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The Concept of 'Odious Debts':  
A Historical Survey

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## THE CONCEPT OF “ODIOUS DEBTS”: A HISTORICAL SURVEY

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- A. Introduction
  - B. The traditional concept of “odious debts”
    - I. Classifications
      - 1. War Debts
      - 2. Subjugation Debts
      - 3. Regime Debts
      - 4. Conclusive remarks on this section
    - II. The definitions of “odious debts”
      - 1. Introduction
      - 2. Alexander N. Sack
      - 3. Bedjaoui and the International Law Commission
      - 4. Other authors
    - III. Is there an internationally binding principle or norm on odious debts?
      - 1. Introduction
      - 2. International conventions
      - 3. Customary international law
      - 4. General principles of law
      - 5. Unilateral declarations
  - C. Proposals to expand the traditional concept of “odious debts”
    - I. Classifications
      - 1. Illegitimate Debts
      - 2. Criminal Debts
      - 3. Illegal Debts
      - 4. Ineffective Debts
      - 5. Other categories
    - II. Legal assessment
      - 1. Differences from the traditional notion
      - 2. Is there a legal basis for an expanded concept?
- Appendix: Bibliography

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## Executive Summary

Over the last several years, as throughout its history, the legal concept of odious debts has generated heated debates, but few concrete proposals have emerged for a workable definition of the issue at stake, let alone proposals for its resolution.

There have been cases when a successor state has refused to honor certain debts contracted by its predecessor state. Depending on the reason for the repudiation, such cases have been classified under the labels of “war debts”, “subjugation debts” or “regime debts”. But all attempts at defining the expression “odious debts” beyond these few categories have met with insurmountable difficulties, so much so that even the International Law Commission, while discussing the issue in its work on state succession, for various reasons ended up not including the concept in the final text of the Convention on succession to property, archives and debts.

Nor have later attempts found any greater success. To the contrary, the very extension of the debate to cases of governmental (rather than state) succession, and the application of the concept to such diverse categories as those of “illegitimate”, “criminal”, “illegal” and “ineffective” debts, have further confused an already vague concept and diminishing its practical value in answering real problems.

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### A. Introduction

The context within which the existence, validity, content and legal consequences of the doctrine of “odious debts” has been (and, for the most part,<sup>1</sup> is still being) discussed is state succession.<sup>2</sup> There is an old<sup>3</sup> and still continuing discussion among public international lawyers

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<sup>1</sup> Questioning the restriction of the relevance of the doctrine to state succession, see, for instance, Gelpern, p. 411, and Paulus, p. 93.

<sup>2</sup> On state succession, and the limited usefulness of broad conceptual categories in this area, see Brownlie, *Principles of International Law*, 6<sup>th</sup> ed., 2003, pp. 621 ff. See also Eisemann and Koskenniemi, “Introduction générale – Les Rapports”, in Eisemann and Koskenniemi (eds.), *La succession d’Etats: la codification à l’épreuve des faits*, 2000, pp. 3ff. and 65ff.; Buchheit, Gulati and Thompson, p. 3: “*State succession is something of a misnomer*”. For the “economic rationale” of the “doctrine of state succession and the rule of maintenance”, see Bonilla, pp. 7ff. (“the rule of state succession is efficient because it removes transaction costs from the creation of long term contracts with positive surplus value”, p. 10).

<sup>3</sup> Relevant cases reach back into Medieval times. A scholarly discussion developed in the late sixteenth century among some of the most prominent international lawyers of the time, such as Grotius, Gentili, Pufendorf and Brynkershoek. See Hoeflich, pp. 40ff.

whether a successor state is bound to assume the debts of its predecessor state and, if so, whether there are any exceptions to this obligation. The answers to those questions vary depending on several factors, including the “civil law” or “common law” background of the participants in the debate. While generalizing may lead to inaccuracy, it is fair to say that civil lawyers tend to argue that a successor state is bound to comply with the obligations incurred by a predecessor state, while common lawyers embrace a more guarded attitude, if not outright rejection.<sup>4</sup> Within this context, an ongoing discussion exists whether there is one category of debts that is to be excluded from succession in all cases, this category being labeled as “odious debts”.<sup>5</sup>

As will become clear from Part C of this note, this expression has gained prominence particularly outside the legal profession. It is seen as a tool to free over-indebted states from the burden of their debts. Hence the issue has been raised within such contexts as the Paris and London Clubs, Sovereign Debt Restructuring Mechanisms, the HIPC Initiative, etc.<sup>6</sup> Despite this renewed interest in the topic, the doctrine of “odious debts” finds little support in the legal literature.<sup>7</sup> The limited objective of this article is to explain the key features of this on-going debate and clarify some of its outstanding issues.

So far, the concept of odious debts has defied any exact definition. It remains an expression with a somewhat elusive content, bordering on the line between law and politics and

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<sup>4</sup> On this discussion, see O’Connell, 1967, vol. 1, pp. 369ff.; Id., “Reflections on the State Succession Convention”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 31 (1979), p. 725, at pp. 734ff.; Bedjaoui, pp. 73ff.; Foorman and Jehle, pp. 11ff.; Abrahams, pp. 21ff.; Ebenroth and Wilken, pp. 888ff. For contemporary developments see additionally, however, the draft of the Rapporteur Georg Ress of the 7th Commission of the *Institut de Droit International* about “State Succession in Matters of Property and Debts”, electronically available at: [www.idi-iiil.org/idiE/resolutionsE/2001\\_van\\_01\\_en.PDF#search=%22Georg%20Ress%20%22State%20succession%20in%20matters%22%22](http://www.idi-iiil.org/idiE/resolutionsE/2001_van_01_en.PDF#search=%22Georg%20Ress%20%22State%20succession%20in%20matters%22%22).

<sup>5</sup> Paradigmatically, Gruber, pp. 37ff.

<sup>6</sup> On these topics, see for instance Manes, *Staatsbankrotte – wirtschaftliche und rechtliche Betrachtungen*, 1922; Reinisch, *State Responsibility*, pp. 12ff.

<sup>7</sup> For criticism, see, for instance, Choi and Posner, *A Critique of the Odious Debt Doctrine* (University of Virginia Law School. Public Law and Legal Theory Working Paper 58, 2007). However, it is to be noted that in recent years there is an increased interest in this topic particularly in the US legal literature: see for instance 32 *North Carolina Journal of International Law and Commercial Regulation* (2007), King, *Odious Debt: The Terms of the Debate*, p. 605 ff.; Shafter, *The Due Diligence Model: An Executive Approach to Odious Debt Reform*, p. 669ff.; Pérez/Weissman, *Public Power and Private Purpose: Odious Debt and the Political Economy of Hegemony*, p. 699ff.; Yianni/ Tinkler, *Is There a Recognized Legal Doctrine of Odious Debts?*, p. 749ff.; Herman, *Doing the Right Thing: Dealing with Developing Country Sovereign Debt*, p. 773ff.; Ramasastry, *Odious Debt or Odious Payments? Using Anti-Corruption Measures to Prevent Odious Debt*, p. 819ff.; Gelpern, *Odious, Not Debt*, 71 *Law & Contemporary Problems*, Summer 2007; Rasmussen, *Sovereign Debt Restructuring, Odious Debt, and the Politics of*

between law and morals. A few examples will convey a sense of the wide variety of situations to which the concept is applied. Sometimes this expression is used in the context of state succession, sometimes in the context of governmental succession; sometimes debts are designated as “odious” because the lender has followed goals which are seen *ex post* as immoral, sometimes because the borrowing country – to be more precise: one of its representatives – has done so; sometimes the term “odious” is used when the money lent was stolen by corrupt officials, sometimes because it was not spent for the intended purpose, and sometimes it is used to denote the co-responsibility of lenders that financed failed projects. The only common thread to all these different usages of the expression is that it is applied to state (as opposed to private) debts<sup>8</sup> and the argument that no repayment obligation would ensue for the respective state from contracting such “odious debts”.

It is exactly this legal consequence (*Rechtsfolge*), namely that debts contracted under such circumstances do not entail a repayment obligation, which has attracted increasing NGOs’ interest in the doctrine of “odious debts”, as a potential solution to the heavy indebtedness of poor countries. Legal writers, on the other hand, are inclined to concentrate on the elements of such “norm” – i.e. whether there is a workable definition of odious debt which, while justifying exemption from repayment, does not erode or invalidate the contractual foundations on which the international financial system is built.

However, there seems to be broad agreement, inside and outside the professional legal environment, on the need to strengthen the ethical dimension of the law. Treatises headed “Fairness in International Law”<sup>9</sup> or chapters in books about “Law and Ethics”<sup>10</sup> provide clear evidence to this trend. Whereas some lawyers restrict the notion of equity to allowing a court to

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*Debt Relief*, Vanderbilt Law and Economics Research Paper No. 07-14; Ginsburg/Ulen, *Odious Debt, Odious Credit, Economic Development, and Democratization*, Illinois Law and Economics Research Paper No. LE07-014.

<sup>8</sup> This is not necessarily identical with the definition in Art. 33 of the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, the text of which is electronically available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/3\\_3\\_1983.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/3_3_1983.pdf). See, for instance, Marcelli, *Il debito estero dei paesi in via di sviluppo nel diritto internazionale*, 2004, pp. 9ff. On the other hand, the expression “state debts”, as used in the present article, refers to all debts of a state alike, and not just to those contracted with international legal subjects. In other words, for the purposes of the present discussion, the creditor may be a state, a private law person or any other legal entity. As in the case of the use adopted in the aforementioned Convention, though, the debtor is always a state to the exclusion of any its political subdivisions.

<sup>9</sup> Franck, *Fairness in International Law and Institutions*, 1995.

<sup>10</sup> See Jochnick and Preston, *Sovereign Debt at the Crossroads – Challenges and Proposals for Resolving the Third World Debt Crisis*, 2006 (especially its third chapter), and Stiglitz, “Ethics, Market and Government Failure, and Globalization: Perspectives on Debt and Finance”, *ibid.*

achieve a “result [that] is nowhere articulated other than [by] the self-serving description of ‘equitable’”,<sup>11</sup> others take a broader approach based on ethical considerations:

“The justice of which equity is an emanation is not abstract justice but justice according to the rule of law; which is to say that its application should display consistence and a degree of predictability; even though it looks with particularity to the more peculiar circumstances in an instant case, it also looks beyond it to principles of more general application. This is precisely why courts have, from the beginning, elaborated equitable principles as being, at the same time, means to an equitable result in a particular case, yet also having a more general validity and hence expressible in general terms.”<sup>12</sup>

Similar attempts to reach a common understanding of the expression “odious debt”, partly on legal and partly on ethical considerations, have met little success, not for lack of effort but for the complexity of the issues involved. To explore these efforts, this note will address the traditional notion of odious debts (Part B) and then examine the concept as it is currently used, at least in some quarters (Part C).

## **B. The traditional concept of “odious debts”**

The expression “traditional concept” is used here to refer primarily (but not exclusively) to the one emerging from the writings of classic authors, from case law,<sup>13</sup> and from treaties. The expression, though, should not be misunderstood as indicating that there were a unanimously shared “traditional concept” of odious debts. To the contrary, within this “traditional concept”, there are disagreements among the writers on practically every detail: classification of debts, delimitation of the concept, and definition of odious debts. In the end, the only common denominator among these divergent views seems to be the use of the same expression (“odious debts”), albeit with different meanings.

### **I. Classifications**

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<sup>11</sup> Higgins, “International Law and the Avoidance, Containment and Resolution of Disputes (General Course in Public International Law”, *Recueil des cours*, 230 (1991), p. 292.

<sup>12</sup> *Case concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, *Judgement*, 1985 ICJ Rep. 39, para. 45.

<sup>13</sup> This note deals only with international cases. Cases within, for instance, the United States, which will be ignored here, have been discussed in Khalfan, King and Thomas, pp. 22ff.

## 1. War Debts

War debts are those contracted during a war by the previous sovereign to cover the costs of a war. Some restrict this concept to those debts aiming at suppressing a war of independence,<sup>14</sup> while others take a more liberal approach.<sup>15</sup> For example, Feilchenfeld writes in his comprehensive monograph:

“Even where debts were distributed after war, treatment of war debts does not appear to have been uniform. The Treaty of Ryswick [1697] did not exclude war debts. It merely provided that the paying capacity should be measured by the revenues of three years before the war. In the treaty between Sweden and Prussia of 1720, Prussia promised expressly to provide for the payment of certain war debts.”<sup>16</sup>

(It will be shown below that this attitude has changed over time, even though there are some counter-examples that seem to be based on obvious political considerations.)<sup>17</sup>

(a) The identification of the underlying theoretical basis justifying the maintenance or repudiation of war debts depends on whether one gives prominent weight to the creditors’ acquired rights or instead relies on considerations of natural justice.<sup>18</sup> The expression “acquired rights” means here an implicit reference to the time-honored rule *pacta sunt servanda*,<sup>19</sup> with the consequence that an agreement has to be respected once the parties have entered into it. In principle, subsequent events, or the circumstances under which the agreement was concluded, should not have any influence on the performance of the contractual obligations deriving from the agreement.

As to “natural justice”, the argument may be based on fairly pragmatic reasons. This, for example, is what Feilchenfeld wrote:

“The arguments which the English negative school and others have advanced against the maintenance of war debts in case of state succession have, however, little connection with the attempts to restrict war, but are based on a point which is sentimental rather than logical, namely, that an annexing state should not be forced to pay for debts which its enemy has contracted in order to destroy it... Apart from vague sentimental considerations, there is no serious ground why annexing states should not pay debts which are validly owed, even if the proceeds have been used against their interests... Whatever

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<sup>14</sup> See Bedjaoui, p. 141.

<sup>15</sup> See Buchheit, Gulati and Thompson, p. 9.

<sup>16</sup> Feilchenfeld, p. 75, footnote 6.

<sup>17</sup> See the references given by Bedjaoui, p. 153.

<sup>18</sup> See the practical examples discussed below.

<sup>19</sup> See, for instance, Frankenberg and Knieper, pp. 16ff.

burdens fall upon an annexing state with regard to war debts of an annexed state are not imposed burdens, but are the result of a voluntary act of the conqueror, since they result from annexation, which in all cases is a voluntary act, unless the opinion is advanced that in some cases a state owes it to the cause of civilization to conquer another state. If the feelings of the people of a state are not disturbed by the incorporation into its organization of men who have fought against it, and by the acquisition of assets which have been used for war purposes, there is no reason why they should be disturbed by the maintenance of war liabilities.”<sup>20</sup>

With the emergence, in international law, of the prohibition of aggressive war, much of the basis on which Feilchenfeld had grounded his considerations fell. Moreover, practice had already started to neglect the creditors’ interests (and, thus, their “acquired rights”) even before the time Feilchenfeld had published his treatise. Creditors of war debts had started being compared with gamblers who had set their money on the losing party.<sup>21</sup>

(b) The emergence of this category of “war debts” is often dated back to a proclamation by Great Britain after the so called Boer War in 1900.<sup>22</sup> The British Government agreed to assume (*ex gratia*, not *ex lege*)<sup>23</sup> the debts of the South African Republic contracted prior to the commencement of the hostilities, but none of those contracted thereafter. The Colonial office asked whether

“even on the assumption that Her Majesty’s Government, as the successor of the South African Republic, inherited generally the obligations as well as the rights of the late Republic, the further question arose whether their liability could be held to extend to any obligation between the outbreak of war and annexation... [t]hat it was possible to argue that the outbreak of war created a situation between the continuance of which no obligations could, in the nature of their things, arise which would legally pass from the enemy Government to Her Majesty’s Government at the conclusion of hostilities”.<sup>24</sup>

To this, Crown Counsel replied:

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<sup>20</sup> Feilchenfeld, p. 719ff.

