associated with the doctrine. To conclude, odious debt involves three aspects: (1) absence of consent, (2) absence of benefit in the purpose and effect of the transaction, and (3) creditor awareness of both of these elements.

F. Different Kinds of Odious Debt

By 1967, O'Connell had classified odious debts into two categories, corresponding roughly with the state practice in relation to the doctrine: hostile debts and war debts. Since the publication of O'Connell's book, the doctrine of odious debt has been applied to a third kind of situation, namely, developing world debts not spent in the interests of the population. I examine each category in turn. It should be noted that these different usages do not create conceptually distinct categories, but rather indicate the different contexts in which the doctrine has been invoked.

1. Hostile Debts

²³ See F.C.R. Despagnet, *Cours de droit international public*, 4th ed. (Paris: L.Larose et L. Tenin, 1910) at 125; A. Cavaglieri "Regles générales du droit de la paix" (1929) 26 Hague Recueil 315 at 381; O'Connell, *supra* note 3 at 459.

²⁴ Sack, *supra* note 1 at 163. Translation found in Frankenberg & Knieper, *supra* note 6 at 430.

²⁵ *Supra* note 4 at 459.

Hostile debts appear to be those that have been contracted in a manner that constitutes an *aggressive gesture* against the interests of a population. O'Connell gives two examples of hostile debts. The first is the Cuban debt controversy of 1898. In this case, the debts were contracted in order to (1) suppress militarily a popular uprising in Cuba and (2) to reincorporate San Domingo into Spanish Dominions. The second example is the Treaty of Versailles's exemption in 1919 of Poland from the repayment of debts incurred for the purposes of the Prussian and German colonisation of Poland. In both these cases, the debts incurred were aggressive, or 'hostile' to the interests of the nations, and were part of an active campaign against their interests.

2. War Debts

O'Connell notes that there is considerable authority for regarding war debts as odious,²⁶ but adds that there is no intrinsic reason why this should always be so. In this context, 'war debts' are those contracted by the losing state during war or where war is imminent. Some authors suggest that by lending in such circumstances the creditors enter the war voluntarily on a particular side.²⁷ The winning side cannot, it is said, be compelled to repay such debts. However O'Connell states, in agreement with Hyde,²⁸ that in fact creditors should be regarded as having taken their chances with the investment, rather than as having contracted an 'odious debt'.

O'Connell discusses two examples. The first is the British 'annexation' of the Boer Republics in 1900. The British government refused to recognize notes issued as security for loans for war purposes, without giving any particular argument as to its reasons.²⁹ The other example is the policy pursued during the peace treaties negotiations after the First World War. Generally, the victorious Allies excluded war debts from distribution amongst the ceded territories, and insisted they be borne by Germany and Austria and Hungary. In the case of Austria and Hungary, however, a compromise agreement was negotiated, since the entire burden would have resulted in immediate bankruptcy.

O'Connell's view that war debts need not be odious seems without question to be correct, if odious debts are to retain the character given to them by Sack. In the example of the Boer Republics, the issue of benefit to the state was entirely irrelevant. The fact that the losing side contracted the debt was alone sufficient to prevent the winning side from repaying. In the matter of debts contracted by former German territories, an expert advisor to the German financial delegation at the post-WWI negotiations argued the following:

The inhabitants of the territories to be ceded, just as much as those of the remaining German people, were prepared to defend their country which they believed was attacked. Not a single deputy of the territories which are now to be separated from Germany has voted against the war credits. All these deputies were elected by means of the then freest franchise of the world, namely equal, general, secret and direct.³⁰

²⁶ O'Connell, *supra* note 4 at 461.

²⁷ J. Westlake, *International Law*, part I (1904).

²⁸ C.C. Hyde, *International Law chiefly as interpreted and applied by the United States*, 2nd Ed., vol I, (Boston: Little Brown, 1945) at 442.

²⁹ O'Connell, *supra* note 4 at 462. The Law Officers whose advice was followed by the British Government simply stated that they "...do not know of any principle of international law which would oblige Her Majesty's Government to recognize such obligations."

³⁰ *Expert Opinion of the German Financial Delegation* of May 1919, at 5-6, cited in Feilchenfeld, *supra* note 5 at 447.

In this case, the delegation *opposing* the annulment of debts invoked the standards employed in the odious debt doctrine, but to no avail. So it seems that benefit to and consent of the population are of little concern to the issue of war debts. The most that can be gathered from state practice is that the rule regarding war debts is that acquiring states are not obliged to pay the debts related in any way to the war that preceded the acquisition of the debtor state.³¹ Despite this critique, war debts are cited as examples of odious debts, and therefore some of these debts may be viewed as support for the doctrine under international law.

3. Developing World Debts Not in the Interests of the Population

Since Sack, Feilchenfeld and O'Connell's publications, the constellation of international lending has changed dramatically. Although there was no reference to underdeveloped nations in those works, it is clear that contemporary advocates of the doctrine are concerned with applying it to modern 'dictators' debts' that are not spent in the interests of populations. Into this category may fall proceeds spent on personal items, used to fight unjust wars, or distributed in a discriminatory fashion. This kind of application of the doctrine is the concern of Günter Frankenberg and Rolf Knieper.³² Frankenberg and Knieper canvass a number of legal problems related to the overindebtedness of developing countries, odious debt being one of them. Similarly, James Foorman and Michael Jehle, though they do not discuss the developing world in particular, aim to warn potential creditors about how they may arrange contemporary international lending agreements to avoid the potential effects of the odious debt doctrine. Perhaps the most important development is the way in which non-legal writers³³ and non-governmental organisations³⁴ have generated a considerable amount of literature regarding the applicability of the doctrine to third world dictator debts. This suggests that a new and developing category of 'odious debts' are those contracted by the dictatorial leaders of developing nations, the proceeds of which are subsequently squandered in a way that provides no benefit to the population.³⁵

³¹ O'Connell, *supra* note 4 at 462 n.7. O'Connell notes the formulation employed in the German *Entscheidungen des Reichsgerechts in Zivilsachen* 108 (1924) : "According to principles of international law, obligations arising out of the conduct of war, or in any other manner bound up with the war, cannot be enforced against the acquiring State."

³² Frankenberg & Knieper, *supra* note 6.

³³ See P. Adams, *Odious Debts, Loose Lending, Corruption and the Third World's Environmental Legacy* (London: Earthscan, 1991). Adams' book is the most extensively researched and authoritative work on the application of the odious debt doctrine as formulated by Sack to third world debts that were contracted contrary to the interests of the population of the state.

³⁴ See <http://www.odiousdebts.org/odiousdebts/index.cfm> for a general departure point for accessing various aspects of the international campaign against odious debts. See also Hanlon, J., "Dictators and Debt" (1998) Jubilee 2000 Report. Online: Jubilee 2000 Campaign (United Kingdom), <<<http://www.jubilee2000uk.org/news/dictatorsreport.html>>> (date accessed: 25 March, 2001); Canadian Ecumenical Jubilee Initiative, "Corruption and Odious Debts" (2000). Online: <<<http://www.ceji-iocj.org/English/debt/Fact5-Odious.htm>>> (date accessed: 16 February 2001).

³⁵ On the importance of civil society organizations on the development of human rights norms, see Thomas Risse and Kathryn Sikkink, "The Socialization of International Human Rights Norms Into Domestic Practices: Introduction" in T. Risse, S.C. Ropp, & K. Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999) at 1. At 17-35 the authors explain their theory of the 'spiral-model' of human rights socialization. The model explains how norms are formed at the international level, and gradually induce through normative exchange domestic support, challenge from within and without, and eventually internalization of the proposed norms. In this process there is a clear link between norm-advocacy and the eventual adoption of law. The rest of the book examines empirical evidence that supports the theory.

G. Terminological Clarification

In order to avoid any confusion, it is worthwhile to define the terms that will be used henceforth in this paper. First, it is useful to separate the use of three terms that are employed frequently: state, government, and population. ‘State’ is defined as the subject of international law, following the general criteria recognized by international legal scholars and Article 1 of the *Montevideo Convention on the Rights and Duties of States*.³⁶ The state is the entity that comprises government, population, a defined territory and which has legal personality under international law.³⁷ Government refers to the legal regime that is recognized internationally as representing the state, and capable of concluding international agreements that bind the state.³⁸ This may include *de facto* and *de jure* governments. It ought to be noted that the legal recognition of a government does not preclude a finding that an agreement it has entered into is illegal under international law.³⁹

For the purposes of the odious debt doctrine, the ‘population’ is to be understood as all or most of the people in a territory, and as the bearer of the proposed right to benefit from public debts. The stipulation of ‘all or most’ is necessary because some debts may benefit a small class of people, and thus be odious for the majority of the population (e.g. apartheid-era South Africa, and similarly elitist societies). The significance of the population’s proposed rights may flow logically from its integral relationship with the state, namely that it is one of the four primary incidents of statehood. Alternatively, it may be seen as a recognition of a population’s interest apart from statehood.⁴⁰

Another necessary clarification is the use of ‘contrary to the interests’ and ‘not in the interests’ of the population. Both Sack⁴¹ and Feilchenfeld⁴² recognized that personal enrichment was a form of odious debt. However Sack used the term ‘contrary to the interest’, which may appear on its face to refer to ‘hostile debts’ only, while Feilchenfeld used the more accurate terms ‘absence of benefit’. However since these authors recognized personal enrichment as odious, it is fair to infer that proceeds from public debts that are ‘not’ spent in the interest of the population meet the absence of benefit requirement. It is logical to assume that funds for which one is liable to repay are used contrary to one’s interest when no benefit is received from them.

³⁶ See I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Oxford University Press, 1998). *Montevideo Convention on the Rights and Duties of States*, 1933.

³⁷ Brownlie, *ibid.* at 70 and following.

³⁸ See Brownlie, *ibid.* at 647-8 for a discussion of agency and representation. Governments as state organs are not the only entities that may bind the state to international agreements..

³⁹ See Section II (Invalidity of Treaties), particularly Arts. 49-53, of the *Vienna Convention on the Law of Treaties*, 23 May 1969, U.N. Doc. A/CONF.39/27 at 289 (1969), 1155 U.N.T.S. 331. See also *infra*, section 4.5, discussion on State Succession and Government Succession.

⁴⁰ The international right of the self-determination of *peoples*, rather than nation-states, is an example of a right conferred by international law directly upon a part or whole of a population. See *infra* note 151.

⁴¹ *Supra* note 1 at 157. “On pourrait également ranger dans cette catégorie de dettes les emprunts contractés dans des vues manifestement intéressées et personnelles des membres du gouvernement ou des personnes et groupements liés au gouvernement—des vues qui n’ont aucun rapport aux intérêts de l’État.” It is clear that ‘aucun rapport aux intérêts de l’État’ and ‘contrary to the interests of the State’ need not be interpreted as being identical. However there is no sound reason for admitting the latter without also admitting the former.

⁴² Feilchenfeld, *supra* note 3 at 710. He adds that “In these cases, the use will normally not only be contrary to fiscal law but constitute an act which is subject to punishment under criminal law.”

II. Evidence of the Doctrine of Odious Debt in International Law

A. Introduction

What is the status of the doctrine under international law? The doctrine claims to qualify the rule of repayment that is said to exist in respect of any validly concluded international treaty. Once authority is given to be bound by a treaty, the state is bound to respect it in accordance with the principle *pacta sunt servanda*.⁴³ In cases of state succession, where the legal personality of the predecessor state was extinguished and a new one replaces it, there is considerable state practice and a variety of rules purporting to maintain the existence of the predecessor's obligations.⁴⁴ Both of these straightforward obligations shall be collectively known as the 'rule of repayment'.

The doctrine of odious debt is not proposed as a legal norm to which states are bound; rather, it is a qualification to the rule of repayment. That is, when the necessary conditions are present, the purported debt is unenforceable under international law against the state that contracted it. In order to establish the existence of this exception to the rule, however, I consider the evidence of it under the traditional categories of the sources of international law.

Article 38 of the Statute of the International Court of Justice is "...generally regarded as a complete statement of the sources of international law."⁴⁵

Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
international custom, as evidence of a general practice accepted as law;
the general principles of law recognized by civilized nations;
subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

Article 59

The decision of the Court has no binding force except between the parties and in respect of that particular case.

In the sections that follow I examine evidence of the doctrine in a manner consistent with this classification of sources, though the order is changed somewhat as a matter of convenience.

B. International Custom

⁴³ See Art.26 of the *Vienna Convention on the Law of Treaties*.

⁴⁴ Feilchenfeld, *supra* note 3 (who postulates a 'rule of maintenance'); O'Connell, *supra* note 4 (who postulates a rule of 'acquired rights', which is roughly based on the doctrine of unjust enrichment); for commentary on both, see Hoeflich, *supra* note 19.

⁴⁵ Brownlie, *supra* note 36 at 3.

The proof of an international customary law depends upon the establishment of three elements: (a) uniformity and consistency of state practice, (b) generality of state practice and (c) *opinio juris*.⁴⁶ Uniformity refers to consistent usage between the relevant states, or absence of fluctuation and change in practice with regard to the norm alleged to be law. Generality refers to the acceptance of the norm by a substantial number of relevant states, and *opinio juris* is the belief of states that the practice is in some way obligatory *as law*, rather than expedient usage.⁴⁷ In the case of odious debts, the concern will be to show how some state practice has coalesced around the recognition of this doctrine, and thus created an exception to the rule of repayment.

1. The US Repudiation of Texan Debts

Other US practice regarding the non-payment of national debts concerns the annexation of the Republic of Texas in 1844. The US and the Republic of Texas drafted a treaty designed to implement the union of the two, and in which the assumption of Texas' debt was provided.⁴⁸ However, the US Senate failed to ratify the treaty, and the union took place by joint resolution instead.⁴⁹ The issue of pre-annexation debts remained outstanding. In 1850, the US agreed to transfer \$10,000,000 to the state of Texas in consideration of the cession of the territory, but in exchange for the revocation of all claims upon the United States for the liability of the Texan debts.⁵⁰ After extensive debate and proceedings before a claims commission, the American government finally paid the majority of the debt on a pro rata basis in 1855. This payment, however, did not satisfy all of the creditors claims, and the position of the American government between 1844 and 1855 displays great uncertainty regarding its obligation to repay in cases of state succession.⁵¹ Hoeflich notes that the position of the American government during this time tended to regard equitable arguments for repayment as more significant, and binding upon them, than legal arguments.

[A]t that time the issues were not perceived as wholly legal in the sense that by virtue of the transfer of sovereignty to the United States there was, *ipso facto*, placed on the United States a binding legal obligation to assume the debt. Rather, the language and argumentation indicate that the question was seen more in terms of what would be "right" and "just" in the circumstances.⁵²

So while this is not an example of the odious debt doctrine, it does represent the American tendency to question on moral or equitable grounds the automatic devolution of debts.

2. Domestic Practice: North Carolina, South Carolina and Mississippi

Certain states in the United States have repudiated debts on the basis of fraudulent activities by the agents purporting to represent those states. Cases include North

⁴⁶ Brownlie, *supra* note 36 at 5-11.

⁴⁷ *Ibid.*

⁴⁸ Hoeflich, *supra* note 19 at 48.

⁴⁹ *Ibid.* at 49.

⁵⁰ *Ibid.*

⁵¹ *Ibid.* at 50.

⁵² *Ibid.*

Carolina, South Carolina and Mississippi, all of which occurred between 1800 and 1880. Sack notes that these debts fall into the category of odious debts.⁵³

Between 1848 and 1870, the state of North Carolina issued a series of state bonds.⁵⁴ Although most of the debt was contracted in order to construct rail and road ways, and some to repay previous debts, subsequent investigations revealed that the debts were procured in a reckless manner, and that the funds were misappropriated. Bribery and corruption of the legislature was said to have played an important role in the scandal.⁵⁵ After this investigation, a series of legislative Acts were passed in which payment upon some of the bonds was restricted. The bondholders applied to a court to have payment compelled. The Superior Court of Wake County held that the bonds were invalid because the agent of the state exceeded his powers when issuing the bonds.⁵⁶ The Supreme Court of the United States later upheld the superior court decision.⁵⁷

In South Carolina, loans were contracted between 1861 and 1863 for a variety of purposes, and after the state defaulted, an investigation revealed that many of the debt transactions were illegal and fraudulent.⁵⁸ The legislature attempted to appease doubts as to the validity of the debt by issuing a declaration in 1872 that all debts listed in the State Treasurer's report are valid and legal. However persistent default was followed by a subsequent rescheduling and reduction of the debt, which was challenged successfully by some creditors.⁵⁹ Nevertheless the problems of repayment continued, and a court of claims was established with the mandate of examining the legality of the debts. The Supreme Court of the state was finally called upon to decide the issue, and it found that some bonds were illegal because they were issued "...without any authority whatsoever."⁶⁰ A Commissioner was subsequently appointed to resolve the outstanding issues, and his report found \$1, 126, 762.99 to be invalid, while \$4,479,048.05 was held to be valid.⁶¹

The state of Mississippi went through a similar crisis.⁶² During the 1830's, the state issued a set of bonds in order to finance the Union Bank, which was chartered by the state in 1837. However the sale of the bonds violated the instructions given to the Bank's agents, and the Governor of the State later alleged that the bonds were illegal and sold fraudulently.⁶³ He recommended repudiation to the legislature, which refused. Shortly thereafter, a new legislature decided in favour of repudiation. This decision was reached notwithstanding the opinions of the courts, whose independence in the matter has been challenged.⁶⁴ Thus the bondholders were never fully repaid.

These cases of domestic repudiation do not involve an invocation of the doctrine of odious debts, not least of all because the doctrine had not been pronounced at the time, but are viewed by Sack as supporting the principle. The

⁵³ Sack, *supra* note 5 at 158. "Les cas de répudiation de certains emprunts par divers États de l'Amerique du Nord. L'une des principales raisons justifiant ces répudiations a été le gaspillage des deniers empruntés...[Les] opérations louches ont été souvent le résultat d'un accord entre des membres indéliçables du gouvernement et des créanciers malhonnêtes."

⁵⁴ For a comprehensive summary of the events surrounding the North Carolina debt issue, see R. C. McGrane, *Foreign Bondholders and American State Debts* (New York: MacMillan, 1935) at 334-344.

⁵⁵ *Ibid.* at 335, where the author refers to the Railroad lobbyists as "plunderers".

⁵⁶ McGrane, *ibid.* at 342 (no style of cause or reporter given).

⁵⁷ *Baltzer v. North Carolina*, 161 U.S. Reports 240.

⁵⁸ McGrane, *supra* note 49 at 344-354.

⁵⁹ *Ibid.* at 351.

⁶⁰ *Ibid.* at 353.

⁶¹ *Ibid.* at 354.

⁶² *Ibid.* at 193-222.

⁶³ *Ibid.* at 200.

⁶⁴ McGrane, *ibid.* at 213-214.

grounds upon which the debts had been repudiated in each case were that the transactions were tainted with fraud, served personal enrichment rather than public purposes, and were contracted in absence of proper authority.

3. Mexican Repudiation of Austrian Debts, 1867

Between 1863 and 1867, the Habsburg Emperor Maximilian contracted debts at onerous rates of interest to maintain his sovereignty over Mexico and suppress an uprising there.⁶⁵ In 1883, 16 years after the fall of Maximilian, the Mexican government under President Juarez repudiated the entirety of the alleged debt against them. “La loi du 18 Juin 1883 ne reconnut pas les dettes contractées ‘par les gouvernements qui prétendaient avoir existé au Mexique du 17 décembre 1857 au 24 décembre 1860 et du 1er juin 1863 au 21 juin 1867.’”⁶⁶ Pomeroy mentions that “...a large part of those debts has been created to maintain that usurper in his place against the legitimate authority and all of them were most scandalously usurious.”⁶⁷ So although the Emperor had legal sovereignty over the territory, the debts were deemed odious to the population and the state as a whole.⁶⁸

4. The Chilean Conquest of Tarapaca, 1880

Prior to 1879, Peru had pledged certain guano deposits and the proceeds for the sale of such deposits as security for a portion of its national debt.⁶⁹ In 1789, Chile occupied the area in which the deposits were located. In February of 1880, the Chilean General Escala decreed that one million tons of the deposits were to be sold, with fifty percent of the proceeds accruing to Chile and the balance transferred to the Bank of England for distribution among Peru’s creditors. The creditors included American citizens and British subjects.⁷⁰ This decree was subsequently confirmed in the Peace Treaty of Ancon, 1883, in which Peru formally ceded the Province of Tarapaca to Chile. Article 8 of the treaty dismissed all other creditor rights in the ceded area, regardless of their nature, and specified that the Chilean government regarded her concessions regarding the guano deposits as voluntary.⁷¹

What is particularly interesting in this case is that the liens against the deposits in no way benefited the territory annexed by Chile. In response to the British argument that the deposits had acquired a civil mortgage, the Chilean government replied that (1) the assets had passed to Chile by virtue of conquest, and (2) that the ceded territories had not benefited from the liens. Although Feilchenfeld claims that the latter argument was not regarded by Chile as relevant under “strict law”, the letter he cites in support of this claim may suggest a different interpretation:

But it will be well to remember that the loans of 1870 and 1872 had for their object the building of railroads and other national works which absorbed the sum of 82,000,000 silver [Peruvian] soles, employed in benefiting territory only

⁶⁵ Sack, *supra* note 1 at 18 and 158.

⁶⁶ *Ibid.* at 158.

⁶⁷ J.N. Pomeroy, *Lectures on international law in time of Peace* (Boston: Houghton-Mifflin, 1886) at 75.

⁶⁸ This case is Sack’s first example of state practice in support of the doctrine, *supra* note 1 at 158.

⁶⁹ See Feilchenfeld, *supra* note 3 at 321-329 for an extensively referenced summary of the ‘controversy’.

⁷⁰ Hoeflich, *supra* note 19 at 56.

⁷¹ Feilchenfeld, *supra* note 3 at 323. “Artículo 8: Fuera de las declaraciones consignadas en los artículos precedentes, i de las obligaciones que el Gobierno de Chile tiene *espontaneamente* aceptadas en el supremo decreto de 28 de marzo de 1882, que reglamento la propiedad salitrera de Tarapaca, el espresado Gobierno de Chile no reconoce créditos de ninguna clase que afectan a los nuevos territorios que adquiere por el presente Tratado, cualquiera que sea su naturaleza i procedencia.” [Emphasis added].

which Peru conserved, without ever spending a single pound sterling in Tarapaca. This weighty circumstance united to the general form and mere promise of honor which the bonds of the Peruvian debt carry makes all reasonable discussion with the bondholders unsustainable.⁷²

Although not a direct instance of odious debt, the Chilean Debt controversy is significant in at least three ways. First, no obligation to repay the debts of the ceded territory was recognized by the Chilean government. Second, the payments that were eventually made were likely granted in consideration of political interests, as illustrated by the Chilean refusal to recognize any other creditor rights concerning the rest of Tarapaca. Third, and most important for this analysis, the fact that the debts did not benefit the territory was considered a ‘weighty circumstance’ in dismissing the argument for a legal obligation to repay.

5. The US Repudiation of the Cuban Debt

The Cuban Loans negotiations at the Paris Conference of 1898 is generally regarded as the first direct application of a doctrine of odious debts.⁷³ The Conference was a part of the peace negotiations that followed the Spanish-American War of 1898. The Cuban debts consisted of various loans issued by the Spanish Government after 1880. Two Spanish laws consolidating and converting the previous loans were passed in 1884 and 1885 respectively.⁷⁴ A loan was then floated by Royal Decree in 1886,⁷⁵ which provided that the revenue from the Island of Cuba would serve as a pledge on the security of the loan:

In order to satisfy the interest and the redemption of the Mortgage Bills, there shall be consigned every year in the Budget of the Island of Cuba the necessary amount for these costs...The new bills shall have the special guarantee of the receipts of the Customs, the Seal, and the stamp office, of the Island of Cuba, the direct and indirect taxes existing in the Island, or which may be established there in the future, and the general guarantee of the Spanish nation.⁷⁶

The Cuban loans were in fact loans contracted under Spanish laws, and their repayment was Spain’s obligation. As they were secured upon Cuban revenues, the issue between the US and Spain was whether those financial obligations devolved to the US upon the cession of the territory. Spain attempted to validate the claim that they did at the negotiations in the Paris Conference. The Spanish argument consisted of two primary parts: (1) Spain was entitled to repayment by virtue of their prior sovereignty over the territory, and (2) it was entitled by virtue of the revenue pledges (what Feilchenfeld calls the “local connection”).⁷⁷ The Americans opposed both of these arguments vigorously, but it was in opposition to the second of them that they raised the defence that the debts were odious and thus not repayable.

⁷² Feilchenfeld, *ibid.* at 328. The citation refers to a note written by Hugh Fraser, the British Minister in Santiago, to the Chilean government on December 28, 1887. It is cited to the U.S. 50th Cong., 2nd Sess., House Ex. Doc. 1, pt. I, p. 185.

⁷³ For the most extensive analysis of the legal negotiations regarding the Cuban loans, see Feilchenfeld, *supra* note 3 at 329-343.

⁷⁴ Feilchenfeld, *supra* note 3 at 332.

⁷⁵ Though not specified, it appears its purpose was to repay creditors of the earlier debts.

⁷⁶ Cited in Feilchenfeld, *supra* note 3 at 333.

⁷⁷ Feilchenfeld, *ibid.* at 333-34.

Part of the Spanish Commissioners' claim appeared to assert an equitable right of repayment:

It would be contrary to the most elementary notions of justice and inconsistent with the dictates of the universal conscience of mankind for a sovereign to lose all his rights over a territory and the inhabitants thereof, and despite this to continue bound by the obligations he had contracted exclusively for their regime and government. These maxims seem to be observed by all cultured nations that are unwilling to trample upon the eternal principles of justice...⁷⁸

This claim invited the equitable response that the regime in question was not representative of the Island's interests. The American Commissioners argued that the debts were 'odious', and put forth two arguments in support of their claim: (1) that the loans had not been contracted for the benefit of Cuba, but rather contrary to its interests, and (2) that the burdens connected with those loans had been imposed upon Cuba without its consent.⁷⁹ The fit between this practice and the doctrine is perfect.

6. Great Britain's Annexation of the Boer Republics in 1900

Ernst Feilchenfeld classified British and US practice regarding the repayment of debts as being founded upon notions of justice rather than positive law, and in contrast to Continental juristic opinion.⁸⁰ Great Britain demonstrated that approach when refusing to repay debts incurred by the Boer Republics in order to try to repel the British military conquest. In *Postmaster General v. Taute*,⁸¹ the Supreme Court of the Transvaal declared that the Boer debts had devolved upon Britain, who as the new sovereign was responsible for all of the territory's outstanding debts. The British government refused to accept this claim with respect to public debts. In the case of war debts, the British position was very similar to that of the United States in the Cuban Debt controversy:⁸² "The British Government denied all legal responsibility for such "odious" debt, denied the Republic's capacity to have issued such debt validly, and announced that the British Government would not honor the bonds upon presentation."⁸³ The British Government later did pay, *ex gratia*, ten percent of the value of the bonds.

7. The Soviet Repudiation of Tsarist Debts, 1918

⁷⁸ Cited in Hoeflich, *supra* note 19 at 52-53; Feilchenfeld, *ibid.* at 336.

⁷⁹ Feilchenfeld, *ibid.* at 337. The famous passage in which these arguments are found is the following, cited in Hoeflich, *ibid.* at 53, n64: "From no point of view can the debts above described be considered as local debts of Cuba or debts incurred for the benefit of Cuba. In no sense are they obligations properly chargeable to that island. They are debts created by the government of Spain, for its own purposes and through its own agents, in whose creation Cuba had no voice, from the moral point of view, the proposal to impose them upon Cuba is equally untenable. If, as is sometimes asserted, the struggles for Cuban independence have been carried on and supported by a minority of the people of the island, to impose upon the inhabitants as a whole the cost of suppressing the insurrections would be to punish the many for the deeds of the few. If, on the other hand, those struggles have, as the American Commissioners maintain, represented the hope and aspirations of the body of the Cuban people, to crush the inhabitants by a burden created by Spain in the effort to oppose their independence would be even more unjust."

⁸⁰ Feilchenfeld, *supra* note 3 at 312.

⁸¹ [1905] T.S. 582 (Sup. Ct. 1905).

⁸² And acknowledged as so by Hoeflich, *supra* note 19 at 59.

⁸³ Hoeflich, *supra* note 19 at 59; Feilchenfeld, *supra* note 3 at 380-81.

After the Revolution of 1917, the Provisional Soviet government declared that it would repay the outstanding debt of the former regime. However Sack notes that “it seems that Russia’s recognition of all the debts and obligations of the Russian Empire was not motivated by the principle of state succession, but by the particular circumstances in which Russia found itself.”⁸⁴ By 1918, the Soviet government had repudiated the debt and it remains unpaid to this day.⁸⁵ Hoeflich mentions that the debts may well have been regarded as “odious”⁸⁶ and Sack refers to Soviet doctrine that regards acts of previous governments as incurring personal obligations only, and not ones which bind the state.⁸⁷ Foorman and Jehle cite a document in which the Soviet Government supports its claim with the precedents of the United States repudiating its treaties with England and Spain.⁸⁸

It would be relatively simple to regard the Soviet repudiation with disdain due to the ideologically charged nature of its international political position. However Sack notes that the character of a successor regime is irrelevant to a finding that a debt was odious; in such cases, the debt still falls with the demise of the prior regime.⁸⁹ It would be difficult to argue that Tsarist Russia ruled in the interests of its population, and it seems clear that this repudiation was largely a recognition of that fact.

8. Repudiation of Polish Debts at the Treaty of Versailles, 1919

O’Connell writes that the doctrine of odious debts “...was the test employed in the drafting of the Treaty of Versailles, which exempted Poland from the apportionment of [certain] debts.”⁹⁰ Those debts were those that, in the opinion of the Reparation Commission, were attributable to measures taken by the German and Prussian governments to colonize Poland.⁹¹ In 1866, a fund of 100,000,000 marks was put at the disposal of the Prussian government in order for it to fund the purchase of Polish estates by ethnic Germans. That fund was replenished in 1898, and again in 1902. As the measures were designed to expand the Prussian dominion and culture, and limit the native Polish influence, few Polish estate holders were willing to sell. Thus the Prussian government passed a law in 1908 allowing for the expropriation of such territories with compensation, and simultaneously increased the fund by 25,000,000 marks and authorized the issue of bonds. In Versailles, the Reparation Commission refused to apportion those debts against the newly liberated state of Poland on the grounds that such action was to be considered a just reversal of “...one of the greatest wrongs of which history has record.”⁹² As indicated above in section 2.6.2, this is generally regarded as a direct application of the doctrine of odious debt.

