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International Law, Sovereign Debt and Odious Debt

Commentators often assume the existence of a nearly conclusive international law obligation to repay all sovereign debt in cases of both state and governmental succession.[1] However, the applicable rules in international law in no way support such a straightforward proposition. The binding nature of any sovereign debt obligation depends on (1) whether the creditor is a state, international organisation or private party; (2) what body of law it arises under (e.g. international law or the law of some domestic jurisdiction); and (3) whether the context involves state succession or a change of government. These scenarios and the rules applicable in the various permutations are explored in this chapter.

I. The Relevance of International Law

Why should international law be worthy of exploration if in practice, and as is shown in chapter 4 below, most loan agreements are governed by the law of a jurisdiction like New York or England? There are a number of answers to this question. The first is that, most obviously, not all loan agreements are with private creditors. Figures maintained by the Paris Club of creditor nations state that, as of 2007, the outstanding public debt of developing countries is 52 per cent private, 21 per cent bilateral and

[1] CG Paulus, 'Odious Debts vs. Debt Trap: A Realistic Help?' (2005) 31 *Brooklyn Journal of Int'l Law* 83, 91; EF Mancina, 'Sinners in the Hands of an Angry God: Resurrecting the Odious Debt Doctrine in International Law' (2004) *George Washington Int'l Law Review* 1239, 1252–1253; LC Buchheit, GM Gulati and RB Thompson, 'The Dilemma of Odious Debts' (2007) 56 *Duke LJ* 1202, 1228; LC Buchheit and GM Gulati, 'Odious Debts and Nation Building: When the Incubus Departs' (2008) 60 *Maine L Rev* 477, 481–482 (referring to the 'strict public international law rules governing the inheritance of state debts incurred by prior regimes' and the 'the normal requirement of state/governmental succession to debt obligations'). For a thorough and critical examination of this starting point, see O Lienau, *Rethinking Sovereign Debt: Politics, Reputation and Legitimacy in Modern Finance* (Cambridge, MA.: Harvard University Press, 2014).

27 per cent multilateral.[2] And as Gelpern notes, highly publicised recent cases involving Iraq, Nigeria and Liberia were overwhelmingly bilateral and multilateral forms of lending.[3] While the legal position is not settled, it is likely that multilateral agreements are governed by international law.[4] Rules of international law may and clearly ought to apply to such agreements between states. The second reason is that where there is an instance of state succession, private contractual claims against the successor state are generally regarded to be subject to change by the new sovereign.[5] Contracts are on perilous footing, and a strong legal claim for repayment must sound in international law. Third, despite important recent expressions of scepticism, international law is still regarded as forming part of the common law of the United States (including New York) and the United Kingdom.[6] In US federal law, it is established that customary international law is the law of the United States and is supreme over the law of the several states.[7] In the United Kingdom, customary international law is considered to be incorporated into domestic law to the extent it is not inconsistent with any statute, though in practice the courts tend to recognise customary international law as a 'source' of the common law, one that enables courts to apply such

[2] Paris Club, 'The Debt of Developing Countries'<www.clubdeparis.org/sections/dette-traitee-en-club/dette-des-pays-en/generalites-evolution>, accessed 22 July 2015.

[3] A Gelpern, 'Odious, Not Debt' (2007) 70 *Law & Contemporary Problems* 81, 82.

[4] JW Head, 'Evolution of the Governing Law for Loan Agreements of the World Bank and Other Multilateral Development Banks' (1996) 90 *AJIL* 214. The Paris Club negotiations and agreements (Agreed Minutes) are not legally binding and constitute recommendations to member states to make bilateral arrangements. See Paris Club, 'Legal Information' <www.clubdeparis.org/sections/notice-legale/notice-legale>, accessed 12 February 2014.

[5] J Crawford, *Brownlie's Principles of Public International Law*, 8th edition (Oxford: Oxford University Press, 2012), p. 432; A Zimmermann, 'State Succession in Other Matters Than Treaties' in R Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2013) <www.mpepil.com>, accessed 22 July 2015.

[6] England and Wales is a legal subdivision of the United Kingdom, and although the government of the United Kingdom is responsible for the England's international relations, the private and even public law of England and Wales differs in small but important ways from that of Scotland and Northern Ireland Contracts invariably specify 'English' law.

[7] *Restatement (3rd) of Foreign Relations Law of the United States* (American Law Institute, 1987) § 111. While there has been no clear curial departure from the earlier judicial authorities, there are well-considered arguments that the position is legally unsound; see CA Bradley and JL Goldsmith, 'Customary International Law as Federal Common Law: A Critique of the Modern Position' (1997) 110 *Harv L Rev* 815; cf GL Neuman, 'Sense and Nonsense about Customary International Law: A Response to Professors Bradley and Goldsmith' (1997) 66 *Fordham L Rev* 371. There are further replies to Bradley and Goldsmith's article in volume 66 of the Fordham L Rev, as well as a rejoinder by the authors of the original revisionist piece.

norms rather than constitute a source that finds automatic application if consistent with municipal (domestic) statutes.[8] In both cases, these rules of reception have been important historically for asserting state rights in respect of matters such as sovereign immunity and diplomatic immunity and rights to consular assistance for individuals.[9] I argue in chapter 4 below that the content of international law can and should inform the content of domestic public policy for use in the law of contract.

Fourth, *public* international law is relevant because sovereigns are public entities, not private persons. They have complex public law rights and duties vis-à-vis their populations, other states, and the international community as a whole. Applying the law of New York or England to a contract is often not to treat a foreign sovereign like the governments of New York, the United States or the United Kingdom. If Congress or Parliament legislated to terminate a contract for reasons resembling anything like the odious debt argument, that would in all likelihood be the end of the story. The state also normally enjoys a range of special legal protections in domestic contract or public law. This is particularly true of continental legal systems such as France, which has the notion of an 'administrative contract',[10] and Germany with its 'public law contract'.[11] It is also true, though to a lesser extent, in England and the United States. The United States, in particular, adopted Chapter 9 of the Bankruptcy Code[12] to provide special

[8] *West Rand Central Gold Mining Company, Limited v The King* [1905] 2 KB 391, 406–407; *Trendtex Trading Corpn v Central Bank of Nigeria* [1977] QB 529 (CA); Crawford, *Brownlie's Public International Law*, pp. 67–71. Despite confirming the soundness of these authorities, some reservations are expressed in *R v Jones* [2006] UKHL 16, [2007] 1 AC 136 [11] per Lord Bingham (concerned with a crime under customary international law). See generally R O'Keefe, 'The Doctrine of Incorporation Revisited' (2008) 79 *BYIL* 7. O'Keefe shows that in practice the application of the doctrine is much more restricted and nuanced than suggested by the broad proposition in *Trendtex*.

[9] See e.g. *Alcom Ltd v Republic of Colombia* [1984] AC 580, [1984] 2 All ER 6 (HL).

[10] See JB Aubry, 'Comparative Approaches to the Rise of Contract in the Public Sphere' (2007) *Public Law* 40 (for an overview of this issue in European comparative law). See also M Fromont, *Droit Administratif des États Européens* (Paris: Presses Universitaires de France, 2006), ch. 7.

[11] See Part IV VwVfG (*Verwaltungsverfahrensgesetz* – concerning public law contracts under the German law of administrative procedure). In section 60(1), invalidity is deemed to flow from any contradiction with the German Civil Code or any condition that would render any corresponding administrative act unlawful. Both Aubry, 'Comparative Approaches to the Rise of Contract', 47 and Fromont, *Droit Administratif*, pp. 313–321, refer to the German public law contract as a type of contract having a restricted application.

[12] 11 USC §§901–946.

protection for municipalities and cities after a crisis involving thousands of municipal debt defaults in the 1930s.[13] The country also provides for certain constitutional protections of the sovereign immunity of states in the Tenth and Eleventh Amendments of the US Constitution. The United Kingdom, which accepts as the baseline that state contracts are in principle subject to private law, also has some distinct rules for government contracting,[14] though commentators often claim that these are not adequate.[15]

Finally, public international law can serve a function analogous to the role played by public law and criminal law in setting limits to contracting in international transactions. I show in chapter 4 below that any contract in the law of New York or England that breaches or is for the purpose of breaching any public or criminal (and often tort) law in that jurisdiction is unenforceable. To some extent, such criminal laws (relating, for example, to corruption) will be applied abroad if the contract chooses that law to apply. But when the activity is more complex and involves foreign officials engaging in crimes against humanity or gross violations of human rights under the colour of public authority and often with the sanction of local public law, the criminal law of New York or England is often not adequate to the task of classifying the legality of such conduct. International law steps into the breach with a well-developed body of legal standards around which broad international consensus has now been achieved. It is not a tenable position that creditors should profit from the benefits of private and international law while avoiding the limitations those same bodies of law ordinarily impose on the financial transactions of private and public persons alike.

