

Odious Debt: The Terms of the Debate

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I. Introduction

There has been a recent revival in interest in the doctrine of odious debt in legal, policy, and economic quarters.¹ One precursor to the present article is a working paper posted by the Centre for International Sustainable Development Law (CISDL), substantially completed in 2001, revised slightly and posted in 2003.² It defined an odious debt as one that met three criteria: it was contracted without the consent of the population of a debtor state, without benefit to it, and with knowledge of both of these elements to the creditor. Shortly after the U.S. invasion of Iraq in 2003, senior members of the U.S. administration, such as Richard Perle and Paul Wolfowitz, together with ambiguous support in leading periodicals, claimed briefly that the debts of the Saddam Hussein regime ought to be considered odious and thus be

¹ See, e.g., Lee C. Buchheit, G. Mitu Gulati, & Robert B. Thompson, *The Dilemma of Odious Debts*, DUKE L.J. (forthcoming 2007), available at <http://eprints.law.duke.edu/archive/00001567/>; Joseph Hanlon, *Defining 'Illegitimate Debt': When Creditors Should be Liable for Improper Loans*, in SOVEREIGN DEBT AT THE CROSSROADS 109 (Chris Jochnick & Fraser A. Preston eds., 2006); Christoph G. Paulus, *'Odious Debts' vs. Debt Trap: A Realistic Help?*, 31 BROOK. J. INT'L L. 83 (2005); Anna Gelpern, *What Iraq and Argentina Might Learn from Each Other*, 6 CHI. J. INT'L L. 391 (2005); Emily F. Mancina, *Sinners in the Hands of an Angry God: Resurrecting the Odious Debt Doctrine in International Law*, 36 GEO. WASH. INT'L L. REV. 1239 (2004); Anupam Chander, *Odious Securitization*, 53 EMORY L.J. 923 (2004). Adam Feibelman, *Contract, Priority, and Odious Debt*, 85 N.C. L. REV. 727 (2007); Michael Kremer, Seema Jayachandran, & Jonathan Shafter, *Applying the Odious Debts Doctrine while Preserving Legitimate Lending*, Dec. 2005 (Blue Sky Conference, Ctr. for Int'l Dev., Harvard Univ.), available at http://www.cid.harvard.edu/bluesky/papers/jayachandran_odiousdebt_0609.pdf.

² See Jeff King, *The Odious Debt Doctrine in International Law: Definition and Evidence*, in Ashfaq Khalfan, Jeff King, & Bryan Thomas, *Advancing the Odious Debt Doctrine* 13-52 (CISDL Working Paper No. COM/RES/ESJ, 2003), available at <http://www.cisd.org/pdf/debtentire.pdf>.

cancelled.³ This led to a revival in academic interest in the relatively obscure doctrine.

This article is not a defense of the odious debt doctrine or a reply to criticisms of my earlier paper. After the volume of recent criticism, depth of recent research on the project, and a variety of new proposals, such a task would require a much lengthier response, and indeed, such a response is now nearing completion.⁴ The purpose of this article is rather to define the doctrine with some precision, discuss the principal authorities in international law, and identify key issues that are faced by those who would critique or advocate the doctrine in international practice. In short, it is an attempt to bring critics and advocates to terms in this debate, and to provide a somewhat precise examination of the genealogy and present usage of the doctrine.

In Part II, I examine the basic rules regarding whether and in what circumstances states are said to be obliged to repay public debts. I show how the nature of the odious debt claim is meant to serve as an exception to these rules, that the rule is very infirm in cases of state succession, but well established—subject to some qualifications—in cases of government succession. In Part III, I examine the historical origins of the doctrine, survey three influential definitions, examine two accepted types of odious debt, and then articulate the present usage of the doctrine and highlight the controversial issues it comports. In Part IV, I examine the ways in which the doctrine has been instantiated in the various sources of international law, without entering too deeply on the merits of the more controversial cases.

Part V moves on to consider key issues facing both advocates and critics of the doctrine. It addresses the issue of odious debt

³ See *Pentagon Adviser Perle: Private Sector Key to Iraqi Recovery*, 53 THE OIL DAILY No. 112, June 12, 2003, available at WL6518177; Gelpert, *supra* note 1, at 403; Patricia Adams, *Iraq's Odious Debts* 16-17 (Cato Institute No. 526, 2004); Joe Siegle, *After Iraq Let's Forgive Some Other Debts*, INT'L HERALD TRIBUNE, Feb. 19, 2004, at 6; J. King, *Saddam's Evil Debts*, FINANCIAL POST (Can.), Oct. 23, 2003, at FP 15; *Those Odious Debts*, ECONOMIST, Oct. 18-24, 2003. But see *Iraq's Debt: The US Should Beware the Principle of Odious Lending*, FINANCIAL TIMES (London), June 16, 2003, at 20 (contending that the doctrine of odious debt is unworkable).

⁴ I will shortly circulate a draft paper entitled 'The International Law of Odious Debt: A Restatement' which contains a thorough restatement of the doctrine, review of historical practice, and defense of various positions alluded to the pages below [hereinafter Restatement].

claims in cases of government succession, proposes to clarify debate by recognizing four categories of odious debt, examines how courts can or have assessed “public benefit,” and then criticizes a prominent alternative model for addressing odious debts. Part VI picks up the gauntlet laid down by critics, and throws one down to creditors, by showing how, whatever the legal status of the doctrine at present, creditors can avoid odious lending in a predictable, cost-effective way that would not destabilize lending. Given this conclusion, one is led inevitably to infer that it is both morally right and pragmatically sensible that creditors begin to use such lending methods, particularly considering the growing shadow cast by the odious debt debate.

II. The Rule of Repayment in State and Government Succession

A. *The Nature of the Burden of Proof*

It must be recalled that under the contemporary definition, as examined below, a debt is said to be odious when there is an absence of popular consent, an absence of benefit, and creditor awareness of these two elements.⁵ The doctrine of odious debt is not purported to be a rule of international law as such. No one claims that it would be illegal to repay odious debts. Yet some writers continue to suggest that instances of non-payment of odious debts must satisfy the thresholds in customary international law of uniformity, consistency and generality of practice, together with the requisite *opinio juris*.⁶ This misunderstands the nature of the burden at issue. Many countries have found it necessary and expedient to repay odious debts. The odious debt claim is rather that the doctrine amounts to a qualification, or exception, to the rule that public debts of predecessor governments and states *must* be repaid. Absence of uniformity, consistency, and generality of practice, or absence of *opinio juris* of that alleged rule of repayment is what advocates of the doctrine must prove. The difference is significant. A fluctuation in practice, or absence of

⁵ See *infra* Part III.C

⁶ “[T]he principle would have to have been applied over a longer period and would have to be recognised as a legal obligation.” Paulus, *supra* note 1, at 86; see *id.* at 91 (“legally binding doctrine of ‘odious debts’”); Mancina, *supra* note 1, at 1252-53.

opinio juris, in respect of repayment of odious debts, rather than a simple assertion of the doctrine, is the threshold that must be crossed. This is of course the only way that so few precedents have managed to convince a number of public international law scholars that odious debts are not apportioned in cases of state succession. Establishing whether such an exception exists requires examining the general rule that public debts remain enforceable upon changes in sovereignty or government. For the sake of simplicity, I will call this the ‘rule of repayment’ and seek in this Part to briefly review its legal foundations. The rule can be asserted in two different contexts: state succession and government succession. Quite apart from the relevance of odious debt, the ‘rule’ is very infirm, if at all existent, in the former case, but well entrenched in the latter case.

B. The Rule of Repayment in State Succession

State succession occurs when “one State is replaced by another in its responsibility for the international relations of a territory.”⁷ This typically occurs by way of cession or annexation, through the dissolution of a state, unification of states, or emergence of a new state.⁸ There has historically been an acute concern in the perennial warring between European states that the “law of peace” provide rules for the peaceful determination of responsibility for debts of ceded and annexed territories. Despite this concern, it is still far from settled law that a successor state is liable for the debts of the predecessor state.⁹ Despite the fact that the present

⁷ Vienna Convention on Succession of States in Respect of Treaties art. 2(1)(b), Aug. 23, 1978, 1946 U.N.T.S. 3, 17 I.L.M. 1488, 1490 (1978), 72 AM. J. INT’L L. 971 (1978); see also O’CONNELL, *infra* note 12, at 3; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 621 (6th ed. 2003) (“[s]tate succession arises when there is a definitive replacement of one state by another in respect of sovereignty over a given territory in conformity with international law”).

⁸ See Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, art. 37-41, Apr. 8, 1983, 22 I.L.M. 306 (1983); MALCOLM SHAW, INTERNATIONAL LAW 864 (5th ed. 2003).

⁹ BROWNLIE, *supra* note 7, at 625-26; see SHAW, *supra* note 8, at 900-04; West Rand Central Gold Mining Company v. The King, 2 K.B. 391(1905); Ottoman Debt Arbitration, 1 R.I.A.A. 529, 573 (1925); J.L. BRIERLY, THE LAW OF NATIONS 159 (6th ed. 1963); CHARLES ROUSSEAU, 3 DROIT INTERNATIONAL PUBLIC 426-70 (1977); Interpretation of Art. 78, Para. 7, of the Peace Treaty with Italy, 1947 (Franco-Ethiopian Railway Company Claim), 24 I.L.R. 602, 629 (1957). For more recent examples, see

virtual consensus is that there is no settled rule of automatic succession, commentators often assume the existence of such a rule as their starting point.¹⁰

The early “universal theory,” advocated by Grotius and Pufendorf, suggested all debts pass with the change of sovereignty over territory.¹¹ This was rejected by what public international law scholar Daniel Patrick O’Connell grouped together as “negative theories,” namely, those that denied the existence of any legal succession of debts.¹² Shortly after World War I, and in the wake of erratic state practice, two in-depth treatises were completed on the subject of public debts and state succession.¹³ To this day,

Yucyco Ltd. v Republic of Slovenia, 984 F. Supp. 209, 213 (S.D.N.Y. 1997) (dicta claiming the rule of repayment is far from established); *see also* 767 Third Ave. Assoc. v. Consulate General of Socialist Federal Republic of Yugoslavia, 218 F.3d 152, 158 (2d Cir. 2000) (finding that international law did not support landlord’s claim that successor state automatically became liable to landlords); G. Aquaviva, *The Dissolution of Yugoslavia and the Fate of Its Financial Obligations*, 30 DENV. J. INT’L L. & POL’Y 93, 93-136 (2002) (reporting a general but very highly qualified obligation); *see generally* P. Williams & J. Harris, *State Succession to Debts and Assets: The Modern Law and Policy*, 42 HARV. INT’L L.J. 355 (2001) (arguing modern practice is so nuanced that a general rule of repayment would be a gross simplification); *Final Report: Economic Aspects of State Succession*, in INT’L LAW ASSOC. 2 (2006), available at <http://www.ila-hq.org/pdf/Aspects%20of%20State%20Succession/Final%20Report%202006.pdf> (“[T]he rules of succession in respect of State debts are disputed, the practice is extremely differentiated, and the formulation of conclusions as to the possible customary nature of various rules is very difficult.”) [hereinafter ILA Final Report].

¹⁰ *See* Buchheit et al., *supra* note 1, at 5; Paulus, *supra* note 1, at 88.

¹¹ *See* ERNEST H. FEILCHENFELD, PUBLIC DEBTS AND STATE SUCCESSION 25-30 (1931).

¹² *See* 1 DANIEL P. O’CONNELL, STATE SUCCESSION IN MUNICIPAL AND INTERNATIONAL LAW 14-15 (1967); J. Foorman & M. Jehle, *Effects of State and Government Succession on Commercial Bank Loans to Foreign Sovereign Borrowers*, 1 UNIV. ILL. L. REV. 9, 11-12 (1982); M. Hoeflich, *Through a Glass Darkly: Reflections Upon the History of the International Law of Public Debt in Connection with State Succession*, 1 UNIV. ILL. L. REV. 39, 42-47 (1982). The leading theory was propounded by A.B. Keith, who, as Hoeflich explains, O’Connell considered an apologist for the British Foreign Office, while Hoeflich himself regarded Keith as a valuable and overlooked analyst. *See* A.B. KEITH, THE THEORY OF STATE SUCCESSION 1-7 (1907); *see also* Hoeflich, *id.* at 42, 67.

¹³ *See generally* ALEXANDER NAHUM SACK, LES EFFETS DES TRANSFORMATIONS DES ÉTATS SUR LEURS DETTES PUBLIQUES ET AUTRES OBLIGATIONS FINANCIÈRES (1927); FEILCHENFELD, *supra* note 11 (discussing, among other things, the treatment of public debts in territorial changes). In a published review, Sack called Feilchenfeld’s treatise “one of the most scholarly works written on any subject of international law. A.N. Sack,

they remain the two most extensive studies of the subject,¹⁴ though it seems that state practice has not validated the general conclusions advanced by either of them. The first was completed by Alexander Nahum Sack in 1927. Though Sack was the first writer to formulate the doctrine of odious debt in those exact terms, his general project was to assert the existence of a general rule of repayment. At the same time, Ernst Feilchenfeld, a German working at Harvard University in the 1920s, completed his compendious work in 1931, in which he advocated a rule of maintenance based on his extensive review of state practice. Though Feilchenfeld found the doctrine of odious debts to be questionable as a matter of positive international law, he did find it relevant as an equitable or justice-based consideration.¹⁵ Yet another highly influential theory of state succession and public debt was proposed by O'Connell in the context of state succession more generally.¹⁶ O'Connell acknowledged that since legal continuity is extinguished in cases of succession, there is a need for a theory other than the idea of *pacta sunt servanda*, or, that agreements shall be honored to justify the assumption of debts. He chose the idea of equity: "[t]he formal contractual relationship may have expired but the equity has not."¹⁷ He thus relied on equitable notions of *quantum meruit* and unjust enrichment to

Public Debts and State Succession, 80 U. PA. L. REV. 608, 623 (1931-1932) (reviewing ERNST H. FEILCHENFELD, PUBLIC DEBTS AND STATE SUCCESSION (1931)). There is no discussion in the review of their disagreement about the nature of odious debt. *See id.*

¹⁴ *See* TAI-HENG CHENG, STATE SUCCESSION AND COMMERCIAL OBLIGATIONS 13-25 (2006).

¹⁵ *See infra* notes 94-101 and accompanying text.

¹⁶ O'CONNELL, STATE SUCCESSION, *supra* note 12.

¹⁷ 1 DANIEL P. O'CONNELL, INTERNATIONAL LAW 381 (2d ed. 1970). O'Connell examines debt and casts doubt on it. *See id.* at 369-87.

The problem is complicated by some uncertainty concerning the extent to which international law protects the rights of creditors to performance, but, subject to what will be said on this topic later, it may be taken that international law does not permit a State by an exercise of municipal law to ignore its debt obligations, whether it has 'inherited' them or not. The problem is different and more acute if the debtor State retains its international personality but as a result of loss of territory becomes economically disabled in the a matter of debt amortization.

Id. at 384.

O'Connell continues to refer to instances of non-assumption, they being the cases most often discussed in the context of odious debt. *Id.* at 384-85.

advance the thesis that creditors retain acquired rights that enable them to claim debts in cases of succession.¹⁸ Though the idea is based on an equitable doctrine, unfortunately the author does not address the corollary domestic law concept that one must come to equity with clean hands.¹⁹

Shortly after the publication of O'Connell's work, the International Law Commission (ILC) began its attempt to codify the law relating to state succession in matters of state property, archives, and public debts.²⁰ The attempt proceeded on the submission of a series of reports by Special Rapporteur Mohammed Bedjaoui (later judge and then President of the International Court of Justice), the adoption of a draft ILC Convention with commentary, and then revisions and adoption of a final text by a conference of plenipotentiaries.²¹ The General Assembly later adopted the Vienna Convention on Succession of States in respect of State Property, Archives, and Debts (the Vienna Convention).²² The Vienna Convention as ultimately adopted provided rules for how debts to other states (though not to private creditors, to the chagrin of rich creditor states) shall pass in various categories of state succession:

- Transfer of a part of the territory of a state (previously known as cession) (article 37): by agreement or debts pass in equitable proportions;
- Newly independent states²³ (article 38): no debt passes absent agreement, and any agreement must comply with the right of peoples to sovereignty over their natural resources and shall

¹⁸ See O'CONNELL, *supra* note 12, at 375-76; see also Hoeflich, *supra* note 12, at 45-47; Foorman, *supra* note 12, at 13; BROWNLIE, *supra* note 7, at 626-27 (discussing disputed authorities regarding acquired rights to concessions).

¹⁹ Thankfully this question has been addressed. See Buchheit et al., *supra* note 1, at 34-36.

²⁰ A summary of the ILC's work and links to its various reports as well as summary records of its meetings is available at http://untreaty.un.org/ilc/guide/3_3.htm (last visited May 7, 2007).

²¹ The proceedings are examined in detail in Part IV.B.1 below.

²² See Vienna Convention on Succession of States in Respect of Treaties, *supra* note 7.