⁸⁴ Sack, *supra* note 1 at 52 [translation].

⁸⁵ It is interesting that none of the sources mention the date of any Act, Declaration or Law passed by the Soviet Union in which the debt was in fact repudiated. As such, it is difficult to assess the grounds upon which the government repudiated. The most likely explanation, consistent with Soviet doctrine as expounded by O’Connell, *supra* note 4 at 19-22, is that the debts were regarded as detrimental to the territory and population of the State.

⁸⁶ Hoeflich, *supra* note 19 at 62. This author is concerned primarily with the argument of the British Government towards the repayment of the debt, a position that he regards as “somewhat strained” owing to its affirmation of settled international law regarding the payment by one government for a previous government’s acts.

⁸⁷ Sack, *supra* note 1 at 68.

⁸⁸ Foorman & Jehle, *supra* note 5 at 20.

⁸⁹ Sack, *supra* note 1 at 157. “Quand même un pouvoir despotique serait renversé par un autre, non moins despotique et ne répondant pas davantage à la volonté du peuple, les dettes “odieuses” du pouvoir déchu n’en demeurent pas moins des dettes personnelles et ne son pas obligatoires pour le nouveau pouvoir.”

⁹⁰ O’Connell, *supra* note 4 at 460.

⁹¹ The details of the debts are provided in Feilchenfeld, *supra* note 3 at 450-53.

⁹² O’Connell, *supra* note 4 at 460-61.

9. *Costa Rica v. Great Britain*

In 1922, Costa Rica refused to honour loans made by the Royal Bank of Canada to the former dictator Federico Tinoco. The case is examined in detail below, in the section pertaining to judicial decisions (3.5.2), and thus it will not be examined here. It is still important to recognize it as an important example of state practice with respect to a change of government, and not state succession. The case also stands for the principles of public benefit and creditor awareness.

10. *Misapplication: The German Repudiation of Austria Debts, 1938*

At the time of the German annexation of Austria, the Austrian Government was heavily indebted to foreign creditors. The loans were obtained subject to various covenants that were designed to prevent a union of Austria with Germany.⁹³ Upon annexation Germany refused to assume any of the foreign debts of the Austrian Federal Government on the grounds that they were contracted against the state's interest. The German response to the American complaint cited the practice of both the United States and Great Britain.⁹⁴ However, the reasoning was based primarily on the claim that union with Germany was in the interests of Austria, and therefore the aforementioned covenants rendered the debts odious.

Although this is formally an invocation of the doctrine, some writers refer to the position as "legally incorrect".⁹⁵ One of the reasons invoked against the German claim was that large portions of the debt were used for the purchase of food.⁹⁶ Foorman and Jehle use the German example to illustrate the point that the doctrine of odious debts may be exploited for opportunistic ends. While this point is no doubt true, it is equally clear that Sack was well aware of this problem⁹⁷ and thus proposed his model of review before an international tribunal. None of the writers that support the doctrine suggest that it ought to be applied unilaterally by states. This procedure would exclude misapplications of the doctrine such as this one.

11. *Recent State Practice in the Balkans*

The recent dissolution of the former Yugoslavia provides another case of debt apportionment after state succession. The work of the International Conference on Former Yugoslavia (Working Group on Succession Issues) continues without a final agreement on the issue of the apportionment of state debts and assets.⁹⁸ The central principle governing the allocation of the debts is that they be distributed in "equitable

⁹³ Foorman & Jehle, *supra* note 5 at 22. See also Garner, "Questions of State Succession Raised by the German Annexation of Austria" (1938) 32 Am. J. of Int'l L. 421.

⁹⁴ Hoeflich, *supra* note 19 at 63-64.

⁹⁵ Foorman & Jehle, *supra* note 5 at 21.

⁹⁶ *Ibid.* at 22.

⁹⁷ Sack, *supra* note 1 at 162. "N'oublions pas que la question meme de la nature "odieuse" de telle ou telle dette ne saurait etre posée que exceptionnellement, lorsqu'il apparait, d'une facon tout a fait incontestable, que ces dettes sont réellement "odieuses", non seulement aux yeux du nouveau gouvernement...*mais aussi à l'avis des représentants compétants et impartiaux de la famille des nations.*" [Emphasis added].

⁹⁸ See M.Koskenniemi, "The Present State of Research Carried Out by the English Speaking Section of the Centre for Studies and Research" in *Codification: State Succession Tested Against the Facts* (The Hague: Hague Academy of International Law, 1996) 89 at 118 at 122, where the author discusses the distribution of state debts. For a recent update, see *Ministry of Foreign Affairs, Republic of Croatia* "Economic Review" 1/2001 <<http://www.mvp.hr/mvprh-www-eng/7-economic/pregled1-01.html>> (date accessed: 2 May, 2001) for an update on the continuing work of the Working Group.

proportions” and thus far the emphasis has been placed on the importance of local nexus, agreement of the Republics, and the non-prejudicial character of any action taken by the Republics during the interim.⁹⁹ The emphasis on local nexus and equity can be related in principle to the ‘public benefit’ aspect of the odious debt doctrine. It would be surprising if the new Republics agreed to assume any of the debts contracted by the former Federal Republic for the purposes of waging war against the seceding republics. These debts may be viewed as odious, and the imminent prospect of their non-assumption may be viewed, it is submitted, as further support for the doctrine of odious debt.

12. Conclusion Regarding State Practice

In conclusion, it is evident that there is a substantial body of state practice in which debts contracted and the proceeds of which were spent against the interests of a population were regarded as not enforceable by the successor state or government. The significance of this practice may be questioned on grounds of opportunism or as representative of moral rather than legal positions. Regardless, it suffices to demonstrate that the obligation to repay such debts has not been absolute in state practice.

However, it is only fair to acknowledge that an enormous number of states validated their debts after revolutionary or peaceful liberation from former regimes. Such states include post-revolutionary France, Spain, Portugal, the Netherlands, Bavaria, Mexico, Ecuador, Brazil, Costa Rica, Turkey and Germany (in 1918).¹⁰⁰ One could claim that in these cases the doctrine would have been ripe for application. The fact that successor states agreed to assume the debts may be viewed as a powerful body of state practice militating against the doctrine.

However this practice may also be questioned. The following points may be issues that could be considered in the attempt to explain such practice.¹⁰¹ It is likely that many of these revolutions were supported by business interests which likely included a large number of creditors. In each case cited, domestic commercial interests were a driving force behind the revolution, and it is possible if not likely that some powerful domestic creditors had outstanding debts with the pre-revolutionary governments.¹⁰² Second, the political and economic element of debt recognition can not be underestimated. As new states emerge into international relations, recognition and the fear of economic ostracisation are among the primary arguments against debt repudiation.¹⁰³ Third, the debts would need to be examined on a case by case basis to determine whether they were in fact contrary to the interests of the nation in each

⁹⁹ *Ibid.*

¹⁰⁰ Sack, *supra* note 1 at 50-52.

¹⁰¹ These points are thoughts culled from a consideration of the various examples examined in the works of the authors surveyed in this paper. They are meant to be questions for further investigation, and not definitive conclusions.

¹⁰² See for example Y. Makkonen, *International Law and the New States of Africa* (Paris:UNESCO, 1983) at 409-10, where the author explains why the *ipso facto* recognition of colonial debts in Eastern Africa does not imply their *ipso jure* recognition. He also explains the role of local élites in the formation of such debts: “[S]ince there was a widespread retention of the local élite from the colonial period, it might be speculated that some of the individuals in the upper echelons might have personally participated in the process of expending some of the loaned funds, before independence.”

¹⁰³ Sack, *supra* note 1 at 52, commenting upon the political motivations of the initial Russian declaration that the Tsarist debts were valid. Makkonen, *ibid.* at 410: “[T]he new States of Eastern Africa did not want to create any psychological problems which could adversely affect future capital flows by rejecting the colonial debts.” See also T. Lothian, “The Criticism of the Third World Debt and a Revision of Legal Doctrine” (1995) 13 Wis. Int’l L.J. 421 at 426 for a discussion and critique of the argument for ‘Fear of Ostracization’.

case. It is not evident that they all were. The validation of those that were not would not count as state practice in opposition to the doctrine. Finally, it is submitted that not exercising a right should not preclude its existence under international law.

13. Questioning the *Opinio Juris* of the Rule of Repayment

The preceding reflections lead to a consideration of whether the actual practice of debt repayment may always be viewed as obligatory as a matter of law. There have been a number of recent arguments in favour of qualifying the obligation to repay under certain circumstances. There are at least three potential qualifications to the rule of repayment for debts that are or can be related to public benefit: (1) the potential ‘duty to re-negotiate’ debts; (2) post-colonial assumption of debts; and (3) emerging norms regarding fraud and corruption of public officials.

Author August Reinisch reviews the practice of rescheduling state debts through the Paris Club and private debts through the London or New York Clubs.¹⁰⁴ The Paris Club is a multilateral conference of creditor states, held on an *ad hoc* basis and with observer participation by some international organizations.¹⁰⁵ Modifications arranged through this forum include new periods of repayment of capital and interest, changed interest rates and reduction of the principal.¹⁰⁶ In exchange for these concessions, debtor states have adopted ‘stand-by arrangements’ in which they agree to an IMF-supervised macro-economic adjustment programme.¹⁰⁷ The London and New York Clubs are even less institutionalized and more *ad hoc* than the Paris Club. Negotiations are generally conducted by a steering committee appointed on behalf of the creditors.¹⁰⁸ Both the Paris and London/New York Club processes require that the debtors be in “imminent default” and that each debtor country be dealt with on an individual basis. Both of these requirements have been criticized.¹⁰⁹

Reinisch discusses the work of some authors that contend that this practice may amount to evidence of an emerging duty to renegotiate.

Since the beginning of the 1980s...sovereign debt re-structurings have occurred with an increased frequency; they have regularly involved a re-negotiation of existing treaty obligations. Thus it might be argued that a corresponding duty to re-negotiate has evolved or is at least in *statu nascendi*.¹¹⁰

German authors Bothe and Brink argue that the duty may be premised on the notion of a duty of international cooperation, as found in Articles 2(3), 33, 55, and 56 of the *Charter of the United Nations*, and in the *Declaration on Principles of International Law Concerning Friendly Relation and Co-operation among States in Accordance with the Charter of the United Nations*.¹¹¹ If true, this argument would qualify the obligation to repay under certain circumstances, which, it may be argued, may weaken the status of the rule of repayment, at least so far as humanitarian considerations are concerned.

¹⁰⁴ A. Reinisch, *State Responsibility for Debts: International Law Aspects of External Debt and Debt Restructuring* (Köln: Böhlau Verlag, 1995) at 19-26.

¹⁰⁵ *Ibid.* at 21. Organizations include the IMF, World Bank, EC, UNCTAD, OECD.

¹⁰⁶ *Ibid.* at 20.

¹⁰⁷ *Ibid.* at 21.

¹⁰⁸ *Ibid.* at 24. For a more recent discussion of rescheduling of private debts, see R.P. Buckley, “Rescheduling As The Groundwork For Secondary Markets In Sovereign Debt” 26 *Denv. J. Int’l L. & Pol’y* 299.

¹⁰⁹ Reinisch, *ibid.* at 25.

¹¹⁰ *Ibid.* at 30. The author adds, however, that such a duty would remain an essentially procedural duty to negotiate in good faith, with no obligation of result.

¹¹¹ GA Res. 2625, 25 UN GAOR Supp. No.28, UN Doc. A/8028 (1970). Bothe & Brink “Public Debt Restructuring, the Case for International Economic Cooperation” (1986) 29 *G.Y.I.L.* 86.

Against this argument, however, it may be asserted that the Clubs dealings have been of a strictly commercial nature and interest, and lack any quality of *opinio juris* that would render the practice legally significant.

The obligation to repay debts incurred by colonial administrations is another area in which the repayment rule is said to be qualified. The Allied refusal to apportion debts incurred for the colonization of Poland by Germany were exactly of this nature. Article 38 of the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts¹¹² stipulates that no debt shall pass to newly emerging successor states unless there is an agreement to that effect. While the Convention has yet to enter into force, and may in fact never do so, it may be valuable as an indication of juristic opinion at the ILC.¹¹³ Yilma Makkonen explains state practice in respect of colonial debts:

If one looks at the practice of the new States which emerged since the Second World War, there was no acceptance of automatic succession to public debts as a matter of legal obligation. In fact, the practice of Israel, Guinea, Indonesia and Algeria clearly shows that colonial public debts have been considered as the responsibility of the respective colonial powers and that certain of the colonial powers have accordingly recognized their responsibilities and duly taken action to fulfil their obligations.¹¹⁴

Some African countries did not assume pre-independence debts. Tanzania, Eritrea and Rwanda and Burundi each emerged without bearing the full brunt of their predecessor's debts.¹¹⁵ However in most cases most African states did in fact assume colonial debts but never recognized that they were obliged by law to do so. Makkonen explains that “[s]uch positions were voluntarily assumed for political reasons.”¹¹⁶ First, the price of repayment was relatively light compared to the detriment they would suffer in international relations if they repudiated. Second, some of the debts were contracted in order to retain expatriate civil servants that may have been deemed necessary to ensure a smooth transition from the colonial period. In some of these cases, relatively legitimate consent from the colonial state was obtained. Third, there was a widespread retention of local élites dating from the colonial period; this militated against the claim that the debts were entirely a colonial matter (though do not necessarily weaken an odious debt claim). Fourth, some of the debts were recent or ongoing transfers, which precludes the claim that they are colonial. Finally, and related to the first argument, the new states of eastern Africa simply could not afford to take any measure that could reduce in any way investor or creditor confidence, particularly when the new international monetary institutions such as the World Bank were seen as indispensable resources for development. Thus, Makonnen concludes, the practice of repayment should not be confused with a practice recognized as obligatory as a matter of law. The *opinio juris* was absent.¹¹⁷

¹¹² The text is cited in (1983) 20 Int. Leg. Mat. 306.

¹¹³ See Brownlie, *supra* note 36 at 11-12. The author states that “[e]ven an unratified treaty may be regarded as evidence of generally accepted rules, at least in the short run.” As the Convention was adopted in 1983, it is questionable whether it would be supported directly by this statement. For further discussion of the significance of the Convention, see below.

¹¹⁴ Makkonen, *supra* note 102 at 375, citing O’Connell, *supra* note 5 at 431 (Israel), 444 (Guinea), 472 (Indonesia and Algeria). See also K. Zemanek, “State Succession after Decolonization” (1965) 116 *Recueil des Cours* of the Hague Academy of International Law.

¹¹⁵ Makkonen, *supra* note 102 at 434 n.164 (Eritrea), 408 (Tanzania) and 408-9 (Rwanda and Burundi).

¹¹⁶ *Ibid.* at 408.

¹¹⁷ Makonnen’s arguments are detailed much further, *supra* note 102 at 409-410.

Finally, there is an emerging body of international law regarding fraud and corruption.¹¹⁸ These initiatives provide regimes for combating the personal enrichment of public officials, and call for punishment of both the official and the individual or corporation that bribes. Although the link to odious debt has not been made, there is a direct connection in principle. Moral considerations and repercussions upon the civilian population are stressed repeatedly as justifications for such initiatives, particularly because it undermines notions of representation of the population.¹¹⁹ The *Vienna Convention on the Law of Treaties* illustrates how these recent developments are relevant to the notion of consent to be bound by treaty provisions:

Article 49

Fraud

If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty.

Article 50

Corruption of a representative of a State

If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.

In the case of fraud, the fraudulent conduct refers to the actions of another state, and not the person claiming to represent the debtor state. In the case of corruption, the consent must be procured by another state's corruption of its representative, which will only be the case in relatively few instances of odious debt (e.g. Zaire, and only in respect of state-to-state loans). Nevertheless, a strong analogy could be drawn, and this provision may gain wider scope when refreshed by the emerging consensus on corruption. According to the texts and doctrine, corruption is being made a transnational crime, and the wilful participation in the crime by another should be punishable. Therefore, it could be argued, should a creditor be aware of the ends towards which the proceeds of an odious debt will be spent, and those ends are for personal enrichment, then the creditor is an accessory and should be precluded from claiming the value of the debt from the state.

¹¹⁸ There is a burgeoning literature regarding the recent attention paid to problems of corruption in international financial law and politics. See A. Posadas, "Combating Corruption under International Law" (2000) 10 *Duke J. Comp. & Int'l L.* 345 (for a discussion of the UN, OECD, and OAS legal initiatives to combat corruption); J.P. Wesberry Jr. "International Financial Institutions Face the Corruption Eruption" 18 *J. Int'l L. Bus.* 498 (for a discussion of the World Bank's recent change in policy regarding its previous refusal to acknowledge corruption); B. Zagaris & S. Lahkani Ohri, "The Emergence Of An International Enforcement Regime On Transnational Corruption In The Americas" (1999) 30 *Law & Pol'y Int'l Bus.* 53 (for a discussion of the 1996 *Inter-American Convention on Corruption* and a comparison of it to the 1997 *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*); S.R. Salbu, "A Delicate Balance: Legislation, Institutional Change, and Transnational Bribery" (2000) 33 *Cornell Int'l L.J.* 657 (for an evaluation of legislative vs. institutional methods of combating corruption).

¹¹⁹ The Preamble of the *Inter-American Convention Against Corruption* opens as follows: "CONVINCED that corruption undermines the legitimacy of public institutions and strikes at society, moral order and justice, as well as at the comprehensive development of peoples; CONSIDERING that representative democracy, an essential condition for stability, peace and development of the region, requires, by its nature, the combating of every form of corruption in the performance of public functions, as well as acts of corruption specifically related to such performance;..."

C. International Conventions

The 1983 *Vienna Convention on Succession of States in Respect of State Property, Archives and Debts*¹²⁰ is the only international convention that bears upon the subject of debt repayment with respect to state succession, though it is quite naturally silent on the issue of government succession.¹²¹ In his report for the Hague Academy of International Law, Martti Koskenniemi remarks that the Convention is unlikely to come into force for want of ratifications, and has been regarded as "...an example of the less successful codification efforts undertaken within the United Nations."¹²² The failure of the Convention to receive widespread ratification is an illustration of the unsettled nature of the law of international debt repayment in cases of state succession. However, the resulting Convention does represent somewhat of a consensus of juristic opinion, if not diplomatic opinion. If viewed in this light, it may be said that there are two relevant aspects of this Convention.

First, the ILC Draft for the Convention originally contained a reference to odious debts.¹²³ It defined them, "...in rather watery terms, as debts contracted by the predecessor state with a view to obtaining objectives contrary to the major interests of the successor state or not in conformity with international law."¹²⁴ The fact that odious debt was contemplated but eventually excluded from the Convention has dual significance. On the one hand, it indicates some juristic acceptance of the importance of the doctrine, while on the other, it illustrates the reluctance of both states and perhaps the Commission itself to include the doctrine explicitly.¹²⁵ It is submitted, however, that since the late 1970s, when the codification efforts were underway, the advancement of human rights, progress at the World Bank in recognizing its role in the dealing with corrupt regimes,¹²⁶ and the qualification of neo-liberal economics through evidence of severe humanitarian limitations¹²⁷ may push contemporary practice to recognize the increasing prominence of humanitarian considerations in international financial practice. That is, had the Convention been codified today, a greater *opinio juris* may have emerged with respect to the issue of odious debt.

The second relevant point to emerge with respect to the Convention is that it provides that newly independent states are not liable for national debts incurred by the colonial regimes:

Article 38
Newly Independent State

¹²⁰ *Supra* note 112.

¹²¹ I write 'quite naturally' for two reasons: (1) the Convention is concerned with state succession exclusively, and (2) the recognition of government succession would have legal repercussions that would be undesirable for certain States' self-interest.

¹²² Koskenniemi, *supra* note 98 at 118.

¹²³ See P.Wood, *The Law and Practice of International Finance* (London: Sweet & Maxwell, 1980) at 120-21.

¹²⁴ *Ibid* at 120.

¹²⁵ Another significance is that it frames the doctrine in such a manner that it pertains only to cases of state succession. It could be argued that this is weighty evidence in favour of limiting odious debts to cases of state succession only. However, it could only be expected that a Draft Convention on state succession would treat the doctrine insofar as it pertains to that state of affairs. It is submitted that it in no way precludes the operation of the doctrine in both cases of state succession and government succession. See *infra* Section 4.5 for a discussion of the problems associated with state and governmental succession.

¹²⁶ Westberry, *supra* note 118.

¹²⁷ See for example A. Sen, *Development as Freedom* (New York: Knopf, 1999). The book is a synthesis of much of the Nobel Prize winning economist's work in indicating the failure of macroeconomic development initiatives to provide for the interests of all people in the developing world.

When the successor State is a newly independent State, no State debt of the predecessor State shall pass to the newly independent State, unless an agreement between the newly independent State and the predecessor State provides otherwise in view of the link between the State debt of the predecessor State connected with its activity in the territory to which the succession of States relates and the property, rights and interests which pass to the newly independent State.

The agreement referred to in paragraph 1 shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, nor shall its implementation endanger the fundamental economic equilibria of the newly independent State.

Geoffrey Watson explains the potential significance of paragraph 2:¹²⁸

This exception doubtless helps explain why so few developed states have adhered to the Property Convention. By establishing a presumption that newly independent states do not inherit any debt, the Convention gives little incentive to enter into an agreement to take on any of the debt of their predecessors.

This comment is helpful in clarifying the self-interested and potentially unprincipled approach state practice adopts in respect of public debts. Thus although the Convention is viewed as unsuccessful in garnering state consent, it does illustrate the way in which *opinio juris* may precede and push forward the consensual adoption of binding international norms.¹²⁹ Perhaps one ought to link the repudiation of colonial debts to the repudiation of odious debts, for it appears that the justification for the former is that the proceeds were not for the benefit of the local population and were in many cases used to exploit them.

D. General Principles of International Law

1. Unjust Enrichment

Unjust enrichment is a fairly well accepted principle of public international law.¹³⁰ The *Civil Code of Quebec*¹³¹ defines unjust enrichment as follows:

1493. A person who is enriched at the expense of another shall, to the extent of his enrichment, indemnify the other for his correlative impoverishment, if there is no justification for the enrichment or the impoverishment.

Its application in cases of odious debt is fairly straightforward. The creditor, if repaid, would be unjustifiably enriched since the debtor state would be impoverished by paying the debt without having received a correlative benefit. It also applies to

¹²⁸ E.G. Schaffer & R.I. Snyder, *Contemporary Practice of Public International Law* (Dobbs Ferry: Oceana Publications, 1997) at 123-24.

¹²⁹ See Risse & Sikkink, *supra* note 35 for more information on norms preceding law.

¹³⁰ See Schreuer, *supra* note 11; see also J.F. O'Connor, *Good Faith in International Law* (Brookfield, Vermont: Dartmouth, 1991) at 40, where he alludes to the significance of unjust enrichment as part of the principle of good faith. O'Connell, *supra* note 4 at 34 writes "The ultimate principles of legal reasoning are formulated in rubrics known as the 'general principles of international law'...The concept of unjust enrichment is such a principle..." At 266, he clarifies that the concept "...lies at the basis of the doctrine of of acquired rights...", the theory he advocates as a basis of restitution in cases of state succession, where the legal personality and its attendant legal obligations are extinguished.

¹³¹ R.S.Q. 1991, c.64.

creditor rights however, by protecting them where the state is enriched at its expense, if the juridical obligation is extinguished by succession or by lack of contracting authority. In such cases, the creditor is entitled only to the amount by which the state has been enriched.

This argument may suffer from some deficiencies. First, the doctrine of unjust enrichment generally applies in the absence of a legal obligation. That is, if the debtor is bound by law to repay, then the doctrine of unjustified enrichment may not be applied.¹³² Thus the debtor state would not be entitled to extinguish a valid obligation on the basis of the doctrine, and still retains the primary burden of invalidating the obligation itself. Secondly, the doctrine would be a slim statement of law, albeit well recognized, upon which to overturn an immense amount of state practice comprising untold billions of dollars of debt obligations. Therefore it is best seen as a supplementary argument once a convincing case for odious debt is already made.

2. Abuse of Rights

Some commentators, such as Frankenberg & Kneiper, believe that the sound basis for odious debt is found in this doctrine:

Odious debts are excepted from the obligation of fulfillment not because they are considered an excessive burden for the successor, but rather because they are contracted under abuse of rights. The abuse is constituted in a purpose which contradicts the interest of the attributable subject (the population)...¹³³

Some authors argue that abuse of rights has a firm place in public international law,¹³⁴ while Brownlie disputes this statement: “In conclusion it may be said that the doctrine is a useful agent in the progressive development of the law, but that, as a general principle, it does not exist in positive law.”¹³⁵

This argument also suffers from some deficiencies. First, the debate as to whether the doctrine actually exists renders the analogy unconvincing on its own. Second, the doctrine generally exists between contracting parties, a juridical relationship which the debtor state wishes to deny. Third, there is much debate regarding what in fact constitutes abuse of rights. It may be defined as ‘damage caused by the exercise of a right’,¹³⁶ which would leave open the unfortunately large question of whether the creditors were causally responsible for the damage, and whether personal enrichment may even qualify as damage (or whether the repayment is what constitutes damage, which may be better treated under another legal category). Third, even if they accepted the existence of the obligation, the doctrine would again have such far reaching consequences as to suffer from the ‘slimness’ objection mentioned with respect to unjustified enrichment. Nonetheless, it is clear that when contracting an odious debt, the creditor is exercising its rights in some way in which it enables detriment to fall upon the population, and thus the doctrine has some intuitive application notwithstanding its legal complications. A synthesis of these observations would suggest that abuse of rights be accorded the same status as unjust

¹³² Schreuer, *supra* note 11 at 294. In commenting on an arbitral tribunal decision, he writes “[h]ere too international judicial practice was careful to confine restitutional remedies for unjustified enrichment to cases which were not governed by other legal relationships, notably a still-existing contractual bond.”

¹³³ Frankenberg & Kneiper, *supra* note 6 at 428.

¹³⁴ O’Connor, *supra* note 4; E. Zoller, *La bonne foi en droit international public*, (Paris: Editions A. Pedone, 1977) at 109-122.

¹³⁵ Brownlie, *supra* note 36 at 448.

¹³⁶ Brownlie, *supra* note 5 at 447, citing Article 1912 of the *Mexican Civil Code*, also referring to Article 226 of the *German Civil Code*.

enrichment, namely, a supplementary rather than free-standing argument for why the repayment of odious debts is not required under public international law.

3. Obligations Arising From Agency

A more promising analogy can be drawn from the municipal common law of agency and civil law of mandate. It is promising because it is an elaborate doctrine with a constellation of actors that are strikingly similar to those of government, state and creditor, and which benefits from a rich jurisprudence on the rights and obligations of each party. Therefore it does not suffer from the slimness objection that would hang too much on a bare equitable assertion without reference to similar factual circumstances.

a) Definition of Agency

Agency is a difficult relationship to define clearly, but the following attempt by G.H.L. Fridman provides a useful starting point:¹³⁷

Agency is the relationship that exists between two persons when one, called the *agent*, is considered in law to represent the other, called the *principal*, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or disposition of property.

The *Civil Code of Quebec* provides an example of the civilian mandate system, which is equivalent in important respects. It defines mandate at Art.2130:

2130. Mandate is a contract by which a person, the mandator, empowers another person, the mandatary, to represent him in the performance of a juridical act with a third person, and the mandatary, by his acceptance, binds himself to exercise the power. [...]

Art. 2137 allows implicit mandates:

2137. Powers granted to persons to perform an act which is an ordinary part of their profession or calling or which may be inferred from the nature of such profession or calling, need not be mentioned expressly.

Fridman explains that the factor of the greatest importance in a relationship of agency is the extent to which one person can produce legal consequences for another.¹³⁸ In public international law, Brownlie notes that the notion of agency extends or could extend to topics such as diplomatic representation, law governing acts of personal agents of states, and "...the distinction between acts of officials for which a state is

¹³⁷ G.H.L. Fridman, *The Law of Agency*, 5th Ed. (London: Sweet & Maxwell, 1983) at 9.

¹³⁸ *Ibid.* See also G. McMeel, "Philosophical Foundations of the Law of Agency" [2000] 116 L.Q.R. 387 (in which the author contrasts the 'consensual' model of agency with the 'power-liability' model, and between which he claims no irreconcilable conflict exists). See also Lord Diplock's comments on agency of necessity in *China Pacific S.A. v. Food Corporation of India (The Winson)* [1982] A.C. 939 at 958: "Whether one person is entitled to act as agency of necessity for another person is relevant to the question whether circumstances exist which in law have the effect of conferring on him authority to create contractual rights and obligations between that other person and a third party that are directly enforceable by each against the other. It would, I think, be an aid to clarity of legal thinking if the use of the expression 'agent of necessity' were confined were confined to contexts in which this was the question to be determined..."

responsible and their ‘personal’ acts, the continuity of governments, including the responsibility of states for acts of previous revolutionary regimes...”¹³⁹ On its face, Fridman’s definition seems to apply well to the relationship between government representatives and the state. The government would be seen as acting as the agent for the state, which is the principal. The fact that the government enters into contracts that bind the state, notwithstanding changes of government, confirms that the agency model is the only legal construct that explains the nature of the relationship between government and state.

b) Obligations of the Agent towards the Principal

Under municipal common law, these obligations are generally classed as (1) those arising from agreement and (2) those arising from the fiduciary nature of the agency.¹⁴⁰ Regarding the fiduciary nature of agency, Fridman writes that “[i]rrespective of any contract, *or even agreement*, between the parties, once the relationship of principal and agent exists, *however it may arise*, a complex of duties attaches to the agent.”¹⁴¹ Generally speaking, the obligation is that the agent must not let his own personal interest conflict with the obligations he owes to his principal.¹⁴² In the Civil Law, the mandatory’s (agent’s) obligations are even clearer: Art.2138: “He shall ...act honestly and faithfully in the best interests of the mandator, and avoid placing himself in a position that puts his own interest in conflict with that of the mandator.”¹⁴³ Specific modalities of these obligations include the obligation of full disclosure to the principal/mandator¹⁴⁴ and the prohibition on secret profits.¹⁴⁵ In the first case, the agent must make full disclosure of all material circumstances, so that the principal can choose whether or not to consent. In the second case, secret profits refer to any financial advantage the agent receives beyond that to which he is entitled by way of remuneration.¹⁴⁶ This may include bribery, corruption of the agent or outright fraud.