[13] See also *Ashton v Cameron County Water Improvement District*, 298 US 513, 533–34 (1936) (Cardozo, J, dissenting) (citing the 'breadth and depth' of the municipal fiscal crises). This case struck down the early precursor of the existing law. A similar law was re-enacted as the Municipal Corporation Bankruptcy Act, Pub L No. 302, 75th Cong., 1st Sess., 50 Stat. 653 (1937) and later upheld by the New Deal-era Supreme Court: in *United States v Bekins*, 304 US 27 (1938) (holding the Act constitutional under both the Fifth and the Tenth Amendments).

[14] See *The Amphitrite* [1921] 3 KB 500. Though read down in later cases, the doctrine of executive necessity is commonly incorporated into public contracts in 'termination for convenience' clauses. See N Seddon, *Government Contracts*, 4th edition (Annandale, NSW: Federation Press, 2009), chs. 4 and 5, and p. 239 in particular.

[15] See A Davies, 'English Law's Treatment of Government Contracts: The Problem of Wider Public Interests' in M Freedland and JB Aubry, *The Public Private Divide – Une Entente Assez Cordiale?* (Oxford: Hart Publishing, 2006), p. 113.

II. The Obligation to Repay Sovereign Debts

The nature of a sovereign nation's obligation to repay official debts will vary depending on the nature and continuity of the state's legal personality, the applicable body of law, and the nature of the creditor.

A. State Succession

State succession occurs when one state is replaced by another in its responsibility for the international relations of a territory.[16] This typically occurs by way of cession (e.g. Alaska) or annexation (e.g. Texas) of territory, through the dissolution of a state (e.g. Yugoslavia), unification of states (e.g. Italy, Germany), or emergence of a new state (e.g. United States, India). There has historically been an acute concern in the perennial warring between European states that the 'law of peace' should provide rules for the peaceful apportionment of responsibility for debts of ceded and annexed territories. Despite this concern, the views of arbitral tribunals, domestic courts, and experts in public international law demonstrate that there is no settled law that a successor state is liable for the debts of a predecessor state.[17] Notwithstanding this fact,

[16] Vienna Convention on Succession of States in Respect of Treaties, Vienna, 23 August 1978, in force 6 November 1996, 1946 UNTS 3, art. 2(1)(b). See also DP O'Connell, *State Succession in Municipal and International Law*, 2 vols. (Cambridge: Cambridge University Press, 1967), vol. I; Crawford, *Brownlie's Public International Law*, p. 423.

[17] Crawford, *Brownlie's Public International Law*, p. 431; M Shaw, *International Law*, 6th edition (Cambridge: Cambridge University Press, 2008), pp. 996–999; *West Rand Central Gold Mining Company v The King* [1905] 2 KB 391, [402]: ('[W]e 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.'); *Ottoman Debt Arbitration* (1925) RIAA i. 531, 573; JL Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 6th edition (Oxford: Clarendon Press, 1963), p. 159; C Rousseau, *Droit International Public*, 5 vols. (Paris: Librairie du Recueil Sirey, 1977), vol. III, pp. 426–470; *Franco-Ethiopian Railway Company Claim* (1957) ILR 24 602, 629. More recently, see *Yucyco Ltd v Republic of Slovenia*, 984 F Supp 209, 213 (SDNY 1997) (dicta claiming that the rule of repayment is far from established); see also *767 Third Ave Assoc v Consulate General of Socialist Federal Republic of Yugoslavia*, 218 F 3d 152, 158 (2d Cir 2000) (finding that international law did not support landlord's claim that the successor state automatically became liable to landlords); see also *Mortimer Off Shore Servs. v Fed. Republic of Germany*, 615 F 3d 97, 110 (2d Cir 2010) (citing *767 Third Ave Assoc*. and expressing, in *obiter*, 'misgivings' about the proposition); *The Republic of Croatia v The Republic of Serbia* [2009] EWHC 1599 (Ch) [36] ('[T]here is in my

commentators appear often to assume the existence of such a rule as their starting point.[18]

A brief excursus into the history of legal writing on the subject of public debts and state succession is nonetheless still helpful. The early 'universal theory', advocated by Grotius and Pufendorf, suggested that all debts pass with the change of sovereignty over territory.[19] This was rejected by what O'Connell grouped together as 'negative theories', which denied the existence of any legal succession of the debts.[20] Shortly after World War I, and in the wake of erratic state practice, two in-depth treatises were completed on the subject of public debts and state succession.[21] To this day, they remain the two most extensive studies of

judgment insufficient evidence to justify a conclusion that a rule as to succession to the property of a dismembered state (however sensible) has yet become a sufficiently general or consistent practice among states to qualify as customary international law for the purposes of recognition by English common law.') See generally, Committee on Aspect of the Law of State Succession, 'Final Report: Economic Aspects of State Succession' in *International Law Association Report of the Seventy Second Conference* (Toronto: International Law Association, 2006), p. 2 [hereinafter 'ILA Final Report'] ('[T]he rules of succession in respect of State debts are disputed, the practice is extremely differentiated, and the formulation of conclusions as to the possible customary nature of various rules is very difficult.'); G Acquaviva, 'The Dissolution of Yugoslavia and the Fate of Its Financial Obligations' (2002) 30 *Denver Journal of Int'l Law and Policy* 173–216 (reporting a general but very highly qualified obligation); P Williams and J Harris, 'State Succession to Debts and Assets: The Modern Law and Practice' (2001) 41 *Harvard Int'l LJ* 355 (arguing modern practice is so nuanced that a general rule of repayment would be a gross simplification). See also Zimmermann, 'State Succession in Other Matters Than Treaties', Part C.

[18] A Gelpern, 'What Iraq and Argentina Might Learn from Each Other' (2005) *Chi J Int'l L* 391; Buchheit, Gulati and Thompson, 'The Dilemma of Odious Debts'; Paulus, 'Odious Debts' vs. Debt Trap', 88–90.

[19] See E Feilchenfeld, *Public Debts and State Succession* (New York: Macmillan, 1931), pp. 25–30.

[20] O'Connell, *State Succession*, pp. 14–16; see also J Foorman and M Jehle, 'Effects of State and Government Succession on Commercial Bank Loans to Foreign Sovereign Borrowers' (1982) *U Illinois L Rev.* 9, 11–12; M Hoeflich 'Through a Glass Darkly: Reflections upon the History of the International Law of Public Debt in Connection with State Succession' (1982) *U Illinois L Rev.* 39. The leading theory was propounded by AB Keith, *The Theory of State Succession with Special Reference to English and Colonial Law* (London: Waterlow & Sons Ltd, 1907). O'Connell considered Keith an apologist for the British Foreign Office, though Hoeflich rather regarded Keith's work as a valuable and often overlooked analysis.

[21] AN Sack, *Les effets des transformations des États sur leur dettes publiques et autres obligations financières* (Paris: Recueil Sirey, 1927); Feilchenfeld, *Public Debts and State Succession*. Sack rightly called Feilchenfeld's book 'one of the most scholarly works written on any subject of international law': AN Sack, 'Book Review: Public Debts and

the subject,[22] though it seems that state practice, as noted in the authorities cited above, has not validated the general conclusions advanced by either. The first was completed by Alexander Nahum Sack, a Russian émigré to France and then to the United States, in 1927. Though Sack was to my knowledge the first writer to formulate the doctrine of odious debt in such terms, his general project was to assert the existence of a general rule of repayment. Ernst Feilchenfeld, a German working at Harvard University in the 1920s, completed his compendious volume in 1931, in which he advocated a 'rule of maintenance' based on his extensive review of state practice.[23] Though Feilchenfeld found the doctrine of odious debts to be questionable as a matter of positive international law, he did find it relevant as an equitable or justice-based consideration.[24] Yet another highly influential theory of state succession and public debt was proposed by DP O'Connell in the context of state succession more generally.[25] O'Connell acknowledged that since legal continuity is extinguished in cases of succession, there is a need for a theory other than the idea of *pacta sunt servanda*: '[t]he formal contractual relationship may have expired but the equity has not'.[26] He thus relied on equitable notions of *quantum meruit* and unjust enrichment to advance the thesis that creditors retain 'acquired rights' that enable them to claim compensation for debt obligations in cases of succession.[27]

State Succession' (1931–32) 80 *U Pa L Rev* 608–623, 623. There is no discussion in the review of their disagreement about the nature of odious debt.

[22] Another, more recent work is TH Cheng, *State Succession and Commercial Obligations* (Ardsley, NY: Transnational Publishers, 2007); S Michalowski, *Unconstitutional Regimes and the Validity of Sovereign Debt: A Legal Perspective* (Hampshire: Ashgate, 2007); and M Waibel, *Sovereign Defaults before International Courts and Tribunals* (Cambridge: Cambridge University Press, 2011).

[23] Feilchenfeld, *Public Debts and State Succession*.

[24] See J King, 'Odious Debt: The Terms of the Debate' (2007) 32 *North Carolina J of Int'l L and Comm Reg* 605, 625–627.

[25] O'Connell, *State Succession*.