<sup>21</sup> Against this argument see *Id.*, p. 721.

<sup>22</sup> As a matter of fact, the examples reach further back into history. See Bedjaoui, p. 142 (references to, e.g., the Treaty of Campo Formio dated October 17, 1797, between France and the Emperor of Austria; the Treaty of Tilsit dated July 9, 1807, between France and Prussia; and the Treaty of Vienna dated October 30, 1864, between Denmark and Prussia/Austria). See also Menon, p. 162.

<sup>23</sup> See Hoeflich, p. 56.

<sup>24</sup> Quoted in O’Connell, 1956, p. 190. On this case (and other ones), see Lauterpacht, *International Law*, vol. 2 (The Law of Peace, Part I), 1975, pp. 115ff.; Hoeflich, pp. 57ff.

“We think that obligations incurred during the war, or in contemplation of the war, stand upon a different footing, and we do not know of any principle in international law which would oblige Her Majesty’s Government to recognize such obligations.”<sup>25</sup>

The emphasis on “such obligations” may be interpreted as an argument based on considerations of justice or balance of power, to the effect that a debtor would not to be held liable for debts previously incurred for financing a war against the ultimately victorious side. Even though the text suggests that Crown Counsel had looked for principles of international law, it becomes quite evident from another case regarding the annexation of the South African Republic that the argument is essentially one based on the power of the winning side. In *West Rand Central Gold Mining Company Ltd. v. The King*, the petitioner, an English registered company, claimed from the conquering state the return of gold which had allegedly been stolen from it by the officials of the predecessor state. Investigating into the question whether Great Britain, as the successor state, was bound by this obligation (the existence of which was not denied against the predecessor state), the judge (Lord Alverstone) reasoned as follows:

“we desire to consider the proposition, that by international law the conquering country is bound to fulfil the obligations of the conquered, upon principle; and upon principle we think it cannot be sustained. When making peace the conquering Sovereign can make any conditions he thinks fit respecting the financial obligations of the conquered country, and it is entirely at his option to what extent he will adopt them. It is a case in which the only law is that of military force... It is not denied on the suppliants’ behalf that the conquering State can make whatever bargain it pleases with the vanquished; and a further concession was made that there may be classes of obligations that it could not be reasonably contended that the conquering State would by annexation take upon itself, as, for instance, obligations to repay money used for the purposes of the war.”<sup>26</sup>

(c) Another instance in which war debts were repudiated can be found in an official declaration of the Peoples’ Commissar for foreign affairs of the newly formed Soviet Union, dated July 9, 1920. Making reference to consultations with the British Government from June 30 through July 7, 1920, the declaration stated:

“All Russian contracts and obligations regarding British citizens have been annulled – beginning from the date on which the British Government has entered into war and intervention against Soviet Russia and has imposed a blockade in order to force the Russian people through hunger and austerity to reject that very form of government which it had chosen by itself through overthrowing the autocratic tsarist Government.”

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<sup>25</sup> Quoted in Bedjaoui, p. 143.

<sup>26</sup> [1905] 2 KB 391, reprinted in *British International Law Cases*, 1965, vol. 2, p. 283.

This happened after a general statement, in 1918, had been interpreted as amounting to outright rejection of liability for any foreign loan debt:

“All foreign loans are hereby annulled without reserve or exception of any kind whatsoever.”

This broad statement surprised lenders and scholars alike, who were debating whether the Russian case after the 1917 revolution was one of succession of state or instead mere succession of government.<sup>27</sup>

(d) In 1924, the German Supreme Court in Private Law Matters (“Reichsgericht”) decided a case in which a former officer in Deutsch-Ostafrika (nowadays Tanzania, Rwanda and Burundi) had deposited a certain amount into an account at a local bank.<sup>28</sup> At that time this territory was a German colony and became therefore involved in World War I. It was within the context of this war that the officer deposited his money, since the (German) Governor had asked the population to contribute to the strengthening of German warfare power. After Germany lost the war and after it entered into the Treaty of Versailles, which took away all colonies from Germany, the officer sued the German Reich for the repayment of his deposit. Upon the objection of the defendant that, not Germany, but Great Britain was to be held liable – because she had received the mandate over this former colony – the Court concluded:

“In no case the liability of a recipient State can be assumed with respect to those debts of the Protectorate which have arisen in the course of warfare or are otherwise connected with the war... In the case at hand the plaintiff had deposited his money at the Governor’s request during wartime; given these facts, it is to be assumed that this money was meant to be used for public – i.e. bellicose – purposes. According to the principles of public international law, debts of this kind cannot be pursued against the recipient State. It cannot be said that the Protectorate’s obligation was vested in the recipient State”.<sup>29</sup>

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<sup>27</sup> On the debate of this thorny issue, see, e.g., Foorman and Jehle, pp. 17ff. See also Hoeflich, pp. 61ff., and Adams, 1991, chapter 17. With respect to the so called “Socialist Revolutionary Rule” (“Sozialistische Revolutionsregel”), see Reinisch and Hafner, pp. 52ff.

<sup>28</sup> RGZ 108, pp. 298ff.

<sup>29</sup> Ibid., pp. 300ff.

(e) In the case that has just been mentioned, several references were made to the Treaty of Versailles dated June 28, 1919,<sup>30</sup> which set forth the consequences of World War I for Germany. From Article 254 of the Treaty, it follows *e contrario* that war debts were not regarded as being transferable. Regarding the successor states to the German Empire, the Treaty provided as follows:

“The Powers to which German territory is ceded shall, subject to the qualifications made in Article 255, undertake to pay: (1) A portion of the debt of the German Empire as it stood on August 1, 1914, calculated on the basis of the ratio between the average for the three financial years 1911, 1912, 1913, of such revenues of the ceded territory, and the average for the same years of such revenues of the whole German Empire as in the judgment of the Reparation Commission are best calculated to represent the relative ability of the respective territories to make payment...”

It was therefore clear that only debts from the pre-war era (namely those contracted before August 1, 1914, the day of the outbreak of World War I) had to be assumed by the successor states; the later ones were seen as being binding on Germany or as having been extinguished. The aforementioned decision of the German Supreme Court confirmed this conclusion.

The various peace treaties signed at the end of World War I extended the concept of war debts far beyond what might be compared to gamblers' debts. All debts that had been contracted after the beginning of the war were considered to be war debts. Thus, “a loan contracted by Germany in 1917 for the construction of a bridge at Teschen in Upper Silesia was regarded by the German Reparations Commission as a war loan simply because of the date on which it was concluded.”<sup>31</sup>

## 2. Subjugation Debts

Bedjaoui describes this category of debts as “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.”<sup>32</sup>

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<sup>30</sup> The text of the Treaty is electronically available at <http://history.acusd.edu/gen/text/versaillestreaty/ver248.html>.

<sup>31</sup> Bedjaoui, p. 150. See also O'Connell, 1956, pp. 190ff.

<sup>32</sup> Bedjaoui, p. 157.

Instead of calling this type of debts “subjugation debts”, some authors call them “hostile debts”.<sup>33</sup> This seems to be a difference in name but not in substance.

(a) The main feature of this category of debts is that the *creditor* must have done something that is seen as sufficient justification for a successor state to repudiate this debt. In contrast, the main feature of war debts is that the *debtor* has contracted it to wage a war or support a war effort. Bedjaoui<sup>34</sup> has given three examples<sup>35</sup> of subjugation debts.

(b) The Treaty of Peace between the United States and Spain dated December 10, 1898,<sup>36</sup> provides in its Article 1 that “Spain relinquishes all claim of sovereignty over and title to Cuba”. There is, in the Treaty, no word about the status of public and private debts, let alone of “odious debts”. However, during the drafting of Article 1, both parties to the Treaty argued heavily on what they called the “Cuban Debt” and what the United States, as the stronger party, rejected to be binding on Cuba. The background to this dispute was a debt contracted (at least nominally) by Cuba as a colony of Spain.<sup>37</sup> The United States regarded it as a purely Spanish debt because the money was (according to the US argument) used for the preservation of the Spanish interests in Cuba – i.e. for the reincorporation of San Domingo into the Spanish dominions, the Spanish expedition to Mexico, and the suppression of uprisings in Cuba itself (1868 and 1895). Spain argued that the debts incurred by a country remain its debts irrespective of a change of sovereignty:

“These maxims seem to be observed by all cultured nations that are unwilling to trample upon the eternal principles of justice, including those in which such cessions were made by force of arms and as reward for victories through treaties relating to territorial cessions. Rare is the treaty in which, together with the territory ceded to the new sovereign, there is not conveyed a proportional part of the general obligations of the ceding state, which in the majority of cases have been in the form of a public debt”<sup>38</sup>

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<sup>33</sup> E.g. O’Connell, 1956, p. 188; Khalfan, King and Thomas, p. 17; Buchheit, Gulati and Thompson, pp. 11ff.; Bonilla, p. 12.

<sup>34</sup> Bedjaoui, pp. 159ff.

<sup>35</sup> These are the cases cited below under letters (b), (c), and (e). Another case, relating to a Mexican law dated June 18, 1883, whereby Mexico denied to be liable for debts resulting from “governments allegedly having existed in Mexico” in certain time periods, is discussed by Sack, p. 158, and Tamen, pp. 10ff.

<sup>36</sup> The text of the Treaty is electronically available at [www.yale.edu/lawweb/avalon/diplomacy/spain/sp1898.htm](http://www.yale.edu/lawweb/avalon/diplomacy/spain/sp1898.htm). For a discussion of the case examined here, see Hoeflich, pp. 51ff., and Adams, 1991, Chapter 17.

<sup>37</sup> This type of debt is sometimes classified as “localized state debt”. See, e.g., Bedjaoui, pp. 14ff.

<sup>38</sup> Reproduced in Moore, *A Digest of International Law*, 1906, I, p. 353.

The United States responded with the following arguments:

“From no point of view can the debts above described be considered as local debts of Cuba or as debts incurred for the benefit of Cuba. In no sense are they obligations properly chargeable to that island. They are debts created by the Government of Spain, for its own purposes and through its own agents, in whose creation Cuba had no voice... From the moral point of view, the proposal to impose them upon Cuba is equally untenable. If, as is sometimes asserted, the struggles for Cuban independence have been carried on and supported by a minority of the people of the island, to impose on the inhabitants as a whole the cost of suppressing the insurrections would be to punish the many for the deeds of the few. If, on the other hand, those struggles have, as the American Commissioners maintain, represented the hopes and aspirations of the body of the Cuban people, to crush the inhabitants by a burden created by Spain in the effort to oppose their independence would be even more unjust”.<sup>39</sup>

Essentially, the American argument was twofold. Legally, the debt was a debt of Spain, as Cuba could not be held liable for an obligation contracted under *force majeure*, with no possibility to resist; morally, given the unjust result of any different solution, it was likewise a debt of Spain:<sup>40</sup>

“... that the so-called Cuban debt is not in any sense a debt of Cuba, but that it is in reality a part of the national debt of Spain. The American Commissioners were able to show that the debt was contracted by Spain for national purposes, which in some cases were alien and in others actually adverse to the interests of Cuba; that in reality the greater part of it was contracted for the purpose of supporting a Spanish army in Cuba; and that, while the interest on it has been collected by a Spanish bank from the revenues of Cuba, the bonds bear upon their face, even where those revenues are pledged for their payment, the guarantee of the Spanish nation. As a national debt of the Spain, the American Commissioners have never questioned its validity”.<sup>41</sup>

The Spanish counter-argument, to the effect that it was legitimate to suppress a rebellion in its own dominions, was rejected by the United States:

“The American Commissioners have read without offense the reference in the Spanish memorandum to the Indian rebellions which it has been necessary for the United States to suppress, for they are unable to see any parallel between the uprisings of those barbarous and often savage tribes, which have disappeared before the march of civilization because they were unable to submit to it, and for the insurrections against Spanish rule in Cuba,

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<sup>39</sup> Ibid., p. 358.

<sup>40</sup> The inclusion of moral arguments within a legal context was not unprecedented. See, for example, the remark regarding creditors' protection made by the Secretary of State Frelinghuysen on the Chilean guano deposits occupation, cited by Foorman and Jehle, p. 30. See also Hoeflich, p. 54.

<sup>41</sup> Moore, p. 367.

insurrections in which many of the noblest men of Spanish blood in the island have participated. Nor are the American Commissioners offended by the reference of the Spanish memorandum to the attempt of the Southern States to secede. The Spanish Commissioners evidently misconceive the nature and the object of that movement. The war of secession was fought and concluded upon a question of constitutional principle, asserted by one party to the conflict and denied by the other. It was a conflict in no respect to be likened to the uprisings against Spanish rule in Cuba.”<sup>42</sup>

In conclusion:

“The American commissioners therefore feel that they are fully justified both in law and in morals in refusing to take upon themselves in addition to the burdens already incurred the obligation of discharging the so-called colonial debts of Spain.”<sup>43</sup>

Such a line of reasoning has not been immune from criticism. However, Bedjaoui, after reporting one classic instance of such criticism (by Despagnet), rejects it writing: “The least that can be said is that this point of view is outmoded...”<sup>44</sup>

To sum up, the argument against holding Cuba liable for repaying the debt was that the debt had been incurred by Spain in the name of Cuba but in fact against its very interest and without Cuba’s consent; moreover, it would be contrary to good morals to argue otherwise.

By embracing also a moral argument, the United States seemed to indicate that the legal argument alone would not suffice. And yet, if one may use a private law analogy, the fact is that a transaction in which one and the same person acts on both sides (“In-sich-Geschäft”) is considered, in many civil law systems, as void.

(c) The Treaty of Versailles of 1919 has already been mentioned above in the context of war debts. It is relevant, however, with respect also to subjugation debts. In fact, Article 255 provided that Poland was to be freed of all debts related to a program whereby Germany had supported German settlers in Polish territory:

“In the case of Poland that portion of the debt which, in the opinion of the Reparation Commission, is attributable to the measures taken by the German and Prussian

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<sup>42</sup> Id., p. 370. Interestingly, no reference was made to para. 4 of the 14<sup>th</sup> Amendment of the US Constitution, which reads in its second sentence: “But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States...” The 14<sup>th</sup> Amendment was introduced into the US Constitution at the end of the secession war. See Adams, 2004, p. 2.

<sup>43</sup> Moore, p. 376.

<sup>44</sup> Bedjaoui, p. 165.

Governments for the German colonisation of Poland shall be excluded from the apportionment to be made under Article 254.”<sup>45</sup>

(d) Another instance was when Germany, after the “Anschluss” (i.e. the annexation), refused to assume those debts of Austria that had been contracted to impede the annexation. This case will be discussed below.