Thus the municipal law of agency/mandate provides a clear example of the logical consequence of the agency position; namely, that when one person is entitled to make binding juridical commitments for another, there is a correlative obligation to use that power to further and not conflict with the principal’s interest. It seems that the only objection to this claim is that the government of a state owes no fiduciary obligation to its population, or to the state itself. It could be said that under private law, there is an express domain of consensual relations between private actors. Where

¹³⁹ Brownlie, *supra* note 36 at 457-8.

¹⁴⁰ Fridman, *supra* note 137 at 137 ff. (agreement) and 152 ff. (fiduciary). See also the CCQ, Arts. 2138-2156, “Obligations Between Parties”. Art. 2138: A mandatory is bound to fulfill the mandate he has accepted, and he shall act with prudence and diligence in performing it. He shall also act honestly and faithfully in the best interests of the mandator, and avoid placing himself in a position that puts his own interest in conflict with that of his mandator.

¹⁴¹ Fridman, *ibid.* at 152-3 [emphasis added].

¹⁴² Fridman, *ibid.* at 153.

¹⁴³ CCQ Art.2138, *supra* note 5.

¹⁴⁴ Fridman, *supra* note 137 at 153 ff., (referred to as ‘Fidelity’, with much case law cited). CCQ Art. 2139. During the mandate, the mandatory is bound to inform the mandator, at his request or where circumstances warrant it, of the stage reached in the performance of the mandate. The mandatory shall inform the mandator without delay that he has fulfilled his mandate.

¹⁴⁵ Fridman, *ibid.* at 156ff. and CCQ Art. 2146. The mandatory may not use for his benefit any information he obtains or any property he is charged with receiving or administering in carrying out his mandate, unless the mandator consents to such use or such use arises from the law or the mandate.

If the mandatory uses the property or information without authorization, he shall, in addition to the compensation for which he may be liable for injury suffered, compensate the mandator by paying, in the case of information, an amount equal to the enrichment he obtains or, in the case of property, an appropriate rent or the interest on the sums used.

¹⁴⁶ Fridman, *ibid.* at 156.

that consent has not been obtained explicitly, the law provides supplementary rules to preserve the implicit will of the parties. However under public international law, the notion of consent legitimizing rule is relatively recent, and thus no similarly universal principle akin to a fiduciary obligation exists. State practice has not been premised on a notion of consensual agency by governments, and if we were to adopt it, many international obligations would be rendered void for lack of contracting authority. Further, while the alleged obligation may exist in constitutional democracies, it cannot be said to have existed in states that were not democracies, and laid no claim to be so.

This argument is problematic for at least two reasons. First, it is plausible to argue that there is an international duty to rule in accordance with the interests of the population, which manifests itself in the principle of self-determination, international human rights norms, and UN Charter commitments.¹⁴⁷ Second, the principle is not based as much on consent as on the very relationship of agency. It is implicit in the doctrine that the power of agency carries the corollary of representing the principal's interests, and thus this argument would confuse agency by agreement with agency arising from the fiduciary relationship. Finally, there would be no international upheaval if one accepted these conclusions because it would only empower states to annul those agreements that were contracted against their interests, and manifestly so.¹⁴⁸ Therefore only those agreements that were expressly contrary to the state's interests would be deemed voidable.

c) Liability of Third Parties for Assisting in a Breach of Trust

The discussion above discusses the obligations of agent with respect to the principal, but it leaves for consideration the liability of those who assist the agent in the breach of its obligation.¹⁴⁹ Generally speaking, the common law holds liable any person who wilfully or knowingly assists in a breach of trust.¹⁵⁰ Liability is founded on either of two criteria: knowing assistance or knowing receipt.¹⁵¹ Knowing assistance is the standard most relevant to the doctrine of odious debt.

The criteria for knowing assistance was developed in the British case *Baden, Delvaux v. Société Générale pour Favoriser le Développement du Commerce et de*

¹⁴⁷ See UN Special Rapporteur on the Granting of Independence to Colonial Countries and Peoples (Hector Gros Espiell), *Implementation of United Nations Resolutions Relating to the Right of Peoples under Colonial and Alien Domination to Self-Determination*, UN Doc. E/CN.4/Sub.2/390, 22 June 1977; Brownlie, *supra* note 5 at 599-602; H. Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights. Rev. Ed.* (Philadelphia: University of Pennsylvania Press, 1996); C.Tomuschat, ed., *Modern Law of Self-Determination* (Dordrecht: Martinus Nijhoff, 1993); A.Margalit & J. Raz, "National Self-Determination" in W. Kymlicka, ed., *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995) 79; M. Pomerance, *Self-Determination in Law and Practice* (The Hague: Martinus Nijhoff, 1982).

¹⁴⁸ By 'manifestly so' I mean that agents are presumably granted a considerable professional discretion when making commitments for the principal. They will not be held liable for breach of agency/mandate in cases where a reasonable person would have thought that the agreement would be beneficial. Therefore only agreements that are manifestly contrary to the principal's interests will be held void.

¹⁴⁹ Fridman, *supra* note 137 at 152 where the author confirms that "...the agency relationship is one of trust, even though not strictly a relationship of trustee and beneficiary."

¹⁵⁰ Authority for this proposition is found in the common law (equity) as far back as *Barnes v. Addy*, (1874) 9 Ch. App. 244 at 251-52, per Lord Selborne L.C. This decision was cited with approval by the majority in *Air Canada v. L & M Travel*, [1993] 3 S.C.R. 787 at para 35 [hereinafter *Air Canada*].

¹⁵¹ S. Gardner, "Knowing Assistance and Knowing Receipt: Taking Stock" 112 L.Q.R. 56; *Air Canada*, *ibid.* at para 35 and *Citadel General Assurance Co. v. Lloyds Bank of Canada*, [1997] 3 S.C.R. 805 at para 21 [hereinafter *Citadel v. Lloyds Bank*].

l'Industrie en France SA.¹⁵² Peter Gibson J. articulated five categories of cognizance, three of which are relevant to this discussion; “... (i) actual knowledge; (ii) wilfully shutting one’s eyes to the obvious; and (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make...”¹⁵³ In *Air Canada*, Iacobucci J. clarified that “[t]he knowledge requirement for this type of liability is actual knowledge; recklessness or wilful blindness will also suffice” and cited *Baden* with approval.¹⁵⁴ When such knowledge is found, the person assisting in the breach of trust may be liable to the principal/beneficiary in damages for the harm caused by the breach of trust.

Without entering into the complexities of this area of law, it is necessary to refer to a recent academic debate surrounding whether the current standard for liability for assisting in the breach of trust is found in knowing assistance, as enunciated in *Baden*, or in dishonest procurement of a breach of trust, as enunciated in a Privy Council case that purported to replace the earlier standard.¹⁵⁵ The decision is subject to debate, and one author points out that “...it is doubtful...that the new law of direct reference to a concept of dishonesty obviates any need for an exegesis upon cognizance.”¹⁵⁶ Moreover, in *Air Canada*, Iacobucci J. reviews the divided Canadian jurisprudence on the subject, and finds the *Baden* standard of knowledge is preferable to the dishonesty requirement not least of all because proving dishonesty in corporate contexts can be exceedingly difficult owing the nature of that kind of agency.¹⁵⁷ In any event, the concept of ‘dishonesty’ as employed in *Royal Brunei* is an objective concept that requires “...simply not acting as an honest person would in the circumstances.”¹⁵⁸ It therefore seems that regardless of the standard employed, creditors lending to dictatorships with knowledge that the regime will not use the funds in the interests of the population/state are liable on either standard.

d) Remedy for Knowing Assistance of a Breach of Trust

In such breaches, the person (natural or legal) assisting in the breach of trust is liable to the principal/beneficiary for the amount of damage caused. In the case of odious debt, however, the constellation is not as simple, for the creditors do not simply gain profits from the knowing assistance, but rather enjoy the benefits of a contract for which consideration has been exchanged. Thus though the liability is similar, the remedy must be altered slightly. In cases of odious debt, it is fair that the contract for debt repayment be voidable at the behest of the debtor state, and all obligations between them cancelled. Once the juridical obligation is cancelled, the creditors are entitled under the doctrine of unjust enrichment to claim the value of the amount by which the debtor state in fact profited from the transaction. Consistent with Sack’s proposals, once the debtor state has proved the knowledge (or dishonesty) of the creditors, the onus shifts to the creditors to claim under the doctrine of unjust enrichment.

¹⁵² [1993 1 W.L.R. 509.

¹⁵³ *Ibid.* at 575;

¹⁵⁴ *Air Canada*, *supra* note 154 at para 38; *Citadel v. Lloyds Bank*, *ibid.* at para 22.

¹⁵⁵ *Royal Brunei Airlines Sdn Bhd v. Tan*, [1995] 2 A.C. 378; see Gardner, *supra* note 155 at 65-68 for a discussion and critique of the decision.

¹⁵⁶ Gardner, *supra* note 155 at 67.

¹⁵⁷ *Air Canada*, *supra* note 154 at para 58. Note that this decision came two years prior to the Privy Council decision, *Royal Brunei*. At present, *Air Canada*’s authority in Canada remains unquestioned.

¹⁵⁸ *Royal Brunei*, *supra* note 159 at 73, per Lord Nicholls.

E. Doctrine and Judicial Decisions

1. Doctrine

Nearly all of the writers who have supported the doctrine under international law have been surveyed thus far, and so this section can remain short. However some writers express higher degrees of support for the principle than others. Therefore it is necessary to classify the doctrine in the following way: (1) those who support the doctrine; (2) those who acknowledge the doctrine, but withhold unqualified acceptance of it; and (3) those who deny it as a matter of law.

Under the first category we can place Sack, and Frankenberg and Knieper. Sack also indicates support in the writings of C.C. Hyde,¹⁵⁹ G. Jèze,¹⁶⁰ and arguably J.N. Pomeroy.¹⁶¹ Under the second category we find O'Connell,¹⁶² Foorman and Jehle,¹⁶³ and Wood.¹⁶⁴ Each of these writers explain the doctrine, but cannot be viewed necessarily as advocating it. It is worth mentioning, however, that as O'Connell's doctrine of acquired rights in cases of state succession is based on the concept of unjust enrichment, it would be impossible for him to argue that an odious debt in a case of state succession is repayable, because the debtor state would *ex hypothesi* not be enriched. In any case, each of these writers' fairly neutral treatment of the topic may lend credibility to the claim that the doctrine exists at law.

As for the third category—those writers who deny the doctrine as a matter of law—we find Feilchenfeld. Although Feilchenfeld gave the most comprehensive treatment of all authors to the subject of debts contracted against the interests of the population of a state, he makes it clear that he views this argument as one of justice and not law.¹⁶⁵ He prefaces his treatment of the topic with the claim that “it is possible, however, to investigate the justice of the debt independently from its legality, and equally possible to investigate the grounds which in future legislation should or should not justify the existence of a debt.”¹⁶⁶ However, Feilchenfeld then launches his discussion by explaining that for centuries the conditions necessary for creating valid public debts in the positive law of most ‘civilized nations’ can be summarized as follows: (1) raising money for public purposes, (2) compensation for tortious acts, (3)

¹⁵⁹ C.C. Hyde, *International Law Chiefly as Interpreted and Applied in the United States* 2nd. Ed., (Boston: Little Brown, 1945) at 400ff (cited by Frankenberg & Knieper, *supra* note 6 at 428); Sack also cites Hyde, *supra* note 1 at 158, in the American Journal on International Law as writing “Where a debt is shown to have been incurred for purposes to be fairly deemed hostile to the purposes of a particular district or territory, that territory, in case of a change of sovereignty wrought, for example, by revolution, is not likely to be regarded as burdened with the fiscal obligation, irrespective of the design of the original debtor.” [Original citation for A.J.I.L. unknown].

¹⁶⁰ G. Jèze, *Cours. Théorie du crédit public*, 6e éd. (Paris: M.Giard, 1922) at 302; see also G. Jèze, *La partage des dettes publiques au cas démembrement de territoire* (Paris: M. Giard, 1921).

¹⁶¹ Pomeroy, *supra* note 62 and accompanying text.

¹⁶² *Supra* note 4 at 458-462.

¹⁶³ *Supra* note 5 at 21-25.

¹⁶⁴ *Supra* note 123 at 120-121.

¹⁶⁵ Feilchenfeld, *supra* note 3 at 701 and 714; on the Cuban loans case, at 340, where he claims that the American arguments are “not strictly legal arguments, but rather equitable arguments.” The evidence supports this claim, however, for the American Commissioners themselves prefaced the famous statement cited *supra* note 79 with the opening phrase “From the moral point of view, the proposal to impose [the debts] upon Cuba is equally untenable.” However, this claim may be viewed as a response to the Spanish argument which was itself a moral claim to restitution. That is, in both cases moral arguments were being advanced as primary arguments for the existence or absence of an obligation to repay.

¹⁶⁶ Feilchenfeld, *supra* note 3 at 701.

by consent of the debtor, or (4) by benefits received by the debtor.¹⁶⁷ It is unclear why Feilchenfeld would elaborate such criteria, which are based in positive law, and then deny that they have firm footing in international law. It may be explained in the following ways. First, he may have simply believed that it was a worthwhile doctrine that deserved exposition, but one which remained justice-based rather than law-based. Second, he may simply not have accorded the weight to general principles of international law in the same way we do now, pursuant to Article 38 of the ICJ Statute. Finally, he may have been cautious in the description of what he felt was an essentially valid claim backed by some practice, but that lacked unquestionable authority in state practice overall. In any case, Feilchenfeld still advances some authority for the recognition of odious debts, even if he does deny them the status of positive international law.

2. Judicial Decisions

The single applicable judicial decision is the *Tinoco Arbitration* (Great Britain v. Costa Rica).¹⁶⁸ Secretary of War for Costa Rica, Federico Tinoco, overthrew the Government of Costa Rica in January 1917. He later held an election to ratify the revolution, in which support for his government may have been legitimate. By August 1919, he left the country, with his government falling in September. In June and July 1919, the Banco Internacional de Costa Rica issued several ‘bills’ of credit to the Royal Bank of Canada, on the strength of which the Royal Bank paid several cheques drawn by the Tinoco government. The funds were used for the personal enrichment of Tinoco and his brother, and for no public purpose. When Tinoco’s government fell, the Constitutional Congress of the restored Costa Rican government enacted a bill purporting to invalidate all transactions between the state and the holders of the ‘bills’ issued by the Banco Internacional.

Chief Justice Taft, of the United States Supreme Court, was the sole arbitrator. While holding that Tinoco’s government was a legitimate *de facto* government capable of binding the state to international obligations,¹⁶⁹ he found that the legislation in question “...did not constitute an international wrong.”

The transactions in question, which did not constitute transactions of an ordinary nature and which were ‘full of irregularities’, were made at a time when the popularity of the Tinoco Government had disappeared, and when the political and military movement aiming at the overthrow of that Government was gaining strength.... ‘The case of the Royal Bank depends not on the mere form of the transaction but upon the good faith of the bank in payment of money for the real use of the Costa Rican Government under the Tinoco régime. It must make out its case of actual furnishing of money to the government for its legitimate use. It has not done so.’¹⁷⁰

This case thus stands for the principle that funds borrowed by the state must be for legitimate governmental use, and not for personal enrichment. Otherwise there is no obligation to repay. A significant aspect of this decision is that the representative authority to contract the obligation was not put into question, but was rather upheld.¹⁷¹

¹⁶⁷ *Ibid.*

¹⁶⁸ *Supra* note 23.

¹⁶⁹ *Tinoco Arbitration*, *ibid.* at 36-38.

¹⁷⁰ *Tinoco Arbitration*, *ibid.* at 176. The portions set off with single-quotes are direct quotes from the decision, while the rest is the standard reporting format in the Digest.

¹⁷¹ Foorman & Jehle cite this case as standing for the proposition that *de facto* governments may bind the state to international obligations. *Supra* note 5 at 18.

The decision thus stands for the principle that contracts made by recognized governments may be held unenforceable under international law because they contravene the legal requirements for the creation of a valid public debt. One such requirement is that they be in the public interest.

III. Problematic Aspects of the Theory and Proposed Solutions

In sections 2 and 3, I presented the state of the doctrine as it has been elaborated and supported in international law. In this section I address what could be some theoretical objections to the plausibility of the doctrine, and provide explanations for why these objections do not pose insurmountable problems.

A. Determining absence of consent

As absence of consent is necessary for the finding of an odious debt, one immediately imagines a difficult and onerous burden of proof. Sack did not treat the issue at any length, as he envisaged the doctrine applying to dictatorial regimes where there could be no question of consent. However, in the modern day context, there are several quasi-democratic governments that could create odious debts. It is necessary therefore to consider the argument that the population of a quasi-democratic or democratic state might have expressed a valid consent to a loan that is subsequently claimed to be odious.

Feilchenfeld examines this issue carefully, but his conclusions are unsatisfactory. The important conclusion he reaches is that "...actual ascertainment of consent or protest is likely to raise difficulties as to evidence in so many cases, unless a particularly fitted machinery is established, as to furnish a very strong argument against consideration of consent or protest in international financial practice."¹⁷² This conclusion, when paired with his claim that the claim cannot stand without a finding of absence of consent,¹⁷³ demonstrates that Feilchenfeld believed that the doctrine would be very difficult to apply in practice.

It is submitted that this conclusion is incorrect, and that Feilchenfeld's treatment of absolute governments illustrates why. In that case, he states clearly that the actual opinion of the population would be relevant.¹⁷⁴ Moreover, the position assumes without justification that absence of consent may not be presumed in instances involving dictatorial governments. A dictatorial government is one that *by definition* rules without the consent of the people. It follows that in purported dictatorial polities consent must be presumed absent, unless proven otherwise (by widespread popular approval of the transaction). This is hardly a controversial suggestion. It is also a very important one because virtually all contemporary odious debt claims pertain to dictatorial regimes.

However, it could be argued that in a relatively democratic state, the election of officials must be regarded as the expression of consent to the government's authority to bind the state to its undertakings in international contracts.¹⁷⁵ This argument would

¹⁷² *Supra* note 3 at 704-05.

¹⁷³ *Ibid.* at 714. It should be noted that Feilchenfeld does not suggest upon whom the burden of proof should lie. "[The application of the tests regarding consent, benefit and creditor fairness] would make denial of protection very improbable if the burden of proof is upon the debtor state, or make legal protection in the field of public debts too uncertain if the burden of proof is upon the creditor."

¹⁷⁴ *Ibid.* at 704.

¹⁷⁵ *Ibid.* "If there is a parliamentary body which has been elected on the basis of what are generally regarded as normal majority rules, its voice should be primarily considered, unless overridden by a

be severely weakened by two considerations. The first is that in quasi-democratic states, public elections do not always express the true interests of the population, who may be ill-informed regarding the consequences of their choices. Secondly, it is absurd to claim that a population would consent to the corrupt acts of an official through mere election. Corruption of public officials is of enormous contemporary concern. As indicated above, the *Inter-American Convention Against Corruption*¹⁷⁶ has been adopted in Latin America where corruption and bribery of public officials within quasi-democratic contexts is a serious problem. It could be argued that the populations of these states ought to bear the consequences of their freely expressed choices, however this is unconvincing in light of the complicity of the creditor in odious debt claims. In other words, it makes no sense to hold a population liable for the near-criminal acts of two others.

It is submitted that the issue of consent ought to be determined in the following way: once the debtor state has proved that there was an absence of benefit to the population, a presumption of lack of consent is established and the burden shifts to the creditors to prove that the population consented to the agreement. This approach is logical, for it is very difficult to imagine a population consenting to an agreement whose very purpose is contrary to its interests. Moreover, good faith creditors are adequately protected by the criteria requiring them to be subjectively aware of the odious nature of the loan.

B. Determining absence of benefit

A great concern to any creditor would be precisely how the absence of benefit would be calculated. If a vague standard were employed, creditors could lose much more through debt cancellation than the doctrine warrants. For example, Feilchenfeld notes that in the Cuban debts case, the American Commissioners acknowledged that at least twenty-five percent of the debt was spent on items of regular maintenance, but refused to assume the obligation to repay it.¹⁷⁷ In acknowledgement of the same point, O'Connell notes that "...it is clear that the United States went beyond the premises of its own argument in treating the entire Cuban debt as unbeneficial to the island."¹⁷⁸ In order to prevent this potential problem, and keep the doctrine reasonably within the bounds of its own premises, the following considerations may be applied to the assessments of 'benefit'.

1. Proving absence of benefit in the purpose of the transaction

When a loan is contracted for a specific reason, its classification as contrary to the population's interests is a relatively simple task. It is submitted that agreements concluded for the following reasons are presumptively not in the interests of the population: (1) personal enrichment, (2) purchase of arms to suppress popular uprisings, (3) purchase of arms to fight imperial wars that are not supported by the population, (4) strengthening of domestic institutions whose main purpose is to maintain a dictatorial state, (5) investment in infrastructure that benefits a discretely defined minority who enjoy a pre-existing position of advantage. Other classes of

plebiscite. Normal constitutional practice does not call for going behind the expressions of such a body to ascertain the actual feelings of the population."

¹⁷⁶ *Supra* note 118. Art. VI(c) defines corruption as, *inter alia*, "Any act or omission in the discharge of his duties by a government official or a person who performs public functions for the purpose of illicitly obtaining benefits for himself or a third party."

¹⁷⁷ Feilchenfeld, *supra* note 3 at 339-340.

¹⁷⁸ O'Connell, *supra* note 4 at 460.

transactions may present themselves over time, and these categories must be interpreted flexibly and as an open ended list.

The more difficult situation is where loans are obtained without a particular reason and the funds are applied to general governmental revenue. It is submitted that in such cases it is necessary to examine the nature of the government of the debtor state in order to determine objectively the purpose of the transaction. Where the debtor is a dictatorial or quasi-dictatorial government and the reasons for the loan are not specified, it is appropriate to presume its purpose to be not beneficial to the population. Where the government is democratic or quasi-democratic, the purpose is presumptively to support beneficial institutions. Therefore in the latter case, the debtor state must prove the existence of a transaction whose purpose was contrary to the population's interest. This will occur on only rare occasions, and likely for personal enrichment.

The terminology employed to classify governments is important both here and in the test proposed below for creditor awareness. By dictatorial it is meant that the government does not govern by consent of the population. Quasi-dictatorial governments are those that govern primarily without the consent of the population, but may have strictly limited franchises, highly limited forms of public representation, or governments that oscillate unpredictably between representative and non-representative forms of governance.¹⁷⁹ A democratic state is one in which a government is elected by an informed electorate possessing universal franchise during regular elections. Quasi-democratic governments are those that are generally representative and accountable through regular elections but who may have, *inter alia*, relatively poorly informed electorates, monopolistic party systems, limited franchise, or substantial unrepresented minorities. It is clear that there is a political continuum in which incidents of democratic or dictatorial governments may be present in varying degrees. It will ultimately be for the deciding institution to choose whether the government in question at the time of the formation of the obligation was *more* dictatorial or democratic, and not absolutely one or the other.

It is important to note the difference between the category of 'purpose of loan' and that of 'creditor awareness'. While creditor awareness is concerned with the *subjective* awareness of the creditors of the odious nature of the loan, the purpose of the loan refers to the intended objects of expenditure. It is submitted that if the objects of expenditure at the time of the formation of the obligation were *objectively* contrary to the interests of the population under international law, then the purpose of the loan is deemed contrary to the interest of the population. This manner of conceiving purpose allows a state to deal effectively with another difficult scenario. Dictators may borrow funds with the *bona fide* intention of benefiting the state. However since the purpose of the loan is to be determined objectively, the borrowing regime's intentions are not determinative of the loan's purpose.

In conclusion then, the absence of benefit in the purpose of the transaction may be presumed when the loan is granted to dictatorial or quasi-dictatorial governments, and must be proved when loaned to democratic or quasi-democratic governments. Again, in the latter case, it is necessary for the debtor state to prove that the transaction itself was not in the interests of the population.

¹⁷⁹ There was some debate as to what constitutes a dictatorship during the Reagan administration. See J. Kirkpatrick, *Dictatorships and Double Standards: Rationalism and Reason in Politics* (New York: American Enterprise Institute, 1982). At 96 ff., Kirkpatrick separates dictatorship from totalitarianism, and quite predictably proceeds to critique the latter only. In legal literature there is little to define dictatorship, with the exception of the issue of a dictatorship in the time of crisis. On this issue, see John P. McCormick, "The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers" 10 *Can. J.L. & Juris.* 163.

2. Absence of benefit in fact to the population

As indicated above,¹⁸⁰ creditors are entitled to restitution for the amount by which the debtor state actually profits from the exchange of funds. It is suggested here that any disbursement of the loan that is not in the interests of the population would be automatically excluded from restitution under such a doctrine, for there would be no enrichment. However, the population may in fact benefit in some ways from transactions that are in part odious. For example, funds may be deposited into general revenue and disbursed on a variety of activities, some of which are odious and others of which are not. Also, when the regime falls, the debtor state inherits the remaining value of the infrastructure and resources purchased by the regime, which qualifies as enrichment. It is therefore necessary to propose criteria for determining what expenses are odious and which are repayable.

The following situations would disclose *prima facie* cases in which there is absence of benefit: (1) where the proceeds are spent for personal enrichment; (2) where the proceeds are spent on arms or military expenses used in a manner contrary to the interests of the population; (3) where the proceeds are spent on infrastructure distributed in a severely¹⁸¹ discriminatory manner; and (4) where the funds were used to promote oppressive institutions. It is submitted that if the debtor state can show that the proceeds of the debt were spent in any of these ways, it will have succeeded in discharging their obligation to prove absence of benefit.

However, when funds are deposited in general government revenue, it will be more difficult to assess how much of the loan was in fact contrary to the population's interest. In such cases, the national budget must be assessed for the year upon which the funds were received,¹⁸² and expenditures classified according to oppressive, neutral and beneficial disbursements. Amounts paid in support of directly oppressive institutions (e.g. state security agencies, state run media, prisons for political prisoners, police hardware, political campaigns etc.), may be deemed entirely not in the interests of the population. When the amounts paid are in support of neutral institutions (such as governmental offices and equipment, public enterprises), the government in question becomes an important factor. If it is a dictatorial or quasi-dictatorial regime, the current market value¹⁸³ of such equipment is deducted from its purchase price, the difference of which is deemed absence of benefit. If it is a democratic or quasi-democratic government, the expenditures are presumed to be for the benefit of the population. 'Current market value' is assessed from the moment of liberation from the

¹⁸⁰ *Supra*, section 3.4.1.

¹⁸¹ Severely is used purposely to refer to systematic discrimination such as apartheid, or rampant nepotism or corruption such as in Indonesia. Although it is arguably the case that much property in the world is shared in discriminatory ways, it is important to adopt an upper-threshold for the purposes of the proposed doctrine.

¹⁸² There is a technical wrinkle involved with this method. If a government receives money and applies it to general revenue, it is difficult to determine whether the funds in fact were used only over the course of one fiscal period. If not, a new 'odious' figure would need to be calculated for each additional fiscal period. This would be a fact specific exercise, taking into account the size of the government's budget relative to the size of the loan, particular expenditures in the given period, representations to the creditor as to purposes of the loan, and ultimately what appears to be a factually reasonable allotment for each fiscal period.

¹⁸³ Although the notion of calculating the value of infrastructure throughout a country may seem an enormously difficult task, in fact it is a necessary one with an existing history. See D.S. Blum, "The Apportionment of Public Debt and Assets During State Secession" (1997) 29 Case W. Res. J. Int'l L. 263. At 285-87 the author discusses how to calculate the value of fixed-assets. He suggests, with support, that fixed assets may be calculated on the basis of current market value, replacement costs or historical costs. It is submitted that in the case of odious debt, current market value is the fairest determinant, for it is the only one that accords with the notion of unjust enrichment.

government in question, because the enrichment cannot be deemed to accrue to the population until a representative government is installed. Finally, where disbursements purchased services that were for the benefit of the population and *generally available* (such as health care, educational facilities, roads etc.), the benefit is deemed (*réputé*).

These categories are intended to be flexible standards, rather than rigid rules. The overriding principle is that the debtor state is liable only for the enrichment that it receives by way of the proceeds of the debt. The rest of the proceeds are not in the interests of the population, and are therefore deemed absence of benefit. Although, I do propose that the entire amount be annulled where the proceeds support an actively oppressive institution, even though some of the infrastructure may be inherited, this may be viewed as an equitable concession. Otherwise the creditor would profit from its own wrongdoing.

The calculation of the price of such infrastructure may be difficult to assess, particularly in regimes where adequate records were not kept. In all cases an independent and reliable accounting firm must be hired to assess the costs most accurately, the price of which ought to be borne by the party losing the dispute. In cases where no records were kept, the role of the accounting process will become both more important and presumably more complicated and expensive, as the accountants will have to assess real and not budgeted expenditures. Although the entire process will involve some degree of indeterminacy, there is no reason to believe that indeterminacy will be any greater than the assessment of the value of public assets during cases of secession. Finally, these criteria are designed to replace the previous notion of odious debts simply as being contrary to the interests of the population without any indication of how to quantify such a concept. Thus, the employment of these criteria should enhance the protection of legitimate creditor rights, and keep practice regarding the doctrine within the premises that justify its application.

C. Subjective Awareness of the Creditors

One of the most persuasive aspects of the doctrine is that the creditor is complicit in the activities of the regime, and thus seems deserving of the liability imposed upon it. However, the notion of awareness may be a confusing standard that is not generally employed in the private law domain. It is proposed that subjective awareness constitute knowledge, as described in *Baden*¹⁸⁴ and *Air Canada*,¹⁸⁵ and discussed in the section 3.4.3.3 (Liability of Third Parties for Knowing Assistance of a Breach of Trust). Thus the categories are (i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; and (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable person would make. Thus it is a partially subjective standard, but subject to an assessment of whether one negligently fails to make inquiries that a reasonable person would. Determining whether this knowledge was present at the time of the transaction is a fact-specific inquiry. The relevant factors will vary with the circumstances, but may include representations to the creditor, the infamy of the regime in question, its duration, its domestic legality, its human rights record, whether its exit is imminent, whether it has well known practices of discrimination or political elitism etc. In some circumstances the loans will have been made directly for the purchase of particular goods, in which case the establishment of subjective awareness will be simple.