[26] DP O'Connell, *International Law*, 2nd edition, 2 vols. (Stevens, 1970), vol. I, p. 381, 384 and 385 (examining standard instances of odious debt). Leading writers on modern equity have observed to me that O'Connell's usage of the term 'equity' departs significantly from how that concept is understood in contemporary usage in English law.

[27] O'Connell, *International Law*, p. 381; see also Hoeflich, 'Through a Glass Darkly', 45–47; Foorman and Jehle, 'Effects of State and Government Succession', 13. See also Crawford, *Brownlie's Public International Law*, pp. 432–433, in respect of disputed authorities regarding acquired rights to concessions. For the enduring relevance of 'acquired rights' theory, see Institut de Droit International, *Resolution on State Succession in Matters of Property and Debts* (2001) <www.idi-iil.org/idiE/resolutionsE/2001_van_01_en.PDF>, accessed 22 July 2015, article 25; J Barde, *La Notion de Droits Acquis en Droit International Public* (Paris: Publications Universitaires de Paris, 1981), p. 166.

Shortly after the publication of O'Connell's work, the International Law Commission (ILC) began its attempt to codify the law relating to state succession in matters of state property, archives and public debts.[28] The attempt proceeded on the submission of a series of reports by a Special Rapporteur, Mohammed Bedjaoui (later judge and then president of the International Court of Justice), the adoption of a draft ILC Convention with commentary, and then revisions and adoption of a final text by a conference of plenipotentiaries.[29] The UN General Assembly later adopted the Vienna Convention on Succession of States in respect of State Property, Archives and Debts (the 'Vienna Convention on Succession of States (Debts)').[30] The Convention as ultimately adopted provided rules for how debts owed to other states (although not to private creditors, to the chagrin of rich creditor states) shall pass in various categories of state succession:

- Transfer of a part of the territory of a state (previously known as cession) (article 37): by agreement or debts pass in equitable proportions;
- Newly independent states[31] (article 38): no debt passes absent agreement, and any agreement must comply with the right of peoples to sovereignty over their natural resources and shall not disturb the economic equilibria of the country;
- Uniting of states (article 39): debts of predecessors pass to successor;
- Separation of part or parts of states (e.g. secession) (article 40): absent agreement, debts pass in equitable proportions; and
- Dissolution of a state (article 41): absent agreement, debts pass in equitable proportions.

The Convention has not received enough ratifications to enter into force, and it has been regarded as 'an example of the less successful codification efforts undertaken within the United Nations'.[32]

[28] A summary of the ILC's work and links to its various reports as well as summary records of its meetings are available at <http://legal.un.org/ilc/guide/3_3.htm> accessed 22 July 2015.

[29] The proceedings are examined in detail in section III.C below.

[30] Adopted 8 April 1983, not in force, UN Doc. A/CONF. 114/14.

[31] These are defined in article 2(1)(e) as a 'dependent territory', which has a rather fixed meaning in international law and would likely exclude modern cases of secession and separation such as in the former Yugoslavia, Eritrea, East Timor, and possibly Namibia.

[32] See generally M Koskenniemi, 'The Present State of Research Carried Out by the English Speaking Section of the Centre for Studies and Research' in PM Eisemann and M Koskenniemi (eds.), *Codification: State Succession Tested against the Facts* (Martinus

It remains, however the starting point for many discussions concerning the applicable law,[33] and it is a common view that, as Malcolm Shaw notes, 'most of its provisions (apart from those concerning "newly independent states") are reflective of custom.'[34] Whatever the reasons for the refusal of states to ratify, however, it is interesting that in none of the cases apart from unification of states is there an automatic passing of the entire debt. The amounts determined in other cases are 'in equitable proportions'.[35] The Convention does not define 'equitable proportions', but it is roughly the familiar idea in state succession law that the benefits of succession in respect of property and other rights should not pass without the burdens of the debts and other liabilities.[36] It is the type of test applied, or attempted, in the most recent waves of state succession in the republics seceding from the USSR, the annexation of the German Democratic Republic by the Federal Republic of Germany, and the dissolution of the Socialist Federal Republic of Yugoslavia.[37] Reliance on §209 the Restatement, Third, on Foreign Relations Law, which finds that local debts do pass in cases of cession and secession, would be misplaced. That statement of the law appears at odds with international practice (including the US practice in the case of the Cuban loans, the war of independence from Great Britain, and the annexation of Texas) and that provision of the Restatement has also been doubted by the US Court of Appeals for the Second Circuit.[38]

Nijhoff, 1997), pp. 89, 90–96. See also O Schachter, 'State Succession: The Once and Future Law' (1993) 33 *Va J Int'l L* 253, 259 (considering it a failed attempt at codification).

[33] See e.g. Zimmermann, 'State Succession in Other Matters Than Treaties'; Institut de Droit International, *Resolution on State Succession in Matters of Property and Debts*; Williams and Harris, 'State Succession to Debts and Assets'.

[34] Shaw, *International Law*, p. 986. However, see *The Republic of Croatia v The Republic of Serbia* [2009] EWHC 1599 (Ch) [36] (rejecting this proposition for the purposes of recognition in English law); Waibel, *Sovereign Defaults*, p. 131 ('The customary status of [its] central provisions . . . is highly doubtful.')

[35] Zimmerman, 'State Succession in Other Matters Than Treaties', 11.

[36] For references to a range of early literature on this concept, see HJ Cahn, 'The Responsibility of the Successor State for War Debts' (1950) 44 *AJIL* 477, 478; see Williams and Harris, 'State Succession to Debts and Assets', 365–366; ILA Final Report 2006, 4; for a critique, see Feilchenfeld, *Public Debts and State Succession*, p. 821.

[37] Koskenniemi, 'The Present State of Research', 89; Williams and Harris, 'State Succession to Debts and Assets', 355–360; Acquaviva, 'The Dissolution of Yugoslavia', 174; ILA Final Report 2006, 3.1; Institut de Droit International, *Resolution on State Succession in Matters of Property and Debts* (2001) arts. 9, 11, 22–29; Cheng, *State Succession and Commercial Obligation*, pp. 138, 292–297.

[38] *Mortimer Off Shore Servs. v Fed. Republic of Germany*, 615 F 3d 97, 110 (2d Cir 2010).

Whether odious debts pass in the process of 'equitable determination' foreseen under the Vienna Convention remains an open question for some, but for most experts who have examined the question against the backdrop of recent state practice, 'there is general agreement in practice, confirmed unanimously by international legal writing, that so-called odious debts (i.e. debts of the State which do not relate to any interest of the population of the territory, or incurred in pursuit of illegal aims, like war) are not subject to succession.'[39] This claim to unanimity is and was an exaggeration, but it certainly suggests much wider acceptance of the doctrine than many commentators suppose.[40] The obvious explanation is that the idea that odious debts are not subject to succession is a much less exotic sounding claim once one realises how uncertain the legal status is of *any* rule of repayment in the law of state succession.

B. *Change of Government*

The legal position of the rule of repayment concerning changes of government rather than state succession appears at first sight to be much more settled in favour of continuity. As the eminent writer John

[39] ILA Final Report 2006, 2; that Committee's general position was adopted in Resolution No.3/2008 at the 73rd Conference of the International Law Association, held in Rio de Janeiro, Brazil, 17–21 August 2008 (see: <resolution_3_aspects_of_the_law_of_state_-succession.pdf>, accessed 4 August 2015; Williams and Harris, 'State Succession to Debts and Assets', 408: ('In rare cases, the identifiable debt . . . may even belong to the category of odious debt, for which the successor state should not be liable.'); Acquaviva, 'The Dissolution of Yugoslavia', 188 ('The general principle – universally accepted – is that of avoiding the necessity of payment of these kind of [odious debt] obligations by the successor state, although the real problem usually lies in ascertaining whether a specific debt falls in this category.'); Zimmermann, 'State Succession in Other Matters Than Treaties', 20: 'Traditionally, so-called odious debts, i.e. debts which have been accrued in relation to an armed conflict . . . or which are otherwise attached to the respective political regime of the predecessor State in a way that would even make their partial succession unacceptable to the respective successor State, were considered, . . ., not to be subject to succession. This approach was confirmed by both the *travaux préparatoires* within the ILC and the discussion during the 1983 diplomatic conference leading to the adoption of the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts. There are no indications that recent State practice has altered that rule so far.' An opposing view is taken in H Beemelmans, 'State Succession in International Law: Remarks on Theory and State Praxis' (1997) 15 *BU Int'l L J* 71, 115. However, Beemelmans' assessment of the situation vis-à-vis the absorption of the German Democratic Republic by the Federal Republic of Germany conflicts with the more detailed account in the ILA Final Report 2006, at 7.

[40] Gelpern, 'What Iraq and Argentina Might Learn', 404, is a notable exception (calling the law 'murky').