(e) Yet another example was the so-called “Indonesian debt”.<sup>46</sup> This refers to the debts contracted by the colonial power (the Netherlands), which were discussed at a Round Table Conference in The Hague in 1949. Indonesia declared its “readiness to assume certain debts prior to the Netherlands capitulation to the Japanese in Indonesia on 8 March (Java) and 7 April 1942 (Sumatra).” Later debts resulting from military operations against the Indonesian national liberation movement,<sup>47</sup> and in particular those financing guerrilla operations, were rejected. In the course of the Conference, however, a compromise was reached pursuant to which the debts were apportioned between the two states. A few years later, Indonesia refused further payments.<sup>48</sup>

### **3. Regime debts**

Various definitions exist for this category of debts. According to the French international lawyer Charles Rousseau, these are:

“Debts contracted by the dismembered State in the temporary interest of a particular form, and the term can include, in peacetime, subjugation debts specifically contracted for the purpose of colonizing or absorbing a particular territory and, in wartime, war debts.”<sup>49</sup>

This definition was quoted by Bedjaoui in one of his reports to the International Law Commission.<sup>50</sup> He explicitly stated that this kind of debts has to be taken into account in any

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<sup>45</sup> For a lengthy discussion of this aspect, see Sack, pp. 159ff., as well as Feilchenfeld, pp. 450ff. See, additionally, O’Connell, 1956, p. 189. For the somewhat parallel argument put forward by Algeria within the context of its war of independence, see Bedjaoui, p. 332.

<sup>46</sup> See Bedjaoui, pp. 169ff.

<sup>47</sup> This example would also fit in the category of war debts.

<sup>48</sup> From then onwards, rejecting to assume the debts contracted by former colonial powers became standard practice, according to Khalfan, King and Thomas, p. 31.

discussion on succession to state debts, with the consequence that regime debts would be regarded as state debts. Moreover, in using this definition, Bedjaoui seemed to imply that the expression “regime debts” is an over-arching expression, which includes war debts and subjugation debts as sub-categories, except that regime debts are themselves a sub-category<sup>51</sup> of the wider category of “odious debts”.

However, since Bedjaoui himself stated that in this uncertain area “it is all a matter of terminology or definition”,<sup>52</sup> regime debts may be understood as state debts contracted for the sole benefit of a government and/or the persons forming the government.

The classic decision regarding this category of debts is the arbitral award in a case between Great Britain and Costa Rica.<sup>53</sup> The dispute arose between the two countries because the Royal Bank of Canada had demanded repayment from the Banco Internacional de Costa Rica despite the fact that the Costa Rican government had enacted a so-called “law of nullities”. This law nullified certain obligations which Costa Rica had entered into under the former government of Tinoco. Tinoco had overthrown the former ruler – not without considerable popular support – and had established a new constitution. After a couple of years Tinoco “retired” and left the country. A new government was then elected in accordance with the old constitution.

The sole arbitrator (William Taft) had to decide the dispute by “taking into consideration existing agreements, the principles of public and international law, and in view of the allegations, documents and evidence”. He considered a complicated bundle of transactions resulting in a loan to Tinoco and his brother, which was clearly a loan for exclusively personal purposes. Accordingly, he decided in favor of Costa Rica stating:

“The whole transaction was full of irregularities. There was no authority of law, in the first place for making the Royal Bank the depositary of a revolving credit fund. The law of... authorized only the Banco Internacional to be made such depositary. The thousand dollar colones bills were most informal and did not comply with the requirements of law as to their form, their signature or their registration. The case of the Royal Bank depends not on the mere form of the transaction but upon good faith of the bank in the payment of money for the real use of the Costa Rican Government under the Tinoco regime. It must make out its case of actual furnishing of money to the government for its legitimate use. It

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<sup>49</sup> *Droit international public*, 1977, vol. III, p. 458.

<sup>50</sup> Bedjaoui, p. 47.

<sup>51</sup> Bedjaoui is surprisingly imprecise on this point. See pp. 115 and 122ff.

<sup>52</sup> *Ibid.*, p. 125.

<sup>53</sup> 1 Reports of International Arbitral Awards (*RIAA*) 375 (1923).

has not done so. The bank knew that this money was to be used by the retiring president, F. Tinoco, for his personal support after he had taken refuge in a foreign country. It could not hold his own government for the money paid to him for this purpose.”

A few sentences later, the arbitrator referred to a possible counter argument stating:

“Whatever it was, it is so closely connected with this payment for obviously personal and unlawful uses of the Tinoco brothers that in the absence of any explanation on behalf of the Royal Bank, it cannot now be made the basis of a claim that it was for any legitimate governmental use of the Tinoco government.”

In any event his conclusion, even without resorting to the doctrine of “odious debts”, was that the repayment of a loan cannot be requested if the lender has extended the loan under circumstances which allowed the reasonable inference that the money had been lent for the personal use of a government’s representative.

It is likely, however, that the formal irregularities of the loan would have caused its invalidity under private – and perhaps even under administrative – law.<sup>54</sup> In other words, the arbitrator invalidated on moral grounds a contract that was already null and void anyway.

#### **4. Conclusive remarks on this section**

After examining the cases discussed above, the first conclusion is that, while one may perhaps detect in them some elements akin to those of odious debts, the fact is that the expression “odious debts” was never and nowhere used.

The second conclusion is that the decisions that have just been briefly examined were often taken on political or moral grounds rather than legal ones. This is evident in some instances of revolutionary uprising.<sup>55</sup> For example, the new French regime refused in 1789 to assume any political and economic obligations entered into by the “disempowered tyrants”. Similarly, the newly constituted All-Russian Central Executive Committee declared in a decree dated February 10, 1918, that all loans contracted by the governments of the Russian land-owners and

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<sup>54</sup> The invalidity, under private law, of the relevant contracts settled some of the disputes between Chile and the Peruvian creditors with respect to guano deposits. See Foorman and Jehle, p. 30.

<sup>55</sup> The following examples are taken from the Russian author Korovin, *Völkerrecht*, 1960, pp. 122ff.

bourgeoisie were void. Finally, after the creation of the Peoples' Republic of China in 1949, the Political Consultative Council of China announced on September 29, 1949: "The Central Government of the Peoples' Republic of China will examine the contracts and agreements entered into by the Kuomintang-Government with foreign Governments and then decide depending on their contents to acknowledge, annul, revise them, or to enter into new consultations."

## II. The definitions of "odious debts"

### 1. Introduction

O'Connell observes in his book on state succession: "The doctrine of odious debts is a dangerous one which, as Despagnet says, 'favors most arbitrary and iniquitous solutions'."<sup>56</sup> (This quotation of Despagnet is taken from what Despagnet wrote on subjugation debts, when discussing the Cuban case mentioned above.)<sup>57</sup> The danger flagged by O'Connell is a valid concern, grounded as it is in the fact that the doctrine of "odious debts" may easily be abused. A striking example in this respect is Germany's repudiation of honoring any of the Austrian debts, after the annexation in 1938.<sup>58</sup> The Minister of the Economy asserted in a public speech on June 16, 1938, that:

"neither by international law nor in the interests of economic policy, nor morally, is there any obligation on the part of the Reich to acknowledge the legal responsibility for Austria's Federal debts."<sup>59</sup>

The justification that was given in support of this view was, firstly, that the rule of state succession would not apply to cases of a debtor state's "self-extinction"; secondly, the "political" character of the debts; and, thirdly, the allegedly comparable precedents from the practice of France, Great Britain and the United States. In other words, we have here a typical case in which the claim that certain debts were "odious" was weak,<sup>60</sup> and in which precedents were misinterpreted to achieve a certain goal.

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<sup>56</sup> O'Connell, 1956, p. 187. For criticism in the more recent literature, see Choi and Posner, *A Critique of the Odious Debt Doctrine*.

<sup>57</sup> Despagnet, *Cours de droit international public*, 3<sup>rd</sup> edn., 1905, pp. 111ff.

<sup>58</sup> See also O'Connell, 1967, vol. 1, pp. 380ff.; Foorman and Jehle, pp. 21ff. Cf. additionally Hoeflich, pp. 63ff.; Siebel, *Rechtsfragen internationaler Anleihen*, 1997, p. 119.

<sup>59</sup> Quoted in Garner, p. 766.

<sup>60</sup> The loans were partially made for benign purposes such as the purchase of food.

In consideration of this danger of abuse, it is indispensable to identify the defining elements of “odious debts” in such a way that this danger may be limited, if not completely overcome. Some authors, such as Sack, Bedjaoui and others, have tried to provide a precise definition, and their views will now be examined.

## 2. Alexander N. Sack

(a) Before the October revolution, Alexander Nahum Sack was a lawyer and lecturer in Tsarist Russia; thereafter he became a law professor in Paris.<sup>61</sup> Influenced presumably by his political experience, he wrote two books dealing with succession of states and its impact on public debts.<sup>62</sup> In the first one, he developed his idea of “debts which do not burden all or part of the territory of the State”,<sup>63</sup> which he stated “might be called ‘odious’” – thereby coining the expression that is still in use today. Sack wrote:

“If a despotic power contracts a debt not for the needs and not in the interest of a State but in order to fortify its despotic regime, to suppress the population from its fight, etc., then this debt is odious for the population of the entire State. This debt is not obligatory for the nation; it is (rather) a debt of the regime, a personal debt of the power which has contracted it... The reason why such odious debts cannot be seen as burdening the territory of a State is that these debts do not comply with one of the conditions which determine the regularity of State debts, namely: the debts of a State must be contracted and the funds thereof must be used for the needs and in the interest of the State.”<sup>64</sup>

A few lines after this text, he concluded that “the creditors have committed a hostile act against the people.” The consequence is that such debts do not bind the nation; they are rather obligations of the particular regime or a personal debt of the power that has contracted the debt. The example given by Sack is the “subjugation debt” mentioned above, namely Mexico’s

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<sup>61</sup> For his biography, see now Ludington/Gulati, *A Convenient Untruth: Facts and Fantasy in the Doctrine of Odious Debts*, Duke Law School Legal Studies – Research Paper Series (No. 174), October 2007, p. 15ff.

<sup>62</sup> Sack, 1927, and *Id.*, *La succession aux Dettes Publiques d’Etat*, 1929. For a detailed analysis of his understanding of what constitutes State debts see Sack, 1932-1933, *passim*.

<sup>63</sup> This is the heading of Chapter IV of the book. Sack used a different classification than the one used in the present note (which is in part based on Bedjaoui’s research). Writing before 1967 (and therefore before Bedjaoui), O’Connell still used, in his two-volume treatise on state succession in municipal law and international law, Sack’s classification.

<sup>64</sup> Sack, p. 157, with a reference to pp. 25ff. of the same work. On p. 27, Sack admits that this rule is “very arbitrary and very vague”.

statutory refusal in 1883 to be held liable for debts which had been contracted by “governments which allegedly have existed in Mexico” during certain periods of time.<sup>65</sup> Additionally, Sack alluded to what have been described above as “regime debts”.

(b) One of the chapters in Sack’s treatise deals with “debts which are odious for the population of a part of the territory of the debtor State”. He described them thus:

“When the government has contracted debts in order to subjugate the population of a part of its territory or to colonize these for the citizens of the dominant nationality, etc. then these debts are odious for the indigenous population of this part of the territory of the debtor State.”

As he referred to the abovementioned Cuban case and the case of the German colonization program in Poland, it becomes clear that what Sack had in mind was what Bedjaoui would later call “subjugation debts”. It is within this context that Sack defines three elements which cumulatively justify calling certain debts “odious” and which are nowadays often quoted by many writers as the defining elements of “odious debts”:

“1. The new government must prove and an international tribunal must regard as proven: (a) that the need for the fulfillment of which the former government has contracted the particular debt is ‘odious’ and evidently contrary to the interests of the population of all or part of the former territory; and (b) that the creditors – at the time of the issuance of the bonds – had knowledge of the said odious purpose. 2. Once these two requirements are established, it is up to the creditors to bear the burden of proof to establish that the funds resulting from such bonds have in fact not been used for odious needs”.<sup>66</sup>

In another chapter, Sack dealt with certain war debts and declared them, too, to belong to the category of “odious debts”: “In providing funds for the war-faring needs of one of the belligerents, the creditors have committed a hostile act against the other belligerent.”<sup>67</sup>

(c) To sum up, Sack developed his concept of “odious debts” within the context of his analysis of state succession, and restricted the relevance of the concept to this context. He wrote that, if debts burdening the entire population (of the predecessor state) are contracted by a despotic regime for purposes contrary to the interests<sup>68</sup> and needs of the population, these debts

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<sup>65</sup> On this particular case, see also Khalfan, King and Thomas, p. 24.

<sup>66</sup> Sack, p. 163.

<sup>67</sup> Id., pp. 165ff.

<sup>68</sup> According to O’Connell, 1956, p. 189, the test of “contrary to the true interests of the territory” is one in which “politics assume dominance over legal analysis”.

are “odious”. If, on the contrary, the debts burden only part of the population, the requirements for establishing the debt is “odious” are more complex. As to war debts, they are “odious” and the successor state would therefore be liable for them only if certain requirements are fulfilled, namely that (1) there is identity between the debtor state and the belligerent state,<sup>69</sup> and (2) the creditors have given the loan with the explicit purpose of waging that war, in addition to the effective use of such a loan for that purpose.<sup>70</sup> In any case, Sack did not advocate the view that all the debts contracted by a despotic regime would be invalid; to the contrary, he advocated a case-by-case assessment of any debt on its own merits.

### 3. Bedjaoui and the International Law Commission

(a) The International Law Commission (ILC) undertook quite an extensive discussion of the definition and legal consequences of “odious debts”. Established in 1948 as a subsidiary organ of the United Nations General Assembly, the Commission’s mandate is to codify and progressively develop international law, in accordance with Article 13(1)(a) of the Charter of the United Nations. In his role as the Commission’s Special Rapporteur on the topic of succession of states in respect of matters other than treaties, Bedjaoui submitted a report in April 1977<sup>71</sup> in which he devoted a long chapter to “odious debts”.

Before describing his line of reasoning, it needs to be emphasized that Bedjaoui, like Sack before him, restricted the applicability of the concept of odious debts to a rather small set of situations: there must be a succession of states (not merely a succession of governments),<sup>72</sup> there must be debts contracted or guaranteed by the predecessor state, and these debts must result from a state’s financial obligation towards another state.<sup>73</sup> It is only within these limits that, according to Bedjaoui, the concept of odious debts has a role to play.

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<sup>69</sup> Sack, p. 166.

<sup>70</sup> Id., p. 168.

<sup>71</sup> Doc. A/CN.4/301 and Add. 1, in *Yearbook of the International Law Commission* (YBILC), 1977, vol. II, part 1, pp. 45ff., electronically available at [http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC\\_1977\\_v2\\_p1\\_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1977_v2_p1_e.pdf). For the Commission’s discussion, see *YBILC* 1971, vol. II, part 1, p. 185; 1977, vol. II, part 1, p. 45; 1977, vol. II, part 2, p. 59; 1978, vol. II, part 1, p. 229; vol. II, part 2, p. 113; 1979, vol. II, part 2, p. 40; 1981, vol. II, part 2, p. 72.

<sup>72</sup> However, Bedjaoui is not entirely clear on this point. (See p. 125 of his report.) On the watering down of this differentiation, see also Foorman and Jehle, p. 10.

<sup>73</sup> See pp. 6ff. in Bedjaoui’s report.

(b) On the basis of his study of the topic, Bedjaoui proposed the two following 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 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 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.

Article D. Non-transferability of odious debts

[Except in the case of the merger of States,] odious debts contracted by the predecessor State are not transferable to the successor State.”