¹⁸⁴ *Supra* note 156.

¹⁸⁵ *Supra* note 154.

Creditor awareness must be proved by the debtor state wishing to invoke the doctrine. Therefore no regime-based presumption is established, though in practice it will be much easier to establish wilful blindness when the regime is a dictatorship.

D. State succession and government succession

A critical commentator may argue that even if one were to be able to show that odious debt may apply in cases of state succession, it certainly does not in cases of government succession. In the former case, one might argue, the application of the rule of repayment law is far less settled, and it is the principal context in which the doctrine has been expounded. Moreover, most of the state practice cited in this paper was in cases of state succession, and therefore it does not necessarily support the doctrine's application in cases of governmental succession. If true, this argument would prevent an application of the doctrine to most developing world debts.

That argument may, indeed must, be challenged. First, the distinction between state and governmental succession has been subject to criticism. O'Connell, perhaps the field's most prominent authority, writes that "[t]he line between these two types of change in some instances wears thin to the point of disappearance, and the placing of a particular instance of change within the one of the other category is often quite arbitrary."¹⁸⁶ Brownlie makes substantively the same comment,¹⁸⁷ while Foorman & Jehle note that the Soviet Repudiation of Tsarist debts "...illustrates how the distinction...can be blurred."¹⁸⁸ South Africa after apartheid, and the Democratic Republic of the Congo (formerly Zaire) after Mobutu, illustrate the same point.

The second reason for which the purported separation between state and government succession should not be a bar to the application of the doctrine is that to do so would be an arbitrary limitation. The reason for which the doctrine applies in cases of state succession is the principle that valid public debts must be spent in the interests of the state/population. The principle should apply no less to cases of governmental succession. Feilchenfeld agrees on this point:

If the opinion prevails that certain burdens should not fall upon the population of a debtor state, protection should be given, even if there has been neither annexation nor dismemberment; for unless such protection is generally admitted, it is illogical to advocate it in the case of state succession, which in itself affords no reason why the burdens of the population of a debtor state should be alleviated.¹⁸⁹

Finally, the claim being made is that a government, valid or not, did not create a valid obligation that binds the state because the transaction *per se* did not conform to a requirement under international law. The *Tinoco Arbitration* illustrates this point quite well. Chief Justice Taft held that the loans were not binding upon Costa Rica notwithstanding the fact that Tinoco was the *de facto* authority of the country.¹⁹⁰ Taken together, these arguments illustrate that the point regarding the distinction between government succession and state succession should not be fatal to the odious debt doctrine.

¹⁸⁶ O'Connell, *supra* note 4 at vi.

¹⁸⁷ Brownlie, *supra* note 36 at 80. "Unfortunately the general categories of 'continuity' and 'state succession', and the assumption of a neat distinction between them, only make a difficult subject more confused by masking the variations of circumstance and the complexities of the legal problems which arise in practice."

¹⁸⁸ Foorman & Jehle, *supra* note 5 at 19.

¹⁸⁹ Feilchenfeld, *supra* note 5 at 716.

¹⁹⁰ *Ibid.* at 176.

E. Protection of Good Faith Creditors

The final potential criticism is that the proposed doctrine would render international lending extremely precarious, and therefore, if applied, could actually be harmful to good faith creditors and debtor states. However, it would be relatively simple for a creditor to discharge its obligation to act in good faith towards the population. Two techniques can be employed.

First, the loan can be issued for a specific purpose, specified in the contract, and the debtor can be bound to that purpose by warranty. This is the recommendation made by Foorman & Jehle, to "...bolster the equitable position of the lender's claim."¹⁹¹ Second, the bank can issue disbursements in installments, conditional upon the application of the funds to the specified purposes. In the event that funds are not applied to the specified purposes, the rest of the credit can be withheld and the debt can become payable immediately (per contract). If the creditor were to follow both of these steps in good faith, it would be nearly impossible to hold it liable under the creditor awareness test, for it will have exhausted the reasonable means at its disposal for becoming aware of loans that are not beneficial for the population of the state.

This is sound business practice too. Banks don't lend to private enterprise without extensive analysis of the risks, which involves intrusive examinations of business plans.

Conclusion

The foregoing inquiry indicates that the doctrine of odious debt can be clearly defined, has considerable support under the traditional categories of international law, and can be modified to withstand *prima facie* theoretical objections. The results are almost surprising. Upon hearing of the doctrine, most international lawyers are likely to believe that the doctrine could never be applied in practice. However, after examining the state practice, general principles of law and writings and judicial decisions, it seems that there is much more material available to make such an argument than one would initially think. This then raises an appropriate question: why has so little study been conducted on the principle? It was important enough to be proposed in the ILC Draft to the Vienna Convention, is outlined in O'Connell's important book, is strikingly consistent with municipal agency law (its closest analogy), accords well with our notions of justice and, above all, addresses a very relevant concern. If nothing else, it is hoped that this paper has succeeded in establishing that there are *legally persuasive* arguments in favour of the *morally compelling* doctrine of odious debt.

¹⁹¹ Foorman & Jehle, *supra* note 5 at 25.

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Chapter Two: Sites and Strategic Legal Options for Addressing Illegitimate Debt

by Ashfaq Khalfan

Introduction

This chapter outlines various legal avenues available to civil society organisations and Southern states for advancing the campaign against odious debts and debts that violate economic and social rights. It assesses the value of each of these approaches. A number of factors should be kept in mind. First, it is important to distinguish between debts owed by Southern states to other states, to international organisations (such as the Bretton Woods institutions and regional development banks) and to private banks located in other countries. Each of these three categories of creditors raise distinct possibilities for redress. Second, for each of these categories, the results may vary according to the provisions of the contract or treaty. Third, the laws operating in the home state of the creditor (and of the borrower) will shape the options for litigation.¹

I. Political Efforts and their Relationship to International Law

It is theoretically possible for a debtor state (or group of states) to unilaterally repudiate debts, either by executive action or within its domestic courts. The only feasible retaliation would be for the creditor state to seize assets of the borrower state held within it, to suspend assistance and trade.² The United Nations Charter limits any military action to self-defence in the case of armed attack and the maintenance by the Security Council of international peace and security, neither of which would apply to loan agreements.³ Although litigation is a further option, the majority of borrower states have very few assets within creditor nations, most of which are legally immune from attachment.⁴ The strongest weapon of creditor states and private entities is the ability to exclude states from capital markets. Tsikata notes that this explains the high rate of repayment of debt by states even when the theory of absolute sovereign immunity of a state from the jurisdiction of another was prevalent.⁵

¹ A related issue is that the diversity of remedies may cause some problems due to norms of equal treatment of creditors by a debtor. This is a common feature of the arrangements whereby a number of concerned creditor banks or creditor states meet to renegotiate a set of loan agreements with a debtor states. As part of the terms of such renegotiated contracts, the debtor is normally obligated to at least seek comparable treatment from commercial creditors. A. Reinisch, *State Responsibility for Debts: International Law Aspects of External Debt and Debt Restructuring* (Koln: Bohlau, 1995) at 23.

² This would, however, entitle the country affected to levy equivalent trade sanctions on the creditor government, under the terms of the GATT 1994.

³ *Charter of the United Nations*, 26 June 1945, Can T.S. 1945 No. 7, Arts. 41-42 & 51.

⁴ J. Hurlock, "The Way Ahead for Sovereign Debt" (1995) *International Financial Law Review* [July 1995] 11 at 11.

⁵ Tsikata, *Sovereign Borrowers, Foreign Creditors and the Resolution of Sovereign Insolvency: A Legal Appraisal of Contemporary Practise*, Thesis submitted for the University of Toronto, 1993 [unpublished: on file with the National Library of Canada] at 92.

Wholesale repudiations of debt have occurred in periods of revolutionary (or revolutionary-like) political change, such as after the Bolshevik Revolution of 1917 or by Germany in 1934 and 1938.⁶ However, in the post-independence period beginning in the 1960s, such outright repudiations have been rare. Debtors have rather defaulted on repayments, or even successfully applied unilateral moratoria on the repayments.⁷ However, they have always stated their willingness to pay this amount in full.⁸

This issue raises a key problem for Southern states. A state that brings forward odious debt claims could expect to face cuts to its aid, both bilateral and multilateral and to be unable to contract new private sector lending on reasonable terms, if at all. In addition, such a state could lose its ability to raise private sector investment by being portrayed as a radical state that did not respect property rights. According to *The Economist*, were South Africa to act on its potential odious debts claim, its “credit rating would be wrecked as it came to be lumped with other deadbeats. Foreign investors would be deterred, and South Africa would have to pay more for future borrowings.”⁹

As noted in Chapter 3, Section 1.6 of this study, such concern may be exaggerated, particularly since the debtor could be seen to be exercising a legally sound legitimate right. However, before that stage is reached, the doctrine will need to exhibit two characteristics. Firstly, the assessment of illegitimate debt must be seen to be fair and to follow consistent principles. This requirement is achievable, particularly if the procedures for such an assessment (or the actual assessment) are clarified by an independent and impartial judicial body. The second element is not as simple; it may be necessary for the international community, particularly the international business community, to be confronted with the reality of an odious debt doctrine that has a high level of acceptance among most Southern states and at least some Northern states.

Until this change occurs, Southern states interested in applying an illegitimate debt doctrine are faced with a free-rider dilemma — the states that take the first steps will not be seen as secure destinations for investment. In addition, since odious debt is contested as a legal concept, a state could only rely on the moral weight of the claim, which may not be enough to offset retaliation.

The proposals made in Section B below, Judicial Recourses, are relevant to debt negotiations. The decision of a judicial body may have influence beyond its jurisdiction and may affect the political dynamic between creditor and debtor states. According to Keohane, Moravcsik and Slaughter, “Inter-state bargaining takes place in the shadow of normative sanctions stemming from the legal obligation itself.”¹⁰ Such a view rests on an argument that international relations is not solely based on the national interest, but rather that international actors partly act in accordance with international norms of conduct. Furthermore, international law and its application can also influence the determination of what is in the national interest. According to Keohane *et. al*, a negative judgment can increase the salience of an issue and undermine the legitimacy of the domestic position in the eyes of national constituents.¹¹

The future application of the odious debt doctrine, even if accepted and utilised by the Courts, will be shaped by state practise. Even if the doctrine does win a

⁶ *Ibid.* at 86-87.

⁷ T. Lothian, “The Criticism of Third-World Debt and the Revision of Legal Doctrine” (1995) 13 Wisconsin International Law Journal 421 at 433-437.

⁸ Reinisch, *supra* note 1 at 18.

⁹ *Economist*, “Unforgivable: South Africa's apartheid debts,” 24 April, 1999.

¹⁰ R. Keohane, A. Moravcsik & A. Slaughter, “Legalised Dispute Regulation: Inter-State and Transitional” (2000) 54 *International Organisation* 457 at 467.

¹¹ *Ibid.*

fair amount of legitimacy, some Southern states may forego their rights to repudiate odious debts, thereby undermining the ability of other Southern states to make similar claims. First, debtor states are in a wide variety of situations in relation to their debts. The Highly Indebted Poor Country (HIPC) Initiative has granted a significant amount of debt reduction to least developed, heavily indebted states that can prove to the satisfaction of the Bretton Woods institutions that their debts are unsustainable, that they have pursued appropriate economic reform and that they have an effective poverty reduction strategy in place.¹² In addition, the odious debt doctrine promises to be more effective for specific states that were led by profligate dictators and who can easily prove their case. Where only a small proportion of a state's debts can be called odious, the state will be unlikely to invest political capital in repudiating such debts. Given the above concerns, odious debt advocates would have to encourage stronger cooperation among Southern states, such as through the Group of 77 developing country negotiating group.

One mechanism to facilitate such a strategy would be to establish a specialized tribunal.¹³ Such a tribunal could be structured as to retain the confidence of both lenders and debtor states. The creation of such a 'clearing house' for odious debt claims would probably facilitate coordinated action by debtors to reduce their debts.

Needless to say, it is unlikely that creditors have much to gain from such a tribunal. In cases of repudiation by a state, creditors would do better to rely on their economic power, rather than on their legal rights. Two situations, however, could alter this state of affairs. The first would be a general repudiation by a number of Southern states, which is unlikely at this point. The second situation would be after one or more judicial decisions upholding the odious debt doctrine. Such decision(s) would indicate the possibility of more repudiations and, as a result, creditor states would be motivated to resolve the disputes in a coordinated, timely and efficient manner so as to reduce the effects of uncertainty on the financial markets.

One could take a more pragmatic approach and suggest that the strategic use of the odious debts doctrine could at least affect the bargaining dynamics between creditors and debtors. In meetings with creditors, debtors could make a case for favourable restructuring arrangements and write-downs, both on moral and legal grounds and in the context of threats of legal action. It should be noted that many restructuring arrangements in reaction to the debt crisis of the 1980s were partly influenced by implicit threats of a repudiation.

A. Progressive Development of International Law

Chapter 1 of this study made the argument for the current legal existence of an odious debt doctrine in international law. There remain some contentious issues, particularly in relation to the doctrine's application to changes of governments rather than changes of states. Some of the contention could be resolved through the emergence of new norms and state practise that self-consciously aims at strengthening odious debt norms. The challenge will be to ensure that the legal validity of odious debt doctrine is recognised by a large number of states, including at least some creditor states.

¹² For a pointed critique of the HIPC programme, see Commission on Human Rights, *Joint Report by the Independent Expert on Structural Adjustment Programmes and the Special Rapporteur on Foreign Debt*, UN ESCOR, 2000, UN Doc. E/CN.4/2000/51 at para. 40. About 22 such states are now receiving debt reduction. Thirteen other states, currently affected by governance or conflict problems can potentially receive debt reduction under the HIPC framework. See World Bank, "HIPC Progress to Date" (April 2001), online: <<<http://www.worldbank.org/hipc>>> (date accessed: 15 April 2001).

¹³ G. Frankenberg & R. Kneiper, "Legal Problems of the Overindebtedness of Developing Countries: The Current Relevance of the Doctrine of Odious Debts" (1984) 12 *International Journal of the Sociology of Law* 415 at 434.

There is ample scope for civil society organisations to play a key role in this project by popularizing odious debt doctrines and lobbying states to give them official endorsement. In particular, international civil society can put pressure on Northern states to accept explicitly that some of the debts due to them are invalid. This would require going beyond the previous efforts of the Jubilee 2000 movement, which has explicitly called for the cancellation of odious debts.¹⁴ Northern states and the Bretton Woods institutions have yet to explicitly recognise that to collect on odious debts would be illegitimate. Their current multilateral debt relief framework is instead justified mainly on the poverty within least developed states and their inability to pay the debts. Eligibility for debt relief is based *inter alia* on the level of *per capita* income of the state and the ratio of debts to export earnings.¹⁵ Debt relief movements should not be satisfied with repudiation, but should emphasize the need for lender states to take responsibility for having made odious loans.

The civil society mobilization to declare the threat or use of nuclear weapons to be illegal provides an example of the use of law in popular mobilizations. This international campaign included an impressive effort to use political means to shape the general understanding of international law. The London Nuclear Warfare Tribunal brought together many witnesses on the various aspects of nuclear weaponry, and resulted in a popular judgment that declared that the threat or use of nuclear weapons would be a crime against humanity. The International Peace Bureau also secured a pledge from thousands of lawyers across the world to work towards a formal legal prohibition on the threat or use of nuclear weaponry.¹⁶ Such efforts eventually convinced the majority of the United Nations General Assembly to pursue a legal approach and to refer the issue to the International Court of Justice for an Advisory Opinion.¹⁷

The global debt relief movement has already begun such mobilization. Some of its initiatives that use legal or quasi-legal strategies include the setting up of a Foreign Debt Tribunal in Brazil in 1999 and an Argentinian Ethical Tribunal on Debt and Adjustment,¹⁸ the pursuit of litigation in national courts in Argentina,¹⁹ and a submission to the South African Truth and Reconciliation Commission. A new variant

¹⁴ *A Jubilee Call for Debt Cancellation and Economic Justice*, Rome, 17 November, 1998 (First Jubilee 2000 International Conference) and *Call to the G7 Leaders: Declaration of Jubilee 2000 movements*, 21 July, 2000 (Okinawa International Jubilee Conference), cited in Canadian Ecumenical Jubilee Initiative, Policy Forum, *Illegitimate Debt: Definitions and Strategies for Repudiation and Cancellation*, (Sheraton Hall, Wycliffe College, Toronto, 15-16 November, 2000) [unpublished] at 21.

¹⁵ See note 12.

¹⁶ Falk, R., "Nuclear Weapons, the World Court and Global Security: The Nuclear Weapons Advisory Opinion and the New Jurisprudence of Global Civil Society" (1997) 7 *Transnational Law & Contemporary Problems* 333 at 340-341.

¹⁷ The consequences of the World Court Project are yet to be assessed. Following on the Court's unanimous statement that there is a legal obligation on nuclear weapon states to pursue negotiations in good faith to lead to nuclear disarmament in all its respects, the members of this project have prepared a model treaty and lobbied governments in the U.N. to lend their support. Falk, *ibid* at 351. An ICJ advisory opinion on odious debt would probably have a greater effect on the practice of lender states than its opinion on nuclear weapons. The former issue does not involve giving up key aspects of their national security interests.

¹⁸ *CEJI Policy Forum*, *supra* note 14, Appendix II: Jubilee Declarations and Illegitimate Debt at 18-20.

¹⁹ In this case, Judge Ballestero ruled that a substantial portion of the external debt amassed between 1976 to 1983 by the military government was illegitimate. The Court noted the responsibility of Argentinian officials at the time and of the international financial institutions. The judge called upon the Congress of the Nation to investigate the responsibility for this debt. See Jubilee 2000 (United Kingdom), "Landmark court ruling condemns Argentina's illegitimate debt," August 2000, online: [http://www.ceji-iocj.org/English/articles/ArgentinaCourtDebt\(Ag00\).htm](http://www.ceji-iocj.org/English/articles/ArgentinaCourtDebt(Ag00).htm) (date accessed: 15 March 2001).

includes recent attempts to sue private corporations that invested in apartheid South Africa.²⁰

One could also add that civil society action, in and of itself, can help in the development of international law. A powerful statement coming from a large number of persons and organisations may help shape the understanding of international law. As noted by Judge Weeramantry's dissenting opinion in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the two million signatures received by the Court on that issue were "evidence of a groundswell of global public opinion which is not without legal relevance."²¹ The use of the double negative in the above phrase indicates that one should not exaggerate the legal relevance of civil society statements. Nevertheless, over a longer period of time, civil society positions can filter into the general understanding of the law. One instance may be in the case of interstitial norms.²² According to Vaughan Lowe, these are norms that do not have independent normative effect, but rather modify the effect of other primary norms of international law.²³ Such emerging norms do not emerge unaided, they are 'drawn out.' Lowe notes that such norms can be generated by both state and non-state actors. The success of a proposed norm depends on its persuasiveness in filling gaps and reconciling conflicts between primary norms of international law, rather than its source.²⁴

Even if there is no court decision in favour of the odious debt doctrine, there is room for its application in the political realm by states and civil society groups, thereby creating new precedents. The doctrine could be deployed to press for a number of actions, including: the unilateral cancellation of odious loans by lenders and the adoption of guidelines and codes of conduct of lending practices (for states, international organisations and private banks). It could also serve as a bargaining tool in the renegotiations of loan agreements.

II. Judicial Recourses

Litigation has rarely been used to resolve disputes over state debt. States prefer to renegotiate rather than litigate the terms of loan agreements.²⁵ From 1985 to 1995, during the height of the Southern debt crisis, there were no identified international arbitrations involving the enforcement of a loan agreement between a Southern debtor state and a creditor government or private bank.²⁶ Within national courts, no official bilateral or multilateral creditor has brought forward cases against Southern governments for delays in debt payment. Relatively few private banks have carried out

²⁰ See Alternative Information and Development Centre (AIDC), Apartheid-Caused Debt Campaign, "Submission to the Truth and Reconciliation Commission," (17 October 1997), Cape Town, South Africa, online: <http://www.aidc.org.za/adc/trc_debt_submission.html> (date accessed 14 February 2001). See also D. Chance, "Apartheid Suit Spurs Odious Debts Battle" *Reuters* June 20, 2002.

²¹ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, [1996] ICJ Rep. 226 at 438 [hereinafter *Threat or Use of Nuclear Weapons*].

²² One should note, however, that interstitial norms may not be sufficient to on their own to justify a doctrine of odious debts. The odious debt doctrine is framed in such categorical terms that it would appear to require the status of a primary norm. However, interstitial norms may play a role in shaping the operation of odious debt doctrine; developing and refining it by reference to emerging norms of good governance and popular participation.

²³ V.Lowe, "The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?" in M. Byers, ed. *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford, Oxford University, 2000) at 214-215.

²⁴ *Ibid.* at 215 & 219-221.

²⁵ Reinisch, *supra* note 1 at 17 & 41.

²⁶ F. Feliciano, "Report of the Director of Studies of the English-speaking Section of the Centre" in D. Carreau & M. Shaw eds. *The External Debt/La dette extérieure* (Dordrecht: Martinus Nijhoff, 1995) at 47.

such acts. In part, this is due to the ability of international debtors and creditors to form wide-ranging restructuring agreements. The small number of players in the field facilitates continuing lending relationships and expectations of future transactions. This situation is facilitated by the preponderance of 'sharing clauses' in loan contracts, which require that where a creditor receives payments greater than its pro rata entitlement, it must share this amount with all the other lenders. Such clauses discourage individual litigation.²⁷ One result of such arrangements is that the law on international debt is relatively underdeveloped.

The two main considerations in determining the sites for litigation are, first, the choice of forum, that is which body (or bodies) can hear the case and, second, the choice of law, that is, which international or domestic laws should be applied to the dispute at hand. Such decisions are often, but not always specified in loan contracts. However, even where such choices are spelled out in the contract, there may be grounds for overriding such choices, as discussed below.

The following discussion will address the issue of forum. The choice of law, a distinct but related issue, will be discussed as it applies to each specific forum, in order to facilitate an analysis of the advantages of each forum. The four major fora that will be considered are the International Court of Justice, International Arbitration Tribunals, the International Centre for the Settlement of Investment Disputes and domestic courts, in particular those of New York and England. It is difficult for civil society groups to have direct involvement in international litigation, aside from helping states to prepare arguments²⁸ and encouraging them to litigate. At the domestic level, their role as public interest litigants will be examined.

A. International Court of Justice

The International Court of Justice (the 'ICJ') is a possible avenue for dispute resolution between states. Most loan agreements between states do not have a choice of forum clause. There are a number of advantages to bringing an odious debt claim before the ICJ. First, unlike arbitration (see below, Section B. II), the ICJ is made up of judges who were not appointed specifically by the two parties to the dispute. There is a relatively high degree of independence of the judges, who serve fixed nine year terms²⁹ and their salaries may not be reduced.³⁰ Judges are elected by the General Assembly and the Security Council voting separately (although discreetly consulting). The five permanent members of the Security Council do not have a veto power in this election.³¹

Second, parties may seek an Advisory Opinion (see further, below, at Section b.1.1 ii and iii), which does not necessarily have to apply to any one particular case of illegitimate debt. It therefore entails less risk on the part of any one debtor state. The ruling achieved could be stated in general terms (where the question put to the Court is framed as such). The generality of a ruling would increase its applicability to a number of other states. In contrast, in a contentious case on a specific dispute, the Court will clarify the law only to the extent necessary to resolve the particular dispute.

²⁷ *Ibid* at 47.

²⁸ A number of submissions by states to the I.C.J in the *Legality of the Use of Nuclear Weapons in Armed Conflict* were based on models prepared by the International Physicians for the Prevention of Nuclear War and the International Association of Lawyers Against Nuclear Arms. Dewes, K. & R. Green, *Aotearoa/New Zealand at the World Court* (Christchurch: Raven, 1999) at 27.

²⁹ Removal of a judge of the Court requires the unanimous agreement of the other members of the Court that the judge has ceased to fulfill the required conditions for appointment. *Statute of the International Court of Justice*, as annexed to the Charter of the United Nations, 26 June, 1945, Can. T.S. 1945 No.7, Art. 18 (1).

³⁰ *Ibid.*, Art. 32.

³¹ *Ibid.*, Art. 8 &10

Finally, the ICJ is seen as the appropriate body for clarifying norms of international law. Decisions by the Court are only binding between the parties and in respect to that particular case.³² However, they constitute a ‘subsidiary’ means for the determination of the rules of law. According to Brownlie, the decisions of the Court are in some instances regarded as authoritative evidence of the state of the law, and the Court has been influential in the development of international law.³³ In addition, the Court’s decisions tend to be relatively detailed. Thus, in addition to legitimating the odious debt doctrine, the Court could provide information which is equally crucial, that is, on how odious debt is to be assessed. Some level of precision on this point is important in order to prevent a generalized panic in capital markets and the cessation of lending to states that are actually acting in the needs and interests of their peoples. Perhaps the main disadvantage of proceeding with a test case before the ICJ is that failure in this forum, on the merits of the case rather than on procedure, would constitute a major setback to the legal foundations of an odious debt campaign.³⁴

A number of obstacles should be taken into account before pursuing a case before the ICJ. First, in relation to contentious cases, the Court’s jurisdiction is essentially based on consent of the states, who must consent to its adjudication in relation to a specific case or to the compulsory jurisdiction of the Court. (This essentially means that the Court has jurisdiction in any dispute with another state that has also accepted this compulsory jurisdiction.) However, most states have not accepted the compulsory jurisdiction of the ICJ.³⁵ Even if they have previously accepted jurisdiction, they may withdraw before a case goes forward. And creditor states would likely refuse to accept the *ad hoc* jurisdiction of the ICJ in relation to a specific odious debt case, given their strong political position at present in negotiations with debtor states. The ICJ would have automatic jurisdiction if it was stipulated in a treaty between the two states, however, as noted above, few loan agreements between states provide for any judicial recourse.

Second, to bring forward a suit involves a public repudiation of debts. The state that brought forward these claims could expect to face cuts to its aid, both bilateral and multilateral. Since the doctrine of odious debt is contested, reliance on this doctrine alone would not be enough to offset economic retaliation. A state that wished to reduce its debts might do better by quietly threatening repudiation while negotiating a settlement.

1. Options for Presenting a Suit:

a) Suit Against a Sympathetic Creditor

An option that might be explored would be to launch ‘sweetheart’ litigation between a creditor and a debtor state that both support the illegitimate debts claim. (South Africa’s loans to Namibia, which were forgiven in total, could have been a perfect example.) One possibility is to lobby a larger developing country that might have made such loans to submit to ICJ jurisdiction. Developed states with a history of support for redistributive approaches to North-South relations might be approached for this purpose. This strategy has some difficulties. The creditor state would face

³² *ICJ Statute*, *supra* note 29, Art. 59.

³³ Brownlie, 19 & 728.

³⁴ This statement should be tempered. Falk notes that paradoxically, the most conservative judgment of the ICJ- rendered in 1966 in relation to the South West Africa cases led paradoxically to the acceleration of extrajudicial anti-apartheid pressures on South Africa both in civil society and within the U.N. system, *supra* note 17 at 343.

³⁵ In 1998, only 59 states had accepted this compulsory jurisdiction, Brownlie, *supra* note 33 at 723.

pressure from other creditor states to avoid breaking the creditor consensus³⁶ and probably would be unwilling to see the negligence of its own officials in disbursing odious loans exposed.

b) Advisory Opinion requested by UN General Assembly

One of the most appropriate avenues to advance the doctrine could be through the use of an Advisory Opinion of the ICJ requested by the General Assembly. Such an opinion is not directly enforceable. However, it would grant significant authority to the odious debt doctrine, which would probably lead to some unilateral compliance by states and have effects in debt negotiations between creditor and debtor states.

One advantage of the Advisory Opinion is that the countries that support the referral will be less likely to face threats from Northern states than if they were actually named as parties to a suit. Another advantage is that if the question permits, the Court could clarify the overall law on the subject, as opposed to a single contentious case judgement that would be crafted in relation to a limited set of facts, and whose specificity would be used by creditors to distinguish it from other situations.

The events leading up to the Advisory Opinion on the Threat or Use of Nuclear Weapons, 1995, may provide some useful lessons for debt cancellation activists. They demonstrate that a few well-placed civil society organisations can set the agenda in relation to an ICJ Advisory Opinion. This describes the role of groups such as the World Court Project and the International Physicians for the Prevention of Nuclear War (now known as Physicians for Global Survival). Another key lesson is the utility of the Non-Aligned Movement (NAM), which provided a forum in which the Advisory Opinion proposal could be introduced and discussed in the absence of heavy-handed diplomacy from the representatives of nuclear states.³⁷ Within the NAM, civil society activists cultivated certain states, such as Zimbabwe and a number of South Pacific states, whose strong support helped prevent pro-United States countries, such as Indonesia, from killing the project.³⁸

There was strong opposition by the nuclear states and their allies to the request for an Advisory Opinion after it was introduced in the General Assembly. The United States, the United Kingdom and France sent delegations to many NAM capitals threatening cuts to aid and trade if the resolution was not withdrawn.³⁹ As a result, action was deferred on the request in November 1993. However, six months later, Zimbabwe convinced the NAM Foreign Ministers to re-introduce the resolution requesting an Advisory Opinion and to put it to a vote at the General Assembly. Prior to this vote, support for the resolution had reached extensive levels and the vote carried with 77 votes to 33. There were 21 abstentions and 53 states did not vote. The lobbyists for the resolution managed to convince key allies of nuclear weapons states, such as Canada, Australia, Japan and Norway to at least abstain from the vote, rather

³⁶ A possible issue may be that other creditors who would be affected by the illegitimate debts doctrine would attempt to intervene in the case under Article 62 of the *ICJ Statute*, which permits intervention where a state has an interest of a legal nature that would be affected by the decision in the case. Such an attempt would probably fail given that the legal interest invoked would be the effect of the decision as legal precedent on the state's own contracts. This would not be convincing since the decisions of the Court bind only the parties to the case (Article 59) and are only a subsidiary source of law (Article 38.4). The *ICJ*, over the course of the years, has avoided the pitfall of allowing a bilateral dispute to be unnecessarily multilateralized. See S. Rosenne, *Intervention in the International Court of Justice* (Dordrecht: Martinus Nijhoff, 1993) at 196.

³⁷ In relation to the issue of debt, the Group of 77, currently chaired by Venezuela, would be a comparable organization, which would be more appropriate given its focus on economic issues.