²³ These are defined in article 2(1)(e) as a "dependent territory," which has a rather fixed meaning in international law and would likely exclude modern cases of secession and separation such as in the Balkans, Eritrea, East Timor, and possibly Namibia. See *id.*

not disturb the economic equilibria of the country;

- Uniting of states (article 39): debts of predecessors pass to successor;
- Separation of part or parts of states (e.g. secession) (article 40): absent agreement, debts pass in equitable proportions; and
- Dissolution of a state (article 41): absent agreement, debts pass in equitable proportions.

The Convention has not received enough ratifications to enter into force, and it has been regarded as “an example of the less successful codification efforts undertaken within the United Nations.”²⁴

In any case, the Restatement on Foreign Relations law announces a somewhat similar position.²⁵ But given what was noted above by the authors and courts of various jurisdictions, the failure to adopt the Convention suggests in no way that its rules were too permissive. And whatever the refusal of states to ratify, it is interesting that in none of the cases apart from unification of states is there an automatic passing of the debt. The amounts determined in other cases are “in equitable proportions.” The Convention does not define equitable proportions, but it is roughly the familiar idea in state succession law that the benefits of succession in respect of property and other rights should not pass without the burdens of the debts and other liabilities.²⁶ It is the type of test applied, or attempted, in the most recent waves of state

²⁴ Martii 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 118 (The Hague: Hague Academy of International Law, 1996); see also O. Schachter, *State Succession: The Once and Future Law*, 33 VA J. INT'L L. 253, 258-60 (1993) (considering it a failed attempt at codification).

²⁵ RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 209 (1987). This section states a rule similar but narrower than the Vienna Convention. See *id.* It claims that debts do not pass unless they are local debts in cases of cession and secession. See *id.* The sole exception where debts do pass is absorption of another state, as with the Vienna Convention. See *id.*

²⁶ For references to a range of early literature on this concept, see H.J. Cahn, *The Responsibility of the Successor State for War Debt*, 44 AM. J. INT'L L. 477, 478 (1950); Williams & Harris, *supra* note 9, at 365-66; ILA Final Report, *supra* note 9, at 4. For a critique, see FEILCHENFELD, *supra* note 11, at 821.

succession in the republics seceding from the USSR, the annexation of the German Democratic Republic by the Federal Republic of Germany, and the dissolution of the Socialist Federal Republic of Yugoslavia.²⁷ Whether odious debts pass in such an equitable determination remains an open question for some, but for most who have examined the question against the backdrop of recent state practice, it is settled that odious debts are not apportioned unless by agreement.²⁸ While the unanimity of agreement may be overstated in these treatments, the substantial uniformity on this point, and non-agreement as to any binding obligation to repay, suggest that vigorous denials of the existence of any odious debt doctrine risk betraying a less than subtle understanding of public international law.²⁹

C. *The Rule of Repayment in Government Succession*

The legal position of the rule of repayment with regard to changes of government, as opposed to state sovereignty, is much more settled in favor of continuity. J.B. Moore found that “[c]hanges in the government or internal policy of the state do not

²⁷ See Koskenniemi, *supra* note 24, at 89-90; Williams & Harris, *supra* note 9, at 355-60; Acquaviva, *supra* note 9, at 93-94; ILA Final Report, *supra* note 9, at 4; *Resolution Concerning State Succession in Matters of Property and Debts* arts. 9, 11, 22-29, INSTITUT DE DROIT INTERNATIONAL (2001), available at http://www.idi-iii.org/idiE/resolutionsE/2001_van_01_en.PDF. Cheng, *supra* note 14, at 138, 292-97.

²⁸ “[T]here is general agreement in practice, confirmed unanimously by international legal writing, that so-called odious debts (i.e. debts of the State which do not relate to any interest of the population of the territory, or incurred in pursuit of illegal aims, like war) are not subject to succession.” ILA Final Report, *supra* note 9, at 2. “In rare cases, the identifiable debt might even belong to the category of odious debt, for which the successor state should not be liable.” Williams & Harris, *supra* note 9, at 408. “The general principle—universally accepted—is that of avoiding the necessity of payment of these kind of [odious debt] obligations by the successor state, although the real problem usually lies in ascertaining whether a specific debt falls in this category.” Acquaviva, *supra* note 9, at 107-08. *But cf.* Hubert Beemelmans, *State Succession in International Law: Remarks on Theory and State Praxis*, 15 B.U. INT'L L.J. 71, 115 (1997) (whose assessment of the situation vis-à-vis the absorption of the German Democratic Republic by the Federal Republic of Germany conflicts with the more detailed account in the ILA Final Report).

²⁹ Mancina, *supra* note 1, at 1252 (“The odious debt doctrine is not a part of international law. It does not exist under any treaties, nor does it exist in state practice, as no state has explicitly invoked it and prevailed by raising the doctrine as a defense to a legal obligation to repay its debts.”).

as a rule affect its position in international law[;] though the government changes, the nation remains, with rights and obligations unimpaired.”³⁰ In the leading *Tinoco Arbitration* case, William H. Taft as sole arbitrator reaffirmed this position and found that the unconstitutional means by which Federico Tinoco came to power in Venezuela in 1917 did not affect his *de facto* authority in the country, and therefore his power to contractually bind the state under international law.³¹ International legal opinion, including the opinion of Sack, was and still is practically unified on this point.³² Yet, in a much less widely acknowledged aspect of the *Tinoco* case,³³ Taft went on to find that the disputed transactions were manifestly for personal and not public uses and were therefore unenforceable.³⁴ Thus the case frequently cited for the principle of continuing responsibility for debts absent state succession³⁵ involved a refusal to enforce such a debt because the Bank failed to show that the funds were for “legitimate governmental use.”³⁶ Understood properly, the case stands for the principle that unconstitutional or revolutionary changes of regimes are not *on their own* sufficient to invalidate an obligation, and that the question of the debt’s validity, whether on grounds of valid formation, public policy, or legality, may enter at an entirely different level. This issue is examined further in Part V.A below.

D. Expediency and the Opinio Juris of the Rule of Repayment

It is often remarked that so many countries have repaid what

³⁰ 1 J.B. MOORE, DIGEST OF INTERNATIONAL LAW 249 (1906). See *Lehigh Valley R. Co. v. State of Russia*, 21 F.2d 396, 401 (2d Cir. 1927); RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, *supra* note 25, at § 208, reporter’s note 2.

³¹ See *Great Britain v. Costa Rica (Tinoco Arbitration)*, 18 AM. J. INT’L L. 147, 149-54 (1924).

³² SACK, *supra* note 13, at 46-47 (citing authority from Grotius, de Vattel, Calvo, Politis, Fauchille, Wheaton, and Bayard). Contemporary opinion is still fairly united on this point. See ILA Final Report, *supra* note 9, at 14.

³³ Indeed, the point seemed lost even on James Crawford as he concludes erroneously that the Tinoco loans were upheld as valid. See James Crawford, *Democracy and the Body of International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 97 (Gregory H. Fox & Brad R. Roth eds., 2000).

³⁴ *Tinoco Arbitration*, 18 AM. J. INT’L L. at 168-69.

³⁵ ILA Final Report, *supra* note 9, at 14.

³⁶ *Tinoco Arbitration*, 18 AM. J. INT’L L. at 169.

would be considered odious debts that this constitutes an instance of international custom, or state practice, in favor of the rule of repaying even odious debts.³⁷ Such instances include post-revolutionary France, Spain, Portugal, the Netherlands, Bavaria, Mexico, Ecuador, Brazil, Costa Rica, Turkey, and Germany (in 1918),³⁸ not to mention the long list of countries that have assumed dictator's debts in the twentieth century. But it must be recalled that state practice alone is not sufficient to establish the existence of a rule of customary international law; it must be accompanied by *opinio juris et necessitatis*. In outlining the sources of law, the Statute of the International Court of Justice refers to "general practice *accepted as law*."³⁹ The requirement that something be accepted as law is explained in the *Lotus Case* as "being conscious of a duty,"⁴⁰ and in the *North Sea Continental Shelf Case* as "a general recognition that a rule of law or legal obligation is involved"⁴¹ and that "evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."⁴² One instance where a practice is not accompanied by the *opinio juris* is where a country expressly claims to make payment *ex gratia*.⁴³ Others include where the conduct is done by courtesy, for expediency, or out of duress.

Both contemporary and earlier practice of repaying odious and other debts is often explicable on grounds of expediency. Malcolm Shaw notes that "successor states may be keen to establish their international creditworthiness by becoming involved in a debt allocation arrangement in circumstances where

³⁷ See Mancina, *supra* note 1, at 1250; Gelpern, *supra* note 1, at 406.

³⁸ SACK, *supra* note 13, at 50-52.

³⁹ Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 1060, 3 Bevans 1179, 1187, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> [hereinafter I.C.J. Statute].

⁴⁰ S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (Ser. A) No. 10, at 24, available at http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus/.

⁴¹ *North Sea Continental Shelf* (F.R.G./Den v. F.R.G./Neth), 1969 I.C.J. 43 (Feb. 20).

⁴² *Id.* at 44. This notion was affirmed in *Military and Paramilitary Activities* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) at 109.

⁴³ An example of this is when the United Kingdom annexed Upper Burma and the Transvaal. See FEILCHENFELD, *supra* note 11, at 379; see also KEITH, *supra* note 12, at 71; Hoeflich, *supra* note 12, at 50 (concerning U.S. annexation of Texas).

in strict international law this may not be necessary.”⁴⁴ Arthur Berriedale Keith explained that that the German compensation of residents in Alsace-Lorraine after the Franco-Prussian war in 1871 could be explained on grounds of expediency.⁴⁵ This was also why the British Government made payments on debts after the Boer War and in Upper Burma notwithstanding its express declaration that it was not obliged to pay.⁴⁶ Mohammed Bedjaoui distinguishes certain examples of states repaying war debts by explaining that “[i]t need hardly be pointed out that such solutions are generally based on considerations of political expediency.”⁴⁷

But expediency would be an understatement of the reasons favoring the repayment of any sovereign debt owed to European bondholders in the nineteenth century. The European powers often used military might or direct administration of the local economy, typically under threat of force, to enforce the payment of debts. Recent literature describes such measures as “supersanctions” in the period of 1870-1913, namely, the use of direct military pressure or direct imposition of foreign political or financial control.⁴⁸ Far from being a remote risk, it was estimated

⁴⁴ SHAW, *supra* note 8, at 902.

⁴⁵ See KEITH, *supra* note 12, at 71.

⁴⁶

[T]he British Government had every motive to satisfy the creditors because the annexation of the Transvaal was already causing grave political unrest in South Africa, and a repudiation of the debentures would have caused much indignation among the Dutch holders in the Cape Colony and among foreign bond holders in Holland, an extremely undesirable contingency in view of the relation of the Transvaal Boers to the Cape Boers and the Netherlands. Further, the fact that the question of altering the terms of the debt were considered is clear proof that His Majesty’s Government did not regard themselves as legally bound. In the case of the annexation of Upper Burma, in 1886, no regular public debt existed, but the Government paid expressly as a matter of grace claims on account of monies bona fide lent for and expended on public purposes, all claims being considered strictly on their merits.

KEITH, *supra* note 12, at 64.

⁴⁷ Mohammed Bedjaoui, *Ninth Report on Succession of States in Respect of Matters other than Treaties*, UN DOC.A/CN.4/301 AND ADD.1 (1977), reprinted in *Yearbook of the International Law Commission*, vol. II, pt. 1, A/CN.4/SER.A/1977/Add.1(Part1), 71, ¶ 154.

⁴⁸ Kris James Mitchener & Mark D. Weidenmier, *Supersanctions and Sovereign Debt Repayment* (NBER Working Paper 11472, 2005), available at <http://www.nber.org/papers/w11472>.

that such sanctions were imposed in roughly one third of cases of sovereign default.⁴⁹ As Mitchener and Weidenmier note, “all nations that defaulted on sovereign debt ran the risk of gunboats blockading their ports or creditor nations seizing fiscal control of their country”⁵⁰ Britain alone led debt-related military interventions or direct administration of the local economy in Mexico (1861), Egypt (1882), Greece (1887), Venezuela (1902), Serbia (1904), and Guatemala (1913).⁵¹ The Mexican incident occurred after the government of Benito Juárez declared a moratorium on debt repayments after the conclusion of the Mexican War of Reform.⁵² This led to military intervention by the armies of Britain, France, and Spain, and ultimately led to the imposition of direct re-colonization by France.⁵³ The Venezuelan affair, which involved shelling Venezuelan cities by British, German, and Italian boats, was a flagrant violation of the Monroe Doctrine and led to a diplomatic intervention by the U.S. President and ultimately to arbitration of the claims.⁵⁴

The issue was so acute at the time that it led to the formulation of the Calvo Doctrine in 1868 and the Drago Doctrine in 1902.⁵⁵ The Calvo Doctrine was the assertion by an Argentinean jurist, Carlos Calvo, that there was no right in international law for one state to use military or even diplomatic intervention to collect on private pecuniary claims against another state. The exercise of

⁴⁹ *See id.* at 2.

⁵⁰ *Id.*

We find that, conditional on default, the probability that a country would be ‘sanctioned’ (either via supersanctions or seizures of assets by private creditors) was greater than 40 percent during the period 1870-1913. Moreover, roughly two-thirds of these sanctions took the form of gunboat diplomacy or the loss of fiscal sovereignty by the defaulting country, i.e. supersanctions.

Id.

⁵¹ *See* H.B. SAMUEL, *THE FRENCH DEFAULT: AN ANALYSIS OF THE PROBLEMS INVOLVED IN THE DEBT REPUDIATION OF THE FRENCH REPUBLIC* 101 (1930).

⁵² *See* JOHN N. POMEROY, *LECTURES ON INTERNATIONAL LAW IN TIME OF PEACE* 75 (1886); *see also* SACK, *supra* note 13, at 158. For details on these events, *see generally* JAN BAZANT, *HISTORIA DE LA DEUDA EXTERIOR DE MÉXICO 1823-1946*, at 84-99 (1968).

⁵³ *See* POMEROY, *supra* note 52, at 75; BAZANT, *supra* note 52, at 89-99.

⁵⁴ *See* A.S. Hershey, *The Calvo and Drago Doctrines*, 1 *AM. J. INT'L L.* 26, 28-31 (1907) (describing the Drago doctrine and President Roosevelt’s acceptance of it).

⁵⁵ *See id.* at 27-28.

such a putative right, he argued, was blatantly at odds with the accepted grounds for military intervention then used in Europe, and was rather a direct continuation of unprincipled attitudes associated with the colonial era.⁵⁶

After the Venezuelan affair in December 1902, the Argentinean foreign minister, Luis M. Drago, sent a note to Washington in which he set out the narrower claim that came to be known as the Drago Doctrine.⁵⁷ The claim was that the issuance of foreign debt is a sovereign act and that the use of military force to collect upon it was not justified in international law or the domestic law of nations such as the United States.⁵⁸ Though some authors found that the doctrine was discredited and rejected by creditor states,⁵⁹ other authors and President Theodore Roosevelt agreed with its validity.⁶⁰ It was in any event an important precursor to the Hague Convention (II) Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, signed at the Second Peace Conference in the Hague on October 18, 1907.⁶¹ Article 1 of this convention stipulates that no military force may be used to collect a sovereign debt owed to a private person, unless the debtor refuses to submit to arbitration or comply with the award of an arbitrator. Though the option of force remained, the use of mandatory arbitration made an important practical difference. For instance, with regard to the Venezuelan affair, the appointed claims commission ultimately awarded only approximately seventeen percent of what was claimed against Venezuela by persons from the United States, Spain, Britain, Germany, Belgium, and France.⁶² Most pertinent, the need for such a convention goes some distance to explaining why so many

⁵⁶ *See id.*

⁵⁷ *See id.* at 28-29.

⁵⁸ *See id.* at 30-31.

⁵⁹ *See* SAMUEL, *supra* note 51, at 101.

⁶⁰ Hershey, *supra* note 54, at 43. Hershey mentions that President Roosevelt fully endorsed the doctrine in 1905. *Id.* at 30.

⁶¹ Hague Convention (II) Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, Oct. 18 1907, 36 Stat. 2241, 1 Bevans 607.

⁶² Hershey, *supra* note 54, at 43. This figure was obtained by aggregating the individual sums reported by Hershey, which amounted to 28, 341, 253 Venezuelan Bolivars awarded out of the 171, 604, 898 claimed.

countries emerging from colonial and other subjugation chose not to take a principled stand against foreign creditors at that point in time.

Military force was not the only element influencing state practice in favor of repaying debts. In the context of African decolonization, for instance, Yilma Makonnen explains that the *ipso facto* recognition of some colonial debts by some new states in Eastern Africa does not imply their *ipso jure* recognition because “[s]uch positions were voluntarily assumed for political reasons.”⁶³ There have been myriad reasons for repayment: political recognition,⁶⁴ institutional membership,⁶⁵ fear of ostracization in capital markets,⁶⁶ access to military aid, trade markets, and drawing rights at the International Monetary Fund and World Bank. Bedjaoui notes that although several South American republics assumed the debts of Spain upon liberation, these were based on the assumption that the debt was concluded on behalf and for the benefit of the colony, and that in any event “the precedents set by the South American republics were not followed in subsequent cases.”⁶⁷

At all times in the history of sovereign debt, there has been a set of overpowering incentives and threats associated with payment of sovereign debt to creditors in a position to punish defaulting sovereigns. The absence of established *opinio juris* undermines the argument that the repayment of such debts was accepted as law by the debt-servicing nations, in cases of both

⁶³ Y. MAKKONEN, INTERNATIONAL LAW AND THE NEW STATES OF AFRICA 409-10 (1983).