Bassett Moore found '[c]hanges in the government or internal policy of the state do not as a rule affect its position in international law ... though the government changes, the nation remains, with rights and obligations unimpaired'.[41] This position was affirmed in the *Tinoco Arbitration* where the arbitrator found that the unconstitutional means by which Federico Tinoco came to power in Costa Rica in 1917 did not affect his de facto authority to bind the country in law.[42] International legal opinion, including the opinion of Sack, was and still is practically unified on this point.[43] Of course, the *Tinoco* case also found that the bank in that case could not recover for loans that it knew were not for public use – but this is much less widely acknowledged, if acknowledged at all.[44]

The principle of *pacta sunt servanda* is both a general principle of law[45] and central rule in the law of treaties.[46] As a general principle of law, *pacta sunt servanda* arguably 'embodies an elementary and universally agreed principle fundamental to all legal systems'.[47] Of course, it is clearly *not* the case that there is a general principle of law that national legislatures cannot legislate the termination of contracts. The 1969 Vienna Convention on the Law of Treaties codifies the customary rule as it

[41] JB Moore, *Digest of International Law*, 8 vols. (Washington, DC: Government Printing Office, 1906), vol. I, p. 249. See also *Restatement (3rd) of Foreign Relations Law*, § 208, reporter's note 2.

[42] *Tinoco Arbitration (Great Britain v Costa Rica)* (1923) 1 RIAA 369, reprinted in (1924) 18 *AJIL* 147, 149–154. The facts and other holding in the case are discussed at length in chapter 3, section IV.C.2 below.

[43] Sack, *Les effets des transformations des États*, p. 46, citing authority from Grotius, de Vattel, Calvo, Politis, Fauchille, Wheaton and Bayard. Contemporary opinion is still fairly united on this point: see ILA Final Report 2006, 14.

[44] *Tinoco Arbitration*, *AJIL*, 163–174. The point at one time seemed lost even on James Crawford: see 'Democracy and the Body of International Law' in GH Fox and BR Roth (eds.), *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2000), pp. 91, 97 (where he concludes that the Tinoco loans were upheld as valid). Others make a different mistake by considering it a one-off arbitration that cannot leverage important principles: Buchheit and Gulati, 'Odious Debt and Nation Building', 482 (referring to it as 'a single arbitral award of [old, obscure] vintage'). International lawyers familiar with both aspects of the case give it weight for both propositions: Zimmermann, 'State Succession in Other Matters Than Treaties', 20.

[45] Statute of the International Court of Justice (adopted with the UN Charter 26 June 1945, entered into force 24 October 1945) TS 993 (ICJ Statute) article 38 (c).

[46] Vienna Convention on the Law of Treaties, Vienna, 22 May 1969, in force 27 January 1980, 1155 UNTS 331(VCLT 1969) article 26.

[47] A Aust, 'Pacta Sunt Servanda' in R Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2013) <www.mpepil.com>, accessed 22 July 2015.

specifically relates to international agreements between states.[48] Article 26 of that Convention describes *pacta sunt servanda* as the rule that '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'. Article 26 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations mirrors this provision, while, as its title suggests, extending its application to agreements with or between international organisation.[49] The 1986 Convention is not, however, yet in force.[50] It remains arguable that the rule of *pacta sunt servanda* as expressed in article 26 of the 1986 Convention is anyway merely a codification of a rule of customary international law. Certainly, at the final conference considering the draft articles adopted by the ILC at its 34th session, the provision was considered beyond contention, '[constituting] a definition of the very essence of treaties'.[51] It is of course also necessary that customary international law '[recognizes] that international organizations are genuine parties to legal instruments which are genuine treaties, even if some differences exist between their participation and that of States'.[52]

Applying these principles, it looks like loan agreements *between subjects of international law* may be international agreements. However, even this has been called into question. The US Restatement (3rd) on the Law of Foreign Relations, for instance, which defines 'international agreement' in almost identical terms as an early provisional draft definition of 'treaty' of the ILC,[53] states unequivocally that '[a]n international agreement, as defined, does not include a contract by a state, even with another state, that is essentially commercial in character and is intended to be governed by some national or other body of contract law. Examples include a loan agreement, a lease of a building, or a sale of

[48] See Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations, 20 March 1986, not yet in force, UN Doc. A/CONF.129/15 (VCLTSIO 1986) article 26.

[49] Ibid., articles 1 and 2.

[50] Article 85 of the Convention requires ratification by thirty-five states. There are currently (at 13 February 2014) forty-two parties, but only thirty of these are states. Pursuant to article 85, international organisations party to the treaty are not counted for entry into force purposes.

[51] 'Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations', 18 February – 21 March 1986 UN Doc A/CONF.129/16 vol. II, 23.

[52] Ibid.

[53] Cf Yearbook of the International Law Commission (1962) ii.161 (cited in Crawford, *Brownlie's Public International Law*, p. 369).

goods.'[54] Certainly, the modern trend of separating commercial relationships from official public acts would suggest that contractual arrangements and treaties are markedly different in character.

However, assuming for the sake of argument that loan agreements between states and agreements between states and international organisations are likely to be protected by the principle of *pacta sunt servanda*, the question of their bindingness does not end there. It is settled law that even a treaty that conflicts with a *jus cogens* norm is void, and as I show below, the most controversial type of odious debt (subjugation debts) is now best understood in terms of breaches of *jus cogens* and other similarly fundamental norms.

More interesting is the position concerning state agreements with private persons (e.g. banks and bondholders). 'The widely accepted principle ... under general international law' an International Centre for the Settlement of Investment Disputes (ICSID) tribunal has found, '[is that] a violation of a contract entered into by a State with an investor of another State, is not, by itself, a violation of international law.'[55] The general position is that a state has the lawful authority in international law to terminate a contract at any time.[56] On this view, a contract between a private citizen or company and a state is *not* an international agreement. So the international law principle of *pacta sunt servanda* simply does not apply.[57]

Of course, this does not mean that states can merely walk away. As Michael Waibel explains, 'sovereign bonds cannot be repudiated without giving rise to a breach of international law.'[58] The matter is generally regarded as falling within the law relating to expropriation.[59] States enjoy certain rights in respect of how their nationals are treated by

[54] *Restatement (3rd) of Foreign Relations Law*, § 301 (Comment d).

[55] *Société Générale de Surveillance S.S. v Pakistan*, ICSID Case No. ARB/01/13, Objections to Jurisdiction, (6 August 2003), 18 ICSID Rev 301 (2003), 8 ICSID Rep. 406 (2005), 42 ILM 1290 (2003), [167].

[56] Crawford, *Brownlie's Public International Law*, pp. 627–629 (citing extensive authority). On p. 628, he also finds that 'there is little evidence that the "internationalized contract" idea corresponds to the existing law. Rather, some element is required, beyond the mere breach of contract, to constitute a confiscatory taking or denial of justice *stricto sensu*.'

[57] As noted also by R Howse, 'The Concept of Odious Debt in International Law' (2007) 185 *United Nations Conference on Trade and Development: Discussion Papers* <www.unctad.org/en/docs/osgdp20074_en.pdf>, accessed 22 July 2015, 4.

[58] Waibel, *Sovereign Defaults*, p. 287.

[59] Crawford, *Brownlie's Public International Law*, pp. 627–628. See WM Reisman and RD Sloane, 'Indirect Expropriation and Its Valuation in the BIT Generation' (2004) 74 *BYIL* 115 (for an overview of state activity that may be deemed expropriation). Waibel,

governments in foreign states. Expropriation of the national's property may give the national's state the right to seek compensation under international law. That is why historically disputes between foreign bondholders and states were in practice taken by the state on behalf of the bondholder.[60] In the United Kingdom, the traditional practice has been that any compensation obtained in such arbitration was only handed over to the national on an ex gratia basis. In contemporary practice, bilateral investment treaties are often concluded in order to give private investors their own standing to bring investment disputes relating to foreign states to international arbitration, ordinarily through the ICSID. Michael Waibel argues convincingly that to commence sovereign bond litigation through international arbitration, something for the most part resisted thus far, would be to open a Pandora's box.[61]

As to the law relating to expropriation, the general rule is that such expropriation must be non-discriminatory and accompanied by prompt, adequate and effective compensation, which typically means fair market value.[62] The historical legal basis for this rule is said to be related to the principle of 'acquired rights', respect for property rights, and notions of unjust enrichment and the abuse of rights.[63] That is, the basis for the

Sovereign Defaults, ch. 12, surveys four alternative theories, none of which sound in contract.

[60] In the *Tinoco Arbitration* Great Britain represented the Royal Bank of Canada, and in the *Case of Certain Norwegian Loans* France represented certain French bondholders.

[61] M Waibel, 'Opening Pandora's Box: Sovereign Bonds in International Arbitration' (2007) 101 *AJIL* 711. See the same author's *Sovereign Defaults* for a comprehensive and superb treatment of this issue. Investment arbitration case law has nevertheless crept unevenly towards finding that bonds are 'investment' for the purposes of BITs. See *Abaclat and others (case formerly known as Giovanna A Beccara and others) v Argentine Republic* (ICSID Case No ARB/07/05), Award, 4 August 2011 at 326 (finding that bonds qualified as investment under article 1(c) of Italy-Argentina BIT); *Ambiente Ufficio S.P.A. and others (case formerly known as Giordano Alpi and others) v Argentine Republic* (ICSID Case No ARB/08/9) Award, 8 February 2013 at 495 (holding that bonds fell within the scope of investments for the purposes of article 1(c) Italy-Argentina BIT); *Giovanni Alemanni and others v Argentine Republic* (ICSID Case No ARB/07/8) Award, 17 November 2014 at 296 (holding that bonds fell within the scope of investments for the purposes of article 1(c) Italy-Argentina BIT). But see *Poštová banka, a.s. and ISTROKAPITAL SE v Hellenic Republic* (ICSID Case No ARB/13/8) Award, 9 April 2015 at 246 (finding that bonds did not amount to a protected investment under article 1(1) of the Slovakia-Greece BIT).