The Commission, though, decided not to incorporate these articles into the draft Convention on the succession of states in matters other than treaties:

“The Commission, following the recommendation of the Drafting Committee, recognized the importance of the issues raised in connexion with the question of ‘odious debts’ but was of the opinion that it was best first to examine each particular type of succession of States, because the rules to be formulated for each type might well settle the issues raised by the question and might dispose of the need to draft general provisions on the matter. It was generally agreed that it would not be useful or timely to draft at this stage, for inclusion in the section on general provisions, articles relating to ‘odious debts’.”<sup>74</sup>

On this decision by the Commission, Bedjaoui commented a few years later:

It was pointed out 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. ‘Odious debts’ were considered to be those imposed upon a country without its consent and contrary to its true interests, and debts intended to finance the preparation for or the prosecution of war against the successor State. In that connection, some representatives deemed the Special Rapporteur’s earlier proposals to be quite interesting... One representative disagreed with the Commission’s conclusion that there was no point in defining the concept of ‘odious debts’ and stipulating that such debts could never be transferred. Another representative deemed it particularly important to clarify that point, since the intent behind the draft articles was that succession to State debts should be a general obligation on all States other than newly independent States. He therefore considered that a provision should be included in the draft to cover that point. Some representatives expressed the hope that, in view of the importance of the question,

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<sup>74</sup> See the Report of the International Law Commission on the work of its twenty-ninth session 9 May-29 July 1977, *YBILC* 1977, vol. II, Part 2, p. 67 (at 44), electronically available at [http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC\\_1977\\_v2\\_p2\\_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1977_v2_p2_e.pdf). For an example of how debts today tend to be treated within the context of state succession, see Schweisfurth, “Das Recht der Staatensukzession – Die Staatenpraxis der Nachfolge in völkerrechtliche Verträge, Staatsvermögen, Staatsschulden und Archive in den Teilungsfällen Sowjetunion, Tschechoslowakei und Jugoslawien”, in *Berichte der Deutschen Gesellschaft für Völkerrecht* 35 (1998), pp. 213ff.

the Commission would review its decision regarding ‘odious debts’ when it took up the articles on second reading.”<sup>75</sup>

However, the Commission did not change its attitude in its second reading.<sup>76</sup> Even though the concept of odious debts was not embodied in the Convention, Bedjaoui’s treatment of the subject is instructive in many ways.

- (c) At the beginning of his analysis, Bedjaoui noted that the Convention “should include one or two provisions relating to what are generally called ‘odious debts’ or ‘regime debts’, in connexion with which the literature refers to the case of ‘war debts’ and ‘subjugation debts’.”<sup>77</sup>

Regrettably, Bedjaoui failed to identify the authorities on which he was relying. It is noteworthy, however, that he did not even once quote Sack’s writings in the chapter dealing with definition and concept of “odious debts”.<sup>78</sup> This is how he explained his approach:

“It is generally recognized that historically the theory relating to these categories of debts has been developed in the writings of Anglo-American jurists, who have excluded them from all possible succession on the basis of moral principles. As will be seen, however, State practice in continental Europe, if not the writings of European jurists, has often stressed the primacy of this ‘clean slate’ principle as regards these categories of debts, at least in the case of debts contracted between European States in order to make war on other European States. A definition of ‘odious debts’ must be sought...”

He therefore began his inquiry with the assumption that the existing definitions “are not very precise” and that the relationship of the various categories of debts to one another is far from clear.<sup>79</sup> The classification that Bedjaoui favored was that “war debts” and “subjugation debts” are sub-categories of “odious debts”. There is no need here to discuss these two sub-categories, as they were mentioned earlier in this note. The relationship between “odious debts” and “regime debts”, however, is not one of subordination but one of overlapping, at least “to a great extent”.<sup>80</sup> With respect to the latter category, Bedjaoui observed that “in the strict sense of the term” regime

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<sup>75</sup> See *YBILC* 1981, vol. II, Part 1, pp. 19ff. (at 135), electronically available at [http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC\\_1981\\_v2\\_p1\\_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1981_v2_p1_e.pdf).

<sup>76</sup> See *ibid.*, vol. II, Part 2, p. 79 (at 43), electronically available at [http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC\\_1981\\_v2\\_p2\\_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1981_v2_p2_e.pdf).

<sup>77</sup> Bedjaoui, p. 115.

<sup>78</sup> This is all the more noteworthy as the original language of the report is French – i.e. the language in which Sack, too, had published his works.

<sup>79</sup> This might be understood as an indirect criticism of Sack’s classification, which has as its decisive criterion the extent to which a territory is affected.

<sup>80</sup> Bedjaoui, p. 126.

debts are “invoked much more frequently in succession of governments than in succession of States.” He referred to “the Tsarist public debt, for which the new régime resulting from the October Revolution of 1917 originally refused to assume responsibility.”<sup>81</sup> He then added:

“The difference between odious debts and régime debts is that the former are considered from the standpoint of the predecessor State (whose political ‘régime’ is involved), whereas the latter are considered from the standpoint of the successor State (for which this category of debts is ‘odious’). Régime debts and odious debts could thus be regarded as practically identical.”<sup>82</sup>

(d) Regarding para. (a) of his definition, Bedjaoui remarked:

“A thorough examination will, of course, reveal that almost any political, economic or social action by a State may be disadvantageous to another State. A debt contracted by a State for the purpose of carrying out the political, economic or social action in question does not, however, become an ‘odious debt’ unless the latter’s interests are gravely or substantially injured.”

As to para. (b) of his definition, he offered some examples:

“A straightforward case is that of a debt contracted with the intention of using funds to violate treaty obligations. However, this problem derives its complexity from another source. The question of ‘odious debts’ in a case of State succession arises today in terms of contemporary legal ethics, in connexion on the one hand with human rights and the right of peoples to self-determination and, on the other hand, with the unlawfulness of recourse to war.”

Bedjaoui referred to the purchase of arms “that were used to flout human rights through genocide, racial discrimination or apartheid” as well as to “any policy contrary to the right of peoples to self-determination”. He continued: “Debts contracted by a State in order to wage a war of aggression are clearly odious debts.”<sup>83</sup>

(e) After having explained his definition of “odious debts”, Bedjaoui presented numerous examples of “war debts” and “subjugation debts”. He did not discuss, however, the Tinoco case, which was mentioned above under the heading of “régime debts”. It is unclear whether or not this category of “régime debts” falls outside of Bedjaoui’s classification – either because it is a mere

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<sup>81</sup> Id., p. 124.

<sup>82</sup> Id., p. 126.

<sup>83</sup> Id. pp. 134, 135, and 136.

government succession issue, or because these debts would fall outside a strict interpretation of “odiousness”.

(f) Bedjaoui’s treatment of the topic was fairly influential in the international literature. It is particularly noteworthy that in a number of textbooks that touched upon the topic, however briefly, reference was made exclusively to Bedjaoui’s report or the ILC work, whereas Sack’s writings were almost completely neglected.<sup>84</sup> Two examples will suffice.

In their textbook of international law, Verdross and Simma wrote:

“Pursuant to customary international law, the duty to assume debts [from the predecessor State] is generally excluded in cases of ‘odious debts’.”<sup>85</sup>

In support of this passage, the authors referred to two cases. The first one was from 1918, when the provisional government of Czechoslovakia declared its readiness to assume part of the general Austrian-Hungarian bond debts, except for specific war-related bonds.<sup>86</sup> The second one was from 1954, when the Italian-French Composition Commission regarding Ethiopia reiterated the same principle.<sup>87</sup> Verdross and Simma then referred to Bedjaoui’s definition stating that its first part (i.e. debts contrary to the major interests of the successor State) is consistent with what can be evinced from customary international law. As to the second part of Bedjaoui’s definition, these two authors refrained from any comment.

A similar conclusion can be drawn from another widely used textbook in the German-speaking world, namely the textbook by Ipsen and others.<sup>88</sup> They, too, citing Bedjaoui’s work, conclude that the non-transferability of “odious debts” is part of customary international law. The fact that no provision on “odious debts” is contained in the Convention on the succession of states regarding matters other than treaties is irrelevant, according to them, because Article 33 of the Convention, which refers to debts that have come into existence in compliance with public international law, is an implicit acknowledgment that “odious debts” are excluded from transferability.<sup>89</sup>

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<sup>84</sup> O’Connell (p. 187) was the exception, but he wrote before Bedjaoui’s report.

<sup>85</sup> Verdross and Simma, *Universelles Völkerrecht*, 3<sup>rd</sup> edn., 1984, p. 629.

<sup>86</sup> See Hackworth, *Digest of International Law*, I, p. 543.

<sup>87</sup> See *RIAA*, vol. XIII, No. 176, pp. 627ff.

<sup>88</sup> Ipsen et al., *Völkerrecht*, 5<sup>th</sup> edn., 2004, pp. 355ff.

<sup>89</sup> For a similar view, see Pöggel and Meißner, *Staatennachfolge im Völkerrecht*, 1986, pp. 138ff.

The examples of these two textbooks are representative of the prevailing view. At the same time, however, the use of the expression “odious debts” is often omitted. The preference seems to be for a generic reference to the need that an agreement be consistent with the requirements of public international law.<sup>90</sup>

#### 4. Other authors

Hardly surprising, the discussion of the concept, contents, and definition of what constitutes an “odious debt” has involved a number of authors, well beyond the ones that have just been considered.

(a) For instance, in his treatise on state succession with respect to debts, Menon too discusses the concept of “odious debts”. Without quoting from Sack’s writings, he follows Bedjaoui in listing as examples of these debts “war debts” and “subjugation debts”.<sup>91</sup> However, he goes beyond this descriptive notion and considers further applications, consistent with the second paragraph of Bedjaoui’s proposed Article C, quoted above:

“Apart from war and subjugation debts, debts contracted for committing acts in violation of fundamental international law principles may also considered odious debts. For example, in the case of a debt contracted by the predecessor State to violate obligations imposed on it under a treaty, the successor state will consider the debt as odious. The same may be the case with regard to debts which enable the predecessor State to breach obligations in respect of human rights or the right to self-determination. For example, if the predecessor State contracted a debt to purchase arms which are used to infringe human rights, commit genocide or institute apartheid, the successor State will have to consider that debt as odious, even if it has not been a victim of the wrongful acts in question, since it does not support an act which is in violation of international law. In brief, debts contracted contrary to the major interest, right of survival, or independence of the successor State, or debts contracted in violation of the peremptory norm of international law would be odious debts, and would thus be repudiated.”<sup>92</sup>

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<sup>90</sup> Paradigmatic in this sense is, for instance, Shaw, *International Law*, 5<sup>th</sup> edn., 2003, pp. 900ff. See also Ress, “State Succession in Matters of Property and Debts” (paper presented in Vancouver), electronically available at: [www.idi-iiil.org/idiE/resolutionsE/2001\\_van\\_01\\_en.PDF#search=%22Georg%20Ress%20%22State%20succession%20in%20matters%22%22](http://www.idi-iiil.org/idiE/resolutionsE/2001_van_01_en.PDF#search=%22Georg%20Ress%20%22State%20succession%20in%20matters%22%22). For practical applications to the cases of Germany’s re-unification and Yugoslavia’s dismemberment, see Anderson, pp. 418ff.

<sup>91</sup> Menon, p. 162.

(b) One of the most comprehensive discussions of “odious debts” in recent times was developed by Khalfan and his co-authors. In defining “odious debts”, they identify the following characters:

“- Absence of Consent: The population must not have consented to the transaction in question. This is so because it is unlikely that the law would forbid a person from willingly entering into a contract that is detrimental to him or her. With dictatorial regimes this requirement presents few problems, while with democratic ones it could pose one.

- Absence of Benefit: According to the applicable writings, there must be absence of benefit to the population in two ways: (1) in the purpose of the transaction and (2) in fact. The purpose requirement refers to the fact that creditors should not be punished for good faith loans that were misspent by corrupt governments, and the fact requirement refers to the principle that populations that benefit in fact from bad faith loans are still required to repay them (unjust enrichment).

- Creditor Awareness: This requirement stipulates that the creditor must be aware of the absence of consent and benefit. There are several standards that may be employed for measuring ‘awareness’, and luckily domestic law provides a sufficiently broad definition of ‘awareness’ to capture those creditors that shut their eyes to the obvious.”<sup>93</sup>

From this premise, the authors conclude that there are three types of “odious debts”: in addition to war and hostile (or subjugation) debts, there are also “Third World debts”, which “were simply harmful burdens assumed by a state but for which the population received no benefit”.<sup>94</sup> If a debt is odious, the agreement through which it was contracted is not null but unenforceable.

This treatment of the subject by Khalfan and his co-authors is designed to support civil society organizations and debtor countries in their effort to articulate reasons for repudiating debts on the ground of their being “odious”. Thus, the authors aim not only at proving or establishing the legal nature of the doctrine of odious debts but also at showing the procedural steps to achieve the goal of repudiating such debts. They give very practical advice to courts, arbitration panels or institutions that may be willing to render far-reaching decisions.<sup>95</sup> Finally, they discuss the implications of the odious debt doctrine.<sup>96</sup>

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<sup>92</sup> Menon, p. 163.

<sup>93</sup> Khalfan, King and Thomas, p. 1 and pp. 14ff. (For a discussion of “unjust enrichment” and “abuse of power” with respect to sovereign debts, see also Lothian, pp. 463ff.)

<sup>94</sup> Khalfan, King and Thomas, pp. 2 and 19. (The authors refer also to the article by Frankenberg and Knieper.)

<sup>95</sup> Khalfan, King and Thomas, pp. 53ff.

<sup>96</sup> *Ibid.*, pp. 86ff.

It is not completely clear, though, whether the authors allege that there is already, in international law, a doctrine of odious debts or instead they are just advocating it through their arguments. The concluding remark by King, in his chapter on the definition of, and evidence for, such a doctrine seems to point in the latter direction:

“If nothing else, it is hoped that this paper has succeeded in establishing that there are legally persuasive arguments in favour of the morally compelling doctrine of odious debts.”<sup>97</sup>

(c) Making reference to the Iraqi war (2003) and to the “Argentina case”,<sup>98</sup> Fischer-Lescano approaches the subject of odious debts by observing what he calls the “structural corruption in the world society” – i.e. the deficiencies in solving Argentina’s over-indebtedness<sup>99</sup> with world political tools and with the help of lawyers. He asks: “Are there really no legal institutions resulting in serious consequences, in particular in the dissolution of contracts?”<sup>100</sup> This question is the starting point for a discussion whether or not “odious debts” are such a legal institution. He defines them thus:

“This norm protects successor states from being held liable for debts of their predecessors if these debts were entered into without being in compliance with the interest of the population of the respective territory – if, for instance, a colonial power’s suppression of a liberation movement has been financed.”<sup>101</sup>

After a description of the historical development of the concept, he then examines its legal character writing:

“In public international law it is not decisive to formulate understandable analogies but to prove the validity of legal concepts. This, however, is successfully done only when and if the norm the validity of which is asserted can be linked with the legal sources listed in Art. 38 of the ICJ Statute. In this context, customary international law and general principles of public international law are relevant. But one has to say that a general rule

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<sup>97</sup> Ibid., p. 48. (On the idea that the “odious debt doctrine” is morally binding, see also Huber, “The ‘odious debt’ principle morally justified”, electronically available at [www.odiousdebts.org/odiousdebts/index.cfm?DSP=content&ContentID=10372](http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=content&ContentID=10372).