⁶⁴ See MOORE, *supra* note 30, at 355-56 (referring to arguments of the Spanish Commissioners stating that recognition of the independence of any Latin American state by Spain was withheld unless they assumed all debts of any kind); see also Bedjaoui, *supra* note 47, at 73, ¶ 166 (describing how the Spanish American colonies unilaterally assumed Spain's debts in return for recognition, peace and friendship); FEILCHENFELD, *supra* note 11, at 348 (discussing the recently seceded Republic of Panama's declaration that it would assume a portion of the Republic of Colombia's debt as soon as independence was recognized).

⁶⁵ See Williams & Harris, *supra* note 9, at 383-400 (discussing the pressure of the multilateral institutions on the former Soviet republics, and in particular on the states formerly comprised within the Federal Republic of Yugoslavia).

⁶⁶ See T. Lothian, *The Criticism of Third World Debt and the Revision of Legal Doctrine*, 13 WIS. INT'L L.J. 421, 426 (1995); Feibelman, *supra* note 1, at 733-34.

⁶⁷ Bedjaoui, *supra* note 47, at 93, ¶ 287.

government and state succession.

III. Definitions of Odious Debt

Since the doctrine has been treated by a number of authors and invoked in a variety of situations, it is helpful to survey earlier treatments and restate the doctrine with some analytical precision. Accordingly, this Part traces the legal history of the doctrine, reviews the definitions given by three influential legal scholars, canvasses the accepted types of odious debt, and then sets forth a contemporary definition of odious debt, one which is drawn principally from earlier work and accords with contemporary usage.

A. *A Brief Legal History of the Doctrine*

As seen above, the law of state succession in respect of debts was in disarray, at no time more so than near the turn of the twentieth century, when Britain and the United States had little time for the more theoretical juristic doctrines of continental thinkers. Prior to the turn of the century, it was widely accepted that debts contracted by one state to repel the invading forces of another would be considered “war debts” and not be repayable by the conquering state. Given the further erratic state practice concerning debts repudiated by Mexico in 1867, those relating to Cuba in 1898, and Prussian colonization debts that the Allies refused to charge Poland in 1919, it became necessary for writers to develop a more sophisticated analysis of law in this area.⁶⁸

In seeking to assert that, contrary to Anglo-American opinion at the time, there *was* a rule of repayment, a number of scholars needed to give an account of the state succession in respect of public debts that addressed the variances of state practice. In his work on the subject, Sack borrowed from Gaston Jèze’s notion of regime debts.⁶⁹ While Sack asserted the doctrine as a principle of law, Feilchenfeld was more cautious and considered it to be a

⁶⁸ For references to these incidents, see *infra* Part IV.A.

⁶⁹ GASTON JÈZE, *COURS DE SCIENCE DES FINANCES ET DE LÉGISLATION FINANCIÈRE FRANÇAISE: DÉPENSES PUBLIQUES-THÉORIE GÉNÉRALE DU CRÉDIT PUBLIC* 302-05, 327 (6th ed.1922); *see also* GASTON JÈZE, *LE PARTAGE DES DETTES PUBLIQUES AU CAS DE DÉMEMBREMENT DE TERRITOIRE* 8-11 (5th ed. 1921).

consideration of equity and morality.⁷⁰ In the United States, Charles Cheney Hyde, the leading American commentator of his day and highly indebted to both Sack and Feilchenfeld, was categorical in his view of the necessity of public benefit for public debts to be apportioned in cases of cession:

[T]erritory, if occupied by human beings, is not, like a mere chattel, to be subjected to such fiscal or other use as may suit the convenience or caprice of the existing governmental authority. On principle the resources of that territory should not be regarded as capable of complete hypothecation save under conditions which do not appear to be essentially adverse to the welfare of the occupants.⁷¹

Hyde did not use the term “odious debt,” though his criteria were even more onerous for creditors. However, Hyde’s views pertained only to cases of cession and dissolution of a state,⁷² where the legal personality of the borrowing state often remains intact. He took a different view on cases of total absorption.⁷³

Subsequent to these authors, the doctrine was raised on occasion by international lawyers after the Second World War, and was discussed briefly in Daniel Patrick O’Connell’s leading study on state succession.⁷⁴ In 1977 and in the early 1980s, the doctrine was considered yet again during the drafting of the Vienna Convention on the Succession of States on matters other than treaties. Its status remained unresolved for some, though definitively included for others. After being taken up only sporadically in the literature of the 1980s⁷⁵—it was raised in litigation a few times then (see further below)—the doctrine experienced a revival after the fall of the Apartheid government in

⁷⁰ FEILCHENFELD, *supra* note 11, at 701, 714.

⁷¹ 1 C.C. HYDE, *INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* § 126 (1947). Hyde doubtless had the Cuban affair in mind, and the term ‘hypothecate’ was used by the Spanish Commissioners in defense of their claim. MOORE, *supra* note 30, at 379.

⁷² See HYDE, *supra* note 71, at 420.

⁷³ See *id.* at 417.

⁷⁴ See O’CONNELL, *supra* note 12, at 458.

⁷⁵ See Hoeflich, *supra* note 12, at 69-70; Foorman, *supra* note 12, at 21-25; Gunter Frankenberg & Rolf Knieper, *Legal Problems of the Overindebtedness of Developing Countries: The Current Relevance of the Doctrine of Odious Debts*, 12 INT’L J. SOC. L. 415, 425-34 (1984).

South Africa when the Truth and Reconciliation Commission recommended cancelling certain odious debts.⁷⁶ This momentum was sustained by a number of civil society groups and various authors arguing or campaigning for debt relief in the 1990s.⁷⁷ Just as the doctrine regained academic interest in the new millennium,⁷⁸ and in the midst of discussions of debt legitimacy in the context of Argentina and Nigeria,⁷⁹ some members of the Bush administration and certain periodicals called for the application of the doctrine to Iraq in 2003.⁸⁰ Interest among academics and activists alike was thus revived.

B. Earlier Legal Definitions

1. Sack's Definition

Sack was likely the first to posit the existence of a doctrine of 'odious debt' in such terms. He drew on the public finance theory and international legal work of the French legal scholar Gaston Jèze, who had developed the concept of "regime debts," namely, "debts contracted in peacetime, but specially for the purpose of subjugating the liberated territory."⁸¹ In building upon this, Jèze's ideas more generally, and state practice with respect to Cuba, the United States, Poland, and Mexico, Sack introduced a three-part typology of odious debts. The first was debts odious for the

⁷⁶ See 6 TRUTH AND RECONCILIATION COMMISSION, REPORT § 2, CH. 5, ¶ 28 (1998) (mentioning the 1976 International Monetary Fund (IMF) loan that helped finance the security state); see *id.* at ¶¶ 29-42 (describing a case study of Eskom and other parastatals involved in security operations); see also ECONOMIST INTELLIGENCE UNIT, COUNTRY PROFILE: SOUTH AFRICA 38 (1996-1997) (mentioning that external debt of South Africa was very low at the time, thus the nation likely had more to risk than to gain by invoking it).

⁷⁷ See Adams, *supra* note 3, at 17 (examining this work will show it is a significant influence on this paper).

⁷⁸ Khalfan et al., *supra* note 2, at 2-6; J. Hanlon, *supra* note 1, at 113-14. See generally Kremer et al., *supra* note 1, at 1-26 (discussing odious debt and advocating a new due diligence model to give lenders more certainty, among other things).

⁷⁹ See Gelpern, *supra* note 1, at 6-10 (discussing Argentina); LEX RIEFFEL, BROOKINGS INSTITUTION, NIGERIA'S PARIS CLUB DEBT PROBLEM 5, POL'Y BRIEF NO. 144 (2005).

⁸⁰ See Gelpern, *supra* note 1, at 3-6.

⁸¹ JÈZE, *supra* note 69, at 327; Bedjaoui, *supra* note 47 at 67, ¶ 122.

population of the entire state;⁸² the second was debts odious to the population of part of a state;⁸³ and the third was debts odious to the new “supreme” power (i.e., war debts).⁸⁴ His definition of “debts odious for the population of an entire state” is generally regarded as the most comprehensive definition of odious debt:

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 population of the entire state. This debt does not bind the nation; it is a debt of the regime, a *personal debt* contracted by the power that contracted it, and consequently it falls with the demise of that power. The reason why these “odious” debts cannot be considered to burden the territory of the state is that they do not fulfill *one of the conditions* determining the *regularity* 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 it—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.⁸⁵

Sack's definition comprises three elements: absence of consent, absence of benefit, and creditor awareness of both. He also expressly included debts that were for manifestly personal interests of members of government or persons or groups linked to

⁸² SACK, *supra* note 13, at 157-58.

⁸³ *Id.* at 158-65.

⁸⁴ *Id.* at 165-82 (“Dettes odieuses pour le nouveau pouvoir suprême. Dettes de Guerre.”)

⁸⁵ Adams, *supra* note 3, at 3 (translating SACK, *supra* note 13, at 157) (translation slightly modified by the present author) (emphasis in original).

government, as well as war debts.⁸⁶ The notion that proceeds for a state debt must be incurred and spent in the interests of the state is borrowed from Jèze,⁸⁷ who argued that “[s]atisfaction of a public need in civilised nations is an essential element [of valid public expenses].”⁸⁸ Jèze proposed two reasons: first, that public money is made available to public servants (*agents publics*) to fulfill the mission of satisfying public needs; second, that to do otherwise would violate the notion of equality before public charges and expenses, because the majority of debt payments are financed through public taxation.⁸⁹ This rationale in some ways merely restates what had at the time been settled constitutional doctrine in the United States for several years.⁹⁰

Sack’s articulation of the odious debt doctrine has been recognized by other legal writers, notably O’Connell,⁹¹ Frankenberg and Kneiper,⁹² and a number of more recent treatments.⁹³

2. *Feilchenfeld’s Definition*

Ernst Feilchenfeld used the terms “odious debt” and “imposed debts” in a number of sections of his book,⁹⁴ but did not offer an

⁸⁶ SACK, *supra* note 13, at 158.

⁸⁷ *Id.* at 25-30.

⁸⁸ *Id.* at 25-26 (citing G. JÈZE, COURS. DEPENSES PUBLIQUES 37 (6ème ed., 1922) (translation by author)).

⁸⁹ *Id.*

⁹⁰ See *infra* notes 223-233 and accompanying text.

⁹¹ O’CONNELL, *supra* note 12, at 458-461.

⁹² Frankenberg & Kneiper, *supra* note 75, at 425-431.

⁹³ See, e.g., King, *supra* note 2, at 2-3; Gelpert, *supra* note 1, at 403-404; Buchheit et al., *supra* note 1, at 15-18.

⁹⁴ See FEILCHENFELD, *supra* note 11, at 32. Feilchenfeld referred to “what some modern writers refer to as ‘odious’ debts or ‘imposed’ debts.” *Id.*; see *id.* at 269 (noting that in annexations and dismemberments in Europe, particularly the unifications of Italy and Germany, in no case were “war debts” or “imposed” debts exempt from maintenance or assumption); see *id.* at 337-42 (referring to the American arguments concerning the absence of consent and benefit and the “odious” character of debts, and to “imposed” debts); see *id.* at 445-54 (discussing “other odious debts” excluded from the post-World War I settlement: one is exemption for Bulgaria’s “war of aggression”; another is for the Polish exemption, which he finds that whatever the moral arguments, could not justify a violation of the law); see *id.* at 701-14 (considering the population of the debtor state, including absence of benefit and absence of consent); see *id.* at 718 (debts contracted to

analytical definition, nor did he refer to Sack's definition, despite referring to Sack on other occasions. The term "odious debt" arises notably in his examination of the American Commissioners' arguments in the Cuban loans affair. Nonetheless, the index entry for "odious debts" in Feilchenfeld's work refers the reader to an elaborate treatment of the notion of absence of consent and absence of benefit as criteria for evaluating the legitimacy of debt.⁹⁵ Feilchenfeld was clear in that particular section that he intended to set out criteria for evaluating the "justice of a debt independent of its legality[,] suggesting such considerations may help shape future legislation."⁹⁶ He claimed that the inquiry was on philosophical grounds, and he warned against introducing "investigations" based on the considerations he offered "so long as the entire system of law [was] not changed in accordance" with such ideas.⁹⁷ But Feilchenfeld's investigation was not simply pure philosophy, nor devoid of the consideration of state practice:

For practical purposes, an investigation of the just grounds for the creation of debts may be restricted to those which for centuries have been regarded as sufficient or necessary in most systems of positive law of most of the civilized nations. A survey of these systems shows that the creation of debts is justified either by the necessity of raising money for public purposes, by the doctrine that compensation is owed for tortious acts to injured persons, by consent of the debtor, or by benefits received by the debtor.⁹⁸

Feilchenfeld thus acknowledged a general, widespread recognition of the requirement of legitimate public purposes for public borrowing. In his consideration, he examined the Cuban case

embarrass the state, uses consent/benefit theory to say the debt should not, on equitable and not legal grounds, be maintained); *see id.* at 786 ("if a rule of law were recognized, war debts and other 'odious' debts would not be subject to exemption; which was not general before the War, and has not been generally recognized since the War, as the Central Powers did not approve of the arguments for such exemption advanced by the Allies."); *see id.* at 862, referring to debts "for the purpose of suppressing a rebellion" and mentioning that it is acceptable only in cases of cession, where "somewhat more elastic principles may be applied than where maintenance of debts is concerned."

⁹⁵ *See* FEILCHENFELD, *supra* note 11, at 916.

⁹⁶ *Id.* at 701.

⁹⁷ *Id.*

⁹⁸ *Id.*

(what he called imposed debts), and a more general examination of what might constitute absence of benefit. He found problems in defining both absence of benefit and absence of consent, but concludes that borrowing for private enrichment of officials is among the items that can with certainty be identified as constituting absence of benefit.⁹⁹ Furthermore, Feilchenfeld acknowledged but contested the validity of war debts.¹⁰⁰ Other authors have referred to Feilchenfeld in their own treatments of odious debts.¹⁰¹

3. *Bedjaoui's Definition*

It is of particular interest that Mohammed Bedjaoui did not refer at all to Sack's formulation of the doctrine in his submission as Special Rapporteur of draft articles on odious debt to the ILC for consideration in the draft Vienna Convention on the Succession of States in Respect of Property, Archives, and Debts.¹⁰² As Bedjaoui's mandate concerned state succession, he was naturally concerned with defining odious debt in that context, though he acknowledged that the notion of regime debts was applied also outside state succession.¹⁰³ He offered the following definition in his draft articles:

Article C. Definition of odious debts

For the purposes of the present articles, "odious debts" means:

- (a) all debts contracted by the predecessor State with a view to attaining the objectives contrary to the major interests of the successor State or of the transferred territory;
- (b) all debts contracted by the predecessor State with an aim

⁹⁹ *See id.* at 710. The other, absence of benefit, is where money is contracted for and spent on items where no possible benefit could be derived, such as a flawed foreign investment. *See id.*

¹⁰⁰ *See id.* at 719. *Cf.* Cahn, *supra* note 26, at 489 (rejecting Feilchenfeld's findings on this point).

¹⁰¹ *See, e.g.,* Beemelmans, *supra* note 28, at 115; Hoeflich, *supra* note 12, at 45; Bedjaoui, *supra* note 47, at 69, ¶ 132 (discussing Feilchenfeld in the context of odious debt).

¹⁰² Bedjaoui, *supra* note 47, at 67-74, ¶¶ 115-173. Bedjaoui was the Minister of Justice of Algeria before serving as the country's Permanent UN Representative. He later served as a judge of the International Court of Justice from 1982-2001, and was its President from 1994-1997.

¹⁰³ *Id.* at 68, ¶¶ 124-25.

and for a purpose not in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.¹⁰⁴

This draft article was not adopted, but neither was the doctrine of odious debt definitively rejected.¹⁰⁵ Bedjaoui's was the most ambitious definition of the doctrine. It used the open-ended standard "contrary to the major interests," consistent with the usage of some other writers,¹⁰⁶ but said nothing about either the absence of consent or creditor awareness conditions. Paragraph (a) addressed both war debts and what Bedjaoui called subjugation debts (roughly similar to Sack's definition), while paragraph (b) addressed a new category altogether. Debts contracted with an aim not in conformity with international law would include those contracted for the prosecution of an illegal war of aggression, colonization, apartheid, genocide, contrary to the principle of self-determination, and other instances of internationally unlawful behavior.¹⁰⁷

Bedjaoui introduced this clause in part to deal with the situation of where debts were used to finance internationally unlawful behavior that, despite its unlawfulness, did not prejudice the interests of the successor state. So if State A borrows to finance an illegal war against State B, and State C subsequently annexes or secedes from State A, Bedjaoui suggested that State C would not be responsible for the illegal war debts of State A. Bedjaoui pointed to little in the way of legal authority for this category, and this would be understandable as what he aimed to proscribe had only recently been regarded as unlawful. Prior to 1945, wars of aggression, apartheid, genocide, and suppression of self-determination were more the norm than exceptional breaches of international law. Thus his definition was an attempt, defensible and appropriate in my view, to further codify the consequences of UN Charter commitments in the wake of genocide, and decolonisation at the height of South African apartheid.