³⁸ *Dewes, supra* note 28 at 28.

³⁹ *Ibid.*

than to vote against the resolution.⁴⁰ Moves to bring forward a case on odious debt would require a very high degree of political mobilization and the cultivation of allies among states. However, the high profile of the Jubilee movement in the last three years would form a basis for such a campaign.

There are some differences between a campaign on odious debt and the campaign on nuclear weapons. With regard to the latter, a substantial number of developing states had little to lose from an ICJ opinion stating that nuclear weapons should be banned; the same may not apply in relation to odious debt. Many developing country governments would not want the increased conditionality and oversight that is likely to follow the recognition of the illegitimate debt claim. However, as shown by the recent adoption of the *Rome Statute of the International Criminal Court* and NEPAD, a significant number of developing country governments in Latin America and Sub-Saharan Africa are willing to accept some fetters on their sovereignty where there are overall benefits for their society and mechanisms that will encourage stability within their regions.

The need to gain the support of a majority of the Assembly should influence the issues that are brought forward in the first test case. It would be useful to either use South Africa as one of the main focuses of the case, or to request an advisory opinion on a more general question, but to emphasise in the run-up to the case that the question applies in particular to South Africa. Southern governments would be hard-pressed to justify not supporting South Africa in such a claim after their public condemnations of the apartheid regime. This would apply in particular to the members of the Non-Aligned Movement, who traditionally took strong positions against apartheid within the United Nations.

A possible concern may be that the ICJ would not be willing to accept a referral from the General Assembly that appears to serve a particular political agenda. This position was taken by Judge Oda in his separate opinion in the *Threat or Use of Nuclear Weapons*.⁴¹ However, the position of 13 of the judges of the ICJ was that this fact was irrelevant and that the Court should deal with all questions of international law that are posed to it, regardless of their political aspects.⁴² This position is consistent with the general attitude of the ICJ on the issue of 'political questions.'⁴³ It should be noted that although the ICJ has the discretion to refuse to give an advisory opinion, the Court has not yet exercised this discretion and has stated that it will do so only for compelling reasons.⁴⁴

c) Advisory Opinion Requested by a UN Agency

A number of United Nations organs and specialized agencies may request advisory opinions with respect to legal questions arising within the scope of their activities. Some of the organs whose concerns could encompass odious debts (and their effects) include the Economic and Social Council (ECOSOC), the World Health Organisation (WHO), the Food and Agriculture Organisation (FAO), the International Labour Organisation (ILO), United Nations Educational, Scientific and Cultural Organisation

⁴⁰ *Ibid.* at 29.

⁴¹ *Threat or Use of Nuclear Weapons*, *supra* note 21 at 271.

⁴² *Ibid.* at 234

⁴³ See for more detail, T. Sugihara, "The Judicial Function of the International Court of Justice with Respect to Disputes Involving Highly Political Issues" in A.S. Mueller, D. Raic & J. Thuranszky, eds. *The International Court of Justice: Its Future Role after Fifty Years* (The Hague: Martinus Nijhoff, 1997) at 119-120.

⁴⁴ Pomerance, "The Advisory Role of the International Court of Justice and its 'Judicial' Character: Past and Future Prisms" in A.S. Mueller, D. Raic & J. Thuranszky, eds. *The International Court of Justice: Its Future Role after Fifty Years* (The Hague: Martinus Nijhoff, 1997) at 298.

(UNESCO).⁴⁵ Some of these organizations may be better disposed to raise the odious debt doctrine than the General Assembly. Although the states represented on these organizations are similar to those represented in the General Assembly,⁴⁶ the ethos and the 'epistemic communities' linked to each of these organisations differ. Unfortunately, programme agencies such as the United Nations Conference on Trade and Development (UNCTAD) and the United Nations Development Programme (UNDP) which would have the greatest interest in this subject are not empowered to seek advisory opinions.

A key limitation on this option is that in order for the court to have jurisdiction under Article 96(2) of the Charter, the question must be a legal one arising within the scope of duties of the agency or organ. The case that sheds the most light on this strategy is the ICJ Advisory Opinion on the Use of Nuclear Weapons in Armed Conflict requested by the WHO, before the General Assembly successfully made a similar but more broadly worded request. In this case, the Court found that it did not have jurisdiction over the request on the basis that the question of the legality of the use of nuclear weapons did not fall within the scope of the duties of the World Health Organization. The Court stated that whatever the competence of the WHO to deal with the effects of nuclear weapons on health, such competence did not rest on the legality of the acts that caused them.⁴⁷ Furthermore, to ascribe such a competence to WHO to address the legality of such weapons would be tantamount to disregarding the principle of speciality within the United Nations system.⁴⁸ The decision can be criticized as reading the responsibilities of WHO in an unduly restrictive and technical manner, as indicated by the three judges who dissented on this point.⁴⁹

It is quite possible that the ICJ would return a similar decision should an opinion on odious debt be requested by some of the agencies mentioned above. However, given the general responsibilities of ECOSOC and of the specific duties of the Bretton Woods Institutions⁵⁰ in relation to lending and development, a request emanating from them would likely be entertained by the Court.

In spite of this obstacle, it should be noted in relation to nuclear weapons that the request of the World Health Organization had a utility aside from the mere referral of the question to the Court. The action taken on this issue by the WHO helped put the issue of legality at the forefront of the international agenda in 1993 and to spur the General Assembly to also request an advisory opinion. The WHO was an appropriate place to start the legal campaign since it had been studying the effects of nuclear weapons since 1981. In addition, the World Court Project's 'comparative advantage' was its link to the International Physicians for the Prevention of Nuclear Weapons, who were in a good position to lobby the WHO.⁵¹ This route to the ICJ would have to be considered with regard to the characteristics of each organisation.

d) Joint Suit by a Group of States

⁴⁵ The organizations of the World Bank Group also have such a capability. However, given that their voting share is heavily weighted towards creditor states, they are unlikely to respond to pressure on this issue.

⁴⁶ The membership of the International Labour Organization is significantly different from that of the General Assembly, comprising representatives of workers and employers in each state.

⁴⁷ Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, [1996] ICJ Rep. 66 at 76

⁴⁸ *Ibid.*, at 79-80.

⁴⁹ *Ibid.* Opinions of Judges Shahabudeen, Koroma and Weeramantry.

⁵⁰ But see note 45 on the Bretton Woods Institutions.

⁵¹ Dewes, *supra* note 28 at 26-29.

Potentially, a number of states affected by illegitimate debt could launch a joint suit against one or more states. Others could possibly also join the suit as proceedings begin. There do not appear to be any reasons which would require the disjoinder of a joint application.⁵² However, it should be noted that, as a contentious case, such a case will normally only be able to proceed with the consent of the creditor. The two instances where the creditors could not reject the Court's jurisdiction – where it has a treaty with the debtor providing for recourse or where both parties subscribe to the ICJ's compulsory jurisdiction – are unlikely to apply. Compulsory jurisdiction applies only on the basis of reciprocity.⁵³ Therefore all the debtor states involved would have deposit declarations recognising the ICJ's compulsory jurisdiction and to withdraw any reservations that could be taken advantage of by the creditor states. In addition, the greater the number of debtors the more difficult it would become to find jurisdiction provided in treaties between each of the states concerned and the creditor state.⁵⁴

2. The Scope of an ICJ case: The Parties and the Law

Most loan agreements between states do not have a choice of law clause.⁵⁵ Where the agreement is in the form of a treaty, particularly one concluded in solemn form (and registered at the UN or published in a law gazette), this agreement would be governed by international law. Absent such formal arrangements, the choice of law would depend on the circumstances and the intentions of the parties. However, where the two parties are both subjects of international law, there is a presumption that international law governs their interactions.⁵⁶

Since international law on financial transactions is not very well developed, some inter-state agreements fix only the amount and purpose of borrowing, and the lender state undertakes to ensure that a private institution concludes a loan agreement with the borrowing state. This contract is then subject to the lender's domestic law.⁵⁷ The latter issue could be problematic, since it is unclear whether odious debt and similar doctrines exist within private domestic contract law. The ICJ would be normally bound by the interpretation of such domestic laws by the national courts of that legal system.⁵⁸ Nevertheless, in interpreting domestic law, the ICJ would have a significant amount of leeway given the unique nature of such a case.

In the above situation, a state may argue that where the loan agreement in question is odious, the choice of law in the contract should be considered odious.⁵⁹ This would particularly be the case if the domestic law selected is that of the creditor nation. The debtor state could claim that the submission to the laws of another state would not be in the interests of its people, precisely because such laws would exclude odious debt doctrines. In rendering such a decision, the Court would be faced with the difficult and still controversial theoretical question of whether international law predominates over domestic law or whether the two occupy separate and distinct

⁵² Even though each state would be raising different loans, and thereby different issues, Article 36 (2) (b) of the ICJ Statute allows disputes concerning "any question of international law," would allow the Court to adjudge on the principles of law that apply to all the specific loans in question.

⁵³ Art. 36 (2).

⁵⁴ Of course, one possibility may be for a number of states to each launch an application to the Court dealing with separate odious loans. This would reduce the exposure of each state to retaliation.

⁵⁵ Reinisch, *supra* note 1 at 51.

⁵⁶ *Ibid* at 52.

⁵⁷ *Ibid* at 53.

⁵⁸ Brownlie, *supra* note 33 at 40. This, however, is justified on the concept of the reserved domain of national jurisdiction, which may be harder to justify in agreements between states.

⁵⁹ A similar argument may apply where the choice of *forum* is that of a domestic court.

spheres.⁶⁰ It is likely that in the case of agreements between two states, international law would govern the contract. This conclusion would be supported, indirectly, by the *Certain Norwegian Loans* case, where the ICJ left the door open to the application of international law, in exceptional cases, to a state's interference with the private-law-governed right of foreigners.⁶¹ Given the uncertainty on this issue, the first test cases should avoid agreements with domestic choice of law clauses.

a) Application of ICJ Rulings to Non-State Actors

Although only about one-seventh of international lending to states emanates from the International Financial Institutions (IFIs), these organisations have critical roles since they have historically insisted on payment according to the original terms of these agreements and until 1996, refused to reduce the overall amounts owing to them. They also insist on being paid prior to other lending organisations; this 'preferred creditor' status probably has some basis in customary law.⁶²

The *Reparations* case shows that the United Nations has international legal personality for certain purposes.⁶³ However, the ICJ Statute states unambiguously that only states may be parties to the Court in contentious cases.⁶⁴ In some situations, such as UN Headquarters agreements, international organisations have concluded agreements with states providing that in the case of a dispute, the agency will request an advisory opinion from the ICJ, and that both parties agree beforehand to be bound by this decision.⁶⁵ However, as noted in Section B. 2.1, the World Bank's general conditions applying to loan agreements specify arbitration, rather than reference to the ICJ, in the case of a dispute.

b) Private Parties

Private parties cannot be parties to litigation in the ICJ. However, the loans they conclude can become the subject of litigation before the Court if private loans are assumed by the creditors' home state. In the *Serbian Loans* case, the Permanent Court of International Justice decided that disputes over such loans constituted an international dispute within the framework of diplomatic protection.⁶⁶ In addition, it has been argued that the financial claims of private creditors can be considered "acquired rights" which cannot be withdrawn by the state without adequate compensation. Therefore, repudiation of debt without an excuse in domestic law or international law would constitute an intentionally wrongful act entailing state

⁶⁰ This would correspond to the argument between theorists of monism and dualist doctrine. Brownlie, *supra* note 58 at 30-33. The ICJ would most probably take the position that this issue need not be resolved in the present case and hold that in an agreement between two states, disputes over the terms of the agreement would be covered by international law. An alternative outcome might be that the ICJ would uphold the domestic choice of law clause. However, if the result was in conflict with the odious debt doctrine in international law, this would be resolved with reference to the state responsibility of the creditor (towards the debtor) under international law, as set out in theories of 'coordination' between domestic and international law, Brownlie, at 34-35.

⁶¹ *Certain Norwegian Loans (France v. Norway)* [1957] ICJ Rep. 37 at 77.

⁶² Reinisch, *supra* note 1 at 35.

⁶³ *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] ICJ Rep. 174 at 184-185.

⁶⁴ *ICJ Statute*, *supra* note 29, Article 34 (1).

⁶⁵ I. Seidl-Hohenveldern, "Access of International Organizations to the International Court of Justice" in A.S. Mueller, D. Raic & J. Thuranszky, eds. *The International Court of Justice: Its Future Role after Fifty Years* (The Hague: Martinus Nijhoff, 1997) at 190

⁶⁶ (1929), PCIJ (Ser. A) No. 20 at 78.

responsibility of the debtor to the creditor state.⁶⁷ However, it is unclear whether the duty is owed to the private party alone or to its state of origin. It is unlikely that such a case would come before the ICJ since creditor states would prefer to have such issues litigated in their domestic courts or resolved through negotiation (in which their bargaining position would normally be stronger). However, in situations where the borrower is refusing to submit to the jurisdiction of the creditor state's courts and is in a powerful economic position, the private creditors' state may take the case to the ICJ. Such an outcome might be beneficial to the debtor, given the advantages of litigation in the ICJ as discussed above.

B. International Arbitration

1. State against State or State against IFI

Arbitration always requires the will of both parties, either as expressed the time of the formation of the loan contracts/treaty or at the time of the dispute. Arbitration in the case of a dispute is often specified in contracts between the IFIs and borrower states. Where the agreement is silent on a choice of forum, arbitration would be a key option for dispute resolution, given that it may be difficult to bring an intergovernmental body before a domestic court, given its status as a subject of international law.

Arbitration tribunals have some advantages over the ICJ and domestic court options. They are less threatening and faster. States, IFIs and private parties will normally prefer such fora as they involve less publicity, and are seen as a measure taken by parties who want to continue their relationship. This route may be one of the best options to reduce the exposure of a debtor state to economic retaliation.

Arbitration has some potential as a venue for a test case on odious debt. The main advantage is that it is easier to set up an arbitration tribunal than to proceed to the ICJ. Furthermore, arbitration represents a strategy of lower risk. The rejection of the odious debt doctrine in such a tribunal would be a setback, but would not be determinative, given the lesser ability of arbitration to influence international law (relative to the ICJ). A successful arbitration would not constitute a breakthrough in legal terms, but would indicate the way forward and shed light on useful arguments for a future ICJ case.

The disadvantages of international arbitration are that the parties have more control over the choice of arbitrators, either for the specific arbitration or at the time of the agreement. This may give the creditor states an opportunity to screen out persons likely to support the odious debt doctrine. However, in relation to World Bank agreements, there is less of a concern on this particular issue. Under such agreements, each party appoints an arbitrator. These two arbitrators then select a third arbitrator, failing which the third arbitrator is appointed by the President of the ICJ. Should the President not appoint the third arbitrator, the choice is made by the Secretary-General of the United Nations.⁶⁸ Therefore, there is a deadlock-breaking mechanism, such that at least two of the three arbitrators can be expected to be relatively neutral or supportive of the debtor claims.

In addition, as opposed to the ICJ, arbitrators are less likely to see themselves as playing a key role in clarifying the law, and would therefore be less likely to adopt positions that depart from the status quo. However, they would be more likely than

⁶⁷ Reinisch, *supra* note 1 at 91.

⁶⁸ International Bank for Reconstruction and Development, "General Conditions Applicable to Loan and Guarantee Agreements (January 1, 1985)" re-printed in D. Bradlow, ed. *Negotiating and Structuring International Debt Transactions*, 2nd ed. (Washington D.C: International Law Institute, 1986) at 78.

domestic courts to take a non-traditional approach, given that parties do not normally provide for the possibility of an appeal to an arbitration decision.

A final question on the choice of forum is whether the choice of arbitration specified in an odious debt contract would remain valid. It would be necessary for a debtor state challenging such a clause to show, at least, that the arbitration would be not in the interests of the state (as assessed at the time of the formation of the agreement). Where the lender is a state, the debtor could attempt to bring such a claim to the ICJ (see Section 1.1). Of course, such an option will not be available for contracts with IFIs. Failing recourse to the ICJ, the debtor state could still validly demand that a new panel of arbitrators acceptable to it be established. However, for such the latter to occur, the debtor would have to convince the arbitrators specified in the contract to exclude their own jurisdiction on the basis of the odious contracts, which would amount to trying the issue under the arbitration specified in the contract.

With regard to the choice of law for an arbitration, international law would normally be applicable, in the absence of the clause to the contrary. The World Bank's official view is that its agreements with states are covered by international law principles.⁶⁹ Loan agreements contracted by the World Bank Group and the regional development banks normally contain a clause stating that the rights and obligations incurred in the agreement are enforceable in accordance with their terms notwithstanding the law of any state to the contrary.⁷⁰

2. State against a Private Party

There may be instances where a state is unwilling or unable to submit to the jurisdiction of a foreign domestic court. In such cases, arbitration may be provided for as a means of settling disputes,⁷¹ for example, contracts between Brazil and some foreign banks.⁷² Litigation between the state and private parties may also occur under the auspices of a state-to-state agreement, as occurred in the establishment of the Iran–U.S. Claims Tribunal. As mentioned in Section A, such a tribunal is unlikely to be set up for odious debts until there is significant judicial or political development of the odious debt doctrine. In agreements with private parties, a debtor state will have the option of attempting to take the dispute to a domestic court that would have had jurisdiction over the contract in the absence of an arbitration clause. However, the domestic court would have to recognize the odious debt doctrine and interpret it so as to nullify the clause in the contract specifying recourse to arbitration.

The choice of law in state-private party arbitrations is not predetermined and will generally depend on the terms of the loan contract or of the arbitration agreement. A state may be able to challenge the validity of a domestic choice of law clause, as set out in Section B.1.2.

3. The International Centre for the Settlement of Investment Disputes (ICSID)

The ICSID is a specialized form of arbitration between states and private parties which could serve as a forum to litigate odious debt claims. According to Reinisch, loan

⁶⁹ Reinisch, *supra* note 1 at 52.

⁷⁰ International Bank for Reconstruction and Development, “General Conditions Applicable to Loan and Guarantee Agreements,” in D. Bradlow, ed. *International Borrowing: Negotiating and Structuring International Debt Transactions*, 2nd ed. (Washington, D.C.: International Law Institute, 1986) at 77 (section 10.01), Reinisch, *supra* note 1 at 52.

⁷¹ A. Gooch & L. Klein, “Annotated Sample Loan Agreement” in D. Bradlow, ed. *International Borrowing: Negotiating and Structuring International Debt Transactions*, 2nd ed. (Washington, D.C.: International Law Institute, 1986) at 357.

⁷² Reinisch, *supra* note 1 at 83.

agreements would fall under the definition of an investment in the ICSID Convention.⁷³ Normally, there would have to be a specific agreement to refer the dispute to ICSID, either in the loan agreement or at the time of the dispute. Additionally, both the borrower and the state of the creditor must be parties to ICSID. One should note that ICSID's jurisdiction may also exist under provisions of bilateral investment treaties between states.⁷⁴

ICSID is unlikely to be an appropriate forum for advancing the odious debt doctrine. States do not see the tribunal as enforcing norms of conduct on investors.⁷⁵ Rather, the body is intended to serve their interests so as to encourage greater flows of investment. Given the origins of the ICSID, one would expect it to decide odious debt issues in favour of the investor. However, the result will depend on the particular judges appointed to the case. The parties can jointly select a sole arbitrator. Alternatively, each party has the opportunity to select one arbitrator. These two arbitrators then select the President of the panel. In the event of a disagreement, which is likely to be the case on an odious debt issue, the President is selected by the Chairman of the ICSID's Administrative Council.

On the choice of law, the proceedings would follow the express choice of law in the contract or arbitration agreement. If a domestic law is specified in the contract, the state may be able to challenge such choice as discussed above in Section B.1.2. In the absence of a choice of law clause, the dispute would be governed by the laws of the state party and any applicable international law. However, international law will be hierarchically superior to the domestic law in this situation.⁷⁶

C. Domestic Courts

Contracts between states and private parties are likely to specify recourse to domestic courts and domestic laws. Such contracts account for a large majority of Southern debt. This issue is explored mainly with reference to loans that specify New York as the choice of forum⁷⁷ and choice of law, together with examples from England so as to provide a comparative perspective. These jurisdictions are the two that are the most often chosen in sovereign loan contracts.

It may be assumed at the outset that it is insufficient for odious debts issues to be litigated within the courts of a debtor state, in particular at an early stage. Although such litigation is feasible, a domestic judgement on odious debts would be unlikely to have international legitimacy. Therefore the intended effect of the odious debt doctrine – to selectively repudiate debt and to encourage selective lending in the future – would not operate. Rather, such an outcome would most likely simply cut off lending to that state in the future, and may even impact on the credit rating of states in similar circumstances.

Although litigation within a debtor state may not be useful in forestalling international economic retaliation, it may be useful in one respect. It can allow civil

⁷³ *Ibid.* at 83.

⁷⁴ The scope of these provisions can be larger than expected. In the case of *Maffezini v. Kingdom of Spain*, a most-favoured nation clause in the Argentinian-Spain BIT allowed the investor to rely on the provisions of the Spain-Chile BIT, which provided access to ICSID without any need for the exhaustion of local remedies, (2000), Case No. Arb/97/7, online: International Centre for the Settlement of Investment Disputes, <www.worldbank.org/icsid/cases/awards.htm> (date accessed 15 April, 2001).

⁷⁵ S. Toope, *Mixed International Arbitration: Studies in Arbitration Between States and Private Persons*, (Cambridge: Grotius, 1990) at 220-221.

⁷⁶ *Ibid.* at 240.

⁷⁷ Note that the contract can grant jurisdiction to specific courts within a jurisdiction. Contracts in relation to New York specify either federal or state New York courts. M. Gruson, "Controlling site of litigation" in M. Gruson, & R. Reisner, eds. *Sovereign Lending: Managing Legal Risk* (London: Euromoney, 1984) at 30.

society to pressure the government to take action on illegitimate debt and provide a forum for producing authoritative supporting information.⁷⁸ On this basis, a state can then go on to raise the issue at negotiating fora and to pursue a claim in an international or foreign tribunal.

As will be discussed below, there is some room for manoeuvre even if a debtor state submits to the jurisdiction of creditor courts, such as by attempting to litigate cases in jurisdictions where success is likely. This could be useful in situations where the courts of some, but not all, creditor states accept odious debt arguments.

A problematic aspect of domestic litigation, however, is that joint suits by debtor states would probably not be permitted by a court given that each state would be raising different 'issues' (i.e. specific loans). This difficulty may be resolved in two ways. Firstly, a number of states could agree to launch various cases at one specific time, thereby spreading the risk. The second would be, of course, to pursue other means mentioned above in sections A and B, but use domestic mechanisms as a means of implementing such results. The combination of domestic and international law approaches here would create an incentive for creditor states to explore the creation of a specialized tribunal, acceptable to all parties, to adjudicate these claims.

1. Determination of Forum

Most loan and loan restructuring agreements, particularly those formulated after the onset of the 1980s debt crisis, state that both parties shall submit to the jurisdiction of the home state of the creditor (i.e. where its head office is situated) or of a forum such as New York or England. Lenders often choose these venues because they have confidence that their courts will uphold their interests. By contrast, lenders perceive that it is dangerous to grant jurisdiction to the domestic courts of a borrower since such courts may approve moratoria on debt, interest limitations or exchange controls, they may even declare some loans to be odious.⁷⁹ According to Gooch and Klein, the courts in New York and England have an institutional interest in being perceived as providing a fair forum to borrowers and lenders. They are the home jurisdiction of major borrowers as well as of lenders. The substantive law in these jurisdictions is well developed and the courts have a good record for the fair treatment of litigants.⁸⁰

New York law does not require that the transaction in question occur within the United States, as long as the contract specifies New York law as the governing law, and the transaction value is greater than \$1,000,000.⁸¹ Where a contract is silent as to the choice of forum, it is likely that the courts of the lender would assert jurisdiction on the basis that the repayment is to take place there.⁸² In addition, it is theoretically possible for the creditor to voluntarily submit to the jurisdiction of the borrower's courts.⁸³ Of course, this is unlikely until there is a greater acceptance of the odious debt doctrine and the courts of a borrower demonstrate an ability to fairly assess odious debt.

A preliminary assessment of New York jurisprudence would suggest that New York would not be the ideal preliminary site for odious debts litigation. In the Allied Bank case III, it was stated:

⁷⁸ See for example the judgement of the Federal Court of Argentina in July 2000 on illegitimate debt in Argentina, *supra* note 19.

⁷⁹ Gooch & Klein, *supra* note 71 at 354.

⁸⁰ *Ibid.* at 357.

⁸¹ *Ibid.*

⁸² V. Carrillo-Batalla Lucas, "Conflicts of Laws in International Lending Transactions – Governing Law and Choice of Forum" in D. Carreau & M. Shaw eds. *The External Debt/La dette extérieure* (Dordrecht: Martinus Nijhoff, 1995) at 441.

⁸³ *Ibid.*, 441.

The United States has an interest in ensuring that creditors entitled to payment in the United States in United States dollars under contracts subject to the jurisdiction of the United States may assume that, except under the most extraordinary circumstances, their rights will be determined in accordance with the principles of contract law.⁸⁴

This case was the re-hearing of an earlier case, *Allied Bank II*, where the Court had validated the Costa Rican delays in repayments under the act of state doctrine (see below Section B. 3.5.2.) stating that such delays were analogous to measures under U.S. Bankruptcy legislation. As an indication as to the likely arguments that would come before a court seized with this question, one may consider the amicus brief presented by the New York Clearing House Association to the court in *Allied Bank II*. The brief emphasised that the decision in *Allied Bank II* would encourage defaults, undermine the bargaining powers of creditors and frighten away international finance from New York to venues in Europe, particularly England.⁸⁵ The *Allied Bank II* decision was therefore overturned and Costa Rica ordered to meet the obligations in the contract. The events surrounding this decision suggest that the New York courts have a vested interest in preserving New York as a centre of international lending. It may be expected that the interests of the local bar in maintaining New York's standing as centre of lending would also be taken into account.

There are a number of means to avoid New York or other unfavourable fora, depending on the circumstances of the loan agreement. The best circumstance is where the contract is silent as to choice of forum or where a clause gives jurisdiction to a specified forum, but does not exclude other jurisdictions. Such 'non-exclusive jurisdiction' clauses often exist in loan contracts. They are generally seen as favouring the creditor by allowing the creditor to sue the debtor state in any other jurisdiction in which the debtor has assets.⁸⁶

In such cases, the borrower can apply for a court decision to reduce or cancel the obligation owed to the creditor in all jurisdictions that recognise odious debt doctrines. There are two limitations. First, the court would normally consider whether there is a reasonable relationship between the loan agreement and the jurisdiction chosen.⁸⁷ Second, it may be preferable that the jurisdiction chosen be that of a Northern state that is normally a creditor so as to forestall the impression that the court's decision was biased in favour of the debtor.

Where there is a forum selection clause, a debtor may challenge its enforceability. This option is permitted in American law on two major grounds. The first is where recognition of this clause would be invalid, for such reason as fraud and 'overreaching'.⁸⁸ The nature of the bargaining relationship between the parties would be relevant in this regard. However, a challenge to jurisdiction based on an argument of unequal bargaining power would not be likely to succeed. The courts have so far not insisted on equal economic strength of the parties as a condition for enforcement of a forum selection clause.⁸⁹ Another possible option would be to submit that providing a loan that is odious to the people of a state would constitute fraud. However, as seen in previous sections, such a challenge to jurisdiction would essentially pre-determine the case. A court willing to accept this argument would probably be favourably disposed to the odious debt doctrine.

⁸⁴ *Allied Bank III* (rehearing), 24 I.L.M. (1985) at 768.

⁸⁵ Cited in Tsikata, *supra* note 5 at 207.

⁸⁶ Gruson, "Site of litigation", *supra* note 77 at 29.

⁸⁷ J. Hill, *The Law Relating to International Commercial Disputes* (London: LLP, 1998) at 449.

⁸⁸ *Bremen v. Zapata Offshore Co.*, 407 U.S. 1 at 10-11 (1972).

⁸⁹ Lucas, *supra* note 82 at 444.

The second major ground for challenging jurisdiction is where the forum selection clause is determined to be unreasonable and unjust, including situations where the public policy of the excluded forum would be violated by the law to be applied.⁹⁰ This element may play a role in removing the case from the jurisdiction of New York, depending on where the Court determines the “excluded forum” is to be. As noted below, New York courts have determined the *situs* of the debt to be the location of the creditor.⁹¹ Therefore, this ground is relevant in situations where the creditor is not situated in New York.

In addition, the more discretionary concept of *forum non conveniens* may be considered as a means for a court to exclude its jurisdiction in favour of another jurisdiction that is seen to be more appropriate. This ground may apply even in a case where a forum has been clearly specified in the contract. However, the burden of proof will rest on the party claiming *forum non conveniens* to show that the interests of justice are served by such a transfer and that there is an adequate and preferable alternative forum.⁹² In addition, according to the United States Supreme Court jurisprudence, American plaintiffs have a further advantage in that their choice of an American forum is accorded a singular deference not accorded to foreign plaintiffs and will rarely be disturbed.⁹³ As with the previous paragraph, this ground is therefore relevant in relation to non-New York based creditors. It should be noted that some loan agreements state that the borrower or both parties waive any objection they may have on the grounds of *forum non conveniens*. In such situations, a debtor state could only rely on the defences of fraud and unjustness mentioned above.⁹⁴

Another possible defence is the ‘Calvo Doctrine’, reflected in several Latin American domestic laws, which would prevent a state from litigating its disputes with a private party in a court outside the country. Although this doctrine has constitutional significance in a number of states, there has been movement away from it in recent years.⁹⁵ In addition, given the need to gain international legitimacy for the doctrine of odious debt, the Calvo Doctrine is not helpful and it would be necessary to interpret it to Latin American states to take debt disputes to international arbitration, rather than to national courts of creditor nations.

Should New York courts refuse to give up jurisdiction over odious debt cases, other national courts may assert jurisdiction on grounds of fraud and public policy in spite of a choice of forum clause specifying adjudication elsewhere. The only requirement would be that the jurisdiction’s own rules allow it to adjudicate such an issue under its own conflict of laws rules. Such an action would not preclude a New York court from addressing the same issue, and issuing an inconsistent judgement. However, the decisive factor in the success of a suit outside New York would be the timing and the perceived legitimacy of the particular court.

2. Determination of the Governing Law

In an agreement between a state and a foreign commercial bank, the choice of law governing the contract will regularly be a national law, usually that of the creditor.