[62] I Marboe, *Calculation of Compensation and Damages in International Investment Law* (Oxford: Oxford University Press, 2009), ch. 3.

[63] I Brownlie, *Public International Law*, 7th edition (Oxford: Oxford University Press, 2008), p. 534. James Crawford's 8th edition removes the reference to the particular legal categories but it is unclear whether the change is meant to be substantive. This

claim lies in extra-contractual principles that have come to be accepted in general international law. However, such principles if anything raise considerable problems for odious creditors, for they raise difficult questions about whether the state was 'enriched' (not so in kleptocracies), whether any purported enrichment was 'unjustified' (an area of considerable ambiguity in international law), and at any rate domestic law principles of unjust enrichment recognise a defence whereby the illegal or immoral conduct of the claimant will deprive it of any assistance from the law. The potential problems with using unjust enrichment as the basis for claims of compensation for expropriation has led some leading commentators to doubt its relevance in justifying a rule requiring compensation for expropriation.[64] Nevertheless, they do recognise that compensation for expropriation has taken on the status of a customary norm of international law.[65] At any rate, even where a state or a private creditor exercises legal standing to bring a claim, issues such as the appropriate level of compensation (in view of secondary markets for debt), whether a rescheduling amounts to expropriation, the timeline for payment of any compensation and the role of motivations for the repudiation are all areas of considerable dispute and uncertainty in international law.[66] Waibel makes clear that in such circumstances 'the quantum due on sovereign debt will generally be only partial compensation' and that 'appropriate compensation could lie substantially below the debt's face value'.[67]

C. *Domestic Law of Another State*

The degree of uncertainty in international law for the protection of private creditors has meant that the most common practice for private creditors is to incorporate a choice of law clause in the bond indenture or loan

historical role is detailed in A Ruzza, 'Expropriation and Nationalization' in R Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2013) <www.mpepil.com> accessed 22 July 2015 at [3], [21].

[64] M Sornarajah, *The International Law on Foreign Investment*, 3rd edition (Cambridge: Cambridge University Press, 2010), pp. 418–419; C Binder and C Schreuer, 'Unjust Enrichment' in R Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2013) <www.mpepil.com>, accessed 22 July 2015 [16] (citing jurisprudence of the Iran–US Claims Tribunal rejecting the theory for application to cases of lawful expropriation).

[65] Sornarajah, *International Law on Foreign Investment*, pp. 32, 89; Ruzza 'Expropriation and Nationalisation', [6].

[66] Waibel, 'Opening Pandora's Box', 742–747.

[67] Waibel, *Sovereign Defaults*, p. 287 and ch. 13 generally.

agreement and also include a waiver of sovereign immunity and submission to local jurisdiction. English and New York laws generally enjoy a dominant position as the choice of law and jurisdictions in international financial contracts, and the reason may be due to both the tradition of judicial reluctance to impose notions of commercial fairness upon the parties and the range of procedural protections afforded to creditors.[68]

While these developments resolved questions about applicable law, the problem of whether the court could take jurisdiction over a sovereign nation remained. Historically, the common law courts of the United Kingdom and the United States declined jurisdiction over foreign sovereigns under the act of state doctrine.[69] In the *Sabbatinno* case, the US Supreme Court overturned a ruling by a lower court that found that a Cuban expropriation in violation of international law was actionable in US courts.[70] A saga followed, however, and Congress passed the Second Hickenlooper Amendment in 1964 (to reverse the effects of *Sabbatinno*) and ultimately the Foreign Sovereign Immunities Act (FSIA) in 1976,[71] which governs the present position in US law. The FSIA, though affirming the general principle of immunity, nonetheless adopted the international law theory of restrictive sovereign immunity, and it gave jurisdiction to national courts over disputes with sovereigns over matters relating to 'commercial activity'.[72] In 1992, the Supreme Court held in *Republic of Argentina v Weltover*[73] that the issuance of bonds for public debt was a 'commercial activity' falling within the exceptions to the general rule of sovereign immunity from jurisdiction. The United Kingdom's State Immunity Act 1978 is similar, though it specifies on its face that a 'loan or other transaction for the provision of finance' is a 'commercial transaction' within the meaning of the Act[74] and that

[68] PR Wood, *Conflicts of Law and International Finance*, 2nd edition (Sweet & Maxwell, 2007), ss 2.004–2.006. See also LC Buchheit and G M Gulati, 'Exit Consents in Sovereign Bond Exchanges' (2000) 48 *UCLA L Rev* 59, 59. Waibel, *Sovereign Defaults*, p. 252, adds Paris, Frankfurt and Zurich to the list.

[69] See chapter 4 for a discussion.

[70] *Banco Nacional de Cuba v Sabbatino*, 376 US 398 (1964).

[71] 28 USC §1602 ff. To compare these developments, see I Achebe, 'The Act of State Doctrine and the Foreign Sovereign Immunities Act of 1976: Can They Co-exist?' (1989) 13 *Maryland J of Int'l L* 247.

[72] FSIA 28 USC §1605(a)(2)). See *Restatement (3rd) of Foreign Relations Law*, ch. 5 (§§ 451–463) for a relevant discussion; compare Brownlie, *Public International Law*, ch. 16; and Crawford, *Brownlie's Public International Law*, ch. 22.

[73] *Republic of Argentina v Weltover, Inc.*, 504 US 607 (1992); now see *Argentina v NML Capital Ltd*. 573 US __ (2014).

[74] Section 3(3)(b) State Immunity Act 1978.

therefore the general principle of state immunity does not apply. These are basically in step with the evolution of international and comparative law on the question of state immunity.[75]

There has in practice always been a difference between the immunity of states from the jurisdiction of foreign courts, and their immunity from execution of any judgments against state assets. The latter immunity has tended to be stronger and more widely recognised, often depriving judgment creditors of a meaningful way to execute their judgment. For instance, the ICSID Convention is clear that submission to the jurisdiction of ICSID arbitration is not a waiver of sovereign immunity in respect of execution.[76] The matter is left to be regulated by the law of individual states. The US and UK statutes both address the issue. Both affirm the general principle of immunity, but provide for exceptions to it. The FSIA provides that judgment creditors can execute against state property provided it is related to commercial activity and that certain other conditions are met.[77] The position in the United Kingdom is in most senses similar,[78] but in other ways more creditor-friendly still. Section 13(4) of the State Immunity Act 1978 affirms that state immunity will not shield property in use for commercial purposes, but in section 13(3) also that a state can validly waive its immunity from execution against even assets dedicated for public use.[79] It means that any state

[75] United Nations Convention on the Jurisdictional Immunities of States and Their Property, New York, 2 December 2004, not in force, G.A. Res. 59/38, Annex, U.N. Doc. A/RES/59/38; PT Stoll, 'State Immunity' in R Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2013) <www.mpepil.com> accessed 22 July 2015. For the position in French and German law, see note 82 below.

[76] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, adopted 18 March 1965, in force 14 October 1966, 575 UNTS 159 (ICSID Convention) article 55.

[77] FSIA, 28 USC §§1610–1611; see also *Restatement (3rd) of the Foreign Relations Law*, § 460. On the extent to which discovery may be ordered in connection with execution against state assets, see *Argentina v NML Capital Ltd* (finding that sovereign immunity under the FSIA does not preclude a creditor obtaining a discovery order against third parties who hold information about the location of the sovereign judgment debtor's extraterritorial assets).

[78] *Alcom Ltd v Republic of Colombia* [1984] AC 580; applied in *Orascom Telecom Holding SAE v Chad* [2008] EWHC 1841 (Comm) (declining immunity from execution). See also *NML Capital Ltd v Republic of Argentina* [2011] UKSC 31 (finding that the execution of a foreign judgment on sovereign debt was a proceeding relating to a commercial transaction and, separately, finding unanimously that the waiver against execution was valid in UK law as well); and *SerVaas Incorporated v Rafidian Bank* [2012] UKSC 40 (on whether assets are for commercial purposes).