Bedjaoui's definition has been influential, particularly upon

¹⁰⁴ *Id.* at 74, ¶ 173.

¹⁰⁵ *See infra* Part IV. B.1 for discussion.

¹⁰⁶ *See* Foorman, *supra* note 12, at 21 ("against the interests of the local populace").

¹⁰⁷ *See* Bedjaoui, *supra* note 47, at 69-70 ¶¶ 133-39.

P.K. Menon's work on state succession in relation to debts,¹⁰⁸ and was used as the working definition in the Iran-U.S. tribunal case.¹⁰⁹ I have also employed Bedjaoui's notion of subjugation debts below.

4. *Established Types of Odious Debt*

Legal writing and state practice has thus far recognized two broad species of odious debt: war debts, and what will for the sake of brevity be called subjugation debts. War debts have traditionally been defined "as debts arising out of transactions which helped or are presumed to have helped the defeated country in waging or preparing war against the successor state or its allies."¹¹⁰ Not all debts relating to war are war debts. Thus Tai Heng Cheng appears to misapply the concept when he claims that Germany's refusal to assume Austria's debts upon its annexation in 1938 was because the debts were regarded as war debts.¹¹¹ That was neither the argument advanced by Germany—which argued that covenants restricting the union of Austria with Germany were against Austria's interests—nor the purpose of the loans.¹¹² Furthermore, could Iraq's debts in 2003 have been regarded by the United States as war debts, as the United States was neither the target of the armed attack such loans funded nor the successor state to Iraq. It is thus important not to conflate war-related debts

¹⁰⁸ See P.K. MENON, *THE SUCCESSION OF STATES IN RESPECT TO TREATIES, STATE PROPERTY, ARCHIVES, AND DEBTS* 157-66 (1991).

¹⁰⁹ See *infra* Part IV.D.

¹¹⁰ Cahn, *supra* note 26, at 477 (stating that Feilchenfeld and Oppenheim continued to believe that war debts were enforceable); see also Bedjaoui, *supra* note 47, at 70, ("any debt contracted by the predecessor state to sustain its war effort against the [successor state]"); J. WESTLAKE, *INTERNATIONAL LAW: PART I, PEACE* 78 (1904) (recognizing war debts as exceptions to the rule that a successor state is liable for the obligations of its predecessor); Amos S. Hershey, *The Succession of States*, 5 AM. J. INT'L L. 285, 296 (1911); SACK, *supra* note 13, at 165; FEILCHENFELD, *supra* note 11, at 269, 450-53, 719; HYDE, *supra* note 71, at 442; O'CONNELL, *supra* note 12, at 461 (acknowledging the widespread authority, but did not believe that war debts should necessarily be regarded as odious).

¹¹¹ T.H. Cheng, *Renegotiating the Odious Debt Doctrine*, (New York Law School Public Law and Legal Theory Research Paper Series 06/07, No.14), available at <http://ssrn.com/abstract=948704> (forthcoming 2007 in *LAW & CONTEMP. PROBS.*).

¹¹² See King, *supra* note 2, at 28; see also HYDE, *supra* note 71, at 419 (citing a U.S. Department of State Press Release of Apr. 9, 1938, at 465-66).

with the species of odious debt known as war debts.

As for the second category, “hostile debts” was the term used by O’Connell to describe Sack’s doctrine, and this term was also employed by the American Commissioners in the Cuban loans negotiations.¹¹³ Jèze referred to “regime debts,” Bedjaoui to “subjugation debts,” and Feilchenfeld, and again the American Commissioners, to “imposed debts.”¹¹⁴ I prefer the term used by Bedjaoui as the most all-encompassing one. These are debts that are contracted by a state representative without the population’s consent and against its interests, with both these issues to the creditor’s knowledge. However, these various formulations raise the question of the extent to which the debt must be aggressively contrary to the population’s interests. At one point, Bedjaoui suggested a very high threshold for the standard: “debts contracted by a State with a view to attempting to repress an insurrectionary movement or war of liberation in a territory that it dominates or seeks to dominate, or to strengthen its economic colonization of that territory.”¹¹⁵ Yet Sack also spoke of the idea of strengthening a despotic regime, something perhaps less overtly antagonistic but still within the conceptual rubric of “absence of benefit” that was of common concern to all, including Hyde and Feilchenfeld. Then there is the further question of whether bribery or corruption of public officials can be considered subjugation or hostile debts. I attempt to clarify some of the problems left by this categorization by refining the idea of subjugation debts and introducing the idea of another species of odious debt, to be called fraudulent, illegal, and corruption debts.¹¹⁶

C. Contemporary Usage: The Three Criteria

Various more recent treatments of odious debt have focused on the three elements inherent in the American Commissioner’s position vis-à-vis the Cuban loans, and in Sack’s statement of the doctrine, namely, that an odious debt must manifest: (1) absence of the population’s consent, (2) absence of benefit to the population, and (3) the creditor’s awareness of these facts. The

¹¹³ See Buchheit et al., *supra* note 1, at 11-13.

¹¹⁴ FEILCHENFELD, *supra* note 11, at 104; MOORE, *supra* note 30, at 358.

¹¹⁵ Bedjaoui, *supra* note 47, at 72, ¶ 157.

¹¹⁶ See *infra* Part V.B.

absence of consent requirement has roots in Sack's concern with *despotic regimes* and it was a key aspect of Cuban debt affair.¹¹⁷ It was examined critically in great detail by Feilchenfeld,¹¹⁸ who was categorical in claiming that a finding of an odious debt must include a finding of lack of consent,¹¹⁹ but that it was not limited to dictatorial regimes.¹²⁰ Bedjaoui did not articulate such a requirement, but the very concept of subjugation debts implies a lack of consent as well.

The absence of benefit is a central aspect to all proposed definitions. In the various definitions proposed so far, I would suggest that there are at least four basic issues requiring resolution: (1) the intensity or the hostility of the harm/lack of benefit; (2) whether the loan must be non-beneficial in *purpose* and in *effect*, or if either of the two is sufficient in of itself; (3) whether and when general purpose loans might be deemed non-beneficial; and (4) how to assess absence of benefit. The question of the intensity of the harm needed is likely to vary depending on what type of odious debt is at issue. This will be discussed further below in Parts V.B and V.C. As for the second issue, my earlier working paper offered the view that the proceeds of the debt must be non-beneficial in *both* purpose and effect.¹²¹ In that regard, lending for odious purposes was recoverable to the extent the state actually benefited. This is an important part of Sack's proposal, and has been raised as a reason for which the American Commissioners went beyond the premises of their own argument in the Cuban loans case.¹²² It was also part of Sack's critique of the application of the doctrine to Poland.¹²³ The tenability of this view appears

¹¹⁷ FEILCHENFELD, *supra* note 11, at 337.

¹¹⁸ *Id.* at 702-05.

¹¹⁹ *Id.* at 714.

¹²⁰ *Id.* at 704. Among other scenarios, Feilchenfeld considers a representative body not elected by the application of fair and normal rules.

¹²¹ See King, *supra* note 2, at 43-46.

¹²² O'CONNELL, *supra* note 12, at 460; FEILCHENFELD, *supra* note 11, at 339-40.

¹²³ SACK, *supra* note 13, at 164. Sack felt that since the landowners whose land was expropriated received compensation, and because the land was cultivated to the general profit of the country, that the entire sum should not have been found odious. *Id.* This reasoning is unsound because it assumes that a foreign subjugating occupier can somehow reclaim the items gained notwithstanding such occupation. The natural response will always be that the loss in opportunity, and harm done, vastly exceed any

now to be highly suspect.¹²⁴ Put shortly, courts are slow to offer restitutionary remedies to parties whose relevant contractual obligations are voidable for illegality or for being contrary to public policy.¹²⁵

As for the third issue, the nub of the problem is whether lending for “general public purposes” to a despotic regime is tantamount to lending for odious purposes. This is a complicated question, but it might not be necessary to resolve it in advance. Much will depend on the facts known to the creditor before the lending takes place. There are ample illustrations of how constructive knowledge and willful blindness in civil claims can expose the true intentions of colluding parties. But if any safe-harbor rule would be needed, it is that lending to non-democratic regimes must be for specific non-odious purposes.¹²⁶ The fourth and final issue is perhaps the most problematic of all: when and who is to say that a loan is non-beneficial? This issue receives separate treatment in Part V.C below.

The idea that creditors must be subjectively aware of the loan is referred to by most authors.¹²⁷ The agreement between Sack and Feilchenfeld 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 their predecessors.¹²⁸ Critics of the doctrine have tended

benefit received. Any analogous claim in domestic law would be dismissed without hesitation.

¹²⁴ I expressed earlier reservations about it in King, *supra* note 2, at 15 n.12. I ultimately argued, however, that there must be absence of benefit in purpose and in fact. I now reject this position.

¹²⁵ N. ENONCHONG, *ILLEGAL TRANSACTIONS* 74-78 (1998) (“Borrowing Contracts: A person who advances money to another under a loan agreement which is illegal cannot recover his money either in contract or in an action in restitution for money had and received.”); THE STATIONARY OFFICE, *LAW COMM’N, ILLEGAL TRANSACTIONS: THE EFFECT OF ILLEGALITY ON CONTRACTS AND TRUSTS* 27-35, Consultation Paper 154 (1999) (“the general rule is that illegality acts as a defence to a standard restitutionary claim except where the parties are ‘not equally at fault’ [i.e. *non in pari delicto*]”); Paulus, *supra* note 1, at 100; *see also* Part IV.C, *infra*.

¹²⁶ For more on this, see Part VI, *infra*.

¹²⁷ *See* SACK, *supra* note 13, at 157; FEILCHENFELD, *supra* note 11, at 714; O’CONNELL, *supra* note 12, at 459; Frankenberg & Knieper, *supra* note 75, at 429-30; Foorman, *supra* note 12, at 24-25.

¹²⁸ Hoeflich, *supra* note 12, at 65.

not to focus on the issue of creditor awareness, for good reasons. Domestic private law, as well as criminal law, provide extensive examples of establishing awareness of circumstances that amounts to knowledge, constructive knowledge, or wilful blindness.¹²⁹ It is generally a fact-specific exercise.¹³⁰ Furthermore, given the fact that there must be a lack of consent, and especially that the *purpose* of the loan must be non-beneficial, it is doubtful that these first two hurdles will be cleared without also landing well past the third.

IV. Odious Debt in the Sources of International Law

Article 38 of the Statute of the International Court of Justice is generally viewed as “a complete statement of the sources of international law.”¹³¹ It identifies treaties, state practice accepted as law, general principles of law recognized by civilized nations, and, subsidiarily, judicial decisions and writings of highly qualified publicists. The following pages survey the ways in which an odious debt doctrine has been recognized, discussed, or instantiated within these sources. It does not seek to defend each example. Nor, for that matter, is it meant to suggest that other examples may not also exist. It is meant rather to summarize the work done so far and, where helpful, shed light on some details not sufficiently explored in the secondary literature.

It should be noted at the outset that states have not historically declared that they are applying the odious debt doctrine by name, and neither have all the tribunals discussed below dealt with the issue under that rubric. It is unnecessary in my view that they have done so in order to speak meaningfully of state practice in relation to the doctrine. The term odious debt is merely a label provided by Sack to identify loans allegedly unenforceable by reason of their conforming to the three conditions of absence of benefit, consent, and creditor awareness of both. What advocates seek to establish is that there is authority in the sources of law that

¹²⁹ See Buchheit et al., *supra* note 1, at 29-36, 47-51; King, *supra* note 2, at 38-39, 46-47; see also NELSON ENONCHONG, DURESS, UNDUE INFLUENCE AND UNCONSCIONABLE DEALING 373-81 (2006) (dealing with cases where the nature of the transaction puts a creditor on alert that reasonable steps must be taken).

¹³⁰ *Id.*

¹³¹ BROWNLIE, *supra* note 7, at 5.

show that the rule of repayment does not apply to those kinds of debts, regardless of what terminology one wishes to use.

A. *International Custom*

The following instances have been defended or identified in various accounts as examples of state practice where the nations have refused to recognize a binding obligation to repay odious debts: the repudiation by various American states of debts contracted in violation of state law;¹³² Mexican repudiation of various European debts (1867);¹³³ the non-apportionment of Spanish debts relating to the repression of an independence struggle on the island of Cuba (1898);¹³⁴ the Soviet repudiation of Tsarist debts (1918);¹³⁵ the non-apportionment of Prussian debts relating to the colonisation of Poland (1919);¹³⁶ the non-assumption of certain Austrian debts after the annexation of

¹³² See *Baltzer v. State*, 104 N.C. 265, 10 S.E. 153, 154 (N.C. 1889) (“It is conceded that these bonds, and all the state bonds so issued, were unwarranted by the constitution of this state, and are void.”), *aff’d* on other grounds in *Baltzer v. North Carolina*, 161 U.S. 240 (1896); SACK, *supra* note 13, at 25, 158; King, *supra* note 2, at 22-24. See generally REGINALD C. McGRANE, FOREIGN BONDHOLDERS AND AMERICAN STATE DEBTS (1935) (giving details of instances when American states repudiated what may be now characterized as odious debts).

¹³³ See SACK, *supra* note 13, at 158; see also POMEROY, *supra* note 52, at 75 (mentioning the scandalously high interest rates used to maintain the usurper in his place).

¹³⁴ See MOORE, *supra* note 30, at 351-85 (presenting the oral arguments of the Spanish and American Commissioners during negotiations); see also FEILCHENFELD, *supra* note 11, at 329-43 (calling the American arguments ‘equitable’ and not legal, a position not shared by the other commentators); SACK, *supra* note 13, at 159; Bedjaoui, *supra* note 47, at 72-73; Foorman, *supra* note 12, at 23.

¹³⁵ See Hoeflich, *supra* note 12, at 62 (acknowledging that the Russians would likely have considered the debt odious); O’CONNELL, *supra* note 12, at 20 (discussing the Soviet repudiation of rights and obligations connected with exploitation, though not connecting it formally with the odious debt doctrine); Bedjaoui, *supra* note 47, at 72 (addressing regime debts as an introduction to the review of subjugation debts); Foorman, *supra* note 12, at 19-21; James V. Feinerman, *Odious Debts: Old and New* (unpublished manuscript available at www.law.georgetown.edu/international/documents/Feinerman.pdf) (quoting official Chinese views that Russia’s position was an instantiation of the doctrine).

¹³⁶ See O’CONNELL, *supra* note 12, at 460; SACK, *supra* note 13, at 163-64 (considering that the entirety of the debt was not odious); Bedjaoui, *supra* note 47, at 73, ¶ 168; HYDE, *supra* note 71, at 407 (not calling it “odious debt” but cited as an instance of the author’s own benefit principle).

Austria by Nazi Germany (1938);¹³⁷ a variety of colonial-era debts,¹³⁸ including all that of the thirteen American colonies upon declaring independence from Britain,¹³⁹ as well as more specific debts relating to Indonesia,¹⁴⁰ all of China's pre-revolution debts, some of which were later characterized as odious in litigation (1952);¹⁴¹ debts relating to the French administration of Algeria (1962);¹⁴² claims by Iran that certain pre-revolutionary debts funding arms purchases were odious, a claim lost in arbitration (1996).¹⁴³

All of these claims have been disputed in recent literature and to deal with each claim would exceed the scope of this article. But in my view, most cases remain relevant instances of state practice, though criticisms have prompted me to abandon certain prior claims.¹⁴⁴

B. Treaties and the Vienna Convention

There are a number of treaties that bear on the topic of what might be called odious debt as defined in Part III above. For instance, the notion that state representatives are actually agents of the corporate personality of the state may be reflected in Article 50 of the Vienna Convention on the Law of Treaties, which allows a state to invoke the corruption of its representative as a justification

¹³⁷ See J.W. Garner, *Questions of State Succession Raised by the German Annexation of Austria*, 32 AM. J. INT'L L. 421, 424-26 (1938); Foorman, *supra* note 12, at 21-22; Hoeflich, *supra* note 12, at 63-64; HYDE, *supra* note 71, at 418-20.

¹³⁸ Bedjaoui, *supra* note 47, at 93.

¹³⁹ *Id.* at ¶ 288; FEILCHENFELD, *supra* note 11, at 54; MOORE, *supra* note 30, at 392 (discussing American Commissioners rejection of the contrary argument submitted by Spain).

¹⁴⁰ Bedjaoui, *supra* note 47, at 73-74, ¶¶ 169-70; *see also infra*, note 187.

¹⁴¹ *See infra* notes 197-199 (the date referred to in the text is taken from the maturity date of the bonds at issue in the *Jackson* litigation).