⁹⁰ Gruson, “Site of Litigation” *supra* note 77 at 29.

⁹¹ See note 124.

⁹² Lucas, *supra* note 82 at 462.

⁹³ J. Bhandari, “International Debt litigation in the United States Courts” 33 *Germ. Y.B. Int’l L.* 383 at 399.

⁹⁴ Gooch & Klein, *supra* note 71 at 358. They may be similar agreement to waive objections on the ground that a suit on the same issue has been launched elsewhere.

⁹⁵ Practically all of the countries whose national law is in theory controlling in relations to interactions with foreign parties have found it necessary to provide exceptions to this doctrine. Lucas, *supra* note 82 at 425.

The same applies also to contractual results of London Club debt reschedulings.⁹⁶ Normally if the chosen forum is that of a creditor state, the law of that state will be selected as the controlling law.

At the present time, it is unclear whether the laws of England and of New York, properly interpreted, provide support for the odious debt doctrine. Given the interest of these jurisdictions in maintaining their positions as key financial centres, their courts are likely to reject the odious debt doctrine. The manner in which these two jurisdictions interpret international financial agreements is remarkably similar. Often the choice between England and New York is not on the basis of any advantages in the specific laws, but rather in relation to more mundane considerations such as the location of the borrower's assets or the location of the lending agency.⁹⁷ It may therefore be necessary to examine the likely action of these courts were they to receive a case on odious debt.

If a case were heard in a New York forum, the guiding principle for questions of choice of law is that the intention of the parties prevails.⁹⁸ An exception would be if the enforcement of the transaction would, under the law of New York, be "inherently vicious, wicked or immoral, that is, shocking to the prevailing moral sense."⁹⁹ In situations where there is no choice of law clause, the governing law will be that of the legal system most reasonably related to the contract.¹⁰⁰

Under English law, an express choice of law clause is normally recognised even if the jurisdiction has no connection with the contract. If there is no express choice, then a court will examine the contract for an implied choice. Only if this fails will a court determine the choice on law on the basis of closest connection to the contract.¹⁰¹ Exceptionally, the choice of law will not be upheld in two circumstances. The first is if it would be contrary to English public policy – if the contract has some close connection to England. The second circumstance would be if the purpose of the choice of law is to evade mandatory provisions of the legal system with which the loan contract has the most substantial connection.¹⁰² In both of the above situations, the result is similar to that found in relation to the choice of forum issue. Where the agreement is made with a creditor from outside the jurisdiction, it may be possible to opt out of the choice of law clause. However, there is less room for such action when the dispute is with a creditor based within the jurisdiction specified in the choice of law clause.

3. The Role of International Law in Domestic Litigation

The desirability of a particular domestic jurisdiction will rest on two factors. One factor will be the extent to which its corporate law may apply to odious debts. The second is the extent to which customary international law will be applied by its courts. In the United States, customary law is considered as part of the supreme federal law according to the *Restatement (Third) of the Foreign Relations Law of the United States*. In situations where custom and statute are in conflict, Paust argues that this is resolved by the 'last in time rule,' that is, since customary law is continually regenerating,

⁹⁶ Reinisch, *supra* note 1 at 49 & 77. The majority of US and UK banks expressly provide for their home state law to govern.

⁹⁷ L. Buchheit, "Choice of Law and Regulatory Statutes" (March 1996) Int'l. Financial L.R. 11 at 11.

⁹⁸ M. Gruson, "Controlling Choice of Law" in *Sovereign Lending: Managing Legal Risk*, eds. *Sovereign Lending: Managing Legal Risk* (London: Euromoney, 1984) at 54.

⁹⁹ Lucas, *supra* note 82 at 434.

¹⁰⁰ Gruson, "Choice of Law" *supra* note 98 at 55.

¹⁰¹ A. Cates & S. Isem-Feliu, "Choice of Law and Site of Litigation in England" in *Sovereign Lending: Managing Legal Risk* (London: Euromoney, 1984) at 71.

¹⁰² *Ibid.* at 66-68.

custom will prevail over an inconsistent statute.¹⁰³ However, a significant school of thought holds that a court cannot repeal an Act of Congress if it is in conflict with principles of international law.¹⁰⁴ In the United Kingdom, the dominant principle is that customary law is considered as the law of the land and enforced, as long as it is not inconsistent with Acts of Parliament or prior judicial decisions of final authority (except where such decisions rested on obsolete rules of international law).¹⁰⁵ The position of the United States and the U.K. could be contrasted with that of Italy, where, according to the Constitution of 1947, Italian law is to be in conformity with the generally recognized rules of international law.¹⁰⁶ Strategically, it would be useful to begin test cases in states with such a structure to incorporate international law.

The incorporation of customary law into domestic law does not completely resolve the question. There is controversy over whether loan contracts between a state and a private party are governed directly by international law. The developing law of state immunity suggests that loan agreements of states are generally to be termed as commercial contracts that are not inherently related to state acts (*jure gestionis*). Therefore, sovereign immunity does not apply. Second, a number of loan agreements with private banks stipulate that national laws governing loan agreements and that sovereign immunity is waived.¹⁰⁷ Nevertheless, the odious debt doctrine, as formulated by Sack and other writers, explicitly states that the doctrine applies to creditors who are non-state entities. The application of international law to interactions between states and private persons is not unprecedented in international law, given the ICJ decision in *Certain Norwegian Loans* which stated that international law can apply to foreign private persons residing within a state, even in relation to private-law regulation.¹⁰⁸

The question of supremacy of custom over statute will also play a key role in the future as states react to odious debts claims. Gruson states that historically, a sovereign in trouble is not above changing the law in order to alleviate its troubles.¹⁰⁹ Where the state can modify the operation of customary law domestically, as in England and possibly the United States, the state could simply legislate to block the recognition of odious debt doctrines in the court. Such action could be applied retroactively to contracts concluded prior to such legislation. American law is generally applied by the courts as it stands at the time of the decision, rather than at the time when the contract was concluded.¹¹⁰ This means that should illegitimate doctrines existing in international law be recognised by an American court, the federal government could legislate to nullify such doctrines being applied to contracts under US law.

4. The Impact of Forum Shopping

In concluding loan agreements, private lenders are normally in a position to ‘shop’ for the forum and the choice of law that best protects their legal interests. Should one jurisdiction uphold the doctrine of illegitimate debt, it is likely that future loan agreements would be crafted so as to avoid such jurisdictions. This outcome could

¹⁰³ J. Paust, *International Law as Law of the United States* (Durnham: Carolina, 1996) at 89 & 96.

¹⁰⁴ *Ibid.* at 90- 94.

¹⁰⁵ Brownlie, *supra* note 33 at 42-46.

¹⁰⁶ *Ibid.* at 50. However, previous legislation passed prior to 1947 is ‘grandfathered’ and left unaffected by international law.

¹⁰⁷ Reinisch, *supra* note 1 at 82.

¹⁰⁸ *Supra* note 60.

¹⁰⁹ Gruson, “Choice of Law” *supra* note 98 at 66.

¹¹⁰ Lucas, *supra* note 82 at 438. Lucas argues that such action would be unconstitutional from the perspective of civil law jurisdictions such as Venezuela and Bolivia, where retroactivity is forbidden.

undermine the deterrent effect of illegitimate debt and the development of greater creditor responsibility.

Forum shopping can be addressed through a variety of means. Firstly, it would be necessary to obtain more widespread recognition of odious debt doctrine as a principle of customary law. Second, some jurisdictions will refuse to accept choice of law clauses intended to evade mandatory provisions of the jurisdiction to which there is the closest connection.¹¹¹ Finally, some jurisdictions that uphold odious debt doctrines may assert jurisdiction over agreements to which they are connected on grounds of public policy even where the contract grants exclusive jurisdiction to another state. For these three means to operate and mitigate the effects of forum shopping, it will be necessary for civil society and Southern states to act in a sustained and co-ordinated manner.

5. Sovereign Defences to Domestic Jurisdiction

Southern states can use a number of grounds to attempt to avoid other states' domestic jurisdiction. However, given the need for international legitimacy, the main utility of such defences would not be to deny legal recourse to creditors, but rather to force disputes into neutral fora that would apply international law, such as international arbitration. Another possible forum, with the co-operation of the creditor states, could be the ICJ.

a) Sovereign Immunity

The defence of sovereign immunity states that the courts of one state should not sit in judgement on the acts of another state. Although this doctrine is widely accepted in international law, its significance should not be exaggerated. First, it is becoming standard practise for loan agreements to include clauses where states waive sovereign immunity (and even diplomatic protection). Second, many, if not most Northern courts, including New York and England, have adopted restrictive theories of sovereign immunity.¹¹² These courts follow common law notions of distinguishing commercial (*jure gestionis*) and state acts (*jure imperii*) and permitting sovereign immunity only for the latter.

Under the U.S. Foreign Sovereign Immunities Act (FSIA), there is no immunity in relation to commercial activity carried out in the United States by a foreign state.¹¹³ Under this law, the nature of the act is relevant, and not its purpose. That is to say, loan transactions by sovereign borrowers are deemed to involve commercial activity for which the sovereign immunity defence is not available.¹¹⁴ This interpretation is corroborated by the legislative history of the Act.¹¹⁵ However, Lucas argues that under this Act, loans for governmental purposes such as infrastructure and which do not involve competition with the private sector, should be covered by sovereign immunity.¹¹⁶ However, there are no cases on this point.

In spite of the above, the modalities for executing judgement on a debtor's assets are not fully yet resolved, and this remains a key area of litigation. Furthermore, the FSIA enacts immunity for property held in the United States by a central bank or

¹¹¹ See *supra* note 102.

¹¹² F. Feliciano, "Report of the Director of Studies of the English-speaking Section of the Centre" in D. Carreau & M. Shaw eds. *The External Debt/La dette extérieure* (Dordrecht: Martinus Nijhoff, 1995) at 47.

¹¹³ *Foreign Sovereign Immunities Act*, 1976, 28 USCS § 1605 (a) (2).

¹¹⁴ Bhandari, *supra* note 92 at 392-93.

¹¹⁵ Lucas, *supra* note 82 at 453.

¹¹⁶ *Ibid.* at 454.

other monetary authority for its own account.¹¹⁷ This indicates some room for manoeuvre by Southern states in their disputes with creditors.¹¹⁸

b) Act of State and Comity Doctrines

The act of state doctrine provides that the courts of one state will not sit in judgement on the acts of another within its territory. It applies in both domestic and international law. Under US law, this doctrine is closely related to the principle of comity, which is defined as:

neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill on the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.¹¹⁹

Comity is not considered to be a rule of law, but rather one of practise, convenience and expediency.¹²⁰ Comity contemplates careful balancing of the interests of private litigants, of the U.S. government and of the foreign government.¹²¹

The doctrines of act of state and comity doctrines do not seem to apply to international lending agreements in the United States. In the case of *Libra Bank Ltd. v. Banco Nacional de Costa Rica*, the New York district court rejected the defence of comity on the grounds that Costa Rica's restrictions on exchange controls in relation to the repayment of debt constituted a confiscation of property without compensation, determined to be repugnant to the laws of the United States. It also stated that the act of state doctrine does not apply if the *situs* of the debt was outside the territory of the foreign state.¹²² United States case law has consistently accepted that the *situs* of the debt is the place of payment.¹²³ This characterization has been heavily criticized on the grounds of competing principles that the debt is located in a state that has control over the debtor.¹²⁴

In the case of *Allied Bank International v. Banco Credit Agricola de Cartago*, heard under the laws of New York, the appeal court decided that Costa Rica's imposition of currency restrictions required deference under the doctrine of comity. It was held that Costa Rica's actions were consistent with U.S. policy on the restructuring of foreign debt.¹²⁵ However, upon rehearing, and after the U.S. government presented arguments against the Costa Rican actions, the same court decided that the decrees were in fact contrary to U.S. policy. The court also justified this conclusion on the grounds that the property affected, i.e. the debts to be paid to the banks, were located within the U.S. and the act of state doctrine did not apply.¹²⁶ In addition to such

¹¹⁷ *FSIA*, *supra* note 113, § 1611 (b).

¹¹⁸ This legislation could of course be changed by the United States. However, one would assume that such action could be deterred in part by the threat of the affected states to carry out similar acts in their own countries, depending on the economic and political power of the Southern state.

¹¹⁹ *Hilton v. Guyot*, 159 U.S. 113 at 183-164.

¹²⁰ *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F. 2d 435 (3rd Cir. 1971).

¹²¹ Lucas, *supra* note 82 at 456.

¹²² 570 F. Supp. 870 (SDNY 1983).

¹²³ Lucas, *supra* note 82 at 443.

¹²⁴ A survey of such claims is provided in Tsikata, *supra* note 5 at 192-193. It should be noted that the *Libra* judgement recognized that the test it was applying was arbitrary.

¹²⁵ (*Allied Bank II*), 23 ILM (1984) 742-747.

¹²⁶ *Allied Bank III*, *supra* note 84 at 762-768.

jurisprudence, many loan agreements require the state to waive defences of act of state.¹²⁷

As a result, the act of state doctrine and comity do not hold much promise currently. This situation may change if there is movement in other fora, such as if the United States agrees to an international tribunal to examine the legitimacy of debts, including those owed to private parties. In such circumstances, comity would function as the mechanism by which domestic courts would exclude their jurisdiction in favour of a more appropriate forum.

6. *The Involvement of Civil Society in Domestic Litigation*

Civil society groups, both within creditor states and debtor states, can play a major role in litigation. Their roles could include mobilizing support for such cases and arranging for *pro bono* legal expertise to help governments prepare their cases. Civil society groups may also try to use the courts of debtor states to compel their governments to challenge the validity of their debts. The success of such an initiative would depend on the rules on public interest standing within the state. Civil society groups may also bring forward a public interest action within a debtor state to call on the state to assess the legitimacy of its debt, as has occurred in Argentina. Such action may spur the state into challenging the debt internationally.

A third possible role for civil society groups is to bring forward a case directly challenging the repayment of debt in a creditor nation. However, such a claim would probably be disallowed for procedural reasons. While the civil society group could argue that it is acting in the interest of the public of a debtor state, there is a strong possibility that the application by a civil society group would be characterised as ‘third party standing.’ The loan agreement in question would be seen to be binding on the debtor state rather than upon the people within the debtor state. As such, the civil society group would have to act on behalf of the state. The doctrine of comity¹²⁸ would militate against permitting non-state actors to take on this role. There is a good chance that the debtor state itself will probably disavow the act of the civil society group, and could make the case that the action being taken is in fact contrary to its interests (such as harming its credit rating).

In the case of New York, the specific rules of both the federal and state courts (either of which could be chosen for as a forum for debt litigation) would not seem to permit third party standing. Federally, it is necessary that there be a close relationship between the litigant and the third party, that the third party not have the ability to vindicate his/her own rights and that the denial of third party standing would dilute the rights of the third party.¹²⁹ The rule is mirrored in the Civil Practise Law and Rules Act of New York State.¹³⁰ It would be difficult for civil society groups to prove that the state is unable to represent itself in court, except where the state in question is a failed state (where it is unlikely that any debts were being collected in any event).

The above argument is based mainly on the procedural rules of these jurisdictions. The conclusion here may not be logically consistent with the principles underlying the odious debt doctrine. The odious debt doctrine essentially amounts to a piercing of the veil of the state and refuses to assume that the state is always the legitimate representative of the people. There are two responses to this concern. First, there is a subtle difference between the courts of one state pronouncing on the ability

¹²⁷ Gooch and Klein, *supra* note 71 at 359.

¹²⁸ (See Section B. 3.5.2 above).

¹²⁹ R. Rotunda & J. Nowak, *Treatise on Constitutional Law: Substance and Procedure*, 3rd ed. (St.Paul: West, 1999) at 249-250.

¹³⁰ NY CLS CPLR § 1007 (2001).

of its own citizens to collect on foreign loans, as would be the case in relation to odious debt, and for such a court to interfere with a state's ability to represent itself in litigation. The latter could be said to intrude to a much greater extent on the state's sovereignty. Second, questions of procedure precede questions of substance and will be dealt with first, prior to a full-fledged analysis of the odious debt issue.¹³¹

III. Treaty Monitoring Bodies: The Committee on Economic, Social and Cultural Rights (CESR)

Human rights institutions could potentially play a role in creating political pressure to reduce Southern governments debt, where such debt repayment could cause violation of core economic, social and cultural rights. Such bodies would probably not normally consider the circumstances surrounding the formation of such debts. As such, this approach is quite distinct from the odious debt approach. The United Nations Committee on Economic, Social and Cultural Rights asks for a report from states that are party to the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* every five years on the measures that they have taken to implement the Covenant. The Committee has tended to actively solicit parallel reports and hear oral opinions from civil society organisations in each country.¹³² It would be useful for the debt relief movement to engage this process and make representations indicating whether a lender country's debt collection policies for specific countries undermines or reverses progress towards the realisation of economic, social and cultural rights in such debtor countries.

Such an effort would help by generating more information on the linkage of debt to the realisation of human rights. More importantly, the report of the Committee normally receives significant press coverage, in which the Committee is portrayed by the media as speaking for the entire United Nations system, thereby boosting its profile in society.¹³³ The *ICESCR* approach has the limitation that it will not necessarily apply to lender states that are not ratified parties to the Covenant, particularly the United States. However, virtually all other major creditor states are ratified parties to the Covenant.

The Committee has already commented on the possible need for debt relief:

International measures to deal with the debt crisis should take full account of the need to protect economic, social and cultural rights through, *inter alia*, international co-operation. In many cases, this might point to the need for major debt relief initiatives.¹³⁴

Article 2 (1) of the *ICESCR* obliges states "to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full

¹³¹ The upshot of the analysis of substance may well point to the need, in exceptional circumstances, for amendments to the procedures by which states (or the peoples within them) are represented in foreign courts.

¹³² M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Clarendon, 1995) at 56-68.

¹³³ In relation to Canada's last report, see *Toronto Star*, "Canada faces U.N. Scrutiny: Committee wants Explanation on Social Conditions" September 28, 1998, *Toronto Star*, "Canada branded as 'inhumane' U.N. committee says workfare violates treaty" November 27, 1998, *Calgary Sun*, "U.N. Fails Canada on Social Front," December 5, 1998, *Toronto Star*, "U.N. Committee Finds us Lacking," December 8, 1998. Some reactions were negative, *Financial Post*, Editorial: No Apologies on Human Rights," December 2, 1998.

¹³⁴ Committee on Economic, Social and Cultural Rights. *General Comment No.2* (1990), UN Doc.E/1990/23 at para. 10.

realisation of the rights recognised in the present Covenant, including particularly the adoption of legislative measures.” This phrase and others in Article 11 do not specify guidelines as to the extent of international assistance due and are especially undermined by the term “progressively.” There have been dramatically diverging interpretations of the ICESCR on this question. While M’Baye believes that the ICESCR lays the foundation for the right to development, Cassin felt that the draft indicated that countries should lend assistance internationally, but did not have any formal obligations.¹³⁵ The Limburg Principles state that Article 2(1) creates an obligation that international co-operation and assistance must be directed towards the establishment of a social and international order in which the rights and freedoms set forth in the ICESCR can be fully realised.¹³⁶ This statement recalls the Universal Declaration on Human Rights (UDHR), which provides for civil, political, economic, social and cultural rights, and which includes the provision: “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”¹³⁷

An interpretation of the ICESCR that suggests the existence of an obligation to give international aid is challenged by the preparatory work of the ICESCR. It was clear that there was not much consensus on the meaning of the draft on this issue. Some developing states said that there was a strong obligation on the developed world, partly on grounds of interdependence, but also, as stated by Mali, as reparation to the developing world for the “systematic plundering of their wealth under colonialism”. But the only formal suggestion of a legal obligation came from Chile who stated that “international assistance to underdeveloped countries had, in a sense become mandatory”, a statement which lacks much specificity. The United States declared it essential that the Article indicated the necessity of international assistance, but no more. Some states that did ratify the ICESCR – France, the Soviet Union and Greece – were emphatic that assistance could not be mandatory.¹³⁸

Alston and Quinn state, however, that the international commitment in Article 2 (1) is not meaningless, and that in certain circumstances, and with regard to a particular obligation, it may be possible to identify an obligation. A reinterpretation of the ICESCR may also be valid, and one approach might be to consider situations where the economic actions of one state or group of states causes substantial injury to other states.¹³⁹ The debt crisis may be one such instance. The obligations under the ICESCR would probably require that measures be urgently taken to remove global structural obstacles, such as unsustainable foreign debt.¹⁴⁰ It should also be noted that the interpretation of the ICESCR should shift in the light of international economic developments. There was no debt crisis when the ICESCR was drafted, and the general assumption at the time was that development was only a matter of time. This

¹³⁵ These views are noted in P. Alston & G. Quinn, “The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights” (1987) 9 Hum. Rts. Q. 156 at 186-187.

¹³⁶ *The Limburg Principles on the Implementation of the Covenant on Economic, Social and Cultural Rights*, U.N. Doc. E/CN.4/1987/17, Annex, 9 Hum. Rts. Q. 123 at para. 30. This is an interpretative guide to the ICESCR produced by some of the experts in the field of international law, members of the ILO, WHO, UNESCO and four members of the ECOSOC Committee on Economic, Social and Cultural Rights.

¹³⁷ *Universal Declaration of Human Rights*, Dec. 10, 1948, G.A. Res. 217 A, UN GAOR, 3d Sess., pt. I, Resolutions, at 71, UN Doc. A/810 (1948), Art. 28.

¹³⁸ Alston & Quinn, *supra* note 135 at 188-190.

¹³⁹ *Ibid.* at 191.

¹⁴⁰ Committee on Economic, Social and Cultural Rights, *Poverty and the International Covenant on Economic, Social and Cultural Rights*, UN ESCOR, 2001, UN Doc. E/C.12/2001/10 at para. 21. Debt repayments have at times amounted to between 69% to 200% of their combined health, education and social expenditure, as has been the case of Zambia, as stated in Commission on Human Rights, *Joint Report by the Independent Expert on Structural Adjustment Programmes and the Special Rapporteur on Foreign Debt*, UN ESCOR, 2000, UN Doc. E/CN.4/2000/51 at para 17.

is consistent with the idea of a 'progressive realisation' of rights. However, the oil crisis, the debt crisis and developmental failures in many states have shown that this assumption is unwarranted. It is notable that per capita consumption in Africa of basic goods has fallen in the 1980s to the extent that it is below the level reached in the 1970s.

Other factors besides the preparatory work are relevant. Under the Vienna Convention on the Law of Treaties, the ICESCR should be interpreted in good faith with regard to its ordinary meaning, the object and purpose, the preparatory work and the relevant practice.¹⁴¹ The Vienna Convention, at Articles 31-33, also permits account to be taken of any relevant rules of international law applicable in relations between the parties (such rules could include the Charter and the UDHR), and any subsequent practise in its application that establishes the agreement of the parties regarding its interpretation. In addition, the ICESCR may be interpreted in a new manner as a result of the emerging right to development, seen as a synthesis of civil, political, economic, social and cultural rights. The Declaration on the Right to Development was passed by the General Assembly in 1986 and reaffirmed at the UN World Conference on Human Rights in Vienna.¹⁴²

The Committee on Economic, Social and Cultural Rights has helped to clarify some of the issues related to the implementation of Article 2.1 of the Covenant. It has commented on the concept of 'core obligations' and stated that these create international assistance obligations. The existence of minimum core obligations was raised in 1990:

"[A] minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary care, of basic shelter and housing or of the most basic forms of education is *prima facie* failing to discharge its obligations under the *ICESCR*... In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations."¹⁴³

In 2001, the Committee stated that core human rights obligations create national obligations for all States, *and* international responsibilities for developed states, as well as others that are "in a position to assist."¹⁴⁴ It also sets out the idea of an international minimum threshold:

"When grouped together, the core obligations establish an international minimum threshold that all developmental policies should be designed to respect. In accordance with General Comment No. 14, it is particularly incumbent on all those who can assist, to help developing countries respect this international minimum threshold. If a national or international anti-poverty

¹⁴¹ *Vienna Convention on the Law of Treaties*, 23 May 1969, 8 I.L.M. 679 (entered into force: 27 January 1980).

¹⁴² A. Rosas, "The Right to Development" in A. Eide, C. Krause and A. Rosas eds. *Economic, Social and Cultural Rights: A Textbook*, (Dordrecht: Martinus Nijhoff, 1995) at 249.

¹⁴³ Committee on Economic, Social and Cultural Rights, *General Comment No.3*, UN ESCOR, 1990, UN Doc. E/1991/23 at para. 10. See also the list of obligations in Committee on Economic, Social and Cultural Rights, *General Comment No.14*, UN ESCOR, 2000, UN Doc. E/C.12/2000/4 at para. 43-44. In this comment, at para. 47, the CESCR has stated that such core obligations are 'non-derogable' and that a state party cannot, under any circumstances whatsoever, justify its non-compliance with core obligations

¹⁴⁴ Committee on Economic, Social and Cultural Rights, *Poverty Statement*, *supra* note 140.

strategy does not reflect this minimum threshold, it is inconsistent with the legally binding obligations of the State party.”¹⁴⁵

If international anti-poverty strategies must ‘enable’ developing countries to meet their core obligations, international responsibilities would correspond to the resources that developing countries – in particular the lesser developing countries – require in addition to their available domestic resources in order to meet such core obligations. The Zedillo Report estimated that partially meeting these obligations (i.e. the targets specified in the Millenium Development Goals, such as reducing the proportion of people suffering from hunger by on half) would require, together with appropriate economic policies, roughly on the order of an additional \$50 billion USD investment in human needs and capacities over current spending.¹⁴⁶

Therefore, it is likely that the Committee could encourage lender states before it to accelerate debt cancellation. In addition, the Committee has on occasion applied an approach that identifies tangible violations of the Covenant.¹⁴⁷ It *may* criticize a country that fails to provide adequate debt relief. One should note, however, one must note that if the amount of debt cancelled not lead to roughly corresponding increases in efforts by the debtor towards achieving the objectives of the *ICESCR*, the legal argument obligating debt relief to that state may no longer apply. The economic and social rights approach is best justified where there is a low level of corruption within the debtor state and where a high proportion of government expenditure is disbursed in the form of social services to the most vulnerable.

The human rights obligations approach can be used to help better frame the debt issue by political and civil society groups within the lender state, in negotiations between Northern and Southern states and, of course, in monitoring by the Committee on Economic, Social and Cultural Rights. However, it would appear that this approach is not amenable to litigation, as may be the case with odious debt. Such action could induce creditor states to reduce lending to poorer states. The obligations under the *ICESCR* are unclear and a tribunal may not accept the interpretations of the *ICESCR* by the Committee on Economic, Social and Cultural Rights, which form a foundation for proving the existence of an international obligation. This is difficulty is complicated by the fact that the *ICESCR* offers the state a margin of discretion in its implementation.

¹⁴⁵ *CESCR Poverty Statement, ibid.* at para. 20. Minimum core obligations in the domestic context were explained as necessary since: “If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d’être*.” (in General Comment No. 3, *supra* note 143 at para. 10). An analogical argument may apply at the international level. Unless international obligations do not exist to compensate for the inability of a domestic party to meet its core obligations, references to international cooperation in the *ICESCR* would be of little relevance in light of the *ICESCR*’s purpose, which is to ensure the realisation of economic, social and cultural rights for all in accordance with the commitments in the *UN Charter* and the *UDHR*. Preambulatory paragraph 3 of the *ICESCR* states, “Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.” See note 141 on the relevance of the ‘object and purpose’ of a treaty in its interpretation.

¹⁴⁶ The panel notes that this estimate does not include increased costs of servicing distant populations, potential synergies in public spending and possible improvements in efficiency. It further states that the \$50 billion estimate is given only to indicate the magnitude of the financing requirements, “but there is no doubt that the figure is substantial.” See *Report of the High-Level Panel on Financing for Development to the Secretary General*, 26 June 2001, U.N. Doc. A/55/1000 at 68-72.

¹⁴⁷ A. Chapman, “A ‘Violations Approach’ for Monitoring the International Covenant on Economic, Social and Cultural Rights” (1996), 18 Hum. Rts. Q. 23.

Conclusion

This chapter has investigated strategic approaches to advance the cancellation of odious debts, with primary reference to legal approaches. It was necessary to survey political approaches and their relationship to international law, in the context of observations regarding the role of civil society in advancing the progressive realisation of international law. Potential judicial recourses were then surveyed. In particular, the International Court of Justice was analysed as a potential forum for a pronouncement on the odious debt doctrine. This included an analysis of options for presenting a case, either as a suit between a debtor and sympathetic creditor, as a request for an Advisory Opinion by the UN General Assembly, as an Advisory Opinion requested by a UN Agency, or as a joint suit by a group of states. The essay also commented on the scope of an ICJ case: in terms of the possible parties and the applicable law.

This chapter briefly considered the possibilities for international arbitration on odious debt. In particular, conditions were described for litigation between states, between a state and an IFI and between a state and a private party. The chapter also reviewed the possibility of litigating odious debt cases within the International Centre for the Settlement of Investment Disputes.

The chapter commented on opportunities for addressing these issues in domestic courts by comparing New York and English approaches, considering issues surrounding the determination of the forum, determination of the governing law, the role of international law in domestic litigation and the impact of forum shopping. The chapter also considered possible sovereign defences to exclude domestic jurisdiction, including sovereign immunity, comity and the act of state doctrine. The chapter further investigated the possibilities for civil society involvement in domestic litigation. Finally, this chapter commented on a parallel route for advocating debt cancellation, this being to apply the *International Covenant on Economic, Social and Cultural Rights* to the issue of debt. As such, this chapter has surveyed a number of sites for intervention by civil society groups and Southern states in taking steps towards the increasing legitimization and institutionalization of the doctrine of odious debt.

The conclusions of this Chapter are linked to the questions raised in Chapter One on the status of the doctrine in international law. Further research must be done on the likely treatment of odious debt in various jurisdictions and fora. The answer to these questions will influence the strategic approaches to be taken by civil society groups and Southern states. Based on the survey of instruments and legal issues in this essay, it is possible to propose aspects of a framework to guide the search for the first test cases, based on three central questions:

1. *What are the risks involved for each forum?*

These could include possibilities of clear rejection by a tribunal and the possibility of incurring unacceptably high costs or unnecessary delays. In assessing these risks, the efficiency and the overall level of influence of the tribunal or court should be taken into account, the strength and legitimacy of its mandate and the possibilities for achieving redress or advancing the doctrine within in.