[79] Section 13(3): 'Subsection (2) above does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent

property (apart from diplomatic premises), including central bank deposits and day-to-day bank accounts for embassies and consulates, normally immune, may be realised against by creditors.[80] Such waivers are in fact common. Philip Wood provides a standard example:

> The State irrevocably waives all immunity to which it may be or become entitled in relation to this agreement including immunity from jurisdiction, enforcement, prejudgement proceedings, injunctions and all other legal proceedings and relief, both in respect of itself and its assets, and consents to such proceedings and relief.[81]

This type of clause, in combination with the statutory sovereign immunity schemes, therefore has the effect of giving creditors incredibly far-reaching powers under the law of the United Kingdom to realise against assets, and only slightly less extensive powers in the United States. Both France and Germany follow the restrictive immunity approach as well.[82]

Notwithstanding these legislative protections, commentators frequently make remarks such as 'enforcement success stories against State assets are still the exception rather than the rule'.[83] So the reality is that, notwithstanding the legal protections, bondholder opportunities for full recovery are somewhat limited.

(which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.'

[80] Section 14(4) State Immunity Act 1978 (central bank immunity); *Alcom* [1984], in respect of diplomatic bank accounts. On the scope of waiver, see L Collins et al (eds), *Dicey, Morris, and Collins on the Conflict of Laws*, 15th edition (Sweet & Maxwell, 2012) [10-014ff].

[81] Reproduced as a standard clause in PR Wood, *International Loans, Bonds, Guarantees and Legal Opinions*, 2nd edition (Sweet & Maxwell, 2007), [7-051].

[82] On France, see JW Dellapenna, *Suing Foreign Governments and Their Corporations*, 2nd edition (Ardsley, NY: Transnational Publishers, 2002) 9; *Eurodif v Islamic Republic of Iran* (1984) 23 ILM 1062, decided by Cour de Cassation on 14 March 1984; *SOABI v State of Senegal*, Revue de l'Arbitrage 1990, pp. 164–167; *Sonatrach v Migeon* (1987) 26 ILM 998. On Germany, see Law on the Constitution of Courts (*Gerichtsverfassungsgesetz*) s20; *Republic of Iraq v GJV*, decided by the Oberlandesgericht (Court of Appeal) of Frankfurt on 1 October 1998; *Philippines Embassy*, decided by the Federal Constitutional Court on 13 December 1977, BVerfGe 46, 342; Dellapenna, *Suing Foreign Governments*, pp. 13–14.

[83] W Mark C Weidemaier, 'Sovereign Immunity and Sovereign Debt' (2014) *U Illinois L Rev* 67; N Blackaby, C Partasides, A Redfern and M Hunter, *Redfern and Hunter on International Arbitration*, 5th edition (Oxford: Oxford University Press, 2009), s11.150. As noted in chapter 1, however, the decisions interpreting the effects of the pari passu clause in the Argentinian litigation may create a seismic shift because it may allow creditors to garnish debtor state payments to other creditors.

An understanding of this legal position now sheds light on a few important issues. First, it is now clear why the doctrine of odious debt itself appears to have little relation to contemporary international financial legal practice. It was historically an international law doctrine, and today's contracts are governed by national law and are subject to domestic jurisdiction. While the international law relating to sovereign immunity played a very important role in the twentieth century, recent changes in international law and especially the domestic law of the United States and the United Kingdom have dispensed with traditional protections. The consolidation of these new legal avenues against sovereign debtors is a fairly recent development, however. The ultimate effect of the modern position has been to treat foreign sovereigns like private parties subject to local private law without much regard for the public laws that control local public authority activity within those same jurisdictions, nor for international public and criminal law applicable to all sovereigns everywhere. One way to rebalance that position is to take seriously the law that has been set out in chapters 3 and 4 below.

III. Odious Debt: A Brief Introduction

Since the doctrine has been treated by a number of authors and invoked in a variety of situations, it is helpful to survey earlier treatments and restate the doctrine with some analytical precision. Accordingly, this section traces the legal history of the doctrine, reviews the definitions given by three influential legal scholars and canvasses two commonly accepted and two newly proposed types of odious debt.

A. A Brief Legal History of the Doctrine

Prior to the turn of the century, it was considered settled law by some commentators that debts contracted by one state to repel the invading forces of another were 'war debts' and not repayable by the conquering state. Otherwise, it was thought, the winning state would bankroll opposition to itself. Mexico repudiated certain debts in the 1860s and 1880s on the grounds that they were subjugation debts contracted by irregular and illegitimate governments. Yet again in 1898, the United States refused to recognise debts contracted by Spain and charged to Cuba for the suppression of Cuban independence. After similar debt-legitimacy principles were applied by the Allies in 1919 to Germany's debts relating to the

colonisation of Poland, it became necessary to develop a more sophisticated analysis of the law.

In seeking to assert that, contrary to Anglo-American opinion at the time, there *was* a rule of repayment, a number of scholars needed an account of state succession in respect of public debts that addressed the variances of state practice. Sack borrowed from Gaston Jèze's notion of regime debts, asserting the doctrine of odious debt as a principle of law.[84] Feilchenfeld was more cautious and considered it to be a consideration of equity and morality.[85] Despite viewing it in this way, Feilchenfeld nonetheless elaborated important aspects of the doctrine in detail, indeed, in much more detail than Sack. This was largely because such considerations were at the time likely to shape state practice, which stubbornly refused to adhere to any strict rule of maintenance (i.e. that successor states took responsibility for their predecessor's debts) as advocated by Feilchenfeld. In the United States, Charles Cheney Hyde, the leading American commentator of his day and highly indebted to both Sack and Feilchenfeld, was categorical in his view of the necessity of public benefit for public debts to be apportioned in cases of cession:

> [T]erritory, if occupied by human beings, is not, like a mere chattel, to be subjected to such fiscal or other use as may suit the convenience or caprice of the existing governmental authority. On principle the resources of that territory should not be regarded as capable of complete hypothecation save under conditions which do not appear to be essentially adverse to the welfare of the occupants.[86]

Hyde did not use the term 'odious debt', though his criteria are even more onerous for creditors. His views pertained, however, only to cases of cession and dissolution of a state, where the legal personality of the original borrower remains intact.[87] Hyde, along with Sack and Feilchenfeld took a different view on cases of total absorption.[88] Thus when the Allies refused to apportion Polish debts, creditors could turn to Germany. When the Americans refused to countenance Spanish debts over Cuba, creditors could turn to Spain. Where, however, the original debtor ceased to exist

[84] G Jèze, *Cours de science des finances et de legislation financière française*, 6th edition (Paris: Marcel Giard, 1922), pp. 302–305; see also G Jèze, *La partage des dettes publiques au cas de démembrement de territoire*, 5th edition (Marcel Giard, 1921).

[85] See King, 'Odious Debt: The Terms of the Debate', pp. 625–627, for a discussion.

[86] CC Hyde, *International Law, Chiefly as Interpreted and Applied by the United States: Vol 1*, 3 vols. (Boston: Little Brown & Co, 1947), p. 412, §126. This passage appears immediately after Hyde's discussion of the American position in the Cuban loans case.

[87] On dissolution, see Hyde, *International Law*, p. 420. [88] Ibid., p. 417.

altogether, as with the state of Texas, or the British annexation of the Boer republics, a somewhat different position was taken (though in both cases the powers refused to take on all those debts too).[89]

In other cases, notably the *Tinoco Arbitration*,[90] a debt was found unenforceable on account of it knowingly being made by the bank for the personal and not public use of the head of state. The doctrine was raised by name on occasion by international lawyers after the World War II, and was discussed briefly in Daniel Patrick O'Connell's leading study on state succession, as well as his general treatise on international law.[91] In 1977 and again in the early 1980s, the doctrine was considered and debated by a range of state representatives during the drafting of the Vienna Convention on Succession of States (Debts), an experience I shortly turn to explaining. In the context of that Convention, the doctrine's status remained uncertain for some, while affirmed for others (see section III.C below). After sporadic attention in the 1980s,[92] the doctrine experienced a revival after the fall of the Apartheid government in South Africa, when the Truth and Reconciliation Commission recommended cancelling certain odious debts,[93] though this recommendation was not followed. This momentum was sustained by a number of civil society groups campaigning internationally for debt relief on the grounds of necessity as well as odious character.[94] Just as the doctrine regained academic interest in the new millennium,[95] members of the Bush administration and certain periodicals called for its application to Iraq in 2003, attracting broader academic and public interest as noted in the introduction to this book. Some indication of the importance of the doctrine is given by the publication by the UN Conference on Trade and Development in 2007 of a paper by the noted public international law

[89] For Texas, see A Khalfan, J King and B Thomas, 'Advancing the Odious Debt Doctrine' (2003) CISDL Working Paper COM/RES/ESJ <www.cisdl.org/public/docs/pdf/Odious_Debt_Study.pdf>, accessed 22 July 2015, 22; and for the Boer debts, see chapter 3, section I.A below.

[90] See chapter 3, section IV.C below.

[91] O'Connell, *State Succession*; O'Connell, *International Law*.

[92] Hoeflich, 'Through a Glass Darkly'; Foorman and Jehle, 'Effects of State and Government Succession'; G Frankenberg and R Knieper, 'Legal Problems of the Overindebtedness of Developing Countries: The Current Relevance of the Doctrine of Odious Debts' (1984) 12 *Int'l J of the Sociology of Law* 415.