¹⁴² Bedjaoui, *supra* note 47, at 99. Bedjaoui was rather familiar with the independence movement in Algeria. *See, e.g.*, M. BEDJAOU, LAW AND THE ALGERIAN REVOLUTION (1961) (surveying legal aspects of the liberation struggle in Algeria, not discussion of debts).

¹⁴³ *See infra*, notes 191-192.

¹⁴⁴ King, *supra* note 2, at 22 (discussing Texas); *see id.* at 24 (discussing Chile and Peru); *see id.* at 28 (discussing the dissolution of the Federal Republic of Yugoslavia).

for invalidating its consent to be bound.¹⁴⁵ Furthermore, the number of international conventions proscribing the bribery of public officials has expanded exponentially in recent years.¹⁴⁶ If the ideas of public consent and benefit are highly relevant to the legality of a public debt in international law, then international human rights law, as well as the UN Charter and various resolutions concerning self-determination and economic rights and duties of states may also be relevant.¹⁴⁷

¹⁴⁵ See Vienna Convention on the Law of Treaties, May 23, 1969, art. 50, 1155 U.N.T.S. 331, 349 (“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”)

¹⁴⁶ See, e.g., Organization of American States, The Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724; Organization of Economic Cooperation and Development, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, OECD Doc. DAF/IME/BR(97)20, 37 I.L.M. 1; Council of Europe: Criminal Law Convention on Corruption, Jan. 27, 1999, 38 I.L.M. 505, ETS No. 173; The African Union Convention on Preventing and Combating Corruption, July 11, 2003, 43 I.L.M. 5 (2004); United Nations, Convention Against Corruption, Dec. 9-11, 2003, G.A. Res. 58/4, U.N. GAOR, 58th Sess., U.N. Doc. A/58/422.

¹⁴⁷ See The Universal Declaration on Human Rights, art. 21 (3), G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 at 71 (1948) (“[t]he will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures”); see also American Convention on Human Rights, art. 23, Nov. 22, 1969, O.A.S. T.S. No. 36, 1144 U.N.T.S. 144; The International Covenant on Economic, Social and Cultural Rights, art. 2(1), Dec. 16, 1966, 993 U.N.T.S. 3 (the obligation of State-parties to take steps to realize progressively the rights set forth in the Covenant to the maximum of available resources); United Nations General Assembly Declaration on the Right to Development, art. 1, Dec. 4, 1986, Resolution 41/128 (“[t]he right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural[,] and political development, in which all human rights and fundamental freedoms can be fully realized”); African Charter on Human and People's Rights, art. 22(2), June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, reprinted in 21 I.L.M. 58 (1982) (“[s]tates shall have the duty, individually and collectively, to ensure the exercise of the right to development”); Michla Pomerance, *The United States and Self-Determination: Perspectives on the Wilsonian Conception*, 70 AM. J. INT'L L. 1 (1976) (stating that the concept of self-determination is endemic in international law, concerned mostly with the rights of peoples to be free of foreign domination; yet at its conceptual core is the idea, expressed by Woodrow Wilson, that people have the right to choose the sovereign under which they live). For more information, see generally HURST HANNUM, AUTONOMY,

These treaties can be related to the doctrine, and are properly so related, but the initial and most pressing question is whether any treaty spoke directly to the existence of the doctrine. The 1983 Vienna Convention on Succession of States in Respect of State Property, Archives, and Debts¹⁴⁸ is the only international convention that bears upon the subject of debt repayment with respect to state succession, though it is naturally silent on the issue of government succession. As noted above,¹⁴⁹ it has not entered into force and it is not generally regarded as a successful attempt at codification. Yet its drafting and adoption by the United Nations is still relevant in this context because it provides a statement of rules and principles that are of some ongoing importance and relevance.¹⁵⁰

It is also relevant because some commentators and critics, including my position in the CISDL working paper, erroneously conclude that the doctrine of odious debt was deliberately excluded from the Convention.¹⁵¹ This claim is false in certain important respects. While it is true that a proposed draft article on odious debts was excluded, there is much evidence to suggest that the doctrine is fully consistent with the final report of the International Law Commission (ILC) and that the draft recommended by the ILC was amended in a way regarded at the time as confirming that odious debts would not be enforceable under the Convention. To understand this legislative history properly, it is necessary to examine three distinct phases of the Convention's drafting history: (1) the report of the Special Rapporteur, (2) the draft Convention adopted by the ILC, and (3) the final text of the Convention adopted by the conference of state representatives.

SOVEREIGNTY AND SELF-DETERMINATION: THE ACCOMODATION OF CONFLICTING RIGHTS (rev. ed., 1996); MODERN LAW OF SELF-DETERMINATION (C. Tomuschat, ed., 1993); Avishai Margalit & Joseph Raz, *National Self-Determination*, in THE RIGHTS OF MINORITY CULTURES (Will Kymlicka, ed., 1995); MICHLA POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE (1982).

¹⁴⁸ See Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, *supra* note 8.

¹⁴⁹ See *supra* notes 102-109 and accompanying text.

¹⁵⁰ See Williams & Harris, *supra* note 9, at 416.

¹⁵¹ Mancina, *supra* note 1, at 1250; Cheng, *supra* note 111, at 24-25; King, *supra* note 2, at 28-30.

1. *Report of the Special Rapporteur Mohammed Bedjaoui*

Mohammed Bedjaoui was appointed Special Rapporteur to the ILC to provide analysis and recommendations on various aspects of state succession to debts, property, and archives. His ninth report recommended draft articles on odious debt. He presented and defended such articles orally in two meetings of the ILC in May 1977, addressing some of the remarks and concerns raised by various ILC members.¹⁵² He addressed a number of problems with the proposed draft, such as the vagueness of the terms used,¹⁵³ the intensity of the threshold needed for subjugation,¹⁵⁴ and the problem of “inconsistent” state practice.¹⁵⁵ Yet he noted that “[m]ost members of the Commission had, however, been of the opinion that [the draft articles] should be included in the draft but that they should be improved.”¹⁵⁶ The ILC unanimously agreed to forward Bedjaoui’s draft articles to the Drafting Committee.

It is clear—or at least arguably clear—in this discussion, however, that Bedjaoui felt that the idea of regime debts was different from that of odious debts, in that the latter was to be limited to cases of state succession while the former could be included in either state or government succession.¹⁵⁷ Thus, Bedjaoui may have believed that the concept of odious debts applied to changes of statehood and not to changes of government. Yet it is difficult to be conclusive on this issue because his investigations were limited to cases of state succession, and he remained more equivocal on this point in his actual report.¹⁵⁸

¹⁵² See *Summary Records of the Twenty-Ninth Session 9 May – 29 July 1977*, at 54-64, reprinted in [1977] 1 Y.B. Int'l L. Comm'n, UN Doc. A/CN.4/SER.A/1977 (referring to 1425th, 1426th and 1427th Meetings) [hereinafter *Summary Records of 1977*].

¹⁵³ See *id.* at 63, ¶ 7 (1427th Meeting).

¹⁵⁴ See *id.* at 55, ¶ 38 (1425th Meeting).

¹⁵⁵ See *id.* at 64, ¶ 12 (1427th Meeting).

¹⁵⁶ *Id.* at 63, ¶ 6 (1427th Meeting).

¹⁵⁷ See *id.* at 62-63, ¶ 4 (1427th Meeting); see also *id.* at 54-55, ¶¶ 33-35 (1425th Meeting).

¹⁵⁸ See Bedjaoui, *supra* note 47, at 68.

2. *Consideration by the International Law Commission*

The ILC took the position that it was *unnecessary* to adopt the proposed draft articles. The issue was considered twice. In its first interim conclusion on the matter, the ILC found that “the Commission had decided against drafting general provisions on ‘odious debts’ in the expectation that the rules being drafted would be sufficiently wide to cover that situation.”¹⁵⁹ It went on to say that some objected to this position, hoping that it was quite important to clarify the point. Some representatives were disappointed at this conclusion and noted this in their remarks.¹⁶⁰

After the second reading, the Commission made the final decision to exclude any articles on odious debt from their final draft. It explained its decision thus:

The Commission, having discussed articles C and D, recognized the importance of the issues raised in connection with the question of “odious” debts, but was of the opinion initially that the rules formulated for each type of succession might well settle the issues raised by the question and might dispose of the need to draft general provisions on it. In completing the second reading of the draft, the Commission confirmed that initial view.¹⁶¹

Thus the Commission, in somewhat more timid language, repeated its view that it was unnecessary to address the problem because the rest of the Convention provided adequately for that situation. This is something considerably different than rejecting the doctrine. In reading the rules that were ultimately adopted, with their focus on equitable apportionment and agreement, the legal basis for the exclusion of odious debts from the Convention’s protection is rather obvious. The sole exception to this rule, however, is that of unification of states, namely, either an equal federation of states or when one state is wholly absorbed by another. But excluding odious debts even from this seemingly

¹⁵⁹ *Documents of the Thirty-Third Session* (excluding the report of the Commission to the General Assembly) at 19 (¶ 135), 22 (¶ 160), reprinted in [1981] 2 Y.B.Int’l L.Comm’n 1, UN Doc. A/CN.4/SER.A/1981/Add.1 (Part 1).

¹⁶⁰ *See id.* at 20, ¶ 136.

¹⁶¹ *Report of the Commission to the General Assembly on the work of its 33d Sess.*, reprinted in [1981] 2 Y.B. Int’l L. Comm’n, UN Doc. A/CN.4/SER.A/1981/Add.1 [hereinafter *Report of 33d Session*].

absolute rule under the Convention becomes not only tenable, but almost undeniable when one sees the revisions undertaken at the next stage of drafting.

3. *Conference of Plenipotentiaries*

When the ILC forwarded its draft Convention and commentary to the UN General Assembly, it recommended that it convene a conference of plenipotentiaries that would discuss the text with a view to adopting a final version.¹⁶² The question of odious debts arose again when this conference discussed what ultimately became article 33 of the Vienna Convention. The ILC draft originally recommended, “*Article 31–State Debt*: For the purposes of the articles in the present Part, ‘State debt’ means any financial obligation of a State towards another State, an international organization or any other subject of international law.”¹⁶³ This was ultimately revised during the conference of plenipotentiaries and the following was adopted:

Article 33–State Debt

For the purposes of the articles in the present Part, “State debt” means any financial obligation of a predecessor State *arising in conformity with international law* towards another State, an international organization or any other subject of international law. [emphasis added]

The words added to the final text were the subject of a controversial amendment proposed by the delegation of Syria.¹⁶⁴ The original Syrian proposal included (1) a requirement that debts arise in “good faith” and thus exclude odious debts, and (2) that financial obligations incurred by a state must be in conformity with international law, as a “logical extension of the requirement

¹⁶² See United Nations Conference on Succession of States in Respect of State Property, Archives and Debts: Vienna, Mar. 1–Apr. 8, 1983: 2 Official Records: Summary Records of the Plenary Meetings and of the Committee of the Whole, 148, U.N. Doc. A/CONF.117/16 (1995). The discussions about odious debt took place principally during three meetings, the summary records of which are produced at 193–200 (31st Meeting), 200–07 (32d Meeting), and 207–12 (33d Meeting) [hereinafter Succession of States].

¹⁶³ *Report of 33d Session*, *supra* note 161, at 72.

¹⁶⁴ See Succession of States, *supra* note 162, at 192–93, ¶ 82 (Syrian delegate introducing UN Doc. A/CONF.117/C.1/L.37 in the 30th Meeting).

of good faith.”¹⁶⁵ There was no clear line separating the two concepts in the statement of the Syrian delegate, but there was widespread objection to the idea of including the concept of good faith. This objection was in nearly all cases, including that of Bedjaoui himself, due to the vague and unnecessary character of the concept, and not due to the idea of odious debt,¹⁶⁶ though a small number of states also objected to the idea on grounds of revisiting the odious debt doctrine.¹⁶⁷ By contrast, a majority favored keeping the reference to debts arising in conformity with international law. Thus the Syrian delegate bowed to the majority’s desire and excluded the reference to good faith in an oral amendment, while keeping the reference to conformity international law. Thus, it passed as amended by a vote of 43-0, with 20 abstentions.¹⁶⁸

The question thus is, was the phrase “arising in conformity with international law” meant, on the basis of this *travaux préparatoires*, to exclude odious debts from the protection of the Convention? The analysis of this work confirms that this is undoubtedly the view of the member states that supported the motion. First, it was the interpretation of the expression advanced by Syria in its admittedly confusing introduction of the amendment. Second, it was explicitly pointed out as the reason why the amendment should be carried by a number of other

¹⁶⁵ *Id.* at 193, ¶ 82.

¹⁶⁶ *See id.* at 193, ¶ 4 (31st Meeting, Bedjaoui); *see id.* at 195, ¶ 16 (31st Meeting, USSR); *see id.* at 195, ¶ 19 (31st Meeting, GDR expressing some doubts, but ultimately supporting it); *see id.* at 195, ¶ 23 (31st Meeting, India); *see id.* at 196, ¶ 26 (31st Meeting, Great Britain); *see id.* at 196, ¶ 31 (31st Meeting, Tunisia); *see id.* at 197, ¶ 40 (31st Meeting, Switzerland); *see id.* at 199, ¶ 53 (31st Meeting, Israel saying it implicitly and referring to the invalidation of contracts created under conditions of fraud, duress, or coercion); *see id.* at 199, ¶ 55 (31st Meeting, Greece); *see id.* at 199, ¶ 60 (31st Meeting, Brazil); *see id.* at 200, ¶ 66 (31st Meeting, Denmark delegation stating that the amendment was “vague and imprecise”); *see id.* at 200, ¶ 69 (31st Meeting, Byelorussian SSR); *see id.* at 200, ¶ 1 (32d Meeting, U.S.A.); *see id.* at 201, ¶ 5 (32d Meeting, Italy); *see id.* at 202, ¶ 17 (32d Meeting, Vietnam); *see id.* at 202, ¶ 24 (32d Meeting, Bulgaria); *see id.* at 203, ¶ 34 (32d Meeting, France); *see id.* at 204, ¶ 41 (32d Meeting, Egypt); *see id.* at 204, ¶ 46 (32d Meeting, Mozambique).

¹⁶⁷ *See id.* at 196, ¶ 33 (31st Meeting, Federal Republic of Germany); *see id.* at 203, ¶ 34 (32d Meeting, France announcing its concern about the reference to international law bring the doctrine back into the Convention); *see id.* at 205, ¶ 64 (32d Meeting, Portugal).

¹⁶⁸ *See id.* at 208, ¶ 12 (33d Meeting).

states.¹⁶⁹ And third, it was the vocal reason that the motion was not supported by a number of abstaining states.¹⁷⁰ The conclusion can only be that the issue was live at the time of voting, and a large majority voted in favor of carrying the amendment.

C. General Principles of Law

Buchheit, Gulati, and Thompson have sought to illustrate how the private law of the state of New York may achieve a good deal of the result sought by advocates of the doctrine of odious debt.¹⁷¹ Other attempts have been made to show how general principles of law would render odious debt unenforceable as a matter of international law. Two principal approaches are discernible in the literature thus far. The first is the use of equitable obligations and defenses. These would include claims relating to the law of unjust enrichment, abuse of rights, good faith, and the doctrine of unclean hands. The idea of abuse of rights and good faith has been used by Frankenberg and Kneiper, with some plausibility, to

¹⁶⁹ See *id.* at 206, ¶ 74 (32d Meeting, Republic of Korea: “[T]he inclusion of the phrase ‘in conformity with international law’ would significantly improve the text by excluding odious debts from the scope of the definition. In [the delegate’s] view, non-transferability of odious debts in cases of State succession was a principle of international law which had already been established.”); see *id.* at 210, ¶ 41 (33d Meeting, “[Algeria] voted in favour of the Syrian amendment because it endorsed the explanation given by the Syrian representative concerning its scope, including the exclusion of odious debts from the concept of State debts”); see *id.* at 195, ¶ 19 (31st Meeting, German Democratic Republic); see *id.* at 198, ¶ 45 (31st Meeting, Morocco); see *id.* at 201, ¶ 5 (32d Meeting, Iran). Other states were more equivocal but supportive. See, e.g., *id.* at 209, ¶ 27 (33d Meeting, Indonesia, “improved the [ILC’s] text”); *id.* at 209, ¶ 35 (33d Meeting, Tunisia, “improved the [ILC’s] text”).

¹⁷⁰ See Succession of States, *supra* note 162, at 208, ¶ 17 (33d Meeting, describing how the Federal Republic of Germany said that it abstained from voting in favor of the Syrian amendment more because of the delegation’s explanation of it rather than the wording); see *id.* at 208, ¶ 19 (33d Meeting, explaining how the U.S. said it abstained because of the ‘drafting monstrosity’ created by the superfluous addition of the wording, but added that it was “sympathetic to some, but not all, of the reasons given for the submission of the amendment”); see *id.* at 209, ¶ 25 (33d Meeting, describing how the U.K. “found disturbing the statement made by the Syrian representative in explanation of the reasons for that amendment”); see *id.* at 209, ¶ 28 (33d Meeting, Pakistan); see *id.* at 209, ¶ 34 (33d Meeting, France); see *id.* at 210, ¶ 37 (33d Meeting, Israel); see *id.* at 210, ¶ 39 (33d Meeting, Australia).