<sup>98</sup> See also the same author’s “Sittenwidrige Schulden”, in *Blätter für deutsche und internationale Politik*, 2003, pp. 404ff., as well as Olmos Gaona, “The illegal foreign debt: the value and likelihood of a legal ruling”, electronically available at [www.odiousdebts.org/odiousdebts/index.cfm?DSP=content&ContentID=2101](http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=content&ContentID=2101). From an economic perspective, see Stiglitz, 2006, pp. 166ff.

<sup>99</sup> On the wider issue of corruption in Latin America, see Oquendo, “Corruption and Legitimation Crises in Latin America”, 14 *Conn. J. Int’l. L.* 475ff. (1999).

<sup>100</sup> *Kritische Justiz*, 2003, p. 226.

<sup>101</sup> Regarding this definition, the author refers neither to Sack nor to the ILC but rather to Menon, *The Succession of States in Respect of Treaties, State Property, Archives and Debts*, 1991, p. 161.

like ‘odious debts are non-obliging’ can hardly be evidenced. Such a rule hardly corresponds to state practice and the evolution of general principles would have to face the difficulty that there might be exceptions to the validity of contracts based on violation of good morals in almost all jurisdictions of the world but that their respective contents differ.”<sup>102</sup>

The ground on which he would nevertheless rely in the case of Argentina’s debts, without invoking a legal norm on “odious debts”, is Article 53 of the Vienna Convention on the Law of Treaties,<sup>103</sup> which reads:

“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

Fischer-Lescano concludes, on the basis of this norm:

“It follows from this text that the relevant norm to the Argentine example is not one that reads: contracts under public international law are null and void when giving rise to odious debts. It rather suffices to have a norm that is violated through the existence of odious debts. The nullity of such a contract then would derive from the application of Art. 53.”<sup>104</sup>

In other words, Fischer-Lescano, while referring to all those elements that would give rise to a separate norm on “odious debts” for scholars like Sack or Bedjaoui, does not appeal to the independent operation of this concept, but rather to the concept of *jus cogens*, which is well-established in international law, even though the exact determination of which norms are peremptory is not immune from difficulties and disagreements.

(d) Whereas the above mentioned author follows the more recent trend of doing away with the concept of “odious debts” and incorporating its contents into other well known legal concepts, the author of this article follows a more traditional approach. While preserving the concept, he defines “odious debts” anew, giving a different meaning to this expression. He starts his

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<sup>102</sup> *Kritische Justiz*, 2003, p. 234.

<sup>103</sup> For further references to Articles 38, 49 and 50 of this Convention as a possible way out of “odious debts”, see Khalfan, King and Thomas, pp. 30ff.

<sup>104</sup> *Kritische Justiz*, 2003, p. 235.

investigation with examining existing definitions, coming to the conclusion that the doctrine of odious debts does not belong to customary international law:

“To conclude this brief historical outline, it can be said that these lines of thought and argumentation leave too great a vacuum in theory and in practice for us to accept the principle of ‘odious debts’ as a legal institution recognized under customary law.”<sup>105</sup>

Before presenting his own proposal, he weighs the advantages and disadvantages of the doctrine of “odious debts”. With respect to the advantages, he observes certain modern trends to the effect that the honorable principle<sup>106</sup> *pacta sunt servanda* (contracts or agreements must be respected) is being increasingly eroded; he mentions, as one indicator of this trend, the increasingly wider scope of consumer protection law.<sup>107</sup>

Paulus then demonstrates that each one of the elements that have been used in previous definitions of odious debts suffer from serious lack of precision. He raises, for example, the following questions:

“[With respect to the requirement of the ‘consent of the population’,] who should define who is a dictator under the terms of the doctrine of ‘odious debts’?... [With respect to the requirement of the ‘absence of benefit’,] who is to provide the yardstick against which ‘benefit’ is to be measured?... The question is, to put it succinctly, who are the ‘people’ and who should represent them?”<sup>108</sup>

His own proposal is aimed at turning the disadvantage of lack of precision into a structural element of a norm which, by definition, is an open norm or a “general clause” (*Generalklausel*). Following the model of similar norms existing in the codified law of continental Europe (such as the prohibition of “immoral contracts”), he writes that, also for a norm on odious debts, several factors (such as the behavior and intentions of the borrower’s representative and/or that of the creditors, the purpose of the loan, and the surrounding circumstances) have to be examined before a decision is made:

“The odiousness of a debt is not automatic, provided the said factual elements [i.e. those identified by Sack or Bedjaoui] are met. Instead, a number of diverse facts must be seen in context before a decision is made in each individual case. This procedure, which will initially have to commence by force of circumstances, can be defined with increased precision as more experience is gained by establishing so-called case groups. Once established, these case groups will represent the experience gained in several cases such

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<sup>105</sup> Paulus, p. 86.

<sup>106</sup> This principle is the strongest obstacle to the recognition of the doctrine of “odious debts”.

<sup>107</sup> Paulus, p. 90.

<sup>108</sup> Id., p. 94.

that, when this level of experience is gained, an individual case can be accorded to an already recognized case group of ‘odious debts’ and the legal consequences will then become axiomatic.”<sup>109</sup>

(e) Buchheit and his co-authors observe a “rebirth of the odious debt debate”:

“The concept of odious debts languished in something of a doctrinal backwater for many years... This changed abruptly, however, following the American invasion of Iraq in 2003 to oust the regime of Saddam Hussein.”<sup>110</sup>

In trying to answer the question whether or not there is now a doctrine of odious debts, these authors see the real challenge in the need to sharply define “the characteristics of this odious debt category”.<sup>111</sup> They describe the term “odiousness” as “dangerously” inviting “ethnocentrism” and conclude:

“We believe that a principle of public international law concerning odious debts does not have, nor is it likely to achieve, the consensus necessary for it to claim the title of ‘doctrine’, or the degree of clarity necessary for it to be of much use in invalidating purportedly odious loans without simultaneously discouraging many legitimate cross-border financings.”<sup>112</sup>

However, they do not stop at this conclusion. As an alternative to an “odious debt” doctrine, they construe a hypothetical case regarding various loans given to a fictitious country (Ruritania) under the law of the State of New York. They distinguish among a “corrupt loan” (“the lender knows that all or part of the proceeds of the loan will be stolen by members of the ruling regime”), a “suspicious loan” (“the lender suspects, but does not know for sure, that some or all of the proceeds of the loan will be stolen by the members of the ruling regime”), and an “utterly fatuous loan” (the government uses the proceeds of the loan “for the sole purpose of funding a program to count – individually – each grain of sand in the vast desert of Ruritania; the counting to be done by a team composed exclusively of Nobel prize-winning economists. No personal corruption by government officials is involved or suspected”).<sup>113</sup>

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<sup>109</sup> Id., pp. 96ff. Even though not mentioned in the text, examples for already existing case groups might be “war debts” and “subjugation debts”.

<sup>110</sup> Buchheit, Gulati and Thompson, pp. 18ff. In agreement with this observation see, for instance, Stiglitz, 2003. Boyce and Ndikumana have written that Africa may have a case on the basis of the odious debt doctrine: “One side-effect of the American/British occupation of Iraq is that it has sparked public debate on a dark secret of international finance: the debt taken on by odious regimes.” ([www.odiousdebts.org/odiousdebts/index.cfm?DSP=content&ContentID=7794](http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=content&ContentID=7794).)

<sup>111</sup> Buchheit, Gulati and Thompson, p. 26.

<sup>112</sup> Id., p. 29.

<sup>113</sup> Id., p. 30.

In examining the possible defenses that the successor regime<sup>114</sup> might raise before a New York court, these authors conclude that the existing arsenal of “legal weapons” is enough to reject re-payment in at least most cases.<sup>115</sup> Thus, bribery is contrary to public policy in the United States; the equity maxim “he who comes to equity must come with clean hands” protects against enforcements of contracts “that are tainted by bribery or other illegal activity”;<sup>116</sup> agency law might serve as shield from re-payment when one sees the population of Ruritania as the principal and the government members as its agents; and, from there, it is just a small step towards the well established doctrine of piercing the corporate veil.

In the final chapter of their article, Buchheit and his co-authors discuss practical problems (such as those of proof and “equal fault”)<sup>117</sup> but demonstrate that these practical obstacles are surmountable. This is their conclusion:

“The attempt over all these years to enshrine a public international law doctrine of odious debts has been fueled by this sense of moral outrage. Strong moral imperatives, however, have a way of embodying themselves in principles of domestic law as well as public international law. We have suggested that the entrenched hostility of American law to bribery, litigants with unclean hands, faithless agents and public officials embezzling state funds under the cover of what we have called ‘governmental veil’, is adequate to allow a sovereign defendant to defend itself in an American court against the attempted enforcement of what Alexander Sack would have recognized as an odious debt.”<sup>118</sup>

(f) Like the authors that have just been mentioned, Mancina is of the view that a legally binding doctrine of “odious debts” neither exists nor would it do any good if it were introduced into public international law. Her focus is the lending policy of such institutions as the World Bank, but her discussion appears to be broad enough to be understood as a general contribution to the discussion of “odious debts”.

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<sup>114</sup> The authors see the distinction between succession of State and regime succession as artificial and thus irrelevant. (Ibid., pp. 3ff.)

<sup>115</sup> The following defenses are discussed on pp. 31ff. Jochnick (p. 145) reaches a similar conclusion and writes: “All of these arguments [i.e. relating to fraud, unconscionability, or odious debts] find support in international and domestic legal systems.”

<sup>116</sup> Buchheit, Gulati and Thompson, p. 34. For a similar survey of possible defenses, see Odiadi, “Sub-Saharan Debt: The imperative of contract adjustment”, pp. 8ff., electronically available at [www.odiousdebts.org/odiousdebts/publications/Sub-saharandebtpaper.pdf](http://www.odiousdebts.org/odiousdebts/publications/Sub-saharandebtpaper.pdf).

<sup>117</sup> Buchheit, Gulati and Thompson, pp. 47ff.

<sup>118</sup> Ibid., p. 56.

She starts with several observations about the moral background to the arguments in favor of such a doctrine but distinguishes between motivation and its translation into an operational tool:

“Levinas channels the abstract suffering of other peoples into a tangible, driving force for the mobilization of efforts to alleviate that suffering. Campaigns to decrease the pain and suffering that result from heavy international debt may be grounded in this sort of moral discourse, but the means through which those campaigns seek to reduce these burdens must be considered in the broader scope of international law... While international law significantly regulates arms control, human rights, and free trade, the legal issues implicated by the international debt crisis remain largely ignored. Present calls for debt relief take many forms, including calls for the integration of the odious debt doctrine into international law. When analyzed as a microcosm for struggles embodied in globalization, this doctrine implicates legal and moral considerations that may ultimately undermine the core values of modern international law.”<sup>119</sup>

In examining the origin and scope of the odious debt doctrine, she concludes:

“The odious debt doctrine has not been invoked successfully in the international sphere, but it has been refined in the academic community... The odious debt doctrine’s scope, most broadly, encompasses both past debts and the present day acquisition of loans.”<sup>120</sup>

Her conclusion about the non-legal nature of this doctrine is the result of her investigation of international law. It is noteworthy that, in this context, she writes:

“Focusing on the World Bank is extremely relevant to a discussion of the odious debt doctrine because the Bank is at the forefront of issues involving international public debt. With approximately \$ 30 billion in loans each year, the Bank is a key player in the global economy and its actions are often a model for the international community. At the outset, then, it should be instructive that the Bank has never applied the doctrine of odious debt... Both Vienna I and the Bank endorse a system whereby the responsibility for debts incurred by a sovereign power is not generally absolved upon the dissolution of a state, but rather is reapportioned so as to maintain the liabilities and foster security of repayment for international lenders.”<sup>121</sup>

She then justifies her objection to a legally binding doctrine of “odious debts” in the following way:

“From a theoretical perspective, debt can be considered one of the primary neo-colonial tools of oppression... There is an ‘approval culture’ inherent in the Bank. The Bank may make loans throughout the world, but it is not representative of the global community.

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<sup>119</sup> Mancina, p. 1242.

<sup>120</sup> Ea., pp. 1246ff.

<sup>121</sup> Mancina, pp. 1250ff. (On p. 1252, Mancina asserts that “the World Bank, even when it has cancelled debt, has not invoked the doctrine”.)

The Bank potentially functions as a mere tool for advocating Western policies and imperialism... The states that run the Bank would still define ‘evil’ regimes. The odious debt doctrine would only further enslave many debtor states because lending policies would become a pretext for the legitimization or de-legitimization of a state’s form of government at the hands of an international institution... The doctrine inevitably increases the power of financial institutions over the Third World countries.”<sup>122</sup>

The way in which Mancina would prefer that the problem be dealt with is the enactment of “a treaty pertaining to international debt and sovereign insolvency issues”.<sup>123</sup>

### **III. Is there an internationally binding principle or norm on odious debts?**

#### **1. Introduction**

The question of the existence of an internationally binding principle or norm on odious debts is extremely hard to answer. The defense of debts being “odious” was invoked by Iran in an arbitration case about debts to the United States incurred by the former Imperial government in 1948. In 1997, the Iran-U.S. Claims Tribunal ruled that the government of Iran was liable for the debts, but the Tribunal wrote that, in coming to this conclusion, it did not “take any stance in the doctrinal debate on the concept of ‘odious debts’ in international law.”<sup>124</sup>

In any event, any attempt to answer the question has to be guided by a clear understanding of the sources of international law as listed in Article 38 of the Statute of the International Court of Justice, which reads:

- “1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
  - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
  - b. international custom, as evidence of a general practice accepted as law;
  - c. the general principles of law recognized by civilized nations;

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<sup>122</sup> Ibid.

<sup>123</sup> Ibid. According to Gelpert, p. 407: “I suggest that countries often are able to get the same debt reduction benefit at a lower cost by going outside the doctrine and framing their decision as a financial restructuring, a composition rather than as repudiation.” For a possible model of such State Insolvency Proceeding, see Paulus, A Statutory Proceeding for Restructuring Debts of Sovereign States, *Recht der Internationalen Wirtschaft* 2003, 401ff.

<sup>124</sup> Case No. B36 (Mealey Publications, 1997) – quoted by Kremer and Jayachandran, p. 6, footnote 5, who comment: “In fact, the doctrinal debate is characterized by jurists taking no stance.” On this case and on another one before an American municipal court (*Jackson v. People’s Republic of China*, 550 F.Supp. 869, 872 (N.D.Ala. 1982)), see Mancina, p. 1248; Buchheit, Gulati and Thompson, pp. 18ff.

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

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

## 2. International conventions

Obviously, no comprehensive analysis of international conventions can be undertaken here. It will be sufficient to recall that, as was mentioned above, the Special Rapporteur Bedjaoui had proposed to include a provision on odious debts in the draft convention on state succession in respect of matters other than treaties. However, the International Law Commission finally decided not to include any such provision in the convention, with the consequence that there is no trace of the odious debts doctrine in its final text – which, moreover, has so far has not yet become a binding legal norm.