[93] South African Truth and Reconciliation Commission, 'Final Report of the South African Truth and Reconciliation Commission' (29 October 1998).

[94] Most notably the work of Patricia Adams (e.g. *Odious Debts*; 'Iraq's Odious Debts'). The Jubilee Debt Campaign was also quite active at promoting the idea.

[95] Above, note 1.

scholar, Robert Howse, which found substantial support for the existence of the legal principle and did not consider any practical objection to its application to be insurmountable. The World Bank published a paper by two economists the following year, which, though even-handed, was much more critical of both its legal foundations and its practicality.[96] The fact that Howse is cautiously optimistic about the status of the doctrine, and that he is without doubt a highly qualified publicist in the field of the law of nations, seems at present to have done little to influence the sceptics, who continue to claim that there is meagre evidence of the doctrine's existence.[97] The present book may be regarded as for the most part consistent with Howse's working paper, and in some cases quite supportive of ideas stated briefly therein. Nonetheless, this book presents a more legalistic account, a different scheme of categorisation, a more specific and perhaps higher threshold for subjugation and more thorough study of the sources.

B. *Definitions of Odious Debt*

The very idea of what constitutes an odious debt is to some extent shifting territory, as is any legal concept that survives for over one hundred years. A survey of the key definitions offered will help approach the task freshly.

1. Sack, Bedjaoui and the 'three criteria' approach[98]

Sack appears to have been the first to posit the existence of a doctrine of odious debt in such terms. He drew upon the public finance theory and international legal work of French legal scholar, Gaston Jèze, who had developed the concept of 'regime debts', as 'debts contracted in peace-time, but specially for the purpose of subjugating the liberated

[96] Howse, 'The Concept of Odious Debt in International Law'; V Nehru and M Thomas, 'The Concept of Odious Debt: Some Considerations' (22 May 2008) *World Bank Economic Policy and Debt Department Policy Paper*, <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-4676>, accessed 22 July 2015. The World Bank paper has value on several levels, but in my view is not authoritative or persuasive on legal questions. For further critique, see S Michalowski and JP Bohoslavsky, 'Ius Cogens, Transitional Justice and Other Trends of the Debate on Odious Debts: A Response to the World Bank Discussion Paper on Odious Debts' (2009–2010) 48 *Colum J Transnat'l L*, 59.

[97] The situation is comparable to the lack of attention to the fact that Mohammed Bedjaoui, the doctrine's other modern expositor, would later become the president of the International Court of Justice.

[98] For a more detailed analysis of the approaches of Sack, Bedjaoui and Feilchenfeld, see King, 'Odious Debt: The Terms of the Debate', pp. 623–630.

territory'.[99] Building upon this concept as well as on Jèze's ideas more generally, and state practice with respect to Cuba, the United States, Poland and Mexico, Sack introduced a three-part typology of debts that are odious. The first was debts odious for the population of the entire state;[100] the second was debts odious to the population of part of a state;[101] and the third was debts odious to a new 'supreme' power.[102] The first was concerned with cases of annexation and changes of political regimes, the second with cession of territory, and the third with war debts. His definition of 'debts odious for the population of an entire state' is widely regarded as the most comprehensive definition of odious debt generally:

> When a *despotic regime* contracts a debt, not *for the needs or in the interests of the state*, but rather to strengthen itself, to suppress a popular insurrection, etc, this debt is odious for the population of the entire state. This debt does not bind the nation; it is a debt of the regime, a *personal debt* contracted by the power that contracted it, and consequently it falls with the demise of that power. The reason why these 'odious' debts cannot be considered to burden the territory of the state is that they do not fulfil *one of the conditions* determining the *regularity* of State debts, namely that *State debts must be incurred, and the proceeds used, for the needs and in the interests of the state.*
>
> Odious debts, contracted and utilised, for purposes which, *to the lenders' knowledge*, are contrary to the needs and the interests of the nation, are not binding on it – when it succeeds in overthrowing the government that contracted them – *unless the debt is within the limits of real advantages that these debts might have afforded.* The lenders have committed a hostile act against the people; they cannot expect a nation, which has freed itself of a despotic regime, to assume these odious debts, which are the personal debts of the ruler. Even if one despotic regime is overthrown by another, which is as despotic and which does not follow the will of the people, the odious debts contracted by the fallen regime remain personal debts and are not binding on the new regime.[103] (emphasis in original)

This definition has been interpreted subsequently as comprising three constituent elements: absence of consent, absence of benefit, and creditor

[99] Jèze, *Cours de science des finances*, pp. 302–305, translation of M Bedjaoui, *Ninth Report on Succession of States in Respect of Matters Other Than Treaties*, UN Doc A/CN 4/301 & Add 1, reprinted [1977] 2 *YB Int'l L Comm'n* Part I, 45, 67.

[100] Sack, *Les effets des transformations des États*, pp. 157–158. [101] Ibid., pp. 158–165.

[102] Ibid., pp. 165–182 ('Dettes odieuses pour le nouveau pouvoir suprême. Dettes de Guerre').

[103] Sack, *Les effets des transformations des États*, p. 157. The translation is from Patricia Adams, 'Iraq's Odious Debts', pp. 3–4, though slightly modified in detail by the present author after re-comparison with the French original.

awareness of both. As noted in chapter 3, he also believed there was a duty to have the claim arbitrated. He also expressly included debts that were for manifestly personal interests of members of government or persons or groups linked to government, as well as war debts.[104] The notion that proceeds for a state debt must be incurred and spent in the interests of the state is borrowed from Jèze,[105] who argued that '[s]atisfaction of a public need in civilised nations is an essential element [of valid public expenses]'.[106] Sack's further support and rationale for this claim[107] was a view already settled in US constitutional doctrine for several years – that public taxes could be raised and debts assumed only for public purposes.[108] Sack's articulation of the odious debt doctrine has been recognised by other legal writers, notably O'Connell,[109] Frankenberg and Kneiper,[110] as well as by a number of more recent authors.[111] More recent scholarship has criticised both Sack's writings and integrity as a scholar, though in my view the work is of high scholarly quality.[112]

It is of notable interest that Mohammed Bedjaoui, far from being an obscure legal authority,[113] did not refer at all to Sack's formulation of the doctrine in his submission to the ILC, as special rapporteur, of draft articles on odious debt for consideration in the Draft Vienna Convention on the Succession of States (Debts).[114] As Bedjaoui's mandate concerned

[104] Sack, *Les effets des transformations des États*, p. 158 (citing the case of the Southern States).

[105] Ibid., pp. 25–30.

[106] Cited in Sack, *Les effets des transformations des États*, pp. 25–26 (my translation).

[107] Sack, *Les effets des transformations des États*, pp. 25–26.

[108] *Cole v City of La Grange*, 113 US 1 (1885) (finding that bonds issued to a private company, formed strictly for private gain and having no public purpose, would not be for a public purpose); *Green v Frazier*, 253 US 233 (1920) (regarding taxes).

[109] O'Connell, *State Succession*, pp. 458–461.

[110] Frankenberg and Knieper, 'Legal Problems'.

[111] King, 'The Odious Debt Doctrine'; Gelpern, 'What Iraq and Argentina Might Learn', pp. 403–404; Buchheit, Gulati and Thompson, 'The Dilemma of Odious Debts'; Howse, 'The Concept of Odious Debt', 2.

[112] Ludington and Gulati, 'A Convenient Untruth'. Having examined Sack's book as a whole, my view is that there is a very valuable examination and penetrating analysis of a broad range of state practice in the work. Charles Cheney Hyde certainly agreed. In his *International Law*, p. 409, fn 10, he observes of Feilchenfeld and Sack both: 'To the researches and expositions of these scholars, statesmen as well as writers in every quarter are indebted, and none more so than this author.'

[113] Bedjaoui was the Minister of Justice of Algeria before serving as the country's permanent UN representative. He later served as a judge of the International Court of Justice from 1982 to 2001, and was its president from 1994 to 1997.