¹⁷¹ See generally Buchheit et al., *supra* note 1 (However, there would be no success, on my understanding of the law they cite, for any claim concerning a subjugation debt related to state-sponsored oppression).

suggest that the exercise of a right to reclaim an odious debt would constitute an abuse of contractual rights.¹⁷² While this approach has obvious plausibility, it is a somewhat slim bit of law upon which to base the desired sweeping result. And furthermore, the precise status of the doctrine of abuse of rights in international law is not altogether confirmed,¹⁷³ though Michael Byers makes a persuasive case for its existence and precise parameters.¹⁷⁴

The concept of unjust enrichment is the central plank in O'Connell's theory of state succession.¹⁷⁵ If this is the rationale, however, then it can become immediately apparent why odious debts would present a problem. By definition, if there is no benefit, there is no enrichment for the state, and furthermore, any putative enrichment would not be unjustified because *ex hypothesi* the very purpose of the debt was contrary to the interests of the population.¹⁷⁶ Whatever the potential of this investigation, however, it is altogether less clear what application it would have in cases of government succession unless the contract at issue were already regarded as void or voidable for illegality. In other words, it may deny a restitutionary remedy where that is the only basis for a claim, but probably would not extinguish a valid contractual claim.

The second principal approach has been to examine the relevance of the law of agency, which recognizes a fiduciary obligation on the part of agents to act for the benefit of their principals. The obvious connection is that state representatives (including heads of state) act as agents for the state itself, which includes the population. This type of analysis was first presented,

¹⁷² See Frankenberg & Knieper, *supra* note 75, at 428. "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] . . ." *Id.*

¹⁷³ BROWNLIE *supra* note 7, at 429-30.

¹⁷⁴ M. Byers, *Abuse of Rights: An Old Principle, a New Age*, 47 MCGILL L.J. 389 (2002).

¹⁷⁵ See O'CONNELL, *supra* note 12, at 34.

¹⁷⁶ For problems in English law associated with recovery of money or property lost as part of an illegal transaction or transaction made against public policy, see *infra* Part V.C; see also Paulus, *supra* note 1, at 100 (confirming the same result obtains in the civil law tradition).

to my knowledge, in the CISDL working paper.¹⁷⁷ That treatment was superseded by a more extensive study of American agency law applicable in the state of New York by Buchheit, Gulati, and Thompson,¹⁷⁸ and has received further elaboration by agency law expert Deborah DeMott.¹⁷⁹ Apart from the issue of whether focusing on New York law is sufficient on its own, or whether a truly international agency law must be examined, more pressing problems remain. First, given that most agency law is based primarily on the notion of consent between principal and agent, and that consent to be governed is not a mandatory requirement in international law, can the analogy properly apply?¹⁸⁰ Second, given the peculiar constitutional arrangements between public officials and the state, is it appropriate to recognize a fiduciary obligation between head of state and population?¹⁸¹ Third, is all this talk of New York law and fiduciary obligations a bit parochial for a claim about a general principle of law that must necessarily sound in more than one legal tradition? Finally, even if all the above concerns were met, precisely what would a fiduciary-like obligation between state representative and state proscribe? Would it cover bribery only? Or would subjugation be included too? The former fits nicely with the clear stand taken in domestic law, but the latter is an issue it has never confronted. None of these issues are in my view insurmountable, but they are, sadly, beyond what can be addressed here.

D. Writings and Judicial Decisions

The legal writing on this topic until now could be classified as those who assert the existence of the doctrine in the international law of state succession;¹⁸² those who assert its existence in cases of

¹⁷⁷ King, *supra* note 2, at 36-39.

¹⁷⁸ See Buchheit et al., *supra* note 1, at 36-44.

¹⁷⁹ Deborah A. DeMott, *Agency by Analogy: A Comment on Odious Debt*, 70 J.L. & CONTEM. PROBS. (forthcoming 2007).

¹⁸⁰ See *id.* (raising this issue); see also King, *supra* note 2, at 37-38 (addressing this issue), and I will shortly issue a stronger defense of this position, *supra* note 4.

¹⁸¹ Of two papers on this topic, see E. Fox-Decent, *The Fiduciary Nature of State Legal Authority*, 31 Queen's L.J. 259 (2005), and Jedediah Purdy & Kimberly Fielding, *Sovereigns, Trustees, Guardians: Private-Law Concepts and the Limits of Legitimate State Power*, 70 J.L. & CONTEM. PROBS. (forthcoming 2007).

¹⁸² For details, see generally SACK, *supra* note 13; HYDE, *supra* note 71 (in cases of

government succession;¹⁸³ those who acknowledge its existence in the law of state succession but express reservations as to its application;¹⁸⁴ and those who have denied it as a matter of positive international law.¹⁸⁵ Clearly one cannot assess the doctrine's validity by placing the various texts on the scales and seeing how they tilt. While there is no consensus as to its present status, it appears that the majority of scholarly opinion is against the idea that the doctrine pertains to cases of government succession.¹⁸⁶

The judicial decisions relating to the existence of a doctrine have been equally inconclusive. There have been at least three cases that have dealt with the doctrine in name. In *Poldermans v State of the Netherlands*,¹⁸⁷ a Dutch national employed in the Netherlands Indies administration claimed lost salary relating to a period of internment he suffered under the Japanese occupation of Dutch controlled Indonesia. The Supreme Court of the Hague upheld the denial of his claim on the grounds that the responsibility for the debt passed to Indonesia under a settlement treaty.¹⁸⁸ Poldermans argued, *inter alia*, that the debt would be regarded as odious by Indonesia.¹⁸⁹ The tribunal took a neutral stand on the existence of the doctrine, and found it had no application to that case.¹⁹⁰ The second case in which it arose was during the mixed arbitrations taking place between Iran and the United States.¹⁹¹ Although there were many claims made over the

cession); Bedjaoui, *supra* note 47; MENON, *supra* note 108; Acquaviva, *supra* note 9; the ILA Final Report, *supra* note 9; Williams & Harris, *supra* note 9; and King, *supra* note 2.

¹⁸³ See SACK, *supra* note 13, at 46; King, *supra* note 2, at 47.

¹⁸⁴ PHILIP R. WOOD, *LAW AND PRACTICE OF INTERNATIONAL FINANCE: PROJECT FINANCE, SUBORDINATED DEBT AND STATE LOANS* 168 (1995).

¹⁸⁵ See Beemelmans, *supra* note 28, at 115; Paulus, *supra* note 1, at 91; Gelpern, *supra* note 1, at 406.

¹⁸⁶ This is a view I will challenge more directly in the forthcoming Restatement, *supra* note 4.

¹⁸⁷ 24 I.L.R. 69 (Sup. Ct. of the Hague 1956).

¹⁸⁸ *Id.* at 72.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* I would thank Dr. Vanessa Mak for confirming the tone of the Dutch-language judgment is accurately described as neutral.

¹⁹¹ See generally, C.N. BROWER & J. D. BRUESCHKE, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL* (1998).

course of several years, the issue of odious debt rarely arose, and was addressed by a majority of panel members only once in the reported decisions. In *United States of America v Islamic Republic of Iran*, Iran contested the enforceability of a 1948 contract for the supply of military and other equipment to Iran.¹⁹² The Tribunal declared that it would take no stand on the doctrinal debate concerning the existence of a “doctrine of odious debts in international law.”¹⁹³ But it added that if such a doctrine did exist, it did so only in cases of state and not government succession.¹⁹⁴ It found further that Iran was a case of government succession, but even if it was a case of state succession, that the loans at issue were not non-beneficial because they were contracted in times of peace and were thus meant to serve the role of protecting the country from external aggression.¹⁹⁵

Another claim arose in the context of complicated litigation involving suit in U.S. federal courts by holders of railway bonds issued by imperial China but ultimately repudiated by the People’s Republic of China (PRC).¹⁹⁶ At first instance, a district court judge entered default judgment against China,¹⁹⁷ precipitating a diplomatic row, and eventually a successful application to have the judgment vacated. China then filed successfully, in a third case, a motion to have the suit dismissed for lack of subject matter jurisdiction.¹⁹⁸ This was appealed by the bondholders to the Court of Appeals of the Eleventh Circuit, and the U.S. government intervened in support of China.¹⁹⁹ In his representations, the U.S. Attorney General explained that China viewed the debts as part of the Western powers’ domination of China at that time, and that

¹⁹² *United States of America v. Islamic Republic of Iran*, 32 Iran-US Cl. Trib. Rep. 162 (1996) (Chamber Two Award No. 574-B36-2 of 3 Dec. 1996) [hereinafter *Iran Tribunal*].

¹⁹³ *Id.* at ¶ 54.

¹⁹⁴ *Id.*

¹⁹⁵ A critique of this case may be found in Restatement, *supra* note 4.

¹⁹⁶ The best general account of the litigation and historical backdrop is Feinerman, *supra* note 135.

¹⁹⁷ *See Jackson v. People’s Republic of China*, 550 F.Supp 869 (N.D. Ala. 1982).

¹⁹⁸ *See Jackson v. People’s Republic of China*, 596 F.Supp. 386 (N.D. Ala. 1984).

¹⁹⁹ *Jackson v. People’s Republic of China*, 794 F.2d 1490 (11th Cir. 1986), *reh’g denied* *Jackson v. People’s Republic of China*, 801 F.2d 404 (11th Cir. 1986), *cert. denied* *Jackson v. People’s Republic of China*, 480 U.S. 917 (1987).

“the PRC maintains that under the principle of non-liability for ‘odious debts’ China bears no responsibility for the bonds.”²⁰⁰ The court upheld the district court judge’s finding on lack of subject matter jurisdiction and gave no opinion on the validity of the odious debt claim. The bondholders remained unpaid.

Apart from these three inconclusive cases, the most well known leading case relating to odious debts is the *Tinoco Arbitration*.²⁰¹ This case involved the use by the Costa Rican president of a revolving credit facility with the Royal Bank of Canada for himself and his brother at a time when the demise of his government was imminent and known to the bank to be so. The arbitrator, Chief Justice Taft of the U.S. Supreme Court, found that

[t]he case of the Royal Bank depends not on the mere form of the transaction but on the good faith of the bank in the 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.²⁰²

It is notable that the case involved debts related to personal enrichment, that it involved government and not state succession, and that the label “odious debt” was not used in the case. Much more recently, it was found by a panel of ICSID arbitrators in a case against Kenya that bribery of public officials is contrary to international public policy and that contracts procured thereby are voidable as against such a policy.²⁰³ The two cases are connected by a common thread: both involved debts used for personal enrichment. Yet in the latter case, the contract was voidable for its illegality, and no restitutionary remedies were sought.²⁰⁴

Anna Gelpern has noted that no tribunal has ever cited the odious debt doctrine as a reason for invalidating a sovereign

²⁰⁰ Jackson, 794 F.2d at 1495.

²⁰¹ *Tinoco Arbitration*, 18 AM. J. INT’L L. 147.

²⁰² *Id.* at 168.

²⁰³ World Duty Free Co. Ltd v. The Republic of Kenya, ICSID (W. Bank) Case No. ARB/00/7 Award, ¶¶ 140-153 (2006).

²⁰⁴ *Id.* at ¶ 179. There was a restitutionary remedy available in *Tinoco Arbitration*, 18 AM. J. INT’L L. 147.

debt.²⁰⁵ This is a characteristically accurate statement of law, but it proves far less than what those who cite it appear to believe. For one thing, neither has a tribunal definitively rejected the doctrine. But additionally, and much more importantly, the fact is that international law is composed chiefly of customary law and treaties. Bringing sovereign states before domestic courts has been a relatively recent phenomenon due to the previously widespread acceptance of the doctrine of “absolute” sovereign immunity.²⁰⁶ Thus, the failure of a court to recognize the doctrine is not surprising. Indeed, Article 38(1)(d) of the Statute of the International Court of Justice makes clear that judicial decisions are a “subsidiary means” for the determination of rules of law.²⁰⁷ Thus while relevant, the absence of judicial endorsement should not be clothed with the significance common law lawyers attribute to the absence of judicial precedent in domestic law.

V. Enduring Issues

A. *State or Government Succession?*

A central issue in the current debate is what the status of the doctrine is in cases of government succession. Some authorities insist that the doctrine, if it applies at all, does so only in cases of state succession.²⁰⁸ The distinction between state and government succession can seem tenuous at times of radical internal upheaval such as the Russian, Chinese, and Iranian revolutions. This may be true, but more important is the observation, made by Ernst Feilchenfeld and others, that acknowledging the relevance of odious debt in cases of state succession but denying it in cases of governmental succession seems entirely arbitrary:

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

²⁰⁵ Gelpert, *supra* note 1, at 406.

²⁰⁶ Buchheit et al., *supra* note 1, at 55-57.

²⁰⁷ Statute of International Court of Justice, June 26, 1945, art. 38(1)(d), 59 Stat. 1055, 1060.

²⁰⁸ Iran Tribunal, 32 Iran-US Cl. Trib. Rep. at ¶ 54.

no reason why the burdens of the population of a debtor state should be alleviated.²⁰⁹

Of the various cases that have been asserted as odious in the context of government succession, there have been the debts in the various American states in the nineteenth century (ones that were part of the Confederacy), one instance in Mexico, and the cases of Russia, China, the Tinoco loans, and the recent Kenya contract that was voided for its illegality.²¹⁰ Though the debate is still quite live and the dust has not settled, it seems that concept of illegitimacy or odiousness may have played a role in the recent debt write-downs pertaining to Argentina, Iraq, and Nigeria.²¹¹

There is admittedly less evidence for the existence of the doctrine in cases involving government succession. Yet given (1) the fundamental overhaul in the international legal framework regarding international human rights, the right to self-determination, and arguments in favor of a right to democratic governance in international law; (2) consensus on the illegality of bribery; (3) the existence of some historical precedents; (4) the weak evidence of *opinio juris* regarding the rule of repayment; and (5) recent write-downs where notions of debt legitimacy appear to play a role, it is possible to argue that an odious debt exception to the rule of repayment in government successions is in *statu nascendi*. This argument needs further development, but creditors

²⁰⁹ FEILCHENFELD, *supra* note 11, at 716; *see also* Gelpert, *supra* note 1, at 411 (stating that the focus on state as opposed to government succession in the doctrine seems artificial); Paulus, *supra* note 1, at 93 (“[t]he debt *per se* is odious; it does not merely become odious because of any change in the actors involved”).

²¹⁰ For a discussion of these cases see *supra* Parts IV.A, D.

²¹¹ The facts pertaining to the Iraqi and Argentinean cases are well set out in Gelpert, *supra* note 1. Gelpert argues that whatever the merit of legitimacy arguments, they were not the reasons officially given by the Argentinean government and U.S.-appointed Iraqi negotiators in their successful bids for the substantial write-downs. *Id.* at 402-03, 409-11. For information regarding the Paris Club write-down of Nigerian debt by about 60 percent, see Lydia Polgreen, *Nigeria Finalizes Plans to Pay Off \$30 Billion Debt*, N.Y. TIMES, Apr. 21, 2006, at A8. Further research will shortly be forthcoming on this issue, including by Justin Alexander, *Iraq and the Odious Debt Doctrine* (unpublished draft on file with author) (surveying the influence of the doctrine on Iraqi society, the U.S. administration, and as a key backdrop to the Paris Club agreement) and by Jai Damle, Note, *The Odious Debt Doctrine After Iraq*, 70 LAW & CONTEMP. PROBS. (forthcoming Fall 2007) (arguing that the doctrine may well have influenced the outcomes in both Iraq and Nigeria, though such influence fell fall short of an application of the traditional doctrine).

should be wary of such an outcome.

B. The Need to Recognize Types of Odious Debt

A little-acknowledged problem in the discussion of odious debts is the varied nature of the debts that are called odious. War debts are considered odious, but there is no observance of the three criteria of absence of consent, absence of benefit, and creditor awareness. This has led quite naturally, for example, to Buchheit, Gulati, and Thompson considering war debts to be different than odious debts, whereas historically war debts have been considered a species of odious debts. More importantly, what happened in Cuba and Poland is unlike what took place in the southern American states, Costa Rica, and Kenya. In the latter cases, there was flagrant corruption or bribery, whereas in the former cases, there was colonial subjugation. And neither the judges nor the parties in the latter cases called the debts “odious.” These differences may muddy the waters in one way, but in another, they point to the need for a distinction that can bring a great deal of clarity to the debate.

In a review of state practice and examination of recent cases where state succession has occurred without the assumption of any debts whatsoever, it has become apparent that there is a need for a typology of four types of odious debts: war debts, subjugation debts, illegal occupation debts, and fraudulent, illegal, or corruption debts. War debts are *sui generis*, as they have nothing to do with the consent or benefit of the population, but history has deemed them odious debts, as they are odious to what Sack called the “new supreme power” and what Bedjaoui referred to less colorfully as the successor state.²¹² But furthermore, there are reasons for believing that certain types of war debts that do not relate to the subjection of a given population still ought not be enforced against them. I have in mind those funding, for example, illegal wars such as the Iraqi invasion of Kuwait in 1991. This corresponds with the second paragraph of Bedjaoui’s proposed formulation of odious debt.²¹³

Subjugation debts would presently include those whose purpose is known to the creditor to assist the subjection of the

²¹² See *supra* Part III.B.1, B.3.