## 3. Customary international law

On the formation of customary international law, this is what the International Court of Justice (ICJ) stated in the North Sea Continental Shelf cases:

“Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective requirement, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts e.g. in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.”<sup>125</sup>

In a later decision on continental shelf delimitation, the ICJ stated:

“Furthermore, the Court would have had *proprio motu* to take account of the progress made by the Conference even if the Parties had not alluded to it...for it could not ignore any provision of the draft convention if it came to the conclusion that the content of such

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<sup>125</sup> *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)*, ICJ Rep. 1969, p. 44 (para. 77).

provision is binding upon all members of the international community because it embodies or crystallizes a pre-existing or emergent rule of customary law.”<sup>126</sup>

In yet another case regarding continental shelf questions, the Court clarified:

“It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinion juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.”<sup>127</sup>

Difficult as it may be to identify the objective element (practice) and the subjective element (*opinio juris*) of international custom, in the case of odious debts it is even difficult to tell what the expression actually means.<sup>128</sup> As was indicated above, Bedjaoui had restricted the concept to a few categories of debts without using or even referring to Sack’s work. The inherent difficulties in defining odious debts, beyond some generally accepted categories, have thus been expressed:

“There is an exception, acknowledged through customary law, from the general rule of the assumption of debts from the predecessor state – namely the so called ‘dettes odieuses’ or ‘odious debts’. Like in any other case of special obligation categories, here, too, it is hard to define its particular contents. Whereas it is well settled that, for instance, war bonds or loans contracted with a view to combat independence movements or opposing civil war parties form the classical core contents of ‘dettes odieuses’, do some interpret them as ‘all debts which have been contracted contrary to the interests of the population or the specific territory’.”<sup>129</sup>

Compared to the approach discussed within the context of the International Law Commission’s work on succession to debts,<sup>130</sup> the “Sack approach” is broader and seems to cover also regime debts. The problem is that there is already scant support in actual practice for the

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<sup>126</sup> *Continental Shelf Case (Tunisia v. Libyan Arab Jamahiriya)*, ICJ Rep. 1982, p. 38 (para. 24); see also *Congo v. Belgium*, ICJ Rep. 2002, p. 21 (para. 58).

<sup>127</sup> *Continental Shelf Case (Libyan Arab Jamahiriya v. Malta)*, ICJ Rep. 1985, pp. 29ff. (para. 27); see also the *Nicaragua case (Nicaragua v. USA)*, ICJ Rep. 1986, p. 97 (para. 183).

<sup>128</sup> See, for example, Grashoff, *Staatensukzessionsbedingter Schuldnerwechsel*, 1995, pp. 76ff., where the author lists several categories or elements which would constitute the odiousness of a debt: war bonds, political or regime debts, main interests of the successor state, and unacceptability.

<sup>129</sup> Reinisch and Hafner, pp. 71ff. See also Grashoff, *Staatensukzessionsbedingter Schuldnerwechsel*, 1995, p. 77.

<sup>130</sup> Even assuming the existence of an international customary allowing the repudiation of odious debts, this would be true only with respect to those cases which were listed above under the categories of “war debts” and “subjugation (or hostile) debts”. See, for instance, Stern, *La Succesion D’États*, 1996, p. 172; Buchheit, Gulati and Thompson, p. 26, footnote. 86. However, see also Hoeflich’s characterization of the treatment of these types of debts, p. 65: “despairing of ever discovering a ‘settled’ principle of international law”.

restricted category of “regime debts”, let alone for proposals going beyond Sack’s categories. In consideration of all this, it is somewhat sobering what Anna Gelpern observes:

“As it happens, no national or international tribunal has ever cited Odious Debt as grounds for invalidating a sovereign obligation. Each of the treaties and other examples of state practice cited even by the doctrine’s most thorough and principled advocates appears fundamentally flawed—it lacks one or more of the doctrine’s essential elements and/or is accompanied by a chorus of specific disavowals of the doctrine by indispensable parties. But even if the examples were on point, the fact that Odious Debt’s most fervent proponents to this day must cite an 1898 treaty and a 1923 arbitration as their best authorities suggests that the law-making project is in trouble. Odious Debt’s apparent disuse and disarray after a century of Hitler, Stalin, Mobutu, Abacha, Somoza, Marcos and Idi Amin—not to mention the socialist revolutions, capitalist restorations, and the intervening wars of liberation from colonial rule—are more than mildly puzzling. Most recently, the overthrow of Saddam Hussein revived the hopes for resurrecting the Odious Debt Doctrine. But when given the opportunity to invoke it, the new Iraqi authorities demurred: ‘Iraq’s need for very substantial debt relief derives from the economic realities facing a post-conflict country that has endured decades of financial corruption and mismanagement under the Saddam regime. Principles of public international law such as the odious debt doctrine, whatever their legal vitality, are not the reason why Iraq is seeking this relief’ (taken from an interview with Adil Abdul Mahdi, minister of Finance in the Interim Government of Iraq).”<sup>131</sup>

A suggested qualification to Gelpern’s statement is that there is actually one decision by an international tribunal in which the “principle of odious debts” was mentioned, at least in a dissenting opinion: Judge Ameli, a member of the Iran-U.S. Tribunal, referred to this principle as one option among others to invalidate a debt.<sup>132</sup>

#### **4. General principles of law**

With respect to the general principles of law (itself quite a controversial source of international law), it appears to be hard to find a general principle to the effect that odious debts are void or unenforceable. Even assuming the existence of a general principle of law (in the sense in which this expression is used in Art. 38 of the Statute of the International Court of Justice) to

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<sup>131</sup> Gelpern, p. 406. Anderson states in his article, on p. 408, that the “principle of odious debts” has been invoked numerous times but admits, on p. 437, that a potential declaration of Iraq’s debts as odious “would be the first direct application” since 1923.

<sup>132</sup> See *INA Corp. v. Iran*, Award No. 184-161-1 (26 Nov. 1986), *Iran-U.S. Claims Tribunal Reports*, vol. 8 (1985-I), p. 403, at pp. 446-447.

the effect that contracts which are contradictory to good morals are void,<sup>133</sup> it would not follow from this premise that what various authors understand to be “odious debts” would automatically fall into this category.

## **5. Unilateral declarations**

In the *Nuclear Tests* cases,<sup>134</sup> the Court indicated that unilateral acts may give rise, under certain conditions, to binding obligations. This is not the place to examine this difficult issue, also because there does not seem to be any instance in which a country may be regarded as having made an internationally legally binding declaration to renounce credits corresponding to “odious debts”.<sup>135</sup>

### **C. Proposals to expand the traditional concept of “odious debts”**

#### **I. Classifications**

In discussing some proposals aimed at expanding the traditional concept of “odious debts”, which one encounters in the international literature, it should be noted that many of these proposals are not advanced by lawyers, with the consequence that these proposals often ignore some basic requirements of legal precision. For example, the epithet “odious” has variously been attributed, sometimes within the same writing, to lenders, regimes, leaders and debts.<sup>136</sup> In the ensuing paragraphs, the proposals under such headings as “illegitimate debts” (paragraph 1), “criminal debts” (2), “illegal debts” (3), “ineffective debts” (4), and “other categories” (5), will be summarily examined. Despite the use of these different categories, it should be kept in mind, though, that there will be a considerable element of overlapping. Moreover, it is debatable

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<sup>133</sup> Grashoff, *Staatensukzessionsbedingter Schuldnerwechsel*, 1995, p. 241. Khalfan / King / Thomas, p. 34 seqq. examine the legal institutions of unjust enrichment, abuse of rights, and obligations arising from agency as possible principles in this context.

<sup>134</sup> ICJ Reports 1974, 253, at 269-270; 457, at 474-475; for a discussion of the present question see, for instance, Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, in the privately distributed book on p. 344 seqq. (publicly available in the *Collected Courses of the Hague Academy of International Law*, Vol. 281 (1999); Krzystov Skubiszewski, *Unilateral Acts of State*, in: Bedjaoui (ed.), *International Law: Achievements and Prospects*, 1991, p. 221 seqq.

<sup>135</sup> Norway, in unilaterally waiving certain repayment claims against states such as Egypt or Ecuador . . . . ., did not mention the term once in its announcements.

whether the category of “illegitimate debts”, at least in some of the proposals, does not end up encompassing all the others.<sup>137</sup>

## 1. Illegitimate Debts

An instructive example of the width and breadth of some proposals (coupled with their lack of precision) can be found in an article by Hanlon.<sup>138</sup> Its very title (“Defining ‘Illegitimate Debt’: When Creditors should be Liable for Improper Loans”) clearly announces that, for this author, the concept serves the purpose of shifting liability. In Hanlon’s own words:

“The concept of ‘illegitimate debt’ is important because it puts the liability for bad and imprudent lending back where it belongs, with the lender”.<sup>139</sup>

Numerous examples are presented which stand for such bad and imprudent lending:

“Campaigners have argued that the concept should be applied not only to countries where the U.S. military has imposed ‘regime change’ and overthrown dictators opposed to it but also to dictators supported by the United States, such as Mobutu Sese Seko in Zaire (now Congo). Campaign groups in the South have gone further and argued that a substantial part of poor-country debt is ‘illegitimate’... International lenders have made improper loans that would not have been acceptable under domestic law on the assumption that the international community would enforce repayment. Lenders should be made liable for their bad lending, both on the grounds that the people of poor countries should not be forced to repay loans that the lenders should never have made and also on grounds of ‘moral hazard’ – that lenders will only learn to exercise the required caution and prudence if they are penalized for past negligence and if... financial markets learn that it is dangerous to make illegitimate loans”.<sup>140</sup>

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<sup>136</sup> See “Odious Lending”, *New Economics Foundation* (“nef”), pp. 3 and 6. On p. 15, the author refers to “gradations of odiousness”.

<sup>137</sup> Ibid, p. 6, where one encounters the “more general term ‘illegitimate debt’.” See also Kaiser and Queck, p. 8: “The doctrine of odious debt is, on the one hand, a very restrictive concept when compared with the broader concept of ‘illegitimate debt’”.

<sup>138</sup> In Jochnick and Preston, pp. 109ff. See also, by the same author, the article headed “Take the hit”, electronically available at [www.newint.org/issue312/hit.htm](http://www.newint.org/issue312/hit.htm).

<sup>139</sup> In Jochnick and Preston, p. 127. For a discussion of lenders’ responsibility under public international law, see Reinisch, *State Responsibility*, pp. 116ff. (concluding that there is – if at all – merely a duty of renegotiating). See also the study prepared by the International Law Commission under the title “‘Force majeure’ and ‘fortuitous event’ as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine”, *YBILC* 1978, vol. II. Part 1, pp. 61ff., electronically available at [http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC\\_1978\\_v2\\_p1\\_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1978_v2_p1_e.pdf). For a discussion of possible future developments affecting lenders liability, see Lothian, pp. 462ff.

Starting from this premise, Hanlon thus delimits what he considers to be “illegitimate debt”:

“We will argue that a loan is ‘illegitimate’ if it would be against national law; is unfair, improper, or objectionable; or infringes public policy. We separate the loans themselves from the conditions attached to those loans so that a loan can be legitimate but the conditions, for example usurious interest rates, can be illegitimate. Second, we distinguish between loans and conditions that are ‘unacceptable’ and those that are ‘inappropriate’. We consider a loan or condition to be ‘unacceptable’ if it is obviously improper. We consider a loan or condition to be ‘inappropriate’ if it would be acceptable in some circumstances but not those in which it was made”.<sup>141</sup>

In conformity with this understanding, the key question becomes one of legitimacy of the loan:

“Entirely an issue of whether a lender should have made a loan. No financial institution should have lent money to Mobutu, and it is the loans themselves that are illegitimate; they are solely the liability of the creditor and should not be repaid, independent of the Congo government and whether or not it ‘deserves’ debt ‘relief’.”<sup>142</sup>

Hanlon distinguishes illegitimate debts from what the Jubilee 2000 campaign calls “unpayable debt” and from a wide category of debts which, according to some Southern NGOs, include debts resulting from failed development projects, debts which have funded capital flight, debts which are linked to bad policy advice and bad projects, and private loans which have been converted into public debt under duress to bail out lenders.

Contrary to such a wide notion of “illegitimate debt”, Hanlon suggests that “illegitimate debt” is a debt that satisfies one of the following conditions: (1) it is against the law or not sanctioned by law; (2) it is unfair, improper, or objectionable; or (3) it infringes some public policy. Noting that the expression “illegitimate debt” is almost never used in legislation or court judgments, Hanlon remarks that, nevertheless, common law systems (such as those of England and Australia) contain rules to the effect that gambling debts cannot be enforced.<sup>143</sup>

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<sup>140</sup> In Jochnick and Preston, pp. 109ff. In the text, there is a reference to a statement by the United States Secretary of the Treasury in April 2003: “Certainly the people of Iraq shouldn’t be saddled with those debts incurred through the regime of the dictator who is now gone.”

<sup>141</sup> Ibid., p. 110. On p. 125, the author states that “an illegitimate condition makes the entire loan illegitimate”.

<sup>142</sup> Ibid., p. 111.

<sup>143</sup> The same is true of German law and the law of numerous other civil law countries. Nevertheless, Hanlon’s observation is perhaps the echo of earlier comparisons between war debts and gambling debts, in the sense that whoever supports one side in a war acts like a gambler.

Further clarifying this point, Hanlon describes, under the heading of “Examples of Illegitimacy in the Courts”, cases in which the concept of “odious debts”, “loans to dictators” and “extortionate debts” have played a role. With respect to odious debts, he refers to the Peace Treaty between the United States and Spain regarding Cuba and to the arbitral award in the *Tinoco* case. He then lists the three elements of Sack’s definition of “odious debt”. Hanlon attributes considerable significance, for the concept of odious debts, to a statement by the British House of Commons International Development Committee in 1998, which he quotes as follows:

“[T]he bulk of Rwanda’s external debt was incurred by the genocidal regime which preceded the current administration... Some argue that loans were used by the genocidal regime to purchase weapons and that the current administration and, ultimately, the people of Rwanda, should not have to repay these ‘odious’ debts... We further recommend that the [UK] government urge all bilateral creditors, in particular France, to cancel the debt incurred by the previous regime.”

However, the Committee, while referring to the concept of “odious debt”, did not do so directly but indirectly, by referring to “some” who have allegedly advanced arguments on the basis of that concept. Moreover, by recommending that the government urge creditors to cancel the debts incurred by the previous regime, the Committee implicitly acknowledged that these debts would not otherwise be void or unenforceable on the basis of the odious debt doctrine.

As to “loans to dictators”, Hanlon refers to the *Tinoco* case, while “extortionate debt” is described with the words of Great Britain’s Consumer Credit Act of 1974, Article 138 of which provides that “a credit bargain is extortionate if it (a) requires the debtor... [t]o make payments... which are grossly exorbitant, or (b) otherwise grossly contravenes ordinary principles of fair dealing.”

Even though not entirely clear from the text, it is probably fair to assume that these categories – according to Hanlon – form part of “illegitimate debt” and therefore entail the legal consequence that the debt is invalid. This seems to be the case also of usury debts, loan laundering and “fungibility”. While the case of usury debts is self-explanatory,<sup>144</sup> the two others need some clarification. Hanlon calls “loan laundering” what he defines as “illegitimate successor loan”:

“1. If an institution replaces, rolls over, or pays off an illegitimate debt with a new loan, then the new loan is an illegitimate successor loan.

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<sup>144</sup> In Jochnick and Preston, pp. 118ff.