2. *What are the procedural aspects of accessing a particular forum?*

As noted above, access to a forum can depend on intricate questions of private international law, legal rules of standing and other requirements. As noted in relation to the ICJ, access will depend on the ability to convince key political actors to support the aims of the campaign.

3. Which jurisdictions are likely to provide support for the odious debt doctrine?

The salience of this consideration will depend on the state of international and domestic laws on this issue, their interaction within a given forum and how these might apply to debt issues. One must consider the contextual factors, such as the overall ethos of the institution and the orientation of the forum in question.

The analysis of the political domain suggests that a judicial approach to the issue of odious debt would have a strong and positive effect in advancing political negotiations and dialogue. This political realm should be actively used by supporters of debt cancellation to generate new legal norms.

The diversity of arenas in which the odious debt could be litigated may appear, at first glance, to bring much complexity to the issue, to raise the cost of litigation and to permit forum shopping by creditors. It may seem that at a significant number of loans will have to be litigated in fora that may not be favourable to the odious debt doctrine. However, as noted above, the key issue is the perceived legitimacy of odious debts in the general international system, rather than the legal status of each particular debt or the ability of creditors to enforce court judgments. The bulk of the disposition of odious debt will occur in negotiations and perhaps arbitration between creditors and debtors. At the beginning, favourable judicial judgments will be necessary in some of the possible fora for litigation. The number of such judgements will depend on the prestige, visibility and legitimacy of the sites of litigation chosen. After this point, the success of initiatives to cancel odious debts will depend on out of court actions taken by states, civil society and private financiers. One key eventual measure of success would be the development of a fair and impartial tribunal that could assess odious debts in a manner that mitigates any fears of financial instability.

A preliminary consideration of the issues raised in this chapter suggests that to request an advisory opinion from the ICJ would appear to be one of the most feasible options for civil society groups, through promoting the case through the UN General Assembly and other United Nations organs and the specialized agencies. However, it would be useful to launch a test case in another forum so as to ensure that participating parties, counsel and civil society organizations are appropriately prepared before submitting the issue to the ICJ. In relation to the economic and social rights approach, there are no disadvantages in simultaneously pursuing the case for debt cancellation in the CDESCR. The costs involved in collecting the information would be justified since the information would have other uses beside the report to the CDESCR itself. Such an approach should not be taken as an alternative to odious debt. The ICDESCR approach would only require the cancellation of the most egregious debts, on the basis of need and would not focus on the manner in which the debts were incurred. The debts that each approach would deal with would only partially overlap.

The human rights and odious debt approaches are complementary. The advantage of the odious debt doctrine, even though it does not necessarily apply to the most needy states, is that it focuses on the moral culpability of lender states and thereby provides a compelling justification for debt cancellation. In addition, it will have a deterrent effect on foreign support for predatory rule and will promote good governance. An acceptance of the odious debt doctrine will go a long way to ensuring the realisation of economic, social and cultural rights.

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Chapter Three: The Doctrine of Odious Debts and International Public Policy: Assessing the Options

by Bryan Thomas

Introduction

The debt crisis currently facing much of the developing world is, for the most part, traceable to a period of intense, indiscriminate lending by private commercial banks and IFIs, which began in the in early 1970s. Some understanding of historical background is, obviously, important in assessing the applicability of the odious debt doctrine to the massive debts incurred by developing countries throughout this period. Though there is disagreement over the root causes of the 1970s lending frenzy, as discussed below, commentators across the political spectrum agree that there *was* a lending frenzy, primarily on the part of private banks, which took place roughly between 1971 and 1982 (when crisis finally struck). The activities of private commercial banks throughout this period are discussed in section 1, below.

Though, in dollar terms, the International Financial Institutions (IFIs) took a back seat to private lenders in the 1970s, these institutions played a key role in the debt crisis. In recent years, officials with the World Bank and the IMF have been candid about the failings of their respective institutions throughout this period. The mandate, legal personality, and internal workings of the World Bank and IMF are explained in section 2, below; as is their role in the debt crisis and its aftermath.

The primary objective of this paper is to demonstrate that lending patterns of this period were in some respects a replay of past events, and in other respects historically unique; the result was a crisis situation which now calls for a unique remedy. To the extent that circumstances surrounding the debt crisis are unique, it is disingenuous, from the perspective of international public policy, to dismiss the odious debt doctrine as unorthodox and virtually unprecedented. Unique, unprecedented problems may well call for unique, unprecedented solutions. In addition, the fact that there is a long history of sovereign debt crises, which to a limited extent resemble the most recent crisis, speaks to the need for innovation. The status quo in international lending has brought incalculable harm to the developing world and recurring instability to the financial institutions of the developed world. The time has come for a change in international public policy. ¹

I. Private Lending: Past, Present, and Future

A. Sovereign Lending Through the Years

¹ A disclaimer: what is offered here is by no means a complete account of the causes and consequences of the debt crisis now facing developing countries. The treatment of the legal dimensions of this crisis is likewise far from exhaustive. Instead, attention is focused on those aspects of the debt crisis which are salient from the point of view of the doctrine of odious debts.

The history of lending to sovereign states is one characterized by the recurring pattern: sovereigns borrow more than they can afford to repay, they consequently borrow more to service the initial debt, and before long the situation spirals into a full-blown debt crisis. Lenders and borrowers learn their lesson, for a time, but collective memory ultimately erodes, and the cycle is repeated. The King of Spain in the sixteenth century was an early exemplar—borrowing heavily from German banks to finance military exploits in neighbouring countries. As debt crises arose, the debts were adjusted, interest rates reduced, and payments rescheduled—repeatedly: in 1557, 1575, 1596, 1604, and 1607. When the stakes are high, both creditor and debtor have an interest in finding manageable solutions, or at least workable stop-gap measures. Debtors struggle to service debts, at least minimally, so that they are not shut off from further lending; creditors offer further loans so that debtors are not driven into complete bankruptcy.

With the emergence of independent nations in Latin America in the 19th century, new lending began. In this case, debt was incurred in the form of bonds issued in London. Nineteen million pounds worth of these bonds were issued by Latin America states in the 1820s, and all were in default by 1828. Thirty years later, that issue was resolved and a new one commenced. By the early 1870s, 75 million pounds worth of fresh bonds had been issued, and promptly went into default in 1873. Short memories resulted in a stunningly immediate repeat of the same mistakes, and in 1890 the Bank of England was forced to provide an enormous bailout package to avert the collapse of Barings Brothers merchant bank, which had over-invested in Argentine stocks and bonds. The Great Depression brought another debt crisis to Latin America, which took decades to resolve.²

Therefore, the over-lending of the 1970s was in keeping with a long tradition. What distinguishes earlier lending from the lending of the 1970s, among other things, is the fact that loans of previous eras came in the form of bonds, supplier credits, and direct investment.³ In the 1970s, by contrast, loans were primarily arranged between private commercial banks and the national governments of developing countries. In assessing the viability of applying the odious debt doctrine to loans of the 1970s, this distinction is crucial. Bondholders of earlier eras were *too far removed* from the end uses of their lending for the courts to establish their subjective awareness of its odious use (recall, subjective awareness of odious use, on the part of creditors, is a primary criterion in applying the odious debt doctrine). In the words of one commentator, “banks [in the 1970s] had branches or representative offices in the debtor countries and they were thus in a position to assess first-hand the local political and economic scene. A similar presumption cannot be made about bondholders.”⁴

B. Private Lending and Southern Debt Accrued in the 1970s: Brief Historical Overview

The conventional explanation of the debt crisis runs as follows: a surge in oil prices in the latter part of 1973 funnelled money into the hands of wealthy OPEC nations, who in turn deposited these funds into commercial bank accounts. Commercial banks were predictably eager to lend this money out, but found few interested borrowers in the developed world, which at the time was in the midst of a recession. And so commercial banks turned to the developing world in search of borrowers. They

² R. Buckley, *Emerging Markets Debt: An Analysis of the Secondary Market* (Boston: Kluwer Law, 1999) at.8.

³ *Ibid.* at 9.

⁴ L. Buchheit, “The New Latin American Debt Regime—Cross-Border Lending: What’s Different This Time?” (1995) 16 J. Intl. L. Bus. 44 at 48

seemed a reasonable credit risk: prices of raw materials—the main exports of the developing world—were steadily rising throughout the 1970s.⁵

Though this is the most often cited explanation of the 1970s lending frenzy, there is good reason to be skeptical of conventional wisdom here. The evidence appears to show a dramatic increase in lending to developing countries between 1971 and the early part of 1973—before the surge in oil prices. Thus a report from the OECD explains that,

[I]t is absolutely clear...that the most decisive and dramatic increase in bank lending to developing countries was associated with the major commodity price boom of 1972-73—before the oil shock, which struck in late 1973. From a 1971 figure of US \$8 billion (at 1983 prices and exchange rates), bank lending expanded to more than US \$18 billion in 1973, and as a share of total flows from 15 percent in 1971 to 29 percent in 1973. Bank lending thereafter levelled off for the next two years, despite the enormous increase in oil bills.⁶

Furthermore, it's not clear why an increase in oil prices, on its own, should result in a net increase in bank deposits. Unless overall production and consumption of oil is on the increase, one would expect increased prices to produce a transfer of funds from oil importing countries to oil exporting countries—but not a net rise in global liquidity.⁷

No matter what triggered the lending, commercial banks may have been somewhat justified in lending large amounts to developing countries in the early 1970s. At that time, many developing countries were experiencing rapid economic growth: Brazil's economy, for example, grew, on average, by 11 percent annually between 1968 and 1971; in 1970, Mexico had thirty years of solid economic growth behind it (6 percent per annum, on average). There was therefore a widespread expectation that the successes of the Asian "tigers" would be replicated in these and other Latin American countries.⁸ These high hopes never came to fruition. Indeed, it was obvious (to some⁹) by the mid-1970s that the debt load of developing countries was unsustainable. As it became obvious to everyone, in the late 1970s, that debts loads were unsustainable, lending to developing countries promptly dried up.

Without a continuing inflow of fresh loans, disaster was inevitable for most Southern states. Most had amassed large budget deficits throughout the 1970s, as governments overspent and under-taxed, making up the difference with borrowed money. As lending dried up, and the international money pyramid constructed throughout the 1970s began to collapse on its own, external factors further exacerbated the crisis facing Southern states: the developed world lapsed into recession and developing country exports declined as a result; worldwide interest rates increased drastically in the same period—and the bulk of developing country

⁵A. G. Santos, "Beyond Baker and Brady: Deeper Debt Reduction for Latin American Sovereign Debtors" (1997) 66 N.Y.U.L. Rev. 1 at 3. See also S. O'Clairacain *Third World Debt and International Public Policy*, (New York: Praeger, 1990) at 15. By one estimate, private commercial lending accounted for 30% of LDC lending in 1973, 50% in 1976, and by 1980, 70%. See T. Allegaert, "Recalcitrant Creditors Against Debtor Nations, or How to Play Darts" (1997) 6 Minn. J. Global Trade 429.

⁶C. Payer, *Lent and Lost: Foreign Credit and Third World Development* (New Jersey: Zed Books, 1991) at 62.

⁷*Ibid.*

⁸*Supra* note 1 at 16.

⁹For example, David Rockefeller, then Chairman of Chase Manhattan, wrote in 1974 that, "Channeling massive flows of oil dollars from dollar-rich to dollar-poor countries once seemed easily manageable. But now it looks more troublesome...My own view...is that the process of recycling through the banking system may already be close to the end for some countries, and in general it is doubtful this technique can bridge the payment gap for more than a year or at the most 18 months." Quoted in *ibid.* at 18.

loans from the 1970s had floating interest rates; the US dollar soared in value relative to Southern currencies—and most developing country loans from the 1970s were to be repaid in US dollars; and finally, the prices of many commodities exported by developing countries began to decline rapidly in 1980 and kept declining until 1986.¹⁰

C. Private Lending and Southern Debt Accrued in the 1970s: Identifying the Lenders

The lending frenzy of the 1970s was led by major U.S. banks: Citicorp, Chase Manhattan, Bank of America, J.P. Morgan and Manufacturers Hanover.¹¹ Much of the lending came in the form of ‘syndicated’ lending, meaning a syndicate of independent banks would combine to finance these loans, under the umbrella of one of the major banks. The rise of syndicated lending in the late 1960s allowed banks to negotiate much larger loans; and the principal bank in a lending syndicate collected an array of fees from other participants, creating an incentive for what has since been called “loan pushing”.

In the parlance of a UN study, the major “leader banks” (listed above) aggressively marketed loans to developing countries, particularly Latin American states, throughout the 1970s, prompting “challenger” banks of Europe, Canada and Japan to enter the market. Smaller banks, dubbed “followers” eventually got in on the action, though less aggressively.¹² As matters reached the crisis point, “followers” were forced to cut their losses and liquidate their developing country debts on the secondary market. The end result is that the bulk of developing country debt is now held by major, “leader” banks.¹³

D. The Search for a Rational Explanation: High Risk Lending and Subjective Awareness

With the benefit of hindsight, one wonders how bankers could not have anticipated widespread defaults on loans made to developing countries throughout this period. These countries’ ratios of debt to GDP were extremely high. One is tempted to suppose that commercial bankers in the 1970s were simply careless and ignorant. But carelessness and ignorance on the part of creditors is not sufficient grounds for debt cancellation under the doctrine of odious debts. The doctrine requires that creditors be subjectively aware of the odious purpose of the loan.¹⁴ In this section, I examine several explanations of bankers’ behaviour through this period. I will try to show that it might have been rational for commercial banks to have made these loans, *even with the knowledge* that the loans were sought for odious purposes, were unlikely to be repaid, and so on.

Economists have struggled to produce a rational explanation of international lending by commercial banks in the 1970s. Some argue that in the long run, developing countries will become major industrial centres. Commercial banks thus (rightly, it is claimed) anticipated that increased indebtedness would be accompanied by increased growth in developing countries. In short, growing economies can sustain growing debt loads, so banks had little to fear in the 1970s. On this rather sanguine view, “the debt crisis is not really a crisis after all. Loans that appear to be

¹⁰ *Ibid* at 22-24.

¹¹ Economic Commission for Latin America and the Caribbean, *Transnational Bank Behaviour and the International Debt Crisis*, Estudios e informes de la CEPAL series, No. 76, quoted in Buckley, *ibid.* at 9.

¹² *Ibid* at 9.

¹³ *Ibid.*

¹⁴ A. N. Sack, *Les effets de transformations des États sur leur dettes publiques et autres obligations financières*, (Paris: Recueil Sirey, 1929) at 157.

going bad really are good loans...Profitability of the commercial bank claims of the developing countries will be demonstrated eventually.”¹⁵ Perhaps this really was the view taken by international bankers in the 1970s, but that they took this view hardly vindicates their behaviour as *rational*. Economic historians have been quick to point out that “[d]evelopment’ loans do not have an impressive history of success. They rarely have produced any semblance of economic development and have often produced defaults.”¹⁶ This view that Southern debt is serviceable in “the long-run” surely does little to quell the worries of investors—particularly those familiar with Keynes’ adage, “In the long run we are all dead.”

Others build on the first explanation—claiming that loans to developing countries were initially rational—adding that commercial banks were caught by surprise, their rational expectations upset by unforeseen (and unforeseeable) events.¹⁷ Recurrent “shocks” in oil prices are often cited as the major unforeseen event. This explanation is puzzling when combined with the conventional explanation of the macroeconomic causes of the debt crisis. Recall that large deposits made by OPEC nations, resulting from the rise in oil prices, were supposed to have provided banks with the funds needed to expand their lending to developing countries. Surely, by the mid-1970s, further increases in oil prices would not come as much of a “shock” to international bankers.¹⁸

Having examined the evidence, economists Darity and Horn reach the conclusion that, in fact, for major banks in the 1970s, bad loans were good business. They write that, “[i]ronically...loan pushing is most consistent, within the context of the rational expectations hypothesis, with [the view that] bankers knowingly made bad foreign loans.” Darity and Horn claim, among other things: that banks received substantial up-front fees for arranging loans to developing countries¹⁹; that major banks relied, with good reason, upon IFIs (such as the IMF) as de facto guarantors of their loans to developing countries; that due to economies of scale, small banks were put at greater risk than large banks by their involvement in lending to developing countries, so that at the end of the day, debt crises may actually have further strengthened the market dominance of the major banks.²⁰

One might, in the alternative, simply abandon the search for an explanation of 1970s lending patterns which is rational (for commercial banks) in the long run; the best explanation may be that commercial banks were motivated by relatively short-term considerations. After all, in the world of international finance, ‘panic’, ‘mania’, and ‘crash’ are elevated to the status of *technical* terms; to the extent that anyone can explain the goings-on in this domain, it is in those words. Many commentators observe that bank officers who were (and are) in charge of negotiating loans to developing countries do not have the level of education and experience required to properly assess the viability of a loan to a foreign government.²¹ Often, loan officers would have moved on in their careers by the time a loan went into default—promoted to the higher ranks, or shifted to another locale.²² And these inexperienced loan officers often assumed that national governments of developing countries would honour their debts. They offer their ability to tax citizens as collateral, after all. Lowly

¹⁵ W. Darity and B. Horn, *The Loan Pushers: The Role of Commercial Banks in the International Debt Crisis*, (Cambridge, Mass. : Ballinger, 1988) at 65.

¹⁶ *Ibid.* For a skeptical view on the correlation between foreign lending and LDC development, see C. Payer, *Lent and Lost: Foreign Credit and Third World Development* (London: Zed Books, 1990), at 115-125.

¹⁷ *Supra* note 3 at 72.

¹⁸ *Ibid.*

¹⁹ See also *supra* note 1.

²⁰ *Supra* note 3 at 74-75.

²¹ *Supra* note 14 at 82.

²² *Supra* note 1 at 15.

loan officers are not the only ones who can be accused of ignorance and naivety in this matter. Walter Wristman, as Chairman of Citicorp, asserted with confidence in the 1970s that, “[c]ountries never go bankrupt.”²³ Loan officers wanting to advance their careers were keen to oversee large loans, and as many as possible. And senior bank officials were hungry for the high interest rates and significant upfront fees they could extract from Southern borrowers.²⁴

There is no simple explanation of the lending frenzy that took place in the 1970s. The behaviour of major lenders throughout this period admits of several explanations. A mixture of short-sightedness and greed, combined with layers of principal-agent problems combined to produce the latest developing country debt crisis. Note that these explanations are, for the most part, compatible with the supposition that both local bankers and senior bank officers knew what they were getting involved in. Local officers went ahead with risky loans because they were rewarded for bringing in contracts and seldom punished for defaults. Senior bank officers went ahead with risky loans because high interest loans, accompanied by substantial front-payments, are impressive on the current balance sheet, which in turn drives up the value of a bank’s shares (in the short run, at least.)

E. Private Lenders, Sovereign Borrowers: Legal Dimensions

It is important to note that banks lending to governments of developing countries in the 1970s had every reason, from a legal perspective, to suppose that their loan contracts were enforceable. Up until the second half of the 20th century, a bank lending to a foreign sovereign had no such expectation: the theory of absolute sovereign immunity barred the possibility of suing a sovereign in the courts of another country. The underlying sentiment is nicely captured in this passage from Lord Campbell’s judgement, in *De Haber v. The Queen of Portugal* [1851]: “to cite a foreign potentate in a municipal court...is contrary to the law of nations and an insult which he is entitled to resent.”²⁵ However, in the latter part of the 20th century, a more restricted theory of sovereign immunity emerged in international law, whereby commercial lenders are able to sue foreign sovereigns in the courts of other countries. The U.S. Foreign Sovereign Immunities Act [1976] and the U.K. State Immunity Act [1978] formally codify this arrangement.²⁶ This change in international law restricts but does not eliminate sovereign immunity. Sovereigns retain their immunity for bona fide governmental activities, but not for their commercial activities.²⁷

Loans contracted between commercial banks and sovereigns invariably stipulate a ‘choice of law’—that is, both parties will agree at the outset that the loan in question is made under, for example, New York law.²⁸ The standard arrangement is for the borrower to agree to submit itself to the jurisdiction of a foreign court (the courts of the lender’s jurisdiction, typically.)²⁹ The bulk of the lending to developing countries in the 1970s can be characterized as commercial lending, and so is not shielded by (what remains of) the theory of sovereign immunity. Furthermore, the vast majority of loan agreements from the period in question contained explicit

²³ *Ibid* 1 at 14.

²⁴ Asked whether U.S. banks extended risky loans to LDCs in response to pressure from government or simply out of “greed for high interest rates,” the chairman of one U.S. bank candidly replied, “You’re all my friends here so I can level with you. It was the latter.” Quoted in *ibid.* at 15.

²⁵ P. Wood, *The Law and Practice of International Finance* (London : Sweet & Maxwell, 1980) at 46.

²⁶ L. Buchheit, “The New Latin American Debt Regime—Cross-Border Lending: What’s Different This Time?” (1995) 16 J. Intl. L. Bus. 44 at 53-54.

²⁷ *Ibid.*

²⁸ *Supra* n.24 at 71.

²⁹ *Ibid.*

clauses waiving any right to plead sovereign immunity.³⁰ Thus, lenders embroiled in the debt crisis of this period could have sought remedy for default loans in the courts of whichever jurisdiction was stipulated by their choice of forum clauses.

In the end, though, lenders recognized that the exercise of such rights would only make matters worse for them. As the debt crisis came to a head in the early 1980s, lenders recognized that suing debtor governments would only “jeopardize the renegotiation [of loans] and force borrowers into a bunker mentality.”³¹ By 1982, when the debt crisis came to a head, total exposure of U.S. banks to developing countries accounted for 287.7 percent of the banks’ total capital.³² Thus, as one writer puts it, “the magnitude of the problem...means that repudiation or a total collapse by even a single country could jeopardize the survival of numerous banks and perhaps of the financial system as a whole.”³³

Furthermore, syndicated lending, by its legal nature, tends to discourage lenders from suing on their debt. Syndicated loans invariably contain contractual provisions which require that any recovery made by any single creditor be shared with all other creditors.³⁴ All of these factors, combined with a desire not to defect from the “brotherhood of bankers”, or upset regulators, were sufficient to deter creditor banks from suing on their loans.³⁵

F. Invoking the Odious Debt Doctrine: Future Ramifications for Private Lending

Given the extent to which they rely on private lenders, Southern states may choose to refrain from invoking the doctrine of odious debt, for fear that such legal actions would scare off private lenders in the future. It is often claimed that developing countries refrain from unilaterally repudiating their debts for precisely this reason. This section addresses this concern by challenging two empirical claims: 1. the claim that it is in the interest of developing countries to service their debts and 2. the claim that if developing countries failed to service their debts, they would be denied future credit. There is evidence to suggest that both of these claims are mistaken. This section then distinguishes unilateral debt repudiation from debt cancellation under the doctrine of odious debt, arguing, on conceptual grounds, that the latter is less likely to cause problems for future lending.

Commentators have often overstated the leverage of private lenders over debtor countries. As we have seen, lenders drastically over-exposed themselves to developing country borrowers, to the point where the latter could demand very favourable renegotiations, with the expectation that lenders would grudgingly comply. One wonders, therefore, why more developing country borrowers didn’t unilaterally repudiate their debts. The obvious explanation is that developing country borrowers needed ongoing financing, and therefore didn’t want to burn any bridges with international lenders; this is the conventional explanation of why developing countries should honour their crippling debts. But this is equally relevant to the odious debt doctrine, as there is a fear that any invocation of the doctrine would scare away future lenders. The Economist did not mince words on this front, as it editorialized on South Africa’s potential use of the doctrine: “[South Africa’s] credit rating would be wrecked

³⁰ R. MacMillan, “The New Latin American Debt Regime: Towards a Sovereign Debt Work-out System” (1995) 16 J. Intl. L. Bus. 57at 72.

³¹ *Supra* note 25 at 53

³² *Supra* note 1at 25.

³³ *Ibid.*

³⁴ *Supra* note 29 at 61. See also K. Clark & M. Hughes “Approaches to the restructuring of sovereign debt” in M. Gruson & R. Reisner *Sovereign Lending: Managing Sovereign Risk* (London: Euromoney Publications, 1984) at 136.

³⁵ *Supra* note 25 at 53.

as it came to be lumped with other deadbeats. Foreign investors would be deterred, and South Africa would have to pay more for future borrowings."³⁶

There is some justification for this concern, but there is good evidence to show that it is frequently overstated. Countries borrow in foreign currencies primarily in order to finance their trade deficits: when a country imports more than it exports, it will borrow foreign currency to make up the difference. Perhaps surprisingly, many developing countries ran relatively small trade deficits through the 1980s. Indeed, for the majority of heavily indebted Latin American countries, the cost of servicing past debts (year after year) was greater than the value of annual trade deficits—at times, *far* greater. Lothian explains,

Throughout the nineteen-eighties, interest payments on foreign debt vastly exceeded the annual deficit in trade. In 1984, for the region as a whole, interest paid on foreign debt was roughly 14 times greater than the negative balance of trade.³⁷

This suggests that Latin American debtors, at least, would have been better off, overall, had they repudiated their debts unilaterally and directed the savings towards financing their trade deficits. Foreign investors might have subsequently punished them in the way editors of *The Economist* describe, but this would have paled in comparison to the punishment lenders were meting out under the (hypothetically repudiated) loan agreements. ³⁸

Those arguing against unilateral debt repudiation frequently point to difficulties encountered by the Peruvian economy, following President Alan Garcia's decision, in 1984, to repudiate a substantial portion of that country's debt. Though Peru did experience serious economic difficulties in the years following its repudiation of foreign debt, there is no evidence to suggest that those difficulties were the result of a backlash on the part of foreign investors. Lothian writes,

Peru did not experience a sudden shutdown of foreign loans and equity capital in response to the infamous ten percent debt moratorium. Furthermore, Peru's trade and short-term credit were not measurably affected by international hostility toward the country. Indeed, export credits increased annually each year from 1983-1988. Shortfalls in the flow of import credit could be financed, at least temporarily, from increased reserves brought about by reduced remittances on external debt.³⁹

This is not to deny that the Peruvian economy ran into trouble under the Garcia administration. Garcia instituted a number of drastic changes in the Peruvian economy, experimenting with price controls, and a fairly radical (but poorly thought-out) program of Keynesian spending.⁴⁰ The results were disastrous, forcing Garcia to return to the IMF, where he agreed to repay old debts and submit Peru to an austerity program. However, these difficulties were not related to Peru's repudiation of debt; retribution by foreign investors in the wake of repudiation did not even occur, let alone serve as factor contributing to Peru's difficulties.

It is also worth noting that ordinary unilateral repudiation (as occurred in the case of Peru) differs from the cancellation of debt under the doctrine of odious debts. Where the doctrine of odious debt is successfully invoked, bringing about the

³⁶ *Economist*, "Unforgivable: South Africa's apartheid debts," 24 April, 1999.

³⁷ T. Lothian, "The Criticism of the Third-World Debt and the Revision of Legal Doctrine" (1995) 13 *Wis. Int'l L.J.* 421 at 431.

³⁸ *Ibid.* at 431

³⁹ *Ibid.* at 434.

⁴⁰ *Ibid.*

cancellation of debt in a proper legal forum, there will be little reason to “lump” the victorious nation in with other “deadbeats”. At the most, other creditors ought to surmise that the country is a poor target for odious lenders. One would therefore expect that debt cancellation under the doctrine of odious debts would not discourage future lending, so much as it would discourage future odious lending. In this regard, the successful invocation (and, moreover, the clear articulation) of the doctrine may have the positive long-term effect of discouraging lenders from creating odious debts.

It should be further noted that lenders have never taken a haphazard approach to the legal technicalities of loan agreements. No major loan agreement has ever gone forward without first receiving a formal stamp of approval from lawyers on all sides. Typically, such agreements will formally require a favourable written “opinion of counsel”—both from the lender and the borrower’s counsel, and, in the case of foreign borrowers, an independent foreign counsel, of the bank’s choosing, before the loan is advanced.⁴¹ This suggests that lenders have been, and would be in future, well equipped to distinguish a valid debt from an odious one. And indeed, there is evidence that lenders are, of their volition, beginning to shy away from odious lending, and to take a greater interest in ensuring the legitimacy of the end uses of the loans they issue. In this way, something parallel to the doctrine of odious debts has taken on a de facto role in the incentive system of international lending:

If one looks at the reasons why some developing country borrowers have sought to disavow their international debt obligations over the last two centuries, perhaps the most common explanation is that the proceeds of the disputed financings did not contribute to the common weal in the debtor countries. It is one thing to contemplate repudiating a loan that found its way into the Swiss bank accounts of the government officials who approves the borrowing, or which financed the construction of a wholly decorative monument to the previous dictator. It is quite another thing for a sovereign to question its moral obligation to repay a debt that clearly benefited the recipient country and its people. With this history in mind, today’s investors prefer to see the proceeds of their credits used for productive (i.e. morally defensible) purposes.⁴²

However, the above discussion on how the doctrine of odious debts might affect incentives vis-à-vis future commercial bank loans may be beside the point. In the past decade, cross-border lending has taken on a new form—evolving as a reaction to the challenges of the 1970s and 80s. Now, cross-border lending takes place,

...[p]rincipally through the medium of the international bond markets. Apart from those few hours in each transaction when the underwriters actually own the bonds, the credit risk is nowadays passed through to the ultimate investor (the bondholder) with all possible speed.⁴³

More broadly, it is worth keeping in mind that international financial markets have changed drastically since the 1970s: the speed and volume of transactions have both increased exponentially; “the markets reassess a country’s investment climate—interest rates, exchange rates, political factors, domestic policies, trade flows, and commodity prices—on a daily or even hourly basis.”⁴⁴ The 1970s image of loan officers stationed

⁴¹ M. Gruson, “Legal Aspects of International Lending: Basic Concepts of a Loan Agreement” in D. Barlow, ed., *International Borrowing: Negotiating and Structuring International Debt Transactions* (Washington: International Law Institute, 1986) at 300.

⁴² *Supra* note 25 at 51

⁴³ *Ibid.* at 47-48

⁴⁴ *Ibid.* at 54.

in far flung locales, arranging major loans for specified purposes is, by now, something of a relic. The dominant image now, in the world of international financial transactions, is of bond traders stationed in front of computer terminals in the financial centres of the developed world, electronically stampeding in and out of national economies—clustering around the latest hot spot, fleeing in herds from the latest panic scene. This is hardly a positive development for developing countries or for the world generally: international financial markets are now more erratic and hyper-speculative than ever before.⁴⁵

But these recent changes in the dynamics of international finance speak further to the historical uniqueness of the 1970s lending frenzy.