²¹³ See *supra* Part III.B.3.

population of a state by a despotic leader, the repression of an independence movement, or the economic or political colonization of a territory. There is some degree of uncertainty in this category, especially in the concept of a “despotic leader.” It will be helpful, then, to use established concepts in international law that set both a high threshold and one for which there is an international practice in identifying and recognizing. Three highly relevant standards, reflecting the gravity and consensus needed, would include those regimes committing genocide, international crimes, or gross and systematic violations of human rights.²¹⁴

A third category, not previously identified, is illegal occupation debts. There is evidence in recent state practice in post-World War II Croatia,²¹⁵ the post-Soviet Baltic republics,²¹⁶ the South African forgiveness of apartheid-era Namibian debt,²¹⁷

²¹⁴ See WILLIAM SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* 2-13 (2000). For more information on the aspects and relevant international legal standards of genocide, crimes against humanity, war crimes, and other international crimes, see generally KRIANGSAK KITTICHAISAREE, *INTERNATIONAL CRIMINAL LAW* (2001). The idea of “gross violations of human rights” is derived from Economic and Social Council Resolution 1235 (XLII), 42 UN ESCOR Supp (No 1) at 17, UN Doc E/4393 (1967), available at <http://www1.umn.edu/humanrts/procedures/1235.html> (article 2, concerning “gross violations of human rights and fundamental freedoms”), and Economic and Social Council Resolution 1503 (XLVII), 48 U.N. ESCOR (No. 1A) at 8, U.N. Doc. E/4832/Add.1 (1970), available at <http://www1.umn.edu/humanrts/procedures/1235.html> (article 1, concerning “a consistent pattern of gross and reliably attested violations of human rights”), both of which empower the former Commission on Human Rights (now the Human Rights Council) to consider communications pertaining to such gross violations. The 1503 procedure is confidential and has been the subject of trenchant criticism. This criticism and a survey of the advantages and drawbacks can be found in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* 151-63 (Philip Alston, ed., 1992) (describing the 1503 procedure and addressing the selection of countries and rapporteurs under the 1235 procedure). For more recent treatment, see HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS AND MORALS* (2d ed. 2000).

²¹⁵ *Postal Administration of Portugal v Postal Administration of Yugoslavia*, 23 I.L.R. 591 (1956).

²¹⁶ See Williams & Harris, *supra* note 9, at 366, 370; see also L. Love, *International Agreement Obligations after the Soviet Union's Break-Up: Current United States Practise and its Consistency with International Law*, 26 VAND. J. TRANSNAT'L L. 373, 398, 402-03 (1993).

²¹⁷ See ECONOMIST INTELLIGENCE UNIT, *COUNTRY REPORT: NAMIBIA, SWAZILAND, THIRD QUARTER 20* (1995).

as well as Eritrea's secession without debt from Ethiopia,²¹⁸ and East Timor (now Timor Leste)'s debt-free independence from Indonesia.²¹⁹ In each case, the republics emerged debt free. The presumption has tended to be that foreign occupation can bring no benefits unless benefits are specifically proved. The existence of a legal framework on illegality, and the presumption of non-benefit, helps keep this category relatively clean and discrete.

The fourth category is fraudulent, illegal, or corruption debts. Such debts have certain features that make them more palatable to critics of the odious debt doctrine. The failure to segregate them has caused us on occasion to conflate them with subjugation debts, which involve a substantive evaluation of a sovereign's policy towards its people. Fraudulent, illegal, or corruption debts can be identified with widely accepted principles of law, with domestic law of the borrowing state (especially constitutional law), and with the law of the chosen jurisdiction. There is typically little doubt about whether a sum paid in bribery was beneficial or not. And furthermore, it is now settled in *World Duty Free v Kenya*, as well as in the *Tinoco Arbitration*, that such debts are as unenforceable in cases of government succession as they are in state succession.²²⁰

Employing this typology will help the debate proceed and ensure that those who object to an assessment of regime legitimacy are not countered with examples of corruption. I suspect that the real issue in the debate going forward will concern the enforceability of subjugation debts, and whether any exception concerning these debts should be recognized in the rule of repayment in government succession.

²¹⁸ On Eritrean independence, see generally R. IYOB, *THE ERITREAN STRUGGLE FOR INDEPENDENCE: DOMINATION, RESISTANCE, NATIONALISM 1941-1993* (1995). For confirmation that Eritrea emerged debt-free, see ECONOMIST INTELLIGENCE UNIT, *COUNTRY PROFILE: ETHIOPIA, ERITREA, SOMALIA AND DJIBOUTI* 47 (1993-1994).

²¹⁹ For details on East Timor's independence movement, see generally MICHAEL G. SMITH & MOREEN DEE, *PEACE KEEPING IN EAST TIMOR: THE PATH TO INDEPENDENCE* (2003). The Economist Intelligence Unit's 2004 Country Report for East Timor makes no mention of any East Timorese debt. See ECONOMIST INTELLIGENCE UNIT, *COUNTRY PROFILE: EAST TIMOR* 24 (2004).

²²⁰ See *World Free Duty Co*, Case No. ARB/00/7 Award, ¶¶ 156, 169; *Tinoco Arbitration*, 18 AM. J. INT'L L. 168-69.

C. *The Problem of Assessing Benefit*

A common criticism of the doctrine is of the difficulty of defining “absence of benefit.”²²¹ The first issue is who will define it; the second is how. The former is easy to answer. Sack advocated an impartial tribunal, and there are ample precedents and settled rules for establishing them.²²² But that answer simply begs the question of what standard such a body would use. That ultimately is the real concern of those who raise the objection.

The idea of “benefit” is vague. My earlier attempt to shed light on this issue has been criticized.²²³ But the law is rife with judicial interpretation of vague terms.²²⁴ Examples include the concept of reasonableness in tort law, the arbitrary and capricious standard of review in American administrative law, the rationality standard in English administrative law,²²⁵ and statutory interpretation of vague terms as well as constitutional interpretation of terms such as “cruel and unusual punishment,”

²²¹ Kremer et al., *supra* note 1, at 17 (criticizing the idea of assessing “consent,” something much easier); see also Paulus, *supra* note 1, at 94; Jack Boorman, Special Advisor to the IMF, Address to the IMF: Who Decides Which Debt Falls into these Categories? What are the Values or Criteria to be Applied? (2003), <http://www.imf.org/external/np/speeches/2003/043003.htm>.

²²² King, *supra* note 2, at 17. I have outlined an approach for the case of Iraq in J. King, *Preliminary Structural and Procedural Aspects of Iraq Tribunal*, <http://www.jubileeraq.org/tribunal.htm> (last visited May 7, 2007). This is not meant to gloss over the inherent difficulties involved in asserting odiousness. Ultimately, the issue must be resolved by examining whether repudiation, arbitration, or litigation is appropriate, and by examining comparative and international approaches to public policy and the enforceability of exclusive and non-exclusive jurisdiction selection clauses, as well as public international law concerns of sovereignty. For reflections on this process, see Ashfaq Khalfan, *Sites and Strategic Legal Options for Addressing Illegitimate Debt*, in Khalfan et al., *supra* note 2, at 53, 68-70.

²²³ See Kremer et al., *supra* note 1, at 17. The careful arguments presented there cannot be addressed properly here, but it is accepted that classifying governments into dictatorial, quasi-dictatorial, democratic and quasi-democratic categories is problematic. However, the indicia I provide are not as unworkable as the critique suggests. Regardless, in work presently underway, I no longer adopt this analysis and so the point is now moot.

²²⁴ For more information, see generally T.A.O. ENDICOTT, *VAGUENESS IN LAW* (2001).

²²⁵ See WILLIAM WADE & CHRISTOPHER FORSYTH, *ADMINISTRATIVE LAW* 351-413 (9th ed. 2004); *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] A.C. 374, 410-11 (H.L.) (stating the classic grounds for review in administrative law).

“equal protection of laws[,]” or “necessary in the interests of a democratic society.”²²⁶ These are hardly peripheral concepts in law. Kremer, Jayachandran, and Shafter argue that international adjudication deals less appropriately with vague concepts due the lack of customary practice and guiding standards.²²⁷ But this argument is not particularly convincing. On the one hand, the same charge has frequently been laid at the feet of domestic judges, whose baby steps on many such issues are also a matter of first impression. On the other hand, international tribunals are free to draw from a much wider range of national sources than domestic judges themselves. The case law of the European Court of Human Rights, European Court of Justice,²²⁸ and a number of others provide ample illustrations of this point. And in any event, there is no reason to think an international tribunal would not use local law and custom in connection with international law to determine the outcome.

Furthermore, it is also the case that the notions of “public

²²⁶ For some examples, see The Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 8(2), 9(2), 10(2), 11(2), Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 222; *see also* Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Part I (Can.), enacted as Schedule B, Canada Act 1982, ch. 11, § 1 (U.K.) (allowing limitations of rights if prescribed by law and ‘demonstrably justifiable in a free and democratic society’); *R. v. Oakes*, [1986]1 S.C.R. 103, 135-42 (holding that provisions of the Narcotic Control Act violated the Charter of Rights and Freedoms and were not justified as reasonable or “demonstrably justified in a free and democratic society”).

²²⁷ Kremer et al., *supra* note 1, at 18.

²²⁸ For one of numerous examples, see *Leyla Sahin v. Turkey*, App. No. 44774/98, Eur. Ct. H.R. (2004), <http://www.echr.coe.int/echr> (search by application number) (reviewing the legal arrangements concerning the wearing of headscarves in schools of several European countries); *see also, e.g.*, Case 17/74, *Transocean Marine Paint Ass’n v. Comm’n*, 2 E.C.R. 1063 (1974), ¶ 15 (“the general [administrative law] rule [of several member states is] that a person whose interests are perceptibly affected by a decision taken by a public authority, must be given the opportunity to make his point of view known”); Case 44/79, *Hauer v. Land Rheinland-Pfalz*, 2 E.C.R. 3727 (1979), ¶ 15 (“fundamental rights form an integral part of the general principles of the law . . . in safeguarding those rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, so that measures which are incompatible with the fundamental rights recognized by the Constitutions of those States are unacceptable in the Community and that, similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law”).

purpose” and “public benefit” already play a role in public law and courts engage in review of them. American public law, for instance, has recognized that the raising of taxes must be for public purposes, and that by extension, any public debt that will be financed out of public tax money must itself be for public purposes.²²⁹ The requirement of public purpose has been litigated in various states. The issue arose in particular in municipal financing of industrial development.²³⁰ According to one judge, over thirty issues of industrial project revenue bonds (a subcategory of industrial project bonds) were challenged in courts and found to be valid, though five were not.²³¹ As elaborated in the case law, the public purpose was often synonymous with public benefit,²³² and several items have been sanctioned as being in the public benefit. So, care of the poor, relief of unemployment, promotion of agriculture and industry,²³³ establishment of a state school, a gristmill for public use, and establishment of railroads were all identified long ago by the Supreme Court as public purposes.²³⁴

The meaning of public purpose is also the center of considerable litigation under takings and eminent domain

²²⁹ See, e.g., *Green v. Frazier*, 253 U.S. 233, 238-39 (1920) (regarding taxes); *Cole v. City of La Grange*, 113 U.S. 1, 8-9 (1885) (finding that bonds issued to a private company, formed strictly for private gain and having no public purpose, would not be for a public purpose).

²³⁰ See Note, *Incentives to Industrial Relocation: The Municipal Industrial Board Plans*, 66 HARV. L. REV. 898 (1953); Note, *The ‘Public Purpose’ of Municipal Financing for Industrial Development*, 70 YALE L.J. 789 (1960-61).

²³¹ See *Potter v. Judge*, 444 N.E.2d 821, 824 (Ill. App. Ct. 1983) (quoting *People ex rel. City of Salem v. McMackin*, 291 N.E.2d 807, 813 (Ill. Sup. Ct. 1972)).

²³² *Id.*; see also *Incentives to Industrial Relocation*, *supra* note 230, at 903. (“the only valid criterion would seem to be whether the expenditures are sufficiently beneficial to the community as a whole to justify governmental involvement . . .”). The Note continues to question the validity of this approach, suggesting a highly deferential approach. *Id.*; *The ‘Public Purpose’*, *supra* note 230, at 796 (providing greater detail on what courts should consider to be public purpose).

²³³ Each cited in *The ‘Public Purpose’*, *supra* note 230, at 795.

²³⁴ As summarized in *Cole*, 113 U.S. at 6-8. The claims must be contextual. Railroads for transporting victims in a genocide will not be beneficial, and those in the Chinese case concerning the Hukuang railroad bonds were equally regarded as odious for the People’s Republic of China. See *supra* notes 196-199 and accompanying text.

litigation in the United States.²³⁵ The standard has remained highly deferential, however.²³⁶ The basic concern in cases of both public debt and takings is to prevent wealth transfers by public bodies from one individual to another—naked expropriations in other words.²³⁷ But since land is taken or debt is issued often in conjunction with a private enterprise initiative, but nominally in the interest of the state, many often doubt the benefit to the community. Courts have been reluctant to substitute their own opinions of what constitutes public benefit in such cases, as doing so is reminiscent of *Lochner*-era judicial attitudes towards New Deal-type social welfare initiatives.²³⁸ Where the aim is legitimate and the means are rationally related to the ends, therefore, the courts will defer to the judgment of the legislature.²³⁹

Thus as much as the litigation serves as an example of judicial review of public purpose, it suggests that one can expect considerable judicial deference as to what constitutes public benefit. However, the reason for deference in most cases was chiefly because of the democratically accountable nature of the primary decision-maker.²⁴⁰ This rationale thus applies less forcefully when dealing with a dictatorial regime. One firm lesson

²³⁵ See, e.g., *Kelo v. City of New London*, 545 U.S. 469 (2005); *Hawaii Housing Authority v. Midkiff*, 465 U.S. 229 (1984). For a pro-property rights view, see generally R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE LAW OF EMINENT DOMAIN* (1985). For a more restrictive view, see generally Jed Rubenfeld, *Usings*, 102 *YALE L.J.* 1077 (1993). See generally J. RYSKAMP, *THE EMINENT DOMAIN REVOLT: CHANGING PERCEPTIONS IN A NEW CONSTITUTIONAL EPOCH* (2006) (discussing the current debate raging about whether takings of property that are then used to confer benefits on private businesses under the rationale of economic development are a legitimate invocation of “public purpose,” notwithstanding the Supreme Court’s apparent endorsement of the practice in *Kelo*, 545 U.S. 469).

²³⁶ *Midkiff*, 465 U.S. at 240. “There is, of course a role for courts to play in reviewing a legislature’s judgment of what constitutes a public use, even when the eminent domain power is equated with police power. But the Court in *Berman* made clear that it is ‘an extremely narrow’ one . . .” *Id.*

²³⁷ *Id.* at 244 (“[a] purely private taking could not withstand the scrutiny of the public use requirement.”)

²³⁸ See generally Cass R. Sunstein, *Lochner’s Legacy*, 87 *COLUM. L. REV.* 873 (1987) (discussing the effect of *Lochner* on the decisions and analyses of subsequent constitutional courts).

²³⁹ *Midkiff*, 465 U.S. at 242; *Kelo*, 545 U.S. at 488.

²⁴⁰ See generally *Midkiff*, 465 U.S. 229; *Kelo*, 545 U.S. 469.

from the American takings law is that it appears possible to ensure that borrowing is for public purposes by essentially procedural means. One way is to require that borrowing be undertaken pursuant to an integrated development plan. This was an essential element of the finding of public purpose in *Kelo*, and it was suggested in the case that purposes arrived at outside such a deliberative process would be subjected to much greater scrutiny.²⁴¹ I employ this same idea in Part VI below.

The idea of a public purpose requirement is a familiar concept in trusts law. Charitable trusts, to obtain their special status, must be for the public benefit in English law.²⁴² Until the introduction of the Charities Act 2006, it was assumed under the English common law of trusts that certain gifts, such as those for the advancement of religion and education, or the relief of poverty, were presumptively for the public benefit.²⁴³ Now section three has removed that presumption and public benefit must be proved under a public benefit test. Thus section 3 actually *expands* the potential for litigation over what constitutes public benefit, and this after a sweeping consultation. The Restatement (Third) of Trusts acknowledges a position analogous to the pre-2006 English common law.²⁴⁴

A further and perhaps more powerful problem for this objection may be found in public international law itself. It is clear that the entire notion of “equitable proportions” in state succession law is linked intrinsically with the notion of benefits and burdens.²⁴⁵ Similarly, Charles Cheney Hyde, perhaps still one of America’s most revered scholars of public international law, advocated the position that in some cases the success of a creditor’s claim should depend on the “proof of benefits” received

²⁴¹ *Kelo*, 545 U.S. at 486-87.