2. If a bond or new loan is issued for the sole or main purpose of paying off an illegitimate debt, then this is an illegitimate successor loan and the creditor has taken the risk.
3. A government guarantee of an illegitimate successor loan does not make the loan any less illegitimate. Furthermore, it strengthens the illegitimacy if international financial pressure has forced the government to accept responsibility for a private debt”.<sup>145</sup>

The primary example of “fungibility” is money given as a loan, “in particular to aid or loan funds for poor countries”.<sup>146</sup> Hanlon continues:

“Aid or a loan can be supplied for a specific beneficial purpose – rural credit or an electricity supply line for poor people – but the aid or loan releases funds that the government would have used for the rural credit or the electricity line, and those funds can be used for another purpose, such as to buy arms or to put in a foreign bank account... We therefore argue that because of fungibility, all loans to odious regimes and dictators can be classed as odious, even if the ostensible purpose was permissible... Therefore, we are forced to conclude that fungibility means that either all loans to a government are illegitimate, probably due to odiousness, or to be illegitimate, an individual loan must be clearly linked to an illegitimate purpose or conduct. Capital flight is an example of fungibility.”

Hanlon then provides examples for the case “Where Lender Misbehavior Makes Loans Illegitimate”.<sup>147</sup> Lending to oppressive regimes is described with the example of Argentina: “Argentina is an example of most of the issues related to illegitimate debt: odious debt, corrupt debt, successor loans, nationalization of debt, and policy advice.”<sup>148</sup>

In this context, a decision of a Federal Judge, Dr. Jorge Ballesteros, dated July 13, 2000, is quoted:

“The exact co-responsibility and eventual guilt of the international financial institutions (particularly the IMF and the World Bank) must be established, as well as that of the creditors, because during the whole period under examination (1976 to 1982) many technical missions sent by the IMF visited our country... The conclusion is that the creditor banks, the IMF and the World Bank acted with imprudence themselves.”

Thereafter, the nullity of “successor debts” is exemplified with loans given to South Africa after Mandela was released from prison: “Therefore, it seems likely that South Africa’s

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<sup>145</sup> Ibid., p. 117.

<sup>146</sup> Ibid. p. 117.

<sup>147</sup> Ibid., pp. 118ff.

<sup>148</sup> Ibid., p. 120.

current indebtedness is almost entirely successor debt. This debt is illegitimate because the current loans obviously refinanced apartheid debt, which is odious debt”<sup>149</sup>

Gross negligence is exemplified by the case of Zaire/Congo: “There is perhaps no clearer example of odious debt. Money was poured into Zaire when the lenders had already been told there was ‘no (repeat no) prospect’ of being repaid.”

The example of lending to self-enriching regimes is The Philippines; the one for failed projects is Tanzania, Nigeria, and Indonesia. With respect to the latter, Hanlon quotes from a document of the United Nations Institute for Training and Research (Debt and Financial Management (Legal Aspects) Training Package):

“Developing countries rely on external expertise because they lack the technical know-how and assistance to plan infrastructure policies and to implement projects. Consequently, developing countries should not bear the burden of... bad planning and bad implementation performed by external sources... [C]omparative law studies indicate that modern civil and commercial law has broadened contractual obligations in complex business transactions beyond the strict delivery of goods... to include dissemination of professional information, exchange of motivated opinions, discovery of special risks, and instructions and consultations, especially if one party is less knowledgeable than the other and therefore must trust the other’s superior skills. Neglecting these accessory obligations may be considered a breach of contract... and should be all the more applicable if the lender is an official donor with the statutory obligation to finance and assist in the execution of development projects.”

Finally, Hanlon gives yet another definition of what he means by the concept of “illegitimate debt” and presents quite an exhaustive list of cases falling under this new definition. He classifies them in four groups on the basis of the distinction between loan and condition and the determination of what is unacceptable and inappropriate:

“We propose the following definition: ‘Illegitimate debt’ is debt that the borrower cannot be required to repay because the original loan or conditions attached to that loan infringed the law or public policy, or because they were unfair, improper, or otherwise objectionable.”

To get a sense of the intentional width of this concept, the four categories deserve to be reported in full:

“1. Unacceptable loans would include loans that were odious, were given to known corrupt officials, and were for obviously bad projects. Examples include: Odious debts, such of the apartheid state in South Africa, and loans to dictators such as Mobutu in Zaire, Duvalier in Haiti, Suharto in Indonesia, and the military in Argentina, which were clearly

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<sup>149</sup> Ibid., p. 123.

not in the interest of the people of those countries. They are loans taken by the regime and not the state; loans that involve corruption and kickbacks; loans directly linked to capital flight, as happened in Argentina and Brazil in the 1990s; loans for manifestly bad projects, such as the Bataan nuclear power station in the Philippines, and for environmentally damaging projects, especially ones such as dam projects and Indonesian “transmigration,” which would not be funded now; successor loans that are explicitly renewals, exchanges, or rollovers of loans that are independently unacceptable; private loans taken over by the state, nationalized, or guaranteed, and where the lender should have accepted the cost of making a bad loan to a private enterprise.

2. Unacceptable conditions would include usurious interest rates and policy demands that violate national laws. Examples include: Usury, including the very high interest rates of the 1980s imposed on floating-rate loans. In assessing usury, interest rates can be calculated in the currency in which the loan is denominated or in the prices of the main export commodities; conditions that are illegal under national law, such as the requirement for repayment of Brazilian debt before the audit required by the constitution; conditions that violate public policy, such as cuts in health or education spending or the imposition of poverty wages on civil servants, especially where later statements by the international financial institutions admitted that such conditions were incorrect or unduly harsh; conditions that ultimately increase the cost of the debt, such as dollar convertibility in Argentina, even if they are accepted by the elected government; requiring the government to nationalize or guarantee unacceptable or inappropriate loans made to the private sector.

3. Inappropriate loans are consumption loans and loans given where grants would have been more correct. Examples include: Consumption loans made to poor countries that have no chance of repaying without imposing unacceptable privation of their people. These are loans that should have been grants and, as a result of policy changes in the 1990s, often are now grants; loans to formally elected governments that had become dictatorial and were no longer using the funds in the interest of the people, such as Robert Mugabe in Zimbabwe and Alberto Fujimori in Peru.

4. Inappropriate conditions are linked to unsuitable policies. Examples include: Restrictions that are inappropriate to the circumstances, such as limits on post-disaster reconstructions.”

Finally, in what is essentially an appendix to his article, Hanlon briefly touches upon three phenomena from which claims of the South against the North might emerge and which would allow some sort of set-off.<sup>150</sup> These three phenomena are (i) odious debts (for which the examples of the debts contracted by Mobutu and the South African apartheid government are given), (ii) capital flight, and (iii) the historical guilt of slave trade, colonialism, damage resulting from recent Cold War proxy wars, and environmental depredations.<sup>151</sup>

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<sup>150</sup> Ibid. pp. 127ff.

<sup>151</sup> The author of the nef-publication has apparently these categories of debt in mind when he refers to what he calls “moral debts”; he classifies into the subcategories of “environmental debts” and “historical debts” (pp. 7ff.). See also Jochnick, pp. 137ff.

From all this, a lawyer is led to conclude that the main thrust of Hanlon's article is to impose a greater measure of liability on creditors. This, after all, is not a unique feature of Hanlon's article but a recurring theme in NGOs' writings. Paradigmatically, for instance, this is what Patricia Adams writes:

"When lenders from France, Germany, the United States, Canada, or anywhere else realize that repayment from an Iraq under Saddam, a Syria, a North Korea, a Cuba, depends on the regime staying in power long enough to see the money repaid, they will think twice about making the loans to finance the armies and foreign bank accounts of dictators, and demand higher premium if they do. An odious debt legal regime would help the United States cut off many sources of funding terrorist states without having to lobby other creditor governments. And that would be profoundly good, not only for Iraqis, but also for world peace and future generations."<sup>152</sup>

In the same direction, Hoeflich writes:

"(C)onservative lenders should examine closely their sovereign debtors and, whenever possible, avoid loans to states which are or could become unstable."<sup>153</sup>

In a somewhat more traditional vein, but nevertheless with the same thrust, Frankenberg and Knieper conclude:

"In the end, therefore, the recognition of 'hostile debts' and 'war debts' as 'odious' results in a distribution of risk between creditors and debtors; whoever makes financial means available for military operations, or other purposes which clearly contradict national interests shall not, under international law, be exempted from the risks of such an investment."<sup>154</sup>

## **2. Criminal debts**

This expression is sometimes applied to a wide category of debts which are alleged to be void, and therefore need not be repaid, because the debt was corruptly diverted from its intended use.<sup>155</sup> The recommendations to the Consultative Group of Indonesia (CGI) by INFID in Jakarta on January 21, 2000, are paradigmatic:

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<sup>152</sup> Adams, 2004, p. 17; Ea., 1991, Chapter 17. See also Jochnick, pp. 134ff. ("Creditor countries and banks share much of the blame for the overindebtedness of countries, having played a critical role in both the international economy and local processes that created the crisis"), and Stiglitz, 2006, pp. 165ff.

<sup>153</sup> Hoeflich, p. 68. See furthermore Hahn in *Encyclopedia of Public International Law*, under "Foreign Debts", with respect particularly to development loans.

<sup>154</sup> Frankenberg and Knieper, p. 34.

<sup>155</sup> For a discussion of the existing patterns of fighting corruption, see Posadas, "Combating Corruption Under International Law", 10 *Duke J. Comp. & Int'l L.* 345 (2000).

“We call on the CGI to support an independent assessment/audit – by the establishment of an international commission – to determine the extent to which foreign loans have been misappropriated through corruption. The portion of the debt that is found to be odious should be cancelled.”<sup>156</sup>

It is in particular Winters who has elaborated this category of invalid debts and who sets it in direct contrast to the common understanding of “odious debts”:

“A third option [apart from asking for charity or referring to the ‘odiousness’ of debts] is the right to demand debt reduction based on the illegal behavior of creditors, particularly the multilateral development banks.”<sup>157</sup>

He defines this category in this way:

“‘Criminal debt’ refers to a repayment burden on a society that is unjust either because sovereign loans were made to a country and then were stolen by officials and business cronies, or because debt was incurred to rescue an economy severely damaged by criminal behavior of powerful actors... Criminal debt is public debt on the shoulders of a society that is directly linked to illegal business activities or outright appropriation of external loan funds by individuals for their private enrichment. The public never receives any benefit from these resources.”<sup>158</sup>

Winters then describes what is, in his view, the World Bank’s role with respect to “criminal debts”:

“But only part of all criminal debt originates wholly from within the national context. Another part originates from international sources... It is here that the World Bank enters the discussion. Just as there is a power relationship between a government and its people, there is also one between the World Bank and governments that borrow. Debt accumulated and stolen domestically is a purely domestic concern. But what of debt accumulated through an institution like the World Bank and systematically stolen by client governments?... The share of criminal debts that originates from sources like the World Bank merits separate treatment because the Bank not only has leverage to prevent (or at least greatly diminish) the accumulation of foreign criminal debt from its own lending, but also the strong legal mandate in its constitution to do so. If it can be shown that the Bank was aware that a share of its resources was systematically being siphoned off as criminal debt, and if it can further be shown that the Bank failed to fulfill its legal mandate to prevent the loss of its loan funds, then according to international law the Bank shares culpability and also must bear some of the fiscal burden for funds transferred and lost.”<sup>159</sup>

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<sup>156</sup> The recommendations are electronically available at [www.infid.be/statementcgi210100.html](http://www.infid.be/statementcgi210100.html).

<sup>157</sup> Winters, p. 5.

<sup>158</sup> Id., pp. 7ff.

<sup>159</sup> Id., p. 9.

The consequences resulting from these considerations are summarized elsewhere by Winters:

“They [i.e. the NGOs] are simply pointing out that there is something very wrong about demanding repayment for funds the people never received. The money was delivered from the World Bank and other MDBs, but it was intercepted along the way and ‘privatized’ illegally. It is easy to demonstrate that officials in the MDBs were aware of these practices for decades and, in violation of legal obligations under the Articles of Agreement, did nothing at all to stop the corruption. On the contrary, in almost every case, flows of funds from the MDBs increased as pressures to lend mounted.”<sup>160</sup>

### **3. Illegal debts**

This category embraces all debts resulting from contracts which have been entered into without giving due respect to certain legal requirements. Sometimes it is added that these requirements have to be those of the borrowing country,<sup>161</sup> such as the requirement that a loan be authorized by parliament or the executive.

Under general principles of contract law, these contracts are null and void. For example, from the description of the facts given by the sole arbitrator Taft, it may be inferred that the agreements that were in dispute in the *Tinoco* case would have fallen under this category.

In this respect, Stephen Mandel (the author of the nef-publication cited above) has observed that creditors have an obligation to ensure that the applicable procedures are followed, failing which the contract would be null and void.

### **4. Ineffective debts**

The expression “ineffective debts” is not technical, but describes a category of debts having certain common elements. These are debts resulting from loans contracted with a particular purpose in mind (as evidenced by the provisions of the contract) which, however, has never been served; instead, the funds have been used for other purposes.

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<sup>160</sup> Winters, “Combating Corruption in the Multilateral Development Banks, Senate Hearing before the Committee on Foreign Relations”, May 13, 2004, p. 7, electronically available at: [www.senate.gov/~foreign/testimony/2004/WintersTestimony040513.pdf](http://www.senate.gov/~foreign/testimony/2004/WintersTestimony040513.pdf).

<sup>161</sup> See, for example, “Odious Lending” (nef-publication), p. 6. From a legal perspective, it should be recalled that these contracts are often concluded under the law of a third country (e.g., the law of New York), with the consequence that the law of this third country too becomes relevant.

While writing about odious debts and citing extensively from Sack’s work, Adams extends Sack’s original concept to one that would encompass what may be called “ineffective debts”. She sees them as belonging to a sub-category of “odious debts”:

“Even those loans extended for purposes that are broadly governmental – to an electric utility or for balance of payment’s support – are subject to challenge. When government officials treat state investments for political favors, graft, and capital flight, and are prepared to turn a blind eye to the technical and economic viability of such projects, foreign bank loans become grease in wheels that turn against state interests. Foreign bankers who fail to recognize or to act upon pricing irregularities, slipshod plans, and suspect contracts soon become parties to hostile acts against a populace.”<sup>162</sup>

Using a different name (“debts incurred by fraud”), but referring essentially to those very cases classified by Adams as “ineffective”, Mahmud considers these debts to be illegitimate and therefore unenforceable:

“Such ‘debts’ are not payable because they are incurred for fraudulent reasons, or at least for reasons of doubtful nature. For example, a drug dealer cannot take to court his correspondent for failing to keep to terms of an illegal contract. There are cases of debts incurred, for example, for building a road or a power project which either did not materialise at all, or which fell far short of required specifications.”<sup>163</sup>

## 5. Other categories

It has already been mentioned that, regrettably, there is no unanimity on the typology of debts, with respect to neither terminology nor contents. The expression “other categories” is therefore used here to capture a wide variety of debts.

(a) The very category of “odious debts”, as defined by Sack, lends itself to divergent considerations. As Buchheit and others have written, the very choice of adjectives by Sack has captured the imagination of later writers:

“Alexander Sack did, however, contribute two highly emotive adjectives to the debate: ‘despotic’ and ‘odious’. Had he been less colorful in his choice of adjectives, we believe that this topic would have attracted less public attention than it has in this century.”<sup>164</sup>

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<sup>162</sup> Adams, 1991, Chapter 17.