G. Some Potential Difficulties in Applying the Doctrine of Odious Debts to debts incurred in the 1970s: Rescheduling and Secondary Markets

The lending mania of the 1970s came to a head in the early 1980s, as lenders pulled out *en masse* and Southern states began to default on their loans. In the wake of these developments, two important changes took place: debts were renegotiated, typically under the direction of the IMF; and debts were often sold to speculators on the secondary market. Both of these developments are relevant in assessing the viability of applying the doctrine of odious debts to these debts. Debtor countries' 'voluntary' participation in renegotiations may be interpreted as an acknowledgement that that debt was legitimate; they may perhaps, as a consequence, be estopped from arguing that the debts were illegitimate (under the doctrine of odious debts). The rise of secondary markets raises difficult questions, which tie in with these concerns over estoppel. Much of the developing countries' debt is now held by third parties who purchased the debt on the secondary market. If this debt is cancelled under the doctrine of odious debts, these secondary creditors will bear the loss, not the initial lenders (potentially). One should expect that secondary creditors will be keen to raise the aforementioned estoppel issues as a response. I address these issues here, explaining the legal workings of debt restructuring and the legal status of secondary creditors.

H. Restructuring Agreements

The over-exposure of commercial banks due to over lending created, in the early 1980s, a threat to the stability of the entire system of international finance. For reasons explained above, attempts to foreclose on this debt would only spell disaster, by triggering widespread defaults. Commercial banks were coaxed, in part by the IMF and in part by the US government, in the case of US banks, into participating in efforts to 'restructure' these debts, to make them minimally serviceable for developing countries.⁴⁶ A variety of models were employed in restructuring developing country

⁴⁵ Besides making the world of international finance more erratic, these changes over the past decade poses a very real threat to democracy and national sovereignty. The editors of *Business Week* comment that, "[in] this new market...billions can flow in or out of an economy in seconds. So powerful has this force become that some observers now see the hot-money set becoming a sort of shadow government—one that is irretrievably eroding the concept of the sovereign powers of a nation state." Quoted in D. Korten, *When Corporations Rule the World* (Connecticut: Kumarian Press, 1996) p. 185.

⁴⁶ The US government's interest in restructuring LDC debt was motivated in part by a concern that crippling LDC debts were bad for domestic exporters; Tamara Lothian writes that "[t]oward the end of the 1980s, the positions of governments and commercial banks collided. In the minds of international bureaucrats and policy-makers, two considerations were paramount: first, the prospect of deepening recession and policy instability in debtor countries; second, the related effects on international

debts in the late 1980s, most prominently the Brady Plan orchestrated by the US government. The Brady Plan and other restructuring schemes relied upon a blend of measures: partial debt forgiveness, the extension of payment schedules, the conversion of private loans into long-maturity bonds, and swapping debts for equity in recently privatized state industries.⁴⁷

As all parties stood to gain from restructuring loan agreements, participation in restructuring was normally consensual. Restructuring plans would bring together all (or most) of a nation's creditors under revised contractual terms of the sort mentioned above. To foster creditor solidarity, such plans typically contained a handful of standard provisions, most notably, cross default clauses and sharing clauses. Cross default clauses stipulate that a default (on the part of the borrower) vis-à-vis one creditor will constitute a default vis-à-vis all creditors party to the rescheduling agreement. Cross default clauses have the effect of putting all creditors (or at least, all who sign on to the restructuring) on an equal footing; the incentive for individual creditors to pre-emptively sue on their loans, triggering a crisis, disappears. The insertion of cross-default provisions also provides an incentive for recalcitrant creditors to sign onto restructuring agreements, as they expect debtor nations will opt first to default on the loans of the "odd man out".⁴⁸

Creditor solidarity is further fostered in restructuring agreements by sharing clauses. These are familiar from the discussion (above) of syndicated lending. Sharing clauses stipulate that payments made from the debtor to any creditor party be shared with all other creditors on a pro-rated basis—each creditor receiving a share proportional to its share of the total outstanding debt.⁴⁹

In many cases, borrowers—state and private—were similarly rolled together under restructuring plans. In some cases, a handful of immensely complex restructuring agreements would emerge as the distillation of hundreds of pre-existing loans:

Before rescheduling, the indebtedness of the 1970s was recorded in thousands of loan agreements...The adoption of multi-year rescheduling agreements and compendious new money agreements...in the rescheduling years dramatically reduced the number of agreements which evidenced and governed the debt. For instance...[I]n Mexico there were over 50 borrowers before 1982, of which only the minority were parastatals or guaranteed by the sovereign. By 1988, this multiplicity of loan agreements had been reduced to two restructuring agreements and three new money agreements with Mexico the borrower or guarantor in each.⁵⁰

Even putting aside estoppel issues (for the moment), it is clear that these restructuring plans have added a new level—many new levels, in fact of complexity to the problem of applying the odious debt doctrine to 1970s lending. After all, it is doubtful that the entire debt load of any given Southern country will be odious; one would expect some portion of the debt load incurred by the most corrupt of regimes to be non-odious, that is, whatever fraction of borrowed capital was spent on schools, hospitals,

economic activity. Stagnation abroad meant shrinking markets for foreign goods, especially goods from U.S. exporters. Gradually, the Washington consensus shifted in favour of comprehensive debt relief." *Supra* note 36 at 433.

⁴⁷ T. Allegaert, "Recalcitrant Creditors Against Debtor Nations, or How to Play Darts" (1997) 6 *Minn. J. Global Trade* 429 at 436.

⁴⁸ *Ibid.* at 438.

⁴⁹ *Ibid.* See also K. Clark & M. Hughes "Approaches to the restructuring of sovereign debt" in M. Gruson & R. Reisner *Sovereign Lending: Managing Sovereign Risk* (London: Euromoney Publications, 1984) at 136.

⁵⁰ *Supra* note 1 at 42-43.

and the like. But under typical restructuring plans, loans used for legitimate and illegitimate purposes alike are lumped together, linked by cross-default and sharing clauses. As mentioned, some of these debts have even been converted into bonds. There is a worry, therefore, that legitimate and illegitimate debts have been effectively consolidated. In the years since these restructuring plans have been instituted, holders of (putatively) odious debts have shared, on a pro-rated basis, in payments made by debtors. In some cases, at least, rescheduling was effected so thoroughly that the forensic work of separating odious from non-odious debts appears extremely difficult. This creates a tangled mess of legal and evidentiary problems.

One might begin to sort these difficulties out by supposing that odious debt holders have been unjustly enriched (by whatever amount debtor countries have paid them to date); but unjustly enriched at whose expense? They have been partly unjustly enriched by whatever amount the debtor nation paid them directly, and partly unjustly enriched by whatever amount other creditors have distributed to them under the terms of sharing clauses of restructuring agreements. The difficulties involved in devising remedies for these complex problems may perhaps be partially avoided if debtor countries invoking the odious debt doctrine seek only the cancellation of future obligations, not redress for odious creditors' past unjust enrichment. In that case, debts found to be odious could simply be struck from restructuring agreements.⁵¹

Before moving on to discuss secondary markets, it is worth mentioning that original creditors might claim that developing country borrowers are estopped from invoking the doctrine of odious debts by virtue of their participation in restructuring plans. Original creditors, it might be argued, have detrimentally adjusted their position, by forgiving a portion of the debt, or agreeing to lowered interest rates, in response to borrowers' promises to honour renegotiated debts. However, this argument can be effectively countered. If the debt in question was illegitimate to begin with, it is impossible to speak of its terms being adjusted in a way that is detrimental to the creditor. Another way of making this point is to say that where the doctrine of odious debts applies, it is assumed that original creditors were in bad faith (since the creditor's subjective awareness of the odious purpose of the loan is a condition of the doctrine). Those contracting in bad faith cannot shield themselves behind principles of equity.⁵²

I. Secondary Markets in Developing Country Debt

Massive restructuring plans had the effect of rendering much of the 1970s developing country debt fungible. Where debts of a given country are governed by a small handful of restructuring agreements, it becomes relatively easy to buy and sell debt; those familiar with the agreements can buy and sell without the burden of investigating the particular details of each particular loan contract, the reputation of countless different borrowers, and so on. Thus, the wave of developing country debt

⁵¹ A solution might look something like this: Suppose country X owes \$1 million to creditor 1 (C1) and \$1 million to creditor 2 (C2). In 1985, X's debts were restructured, and a sharing clause introduced between C1 and C2. Over the next decade, X repays half of the principal (\$1 million) to C1, who in turn passes on half of that to C2, as stipulated in the sharing clause. In 1995, C2's debt is declared odious, and so C2's remaining claim is stricken from the restructuring plan. Now X owes \$500,000 to C1 only (—and X perhaps has the option of pursuing C1 for unjust enrichment in the amount of \$500,000). Alternatively, it could be C1 who bears the loss: once C2's claim is cancelled, it is calculated that X owed \$1 million, and has already paid this. C1 is left to pursue C2 for unjust enrichment, again in the amount of \$500,000.

⁵² One final consideration: it is not clear that creditors adjusted their position to their detriment under restructuring plans. While it's true that restructuring called for partial debt forgiveness, payment extensions, and so on, these plans were ultimately beneficial to creditors, as they averted the threat of complete repudiation.

restructuring gave rise to a secondary market in developing country debt wherein speculators purchase outstanding debt at a fraction of its face value, hoping the debtor will surpass the market's expectations.⁵³ Apart from this speculative dimension on the part of buyers, secondary markets allow risk-averse commercial banks to rid their portfolios of risky Southern debts and replace them with something more stable.

There is some disagreement and over which precise legal mechanism effects the transfer of debt from initial creditors to the secondary market purchasers. Most developing country loans contain "assignment provisions," which speak of "assignment" throughout;⁵⁴ but these same provisions typically require that the debtor consent to the transfer, and further stipulate that at the moment of transfer, the old creditor be absolved of all rights and obligations vis-à-vis the debtor. Though the word "assignment," is used, legal operations of this sort—wherein the consent of the debtor is required and whereby the initial contractor is absolved of all duties are by definition acts of *novation*.⁵⁵ This at least appears to be the technically accurate way to regard these transactions, though in the literature, it is customary to speak of simple assignment.⁵⁶

From the perspective of the doctrine of odious debts, the distinction between novation and assignment may amount to more than academic hair-splitting. Novation is thought to *extinguish* the contract between the debtor and original creditor, and create a new contract between the debtor and the secondary creditor; whereas *assignment* merely transfers the rights of the original creditor to a new creditor, keeping the original contract nominally intact; the original creditor may by assignment divest himself of rights, but not of duties.

If the courts opt to construe such debt transfers as having been effected by novation (as it appears they should), they may take a negative view of subsequent efforts to invoke the doctrine of odious debts. It may be found that the original contract, odious or not, was extinguished (by novation), and replaced with a new and binding contract—all judicial links with the original (putatively odious) debt severed. It is not clear what tactics might be employed to overcome this challenge. Perhaps it can be argued that the assignment provisions⁵⁷ of the original loan—the very provisions which effectively call for transfer by novation—are themselves invalid, where they form a part of a larger contract which is invalid under the doctrine of odious debts. The problem may then revert to an estoppel issue: if the country in question held that the initial loan contract was invalid, and thus that the hypothetical novation was invalid, why did they consent to the latter? The secondary creditor

⁵³ *Supra* note 1 at 42-44

⁵⁴ Buckley quotes the standard assignment provision in an LDC loan: "any Bank may at any time assign its rights or its rights and obligations with respect to any Credit under this Agreement as a whole or in part to another bank or financial institution...*provided that*...such Bank shall not be relieved of any obligations so assigned unless...such assignment is made with the Obligor's prior written consent (which shall not be unreasonably withheld and shall be deemed to have been given if the Obligor fails to reply to a request for its consent within 15 business days after its receipt thereof)." *Supra* note 1 at 237.

⁵⁵ *Supra* note 1 at 236-238. cf., "The only way in which it is possible to transfer contractual duties to a third party is by the process of novation, which requires the consent of the other party to the contract. In fact novation really amounts to the extinction of the old obligation, and the creation of a new one, rather than the transfer of the obligation from one person to another. Thus if B owes A \$100, and C owes B the same amount, B cannot transfer to C the legal duty of paying his debt to A without A's consent. But if A agrees to accept C as a debtor in place of B, and if C agrees to accept A as his creditor in place of B, the three parties may make a tripartite agreement to this effect, known as novation. The effect of this is to extinguish B's liability to A and create a new liability on the part of C." P.S. Atiyah, *An Introduction to the Law of Contract* (3d ed. 1981) at 283.

⁵⁶ See (e.g.)T. Allegaert, "Recalcitrant Creditors Against Debtor Nations, or How to Play Darts" (1997) 6 *Minn. J. Global Trade* 429. Allegaert speaks throughout of assignment, never mentioning novation.

⁵⁷ See note 54.

might claim that she acted in reliance upon the debtor's consent to the transfer, and thereby estopp debtors from denying the validity of the debt.

The best tactic for those pursuing the cancellation of debts now traded on secondary markets may be to argue that transfers between original and secondary creditors were effected by assignment rather than novation. As mentioned, this is the way in which such transfers are customarily viewed. And there is plenty of expert opinion to support this view. Thus, for instance, Lee Buchheit, a leading sovereign debt analyst, writes,

The transfer of interests in sovereign debt restructuring agreements through novation...has not been common. Among the explanations for this reluctance to utilize a novation mechanism in the restructuring context is a sense, at least among US banks, that conventional assignments are perfectly adequate to effect such transfers.⁵⁸

And it is doubtless the case that—were it not for the wording of standard assignment provisions in the loan contracts—conventional assignment *would* be perfectly adequate. After all, creditors in these cases have little in the way of reciprocal duties to their debtors, and so little or nothing to divest themselves *of* by way of novation. And, this being the case, the consent of the borrowers in these cases is largely symbolic as well: debtors have no reason to be choosy among creditors unless the latter are to assume *some* reciprocal duties.

If it can be established that developing country debts are transferred onto the secondary market by assignment, then it will be possible for debtors to raise the defence of odious debt against secondary creditors.⁵⁹ But whether the transfer from original creditor to secondary creditor is construed as having been effected by novation or assignment, it remains the case that developing countries routinely *consented* to such transfers. In the case of assignment, such consent is superfluous, but nevertheless may be used by secondary creditors to estopp debtors from invoking the doctrine of odious debts. It was earlier argued that the original creditor, in cases of odious debt, acted in bad faith and so could not be shielded by principles of equity (such as estoppel). But there is no reason to suppose that secondary creditors have acted in bad faith in purchasing odious debts, so this line of defence will not work against them. Perhaps an argument can be made that Southern states routinely consented to such transfers under duress, as they were desperate to restructure their entire debt load and thereby clear the way for fresh injections of foreign capital.

J. Private Lending in the 1970s and the Doctrine of Odious Debts: Some Tentative Conclusions

This section began by arguing that 1970s commercial bank lending to developing countries was in a sense *uniquely* amenable to cancellation under the doctrine of odious debts; those lenders, in most cases, had more information at their disposal about the end uses of their loans than did bondholders of previous eras. One of the biggest difficulties in applying the doctrine of odious debt is in establishing subjective awareness (of the odious nature of a loan) of creditors. Broadly speaking, one should

⁵⁸ Buckley, *supra* note 1 at 237. Buckley cites Buchheit here as an example of how analysts have got things wrong. He later writes (*supra* note 1 at 228-229): "It is not clear why the market and its commentators have failed to recognise that emerging market debt is in fact transferred by novation and not assignment, particularly as transfer by assignment, even with a delegation of duties, would leave all unperformed creditor's obligations with the original creditor which is clearly not the basis on which the market operates."

⁵⁹ "...an assignor only transfers his rights subject to any defenses that could be pleaded against him..." P.S. Atiyah, *An Introduction to the Law of Contract* (3rd ed. 1981) at 278-279.

expect that this requirement will become more and more easy to satisfy with the advancement of communications technology, increased global economic integration, and increased sophistication of international financial systems. But, perhaps paradoxically, advancements of this sort may, in other ways, have made the doctrine of odious debts more difficult to apply. After all, another major challenge in applying the doctrine is the forensic task of establishing when, where, by whom and under what conditions the debt was contracted. This task may have been accomplished with relative ease at the end of the 19th century, but by the end of the 20th century, the advent of debt restructuring and secondary markets and the like have made this task far more difficult; to my mind, frankly, these difficulties appear at times insurmountable.⁶⁰

Loosely speaking, restructuring plans had the effect of rolling odious debts together with non-odious debts, and subsequent trading on secondary markets immensely complicated the task of sorting them out again. Again, loosely speaking, one wonders why, when odious debt is combined with non-odious, the resulting aggregate is non-odious. By some accounts, after all, the *bulk* of developing country debt is thought to be odious.⁶¹

II. International Financial Institutions: World Bank and IMF

As mentioned above, International Financial Institutions played a part in creating the latest debt crisis. It is therefore conceivable that, in their efforts to have debts cancelled under the doctrine of odious debts, Southern countries will be required to demonstrate that IFIs partook in loan agreements despite subjective awareness, on the part of their agents, that the loans were likely to be used for corrupt or tyrannical purposes. In this section, I begin by describing these institutions: their respective mandates, internal structures, and so on. I then offer evidence to suggest that agents of these IFIs have indeed turned a blind eye to corruption, and as a result may have contracted odious debts.

A. The Legal Personality of IFIs

International financial organizations such as the World Bank and the IMF have a peculiar, hybrid, legal status. On the one hand, these entities are the product of international agreements, and so are creatures of international law (they resemble sovereign states, in this regard). But on the other hand, these entities bear virtually no resemblance to sovereign states; they bear a much closer resemblance to municipal corporations.⁶² There are rival theories about the recognition of such entities under international and municipal law. The conventional view among writers is that the constitution of these entities is governed by public international law. On one view, therefore, states which have not signed the treaty creating an IFI may opt not to recognise the IFI in their courts. The rival view is that because IFIs such as the World

⁶⁰ Note also that I've only discussed at length the problems of repudiating debts which have been restructured and are now trading on the secondary markets; in cases where loans have been converted into *bonds* (which are even *more* negotiable) the obstacles are greater still.

⁶¹ In a 1996 interview, writer and activist Noam Chomsky commented that, "Debt is not valid if it's essentially imposed by force. The Third World debt is odious debt. That's even been recognized by the US representative at the IMF, Karen Lissaker, an international economist, who pointed out a couple of years ago that if we were to apply the principles of odious debt, most of the Third World debt would simply disappear." D. Barsamian: "Talking 'Anarchy' With Noam Chomsky" (1996), online <<http://www.nettime.org/nettime.w3archive/200004/msg00075.html>>

⁶² P. Wood, *Law and Practice of International Finance* (London : Sweet & Maxwell, 1980) at 64.

Bank and the IMF have been accorded legal personality in the vast majority of countries, these institutions have achieved objective legal personality, and so must be recognised even by non-member countries. The Articles of Agreement of both the IMF and the World Bank state that, respectively, that these institutions shall possess “full juridical personality.”⁶³

From the perspective of the doctrine of odious debts, issues of legal recognition for groups like the World Bank may not be controversial, or even of much relevance. First, anyone participating in a loan contract must be part of a member country of the Bank. Second, World Bank contracts stipulate that conflicts over loans be resolved by arbitration. The standard clause in World Bank loan agreements reads as follows:

Any controversy between the parties to the Loan Agreement...and any claim by any such party against any other such party arising under the Loan Agreement or the Guarantee Agreement which has not been settled by agreement of the parties shall be submitted to...an Arbitration Tribunal [composed of arbitrators selected by the bank, the borrower, the guarantor; failing which, the President of the ICJ will appoint arbitrators.]⁶⁴

B. The World Bank

The World Bank is composed of five sub-groups: The International Bank for Reconstruction and Development (IBRD); The International Development Agency (IDA); The International Finance Corporation (IFC); The Multilateral Investment Guarantee Agency (MIGA); International Centre for Investment Dispute Settlement (ICSID). Commentators discussing the World Bank’s involvement in the debt crisis have in mind specifically the IBRD, the IDA, and the IFC. (MIGA was not created until 1985, and ICSID is involved in dispute settlement, not lending.) The World Bank is the largest single creditor to developing countries. Roughly one-seventh of developing country debt was borrowed from the World Bank.

C. World Bank Lending: IBRD and IDA

The IBRD is the oldest and largest sub-group of the World Bank. It was established in 1945, following discussions at the United Nations Monetary and Financial Conference at Bretton Woods in July 1944. Its initial intended function was to provide needed financing for the reconstruction of war-torn Europe. Thus Article 1.1 of the IBRD’s Articles of Agreement states its purpose as, among other things,

To assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the reconversion of productive facilities to peacetime needs and the encouragement of the development of productive facilities and resources in less developed countries.⁶⁵

As explained in the Articles of Agreement, the purpose of the IBRD is not solely to lend money out itself, but also to promote private lending by offering guarantees to lenders; thus, article 1.2 of its Articles of Agreement explains its purpose as being:

⁶³ *Ibid.*

⁶⁴ D. Barlow, ed., *International Borrowing: Negotiating and Structuring International Debt Transactions* (Washington: International Law Institute, 1986) at 78.

⁶⁵ Article 1.1 of *IBRD Articles of Agreement*

To promote private foreign investment by means of guarantees or participations in loans and other investments made by private investors; and when private capital is not available on reasonable terms, to supplement private investment by providing, on suitable conditions, finance for productive purposes out of its own capital, funds raised by it and its other resources.⁶⁶

Given its mandate, the IBRD is commonly referred to as a ‘lender of last resort’. The bulk of IBRD loans through the 1970s came in the form of ‘project loans’, meaning that loans were created for a specified project intended to foster development for the country in question.⁶⁷ In 1981, some 90% of World Bank loans were project loans.⁶⁸

World Bank project loans proceed by a specified protocol, called a ‘project cycle.’ In the first phase of the cycle, projects are identified, their suitability is gauged in the light of the Bank’s mandate, and their feasibility is assessed. Often, developing countries or private enterprises will approach the Bank with proposals. Once identified, multi-year lending programs are designed. At the next, preparatory, stage the borrower designs a specific plan for the project in question, and conducts formal feasibility studies. Next, the Bank itself reviews the plan, assessing its technical, institutional, economic and financial feasibility. The Bank then enters into negotiations with the borrower, at which point the Bank is able to exert influence over the direction of the project on the basis of its earlier assessment. Legal documentation is drawn up in the negotiation stage, and implementation subsequently begins. The Bank invariably has a major role in supervising these projects; contracts between borrowers and the bank always stipulate a regular schedule of progress reports. When the project is finally completed, an ex post audit is conducted by a third party, ostensibly to ensure accountability and assess the merits of the project.

Clearly, World Bank lending differs from the carefree policies of commercial banks in the 1970s. With World Bank loans, projects were monitored through to completion. But this does not obviate altogether the possibility that some IBRD and IDA loans of the 1970s were at least partially odious. In recent years, the World Bank has been surprisingly candid about its failings throughout this period, effectively confessing to wilful blindness in the face of corruption on the part of developing country borrowers. Former World Bank staff member James Wesberry writes that, “From the end of World War II to almost the end of this century, IFIs maintained a ‘three-monkey policy’ toward corruption—they did not see it, they did not hear of it, and they never, never spoke of it—except perhaps in hushed words like ‘rent-seeking.’”⁶⁹ In 1996, then President of the World Bank James Wolfensohn was equally candid, publicly stating: “Let’s not mince words: we need to deal with the cancer of corruption.”⁷⁰ To “deal with the cancer of corruption” the World Bank subsequently created an Anti-Corruption Task Force charged with the task of revising World Bank protocol to combat corruption.

There have been serious allegations of corruption in projects financed by the World Bank.⁷¹ Until recently, these allegations were denied; World Bank spokespersons would point to the rigorous demands of the ‘project cycle’ as evidence

⁶⁶ *Ibid.*.

⁶⁷ J. Loxley, *Debt and Disorder* (London: Westview, 1986) at 126.

⁶⁸ *Ibid.*

⁶⁹ J. Wesberry, “International Financial Institutions Face the Corruption Eruption: If the IFIs Put Their Muscle and Money Where Their Mouth Is, the Corruption Eruption May Be Capped” (1998) 18 J. Intl. L. Bus. 498 at 499.

⁷⁰ *Ibid.*

⁷¹ For example, US academic Jeffrey Winters has been quoted as saying that one third of the World Bank’s disbursements to Indonesia ultimately “leak[ed] into the government bureaucracy and disappear[ed].” Quoted in *ibid.* at 511.

that accountability had always been built into the system. But the plausibility of such denials is now known to be tenuous:

These denials...[are]...considered laughable by those persons who know that the procurement, disbursement, supervision, auditing and review processes...primarily have been cosmetic measures which, though printed in operations and policy manuals...were rarely given high priority.⁷²

D. World Bank Loan Contracts and the Doctrine of Odious Debts

Though World Bank loans do not by any means account for the bulk of outstanding Southern debt, these loans might offer some of the best test cases for innovative uses of the doctrine of odious debts. First, the extensive involvement of World Bank loan officers throughout projects will make subjective awareness (or, what may be the equivalent, wilful blindness) relatively easy to establish. Secondly, recent statements by officials with the World Bank amount, essentially, to confessions of the prior involvement of these organizations in odious lending. Third, World Bank debts have not been sold on secondary markets, nor have they been restructured in the way that private commercial debt has been. This eliminates a great many of the difficulties discussed at length in section 1. And finally, World Bank loan contracts, as explained above, are subject to arbitration tribunals. The former may be more willing to entertain a principle of international law such as the doctrine of odious debts.

E. The International Monetary Fund

The IMF exists, ostensibly, to help countries respond to short-term balance of payment problems. Recall from earlier discussions (see section 1.5, above) that, where countries run trade deficits, they are required to borrow foreign currency to make up the gap between total exports and total imports. The IMF offers loans for this purpose. It may appear strange, in light of the earlier discussion, that developing countries have contracted so many private commercial loans, over the years, in order to meet their balance of payment requirements. Why didn't they turn instead to the IMF? In fact, developing countries often prefer to loan from private sources because IMF loans come attached with a long list of conditions.⁷³ The most controversial of these conditions are so-called "structural adjustment plans", which require that borrower nations direct their economies towards export production, cut public spending, and other supply-side measures designed to avert future balance of payment problems.⁷⁴ Distilled to its essence, the IMF is (or at least *was*) supposed to foster trade and reduce protectionism, by acting as a kind of safety net for underdeveloped nations; if they opened themselves to global markets and were swamped with imports, the IMF would be there to help with their balance of payment problems.⁷⁵

Given its mandate, it should come as no surprise that the IMF played an important role in overseeing debt restructuring plans in the mid-1980s. When the debt crisis broke in 1982, the IMF took a lead role: supervising restructuring plans, offering loans to developing countries so they could meet short term balance of payment needs, and imposing harsh structural adjustment programs on developing countries to assuage creditor's worries. The IMF, as overseer, effectively insured that Southern

⁷² *Ibid.*, p.512

⁷³ Daniel D. Barlow, ed., *International Borrowing: Negotiating and Structuring International Debt Transactions* (Washington: International Law Institute, 1986) at 405.

⁷⁴ P. Adams, *Odious Debts* (Toronto: Earthscan, 1991) at 77.

⁷⁵ *Ibid.*

debtors got their fiscal houses in order, and their priorities straight (priority number one: repay debts.) Commercial banks were not shy in expressing their gratitude,

[A] fruitful co-operation is emerging between the commercial banks and the IMF...without IMF persuasion of the borrowing countries to undertake needed adjustment and in the absence of fund monitoring of the progress, the banks would be unwilling to advance sufficient additional credit.⁷⁶

The senior banker in question fails to mention that such an unwillingness to advance additional credit would have amounted to collective suicide for the banks themselves, as widespread defaults would have inevitably resulted.⁷⁷

F. IMF Loans and the Doctrine of Odious Debts

It is unlikely that any IMF loans will qualify for cancellation under the doctrine of odious debts. The primary reason is that the IMF always imposes conditions upon its loans, and corrupt governments of the 1970s preferred to contract unconditional loans from private creditors. Indeed, as the lending mania of the 1970s reached its peak, many developing countries were not borrowing from the IMF at all.⁷⁸ Furthermore, the IMF has a purely macroeconomic mandate: its role is not to fund projects, or even to gather information on the political economic activities of its members.⁷⁹ Thus, even if loans disbursed by the IMF were misused, it may be very difficult to demonstrate that officials with the fund were *aware* that they would be misused. Moreover much of the developing country debt held by the IMF is from the period of restructuring that came *after* the debt crisis; we may have mixed views of IMF structural adjustment plans that came about at this time, but it seems untenable to suppose that loans intended (at least ostensibly) to avert default and aid in balance of payment problems are *odious*.

Conclusion

Throughout this chapter, I have discussed an array of potential difficulties in employing the doctrine of odious debt to repudiate 1970s debt. In many ways, my view of the feasibility of such efforts is pessimistic. All of the major difficulties stem from the fact that 20 years have passed since the debt crisis, and the debts have changed form and changed hands in the intervening years. But none of this points to a fundamental flaw in the doctrine itself; the fact that difficulties arise in applying the doctrine to loans from the 1970s does not speak to the question of whether or not the doctrine belongs as a principle of international law. We face serious difficulties applying laws prohibiting murder when the accusation comes 20 years after the crime has been committed; but no one would argue that murder should therefore be struck from the criminal code.

It should also be noted that this chapter, and indeed most of the secondary literature on the 1970s debt crisis, subsequent restructuring, and so on, speaks of developing country loans in very broad terms. And it may well be the case that,

⁷⁶ Rimmer de Vries, a senior executive with Morgan Guaranty Trust Company, quoted in *supra* note 1 at 31.

⁷⁷ *Ibid.*

⁷⁸ S. O'Cleireacain, *Third World Debt and International Public Policy* (New York: Praeger, 1990) at 109.

⁷⁹ The IMF's Managing Director Michael Camdessus explained in 1998 that, "[The IMF] has a macroeconomic mission, and our mandate is restricted to those specific instances of corruption that may have a significant—some would say demonstrable—macroeconomic impact." Quoted in *supra* 69 at 517.

though the doctrine appears tenuous when one contemplates its application to Southern debt as a whole, it becomes more plausible when its application is restricted to certain specific countries.

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