²⁴² JILL E. MARTIN, HANBURY AND MARTIN ON MODERN EQUITY 432 (17th ed. 2005). For an early look at the problem, see generally Patrick S. Atiyah, *Public Benefit in Charities*, 21 MOD. L. REV. 138 (1958).

²⁴³ MARTIN, *supra* note 242, at 432-34. For discussion of public benefit in the draft law, see *id.* at 475.

²⁴⁴ See RESTATEMENT (THIRD) OF TRUSTS §28(f) (2003), which states charitable trust purposes include “purposes that are beneficial to the community.”

²⁴⁵ See *supra* note 26 and accompanying text.

by the territory.²⁴⁶

All told, the objections to the judicial or arbitral review of what constitutes public benefit appear to be familiar but generally unsustainable objections to the expansion of judicial discretion. The likely outcome of any determination of public benefit under an odious debt arbitration would be unsurprising: highly deferential to the opinion of public officials and likely to intervene in exceptional cases only. But exceptional cases would present themselves, and the existence of accountability can have a quite formative impact on practice. Much as with US securities regulation, where there is a common law obligation to conduct due diligence towards the discovery and disclosure of investment risks, there would be little litigation but a fair bit of good faith compliance.

Going forward, two quite pressing issues remain for advocates and critics. First, it is clearly the case that a more structured test would be desirable than a less structured one. It would be helpful thus to identify the types of expenditures that might be regarded as odious ahead of time. In this regard, the high threshold used for subjugation, if it employs the standards alluded to above,²⁴⁷ would provide a relatively objective benchmark. Secondly, there is the problem of fungibility. Is all lending to a dictatorial regime odious because it can free up other funds to commit odious acts? Sack clearly did not think so, but some contemporary authors take a different view.²⁴⁸ My present view is that under such a model one would need to assess the legitimacy of every regime, rather than the use of proceeds, and that this would be a more unstable and more politicized endeavour. On the other hand, it is possible to provide a clear line by saying that any loan to any non-democratically elected government is odious. But there may be good reasons to lend to non-democratic regimes (e.g., China, Pakistan, countries in transition) provided they apply the funds in a beneficial way. However, it must be correct to say that in certain extreme cases, such during the preparation or execution of a genocide, the provision of any support to a country would

²⁴⁶ See HYDE, *supra* note 71, at 413.

²⁴⁷ See *supra* note 214 and accompanying text.

²⁴⁸ See, e.g., Hanlon, *supra* note 1, at 113-14, 120-21, 125-26, 128 (claiming loans made to dictators and dictatorial regimes are illegitimate and should not be repaid).

reasonably be viewed as creating an odious debt.²⁴⁹

D. The Problem with the Ex Ante Model

Michael Kremer, Seema Jayachandran, and Jonathan Shafter set aside the question of whether the doctrine of odious debt exists in international law, preferring to show that in their view it would be a sub-optimal choice for deterring odious lending.²⁵⁰ They rather advocate the creation of an international institution that would designate certain regimes as odious, and that thereafter lending would be restricted unless particular transactions were pre-authorized by the institution.²⁵¹ The great advantage of the proposal is that it can provide creditors with a definitive and clear understanding of when a loan would be odious—hence stability. But in my view its problems may outweigh its advantages.

The first problem is that such an institution will likely designate very few regimes as odious. It might take years to establish, and would have to be internationally representative. That is to say it would be composed of states presumably acting either on consensus or super-majority, and in any event in their self-interest and never on the basis of impartial assessments. If the body were established within the United Nations, it would have international legitimacy but take years to establish, and due to geopolitics act only in the most outrageous instances. If, by contrast, it were established within the Organization for Economic Cooperation and Development (OECD), or, even worse, the Group of Seven (G7), then the process would be regarded as the outcome of a politicized, non-objective, rich-nations' club facilitating the furtherance of a neo-colonial economic agenda. This would doubtless be the view taken presently in Zimbabwe, Iran, and North Korea, with China and Russia likely to be nodding in agreement. This would be further complicated when the despotic allies of OECD nations would be favored, while the enemies would likely be stigmatized regardless of their democratic pedigree (e.g., Venezuela and Bolivia).

A second problem is that declaring a regime, rather than a set of actions, to be odious is a rather 'nuclear' type of option and is

²⁴⁹ This issue is discussed further in my Restatement, *supra* note 4.

²⁵⁰ See Kremer et al., *supra* note 1, at 14.

²⁵¹ See *id.* at 18-22.

unlikely to be deployed until the regime reaches pariah status. The international community's apathetic responses to crises in Rwanda, Darfur, the Congo, and East Timor are testament to its reluctance to take minor steps in the face of horrendous acts. Further, if the international community were attempting non-confrontational diplomacy with a country, the odious debt button could not realistically be pushed. Obviously, debts may clearly be linked to odious actions well before the option is taken.

Both the first and second problems lead inexorably to the third, and indeed perhaps the most significant problem: if a given regime is not so designated, a creditor can rely on this fact in lending to it. In other words, and quite ironically, the idea of calling this model the "due diligence" model is highly misleading. It would eliminate the need for any diligence at all. At one point, I was inclined to suggest that the ex ante model could exist in tandem with a customary international law model. But it soon became apparent that the stability conferred by the model would be stability of the very wrong kind. It would stabilize lending to any government that is not designated as odious through a possibly illegitimate procedure that is likely only to be used in the rarest of instances.

Proponents of this model may well retort that the system might have a modest outcome, but it is better than a purported international law exception to the rule of repayment that either does not exist, or, if it did and was asserted, would either raise premiums or shut down lending.²⁵² It is this final point that runs through a number of sophisticated critiques that I now turn to addressing by way of closure.

VI. Odious Debt Proof Lending

A common policy concern and chief justification of the ex ante proposal is that application of the traditional doctrine would render lending unstable.²⁵³ If defining a debt as odious is not a precise endeavor, then how are creditors to ensure before the fact that their loans will not be considered odious? In my view this argument is vastly overstated, however, because it fails to appreciate the difference between the certainty with which an odious debt can be

²⁵² *See id.* at 21.

²⁵³ *Id.*; *see* Paulus, *supra* note 1, at 91-92.

identified, and the certainty with which it can be avoided. The latter is much more predictable, because it can basically be reduced to a procedure. There are three easy steps. If these three steps were followed in good faith, it would in my opinion be virtually impossible to apply the doctrine to the loan in a legitimate fashion.²⁵⁴

The first step would be to ensure that there was consent. Kremer et al., attach some significance to determining whether there was consent for a given loan, but in reality the matter today is not very complicated. Was the government elected in elections either ordinarily deemed to be free and fair, or certified as such by elections monitors? If determining that elections were free and fair presents the enormous philosophical complications complained of in their article, then just what are elections monitors doing these days? To establish some measure of security on this point, creditors need to examine a number of reports such as the U.S. Department of State human rights reports, international media coverage of elections, the Economist Intelligence Unit, and United Nations reports. They can then make a considered judgment about the fairness of the electoral process, and record it as a standard part of their due diligence. What they need to ascertain, in such a context, is not whether the elections mirrored some Platonic idea of “consent,” but rather whether there is considerable doubt about the propriety of the electoral process. If there is not, there is no application of the odious debt doctrine and the creditor is assured. If there is a risk of doubt, then the creditor must take precautions at step two of the process. It should be noted here that it is naturally possible that democratic governments will be corrupt and the creditor may well be aware or actively participate in the corruption of the state representative. In such case, it is a necessary presumption that loans procured through corruption are necessarily without the consent of the population notwithstanding the democratic nature of the government.²⁵⁵

²⁵⁴ I am particularly grateful to Mitu Gulati and Lee Buchheit for comments on this section.

²⁵⁵ This idea is developed further in my Restatement, *supra* note 4. It is there pointed out that it is conceivable that a democratically elected legislature *could* unequivocally ratify a measure providing for what seems like extravagant personal enrichment to foreign eyes. There is a presumption that it would not.

Under step two, the creditor must undertake to ensure that the loan is contracted for the benefit of the state. When dealing with a non-democratic regime, then, certain types of contracts would effectively be off limits: loans for general, unspecified purposes, loans for the purchase or maintenance of military hardware, loans for supporting flagrant breaches of international law, and loans for purposes that, under extenuating circumstances, might possibly be linked with forms of subjugation identified in Part V.B above. The best and most secure method, in the same spirit as the *Kelo* decision of the U.S. Supreme Court, is to ensure that funds are applied to purposes identified as part of an integrated development plan.²⁵⁶ This would not only virtually guarantee that the loan is not susceptible to later being identified as odious, but it makes sound financial sense. Indeed, it is virtually unimaginable that any public debt in North America or Western Europe be contracted in any other way. It would be possible to identify a range of instances that are presumptively for the public benefit, such as education, relief of the poor, infrastructure (depending on the circumstances), industrial finance, housing, etc. But it seems this is not necessary as it will be quite clear from the circumstances when a proposed purpose falls safely on one side of the public benefit line. And where it is not clear, the creditor can either insist that the particular purpose be removed or take further steps to quell uncertainties.

One difficult issue in this process would be loan refinancing. What if a dictator wishes to borrow to refinance a loan that itself has dubious legitimacy under the terms of the doctrine? My present view is that if the refinancing were determined to be necessary in the interests of the country as part of an integrated development plan, it will be impossible to challenge the decision as being odious for the country. Some may object that this would allow dictators to whitewash odious loans. But the contrary view would tie the hands of a borrower when it may well be necessary to take advantage of a restructuring that is in the *bona fide* interests of the country and a democratic election or referendum

²⁵⁶ There is clearly room for discussion about what would constitute an integrated development plan, and what type of consultation would be desirable, but that task is for another day. The Supreme Court's understanding is likely sufficient for present purposes.

seems genuinely problematic.²⁵⁷ So although the possibility of a whitewash exists, it seems the trade-off is between allowing that and possibly preventing need for refinancing. At the moment, it seems best not to tie borrowers and creditors' hands too greatly.

There is a second aspect of assuring that the purpose is for a public benefit. There would need to be an accountability regime put in place that tracks funds from disbursement to application. Otherwise creditors could go through the motions but then turn a blind eye to the actual end use of the funds. Developing such an accountability regime would not be a difficult process. A segregation of funds and annual audited financial reporting to a committee of bondholders or the creditor(s) would almost certainly meet the need. If more nuance were needed, there is little reason to think that international auditing and consulting firms could not provide it.

The third and final step would be for the creditor to ensure that it is not subjectively aware of any odious purposes. One way to demonstrate good faith on the issue of purpose is for creditors to hold a meeting to discuss the proposed use of proceeds and the beneficial nature of such proceeds for the state, to express any concerns about particular extenuating circumstances, and to obtain and later incorporate into the agreement any needed representations and warranties about not applying funds towards any dubious circumstances. The meeting can be recorded in minutes and it would become part of the due diligence record. It would be necessary in this process that the participating firms and creditor itself has carried out some form of bona fide pre-negotiations assessment. This can be done by examining reputable human rights reports, United Nations reports, regional organization reports, U.S. Department of State reports, etc. None of this is beyond the powers or competency of any corporate law firm now involved in sovereign lending. The added costs would be marginal.

Naturally, creditors will not wish to appear to intrude deeply into the borrower's public agenda. There are concerns of comity to be observed in sovereign negotiations. But a polite exchange in which views are aired and legal risks are discussed, is not a heavy

²⁵⁷ Pakistan and China might be relevant examples of where this type of problem might arise. A country in transition may be another example.

infringement upon the dignity of the state. The resulting paper-trail will demonstrate the creditor's diligence, provided that live issues are reflected adequately in the loan contract. Above all, it must be recalled at this stage that these additional requirements arise *only where creditors deal with non-democratic regimes*. Is this too high a transaction cost when lending money to dictators? Hardly. If the creditor needs to offer a justification for requiring this higher level of scrutiny, it can readily point to the resurgent interest in the odious debt doctrine and massive restructurings that occurred in Nigeria, Argentina, and Iraq.

Given the extraordinarily high costs of repudiation, and the relatively easy procedural scheme presented here, there is no reason to think that creditors could not take this step and increase the security of their credit arrangements without prompting any greater market instability. It may be observed that most banks or domestic corporate lenders conduct much the same type of diligence in day-to-day lending, as do private companies doing business in foreign countries where there are significant investment risks. In short, it makes business sense. More importantly, perhaps, creditors may well live up to a moral responsibility that no one publicly doubts: to ensure that they do not lend support to non-democratic regimes that are harming or defrauding their own populations.

VII. Conclusion

This article aimed to define the odious debt doctrine with some degree of precision, review the key authorities, draw attention to key areas of disagreement about the status of the doctrine, and to shed light on issues not adequately discussed in the secondary literature. The conclusions can be put simply. First, the doctrine of odious debt must be viewed as an exception to the rules of repayment. The rules themselves, particularly the rule in state succession, have been subject to important qualifications quite apart from the idea of odious debt. There is ample reason to believe that repayment of what may well have been regarded as odious debts was essentially done without recognizing the existence of any binding obligation to repay. When examining the origins of scholarly treatment of odious debts, one sees the definitions of three prominent authors as having exercised an important influence over the development of the concept: Sack,

Feilchenfeld, and Bedjaoui. Other writers, such as Hyde and O'Connell, also made relevant and important contributions. The upshot of the historical analysis is that there is a contemporary usage of the doctrine that advocates the view, drawn mostly from Sack, that a debt is odious if it was contracted without the consent of the population, without benefit to it, and both these are known to the creditor.

The definition of odious debt thus having been made clear, it was important to examine the main sources of international law which are cited in favor of the existence of such a doctrine. Several instances of state practice are alluded to, but the controversial nature of certain examples is not fully canvassed. As for treaties, it is acknowledged that many treaties may be relevant to the doctrine. However, the most relevant treaty, unlikely ever to enter into force, is the product of a drafting history that suggests that odious debt was regarded as unenforceable in cases of state succession under that Convention. General principles of law such as abuse of rights, equitable obligations and defenses, and the law of agency show considerable though qualified promise as sources for an odious debt exception to the rule of repayment. The decisions of various national courts and international tribunals display a marked ambivalence over the existence of the doctrine, whereas the scholarly commentary seems divided on most issues. Scholars familiar with the international law of state succession appear to find that odious debts are not required to be apportioned after succession. However, a clear majority of authors presently appear to find that there is little authority (outside cases of corruption or bribery) for the doctrine's application in cases of government succession.

Having discussed the authorities, Part IV proceeded to identify some of the key issues that continue to plague the debate. It was shown that the distinction between cases of state and government succession was, for the purposes of odious debt, completely arbitrary and that the structure of international law and recent state practice have changed in a way suggestive of a possible emerging doctrine of odious debt in cases of government succession. I next highlighted the possibility of confusion between various types of odious debts, and outlined, quite briefly, four broad types of odious debt: war debts; subjugation debts; illegal occupation debts; and fraudulent, illegal and corruption debts. Understanding

the differences between them allows us to avoid conceptual confusion and see why different presumptions may operate in different situations. The next section turned to showing why the broad concern about a tribunal assessing 'absence of benefit' is generally overstated. It is not beyond the competence of what courts or tribunals can do or in fact have done and continue to do in domestic law. It is equally clear there, however, that the standard will doubtless be deferential to the views of public officials and it would be likely that only egregious examples of harmful conduct could be declared odious. I conclude Part V by taking up and ultimately rejecting the proposal for an institution that would declare debts odious beforehand. The idea offers some promise as a way to allow stable lending while precluding lending to exceptionally odious regimes. However, it is plagued by a host of institutional design problems as by the fact that it would eliminate rather than generate the need to conduct genuine due diligence about the odiousness of the vast majority of borrowing regimes.

The final Part turned to addressing a key objection that runs through various critiques of the doctrine, namely, the idea that recognizing the doctrine would render international lending unstable. This view is rejected on the premise that there is a fundamental difference between the certainty with which a debt can be identified as odious, and the certainty with which odious lending can be avoided. I thus set out three basic steps for odious proof lending: (1) ascertain whether there is a considerable doubt about democratic consent to the government; (2) if there is, ensure the funds are for the benefit of the state, by (a) identifying purposes *ad hoc* and avoiding certain obviously suspicious ones, and/or (b) by requiring the provision of an integrated state development plan, and (c) establishing an accountability regime that tracks the use of proceeds; and (3) ensure creditor diligence by discussing and contractually warranting the beneficial use of proceeds. I contend that if this process were followed in good faith, it would be highly implausible that any tribunal or government would find that a creditor had created an odious debt. Since the steps are both cost-effective and within the powers of existing financial and legal institutions, there is little reason to believe that lending would become substantially more expensive or unstable.

The ultimate conclusion from all of this is that the doctrine of odious debt has a varied pedigree, but advocates have based their claims in a substantial number of legal sources. It is hoped that this article helped to clarify the terms of the debate and the remaining areas of disagreement. Whether the doctrine as traditionally conceived or as restated by various authors will ultimately be recognized in cases of government and state succession remains an open question. But it is beyond any commentator's doubt that odious debts are *morally* odious. This article further demonstrated that creditors can eliminate them from international lending without incurring any substantial cost. There is thus little need for creditors to wait for scholars to clarify the law. Rather, there is a clear and urgent program of action for them that could make the odious debt debate a matter of legal history alone.