<sup>163</sup> Mahmud, p. 3 (printed version).

<sup>164</sup> Buchheit, Gulati and Thompson, p. 18.

However, referring to Sack's work does not necessarily imply that one accepts also Sack's criteria for classifying odious debts; and, even when accepting the same criteria, these are often given a completely different meaning from the one originally intended by Sack.

(1) The author of the nef-publication, for example, writes under the heading of "typology of illegitimate debt" and "odious debts":

"Then there is the concept of odious debt... though... it should more accurately [be] defined as odious lending... In essence it is where those taking out the loan do not have the right to impose the obligation of servicing the debt on the population of the country in whose name they ostensibly take out the loan, either because they have no proper power, or because they are seriously corrupt. This is not quite synonymous with dictator debt, since democratically elected leaders could equally be blatantly corrupt, but it includes all dictator debt."<sup>165</sup>

In the same publication, "odious debts" are defined as those where the relevant contract is formally impeccable but still illegitimate because of the absence of consent by, or benefit to, the debtor, with the creditor's knowledge.

The requirements that Sack had treated as cumulative seem to be regarded here as potentially alternative to one another. The author further explains:

"We therefore conclude that for a debt to be odious, it is sufficient to show that those contracting the debt did not have the right to impose the burden of repayment on their successors (because of the absence of legitimacy or gross corruption) and that the creditor was in the position to know that this was the case. Certainly the burden of proof should lie with the creditor (to prove benefit) in the case of an odious regime. Furthermore, it could be argued that the absence of proper consent will exist with any illegitimate regime, which should render the contract a contract with the regime and not with the state... We argue that an undemocratic and illegitimate government has no right to impose costs on the country's population; and that a democratic successor government should not be worse off, in terms of its external indebtedness, than it would have been had no odious debt been incurred."<sup>166</sup>

In dealing with odious debt, four principles are articulated, as follows:

"1. Unrepresentative and undemocratic governments do not have the right to impose external debts on subsequent representative and democratic governments. 2. Creditors act irresponsibly in lending to such governments, thereby promoting their continuation in office, and therefore forfeiting the right either to profit from such loans or to recover the capital so provided. 3. Representative governments should be no worse off, in terms of

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<sup>165</sup> "Odious Lending", nef-publication, p. 6.

<sup>166</sup> Ibid. pp. 10ff.

external indebtedness as a result of such odious debts having been incurred by previous governments than they would have been had such debts not been incurred. 4. Arbitration over the extent and treatment of odious debts should be in the hands of an independent international body, which is neither a creditor in its own right, nor controlled by creditors, and which conducts its activities in a transparent fashion.”<sup>167</sup>

From these lines and the ones that follow thereafter, it becomes evident that the author intends to restrict the application of the concept of odious debts to the context of a succession of state.

(2) Some authors, on the other hand, take the concept of “odious debts” as a given, without even trying to define it. A good example is provided by several writings of Kremer, Jayachandran and others.<sup>168</sup> This is their understanding of “odious debts”:

“This paper... examines the case for eliminating illegitimate or odious debt. The argument is that, just as individuals do not have to repay if others illegitimately borrow in their name, the population of a country is not responsible for loans taken out by an illegitimate government that did not have the right to borrow ‘in its name’. There is also an analogous principle in corporate law that a corporation is not liable to a third party for a contract that the CEO (or other agent) entered without the authority to bind the corporation. The view that some uses of power by government officials might be illegitimate or criminal is in line with a trend in international law toward the individualization of sovereign activity, examples of which are the prosecution of Slobodan Milosevic for war crimes and the use of the Alien Torts Claims Act for survivors of torture and other human rights abuses abroad to sue the perpetrators in U.S. courts.”<sup>169</sup>

They then add that a sovereign debt is odious if (1) its purpose does not benefit the people, and (2) if it is incurred without the consent of the people.<sup>170</sup> The same authors, however, acknowledge that “others hold” that a third requirement is necessary to make a debt non-transferable – namely that “creditors were aware in advance that (1) and (2) held”.<sup>171</sup>

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<sup>167</sup> Ibid., p. 21.

<sup>168</sup> See Kremer and Jayachandran, 2002; Jayachandran and Kremer, 2006; and Jayachandran, Kremer and Shafter, 2006. See also Mahmud, p. 2 (in the printed version).

<sup>169</sup> See Kremer and Jayachandran, pp. 1ff.

<sup>170</sup> Ibid., p. 6. See also Jayachandran, Kremer and Shafter, p. 2. (These authors criticize the “classical model” of odious debt and contrast it with what they call an “economic model of odious debt”.)

<sup>171</sup> Kremer and Jayachandran, p. 6, referring to Sack and O’Connell.

The main objective of these authors is to show the need for the creation of an institution<sup>172</sup> that would assess *in advance* whether certain governments are “odious” or “illegitimate”. Potential lenders would therefore be *ex ante* put in the position of calculating the risk they are facing when entering into loan agreements with such “odious” or “illegitimate” governments.<sup>173</sup> These authors propose to utilize the concept of “odious debts” as “loan sanctions”.<sup>174</sup> They discuss in detail various scenarios in which governments, whether democratic or not, behave “odiously” (a particularly important case is that of legitimate governments borrowing to finance corrupt or economically disastrous policies)<sup>175</sup> or support an investment despite its being unproductive.<sup>176</sup>

Stiglitz points in the same direction when, in his paper on “odious rulers, odious debts”, he is more concerned with stressing the need to establish an international bankruptcy court than with defining the necessary elements for a debt to be classified as “odious”:

“We need an international ‘bankruptcy’ court, with no vested national interest, to deal with debt restructuring and relief, and to ensure a fair sharing of the burdens this would create. The United Nations could devise a set of principles – a rule of law – that would guide the court as it assessed the validity of contracts made with, and debts incurred by, outlaw regimes. Loans to build schools might be permitted, and the debt obligation, accordingly, would not be treated as odious; loans to buy arms might not be permitted.”<sup>177</sup>

(3) In their paper headed “Odious Debts – Odious Creditors?”, Kaiser and Queck articulate a proposal to free Iraq of its debts by referring to Sack’s writings. This is how they summarize the key elements of Sack’s doctrine:

“(a) The debt is contracted without the consent of the population affected: It can normally be assumed that this condition is given when a loan is granted to a regime which has not been legitimized by democratic or constitutional means... The condition may be given if a formally legitimate government makes use of an illegitimate procedure to acquire a loan. An example would be borrowing by a government without the constitutionally stipulated approval of a supervisory parliamentary body.

(b) The credit did not benefit the population concerned: While there are fairly clear formal rules governing the first condition, the second condition allows for far greater scope for interpretation due to the vague nature of the term ‘benefit’... Loans not ‘odious’ in the sense of this condition include credits which have been granted to a country and, despite

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<sup>172</sup> For criticism of this approach, see Bonilla, pp. 20ff.

<sup>173</sup> Jayachandran, Kremer and Shafter, pp. 6ff. Gelpern too sees the only future of the “odious debts doctrine” in exercising an *ex ante* effect on lenders and borrowers (pp. 410ff.).

<sup>174</sup> In particular, Jayachandran and Kremer, 2006, pp. 82ff.

<sup>175</sup> Kremer and Jayachandran, p. 4.

<sup>176</sup> Ibid., p. 27, footnote 23.

<sup>177</sup> Stiglitz, 2003, p. 4 (in the printout).

dictatorial rule, benefited e.g. private companies and subsequently been used to bring about recognizable benefits.

(c) At the time the loan was granted the creditors were aware of the illegitimate status of their partner as well as of the fact that the debt incurred would not be used to the benefit of the population of the recipient country... Playing naïve won't do either".<sup>178</sup>

(4) Some ideas in a somewhat different direction have been put forward by Frankenberg and Knieper. Moving from certain premises to the effect that sovereignty is today "a principle of intervention in the name of which an under-privileged State may claim genuine equality, meaning equal opportunities in the domain of development",<sup>179</sup> they then conclude:

"An obligation of all States... can be drawn from the projected aims of the U.N. and its organizations, to make every effort within their powers which are apt to (1) narrow the 'gap in wealth' between the industrially developed and the underdeveloped societies, (2) secure the provision of foodstuffs, and (3) develop and expand production structures which will put especially the LLDC in a position to participate in international trade... Consequently, also debts which are inimical to development have to be regarded as odious."<sup>180</sup>

(b) A further category is what the nef-publication calls "onerous debts".<sup>181</sup> The author describes them thus:

"In the UK, under the Consumer Credit Act 1974 (Section 138) debts are recognised as being unenforceable if their terms are unreasonable. This could be applicable to some sovereign debt, especially in cases where the borrower could be considered to have had no choice in their financial circumstances but to accept the terms of the loan, a situation specifically referred to by the Act."

(c) "Unsustainable debts", on the other hand, present these features:

"Where a debt may be legal and used for the benefit of the population and in isolation its terms are not overly onerous, it may nevertheless be unpayable because of the overall level of indebtedness of the country relative to its debt-servicing capacity. The concept of debt sustainability is at present defined very narrowly by the creditors and has focused almost entirely on a country's ability to pay in terms of its export earnings. National governments, however, have an obligation towards their citizens to provide their basic

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<sup>178</sup> Kaiser and Queck, p. 8. (Needless to add that Sack had never indicated that the doctrine of odious debts would also be meant to foster democracy). On pp. 16ff., the authors apply these general categories to the specific case of the Iraqi debt.

<sup>179</sup> Frankenberg and Knieper, p. 37 (quoting from Flory, *Droit international du développement*, 1977, pp. 46ff.).

<sup>180</sup> Frankenberg and Knieper, p. 38. On the following page, the authors add that, in contrast to the traditional understanding, private creditors as well "must reckon with a successor government raising the objection that this... commitment... was an odious debt".

<sup>181</sup> Nef-publication, p. 7. (In the same publication, the author writes that a debt may be illegitimate because of other unreasonable aspects, such as "real choice on the part of the debtor".)

needs for clean water, health and education and at least not to frustrate their citizen's attempts to meet their needs for food, clothing and shelter. The freedom of the population to pursue the meeting of these needs is a fundamental human right".<sup>182</sup>

(d) "Dubious debts" are described by Mahmud as follows:

"The third world's debts in different form originate in shady conditions. Most of the debt is official... In Asia and Latin America, much of the debt is commercial".<sup>183</sup>

(e) The same author, Mahmud, lists some more categories, one of them being "honorific debts", which are

"the financial obligations incurred in fulfillment of UN resolutions. Such debts are owed by the international community to the lenders and not by the regime that submitted to UN resolutions. Zambia incurred millions of dollars to follow the UN resolutions on Rhodesia, Mozambique and South Africa for over two decades. In all fairness and justice, why should the people of Zambia be responsible for meeting those expenses and pay as its 'debts'. In the name of justice and equity, Zambia should claim compensation from the UN for loss of life and damage to its economy in pursuing UN resolutions".<sup>184</sup>

(f) Further categories listed in Mahmud's article are, for instance, "debts due to experts' fees", "debts due to accumulation of interest", "debts due to foreign exchange volatility". There is also a category relating to the Bretton Wood Institutions:

"Last but not least, there are debts incurred by the developing countries because their development policies were misguided by IMF, World Bank and lending countries could not fulfill development targets. Many IMF or World Bank designed strategies of 'development' failed, exacerbating the debt burden... Hence, the debts owed by countries as a result of the failure of the Bretton Wood Institutions' strategies of 'development' are both illegitimate and unpayable."<sup>185</sup>

## II. Legal assessment

It clearly emerges, from the foregoing analysis, that terminological precision is not a hallmark of the literature on odious debts. Therefore, it is futile to discuss whether the concept of "odious debt" is the all-encompassing one, or instead "illegitimate debt" may be preferable as the

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<sup>182</sup> Ibid. (The reference to basic needs may have to do with an intervention by the South African representative at the League of Nations in 1930. See Rosenne, *League of Nations, Conference for the Codification of International Law (1930)*, vol. II, 1975, pp. 459ff.)

<sup>183</sup> Mahmud, p. 2 (in the printed version).

<sup>184</sup> Ibid., under the heading "honorific debts".

<sup>185</sup> Ibid., p. 3.

generic expression. Either expression is, in essence, short-hand for a wide category of debts regarding which “something went wrong”. Despite this less than encouraging conclusion, two questions need to be answered: (1) are there differences between the traditional notion of “odious debt” and the various proposals to expand the concept; and (2) if there are differences, what is the legal basis of this expanded concept?

### **1. Differences from the traditional notion**

The recent writings from which several quotations have been reproduced above show a tendency to depart from the “traditional approach”. In particular, there is a shift from a loan-by-loan test to determine whether a debt is odious to a general and all-encompassing condemnation of “odious regimes”, the debts of which would invariably be odious. Instead of applying the (perhaps unsatisfactory but still) specific criteria proposed by Sack, Bedjaoui and others, the authors of these more recent articles seem to favor a “one-criterion approach”: if a regime is odious, all the debts it has contracted are odious, irrespective of their actual use.<sup>186</sup> The regime’s odiousness “is contagious”, so to speak, for the lender, the debt, and the surrounding circumstances.

The consequence of this approach is that more questions are raised than answers given. Buchheit and his co-authors list some of these questions:

“Odiousness – whether of regimes, individuals or cooked green vegetables – is a subjective concept. But in this context, it dangerously invites ethnocentrism. Is a democracy a necessary condition for avoiding the label odious? Is it a sufficient condition? Is universal suffrage a necessary predicate? Equal rights for women? Is a regime odious if it misprizes environmental issues or civil rights? And so forth and endlessly on... Can a regime be odious one day and honorable the next?... Finally, who is to make the judgement? The lender? Obviously not. Were this the test, the municipality of Rome would still be paying off Caligula’s gambling debts. The sovereign debtor?”<sup>187</sup>

Even though many writers are ready to follow-up on Sack’s idea of an international tribunal, not all agree. As difficult as the decision about the interest or consent of the population may be, it is a purely political question whether a particular government is “odious” or not. What an international tribunal could achieve, what its composition should be, are questions the answers to which present even greater challenges today than in Sack’s time.

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<sup>186</sup> See Buchheit, Gulati and Thompson, pp. 21ff.

## 2. Is there a legal basis for an expanded concept?

A comprehensive answer to this question is impossible as long as there is (1) no established doctrine of “odious debts” and – even more importantly – (2) no specific court or tribunal with the jurisdiction to decide claims brought against odious debts.<sup>188</sup> Under these circumstances, the scenario discussed by Buchheit and his co-authors is a pragmatic and reasonable starting point that leads to searching a solution in national law. However, as the issue is a global one, a worldwide uniform concept – whether in its original or in its expanded version – appears to be preferable to ensure consistent outcomes when deciding similar cases in different jurisdictions. However, as long as there is no truly convincing evidence of an internationally legally binding norm regarding the traditional notion of “odious debts”, there is *a fortiori* no legal basis for any expansion of the concept.

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<sup>187</sup> Ibid., pp. 27ff. On these questions, see also Paulus, pp. 93ff.

<sup>188</sup> For a brief discussion of possible options on which authority may be called to decide on a claim that a debt is odious, see Paulus, pp. 101ff. For an overview of the existing alternatives, see Khalfan, King and Thomas, pp. 57ff.; Marcelli, *Il debito estero dei paesi in via di sviluppo nel diritto internazionale*, 2004, pp. 21ff.

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