[114] Bedjaoui, *Ninth Report*, esp 67–74, [115]–[173].

state succession, he was naturally concerned with defining odious debt in that context, though he acknowledged that the notion of regime debts was applied outside the context of state succession.[115] He offered the following definition:

Draft Article C

Definition of odious debts: For the purposes of the present articles, 'odious debts' means:

a) all debts contracted by the predecessor State with a view to attaining the objectives contrary to the major interests of the successor State or of the transferred territory;
b) all debts contracted by the predecessor State with an aim 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.[116]

Paragraph (a) is concerned with both war debts ('contrary to the major interests of the successor State') and subjugation debts ('interests of the transferred territory'). The most notable difference between Bedjaoui's and Sack's definitions is found in paragraph (b) of this definition. Whereas Sack's definition concerned debts odious by reason of their unacceptable character to the successor state or government, Bedjaoui's second paragraph deals with those unenforceable by nature of their illegal character per se. So a loan to prosecute an illegal war or fund a genocide would, on this definition, be illegal regardless of its relation to the interests of either the successor state or local population. Debts contracted with an aim not in conformity with international law would include those contracted for the prosecution of an illegal war of aggression, colonisation, apartheid and genocide and for purposes contrary to the principle of self-determination and funding other instances of internationally unlawful behavior.[117]

Bedjaoui is not unequivocally clear about the aspects of absence of consent or creditor awareness, but both seem implicit in his treatment. The loan must be 'with a view' or 'for an aim or purpose' that is odious. This implies creditor awareness. The threshold for harm to the population is somewhat high, contrary to the 'major' interests of the state (which includes its population), and his analysis of subjugation also suggests

[115] Bedjaoui, *Ninth Report*, 68, [124]–[125]. [116] Bedjaoui, *Ninth Report*, 74, [173].
[117] Ibid., 69–70, [133]–[139].

a rather high threshold, as I argue further in chapter 3, section II. E. Bedjaoui's definition has been influential, particularly upon the noted jurist PK Menon's work on state succession in relation to debts,[118] and was used as the definition of odious debt in an Iran–US tribunal case.[119] Sabine Michalowski takes the second paragraph as the departure point for her articulation of a *jus cogens* approach to odious debt, an approach that I believe comes closest to the position taken in this book, though differences remain.[120]

Drawing on these earlier experiences (though less on Bedjaoui's work), most recent treatments of the doctrine of odious debt have settled on a three-fold definition, which is that an odious debt must manifest: (1) absence of the population's consent, (2) absence of benefit to the population, and (3) the creditor awareness of these facts. At this stage of the debate on the topic, there is little need for an in-depth tracing of the various authorities on each element.[121] The absence of consent requirement has its roots in Sack's concern with *despotic regimes* and was a key aspect of the Cuban debt affair.[122] It was examined in great detail by Feilchenfeld,[123] who was categorical in claiming that an absence of consent was essential to a finding of odious debt,[124] but also that this criterion was not limited to dictatorial regimes.[125] The idea that creditors must be subjectively aware of the loan is referred to by most authors,[126] and as discussed in chapter 4 below this is consonant with the domestic law relating to the enforceability of illegal contracts.

The absence of benefit is a central aspect of all proposed definitions, but is the cause of some confusion. While on the one hand there is much more room for a justiciable standard of public purpose or public benefit than most critics suppose,[127] on the other it is obvious that extensive and

[118] PK Menon, *The Succession of States in Respect to Treaties, State Property, Archives, and Debts* (Lewiston, NY: Edwin Mellen Press, 1991).
[119] See chapter 3, section II.D.2 for discussion.
[120] See Michalowski, *Unconstitutional Regimes and Sovereign Debt*, ch. 4. The differences are sketched out in chapter 3, section II.E.
[121] See generally King, 'Odious Debt: The Terms of the Debate', pp. 630–633, and 653–659.
[122] Ibid., p. 337 and following.
[123] Feilchenfeld, *Public Debts and State Succession*, pp. 702–705. [124] Ibid., p. 714.
[125] Ibid., p. 704. Among other scenarios, he considers a representative body not elected by the application of fair and normal rules.
[126] Sack, *Les effets des transformations des États*, p. 157; Feilchenfeld, *Public Debts and State Succession*, p. 714; O'Connell, *State Succession*, p. 459; Frankenberg and Knieper, 'Legal Problems', pp. 429–430. Foorman and Jehle, 'Effects of State and Government Succession', pp. 24–25.
[127] King, 'Odious Debt: The Terms of the Debate', pp. 653–659.

reasonable disagreement would prevail about whether a great many types of projects are beneficial or not. It may be an open question whether an IMF-sanctioned structural adjustment program is for the benefit of a country in light of a particular crisis, but surely that is not a question a judge can answer effectively. The examples of 'absence of benefit' in the precedents, definitions considered above and other writing have tended to be only very clear instances. Debts for personal enrichment are one, and those that reach the high threshold of subjugation that I discuss in chapter 3 are another.

2. The need for a fresh start: types of odious debt

The tripartite definition is a convenient checklist, but in my view it has on the whole obscured the true legal position. It cannot account for a number of anomalies. First, the concept of war debts has nothing to do with the element of consent or benefit to the population of the debtor state. Second, while the law on state succession makes the most room for the non-assumption of subjugation and war debts, this is strongly linked to the uncertain status of all debts in the international law of state succession. And there are very few clear precedents of subjugation debts being repudiated in cases concerned only with a change of government. Third, one can distinguish on relevant grounds the clear authorities that debts procured for personal enrichment or by bribery are unenforceable in cases of state and government succession (chapter 3). The distinguishing legal factors in such cases – over and above the fact that the expression 'odious debt' is not used – are that (1) the emerging and universal agreement in domestic law and international law that bribery of public officials is always illegal and (2) corruption is comparatively easy to define, whereas subjugation is less so (unless further specified as I have done below). So it is a stretch to say that the cases finding corruption debts unenforceable somehow prove an absence of benefit principle that encompasses all subjugation debts as well, both government and state succession. Fourth, the notion of corruption debts is totally absent from Bedjaoui's definition, and there is no evidence in the *travaux preparatoires* that he was concerned with that issue.

Furthermore, international law has evolved further since the early doctrinal treatments. The international law of human rights and humanitarian law, international criminal law, as well as prohibitions of the international use of force (international aggression) and the protection of the rights of peoples to self-determination have grown to become firmly entrenched elements of international law and by implication of transnational public

policy. For instance, the very idea of an 'illegal occupation' in the sense discussed in chapter 3 below would not have been internationally recognisable before the adoption of the UN Charter. This invigorated role for international law explains why part of Bedjaoui's conception of odious debts were those debts that did not arise in conformity with international law – regardless of whether they harmed the population or not.

It is an oversimplification to suggest that three simple criteria can explain the diversity of state practice and legal opinion on the enforceability of such debts. The reality is that there are four distinct lines of authority that come together as tributaries into one conceptual river, that river being the concept of odious debts: war debts, subjugation debts, illegal occupation debts, and corruption debts. The uniting thread is that each is an instance of a purported debt that was knowingly contrary to the interests of the population of successor state, or otherwise contrary to public or transnational public policy. I propose to investigate the authorities for each of these before summarising a complete statement of the odious debt doctrine by way of conclusion.

C. *Odious Debt in the Vienna Convention*

Before proceeding to the examination of those lega sources, it is important to consider the issue of how the doctrine of odious debt was treated in the 1983 Vienna Convention on Succession of States (Debts). It is the only convention on the topic. It has not come into force, but as noted above it remains a statement of principles that learned writers address in their analysis of the topic. The Convention is also an important part of the legal history of the doctrine and the present book serves as an occasion to correct the prevailing mistaken view that the doctrine was rejected by states during the drafting of the Convention.[128] This emerges upon a close look at the three key stages of that process.

The first stage was the issuance of the Report of the Special Rappoteur. Mohammed Bedjaoui was appointed Special Rapporteur to the ILC to provide analysis and recommendations on various aspects of state succession to debts, property and archives. His ninth report concerned the

[128] Commentators (including myself) have concluded wrongly that the doctrine was rejected by states during the drafting process: Mancina, 'Sinners in the Hands of an Angry God', 1250; Cheng, *State Succession and Commercial Obligations*, pp. 24–25; my treatment in Khalfan, King and Thomas, 'Advancing the Odious Debt Doctrine', 28. The present section is adapted with permission from King, 'Odious Debt: The Terms of the Debate', 635–642.

topic of odious debt, and he recommended certain draft articles, already discussed above, for inclusion. He presented and defended these articles orally in two meetings of the ILC in May 1977, addressing some of the remarks and concerns raised by various ILC members.[129] He addressed a number of alleged problems regarding the draft, including the vagueness of the terms used,[130] the intensity of the threshold needed for 'subjugation'[131] and the problem of inconsistent state practice.[132] Yet he noted that 'most members of the Commission had, however, been of the opinion that [the draft articles] should be included in the draft but that they should be improved.'[133] The ILC unanimously agreed to forward Bedjaoui's draft articles to the Drafting Committee. It arguably emerges as clear in this discussion that Bedjaoui felt that the idea of regime debts was different to that of odious debts, in that the latter was to be limited to cases of state succession while the former could include either state or government succession.[134] This may suggest Bedjaoui believed that the concept of odious debts applied to changes of statehood and not to changes of government.

The second stage was the consideration by the ILC, which took the position that it was *unnecessary* to adopt the proposed draft articles. The issue was considered twice. In its first interim conclusion on the matter, the report of the ILC's meeting stated 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'.[135] The report states that some representatives objected to this position, on the basis that it was considered quite important to clarify the point. Some representatives were disappointed by the conclusion and noted this in their remarks.[136] After the second reading, the Commission made the final decision to exclude any articles on odious debt from its final draft. The report states:

> The Commission, having discussed articles C and D, recognized the importance of the issues raised in connection with the question of 'odious'

[129] ILC, 'Yearbook of the International Law Commission 1977, vol. I, Summary Records of the 29th Session', (9 May – 29 July 1977) UN Doc A/CN.4/SER.A/1977, pp. 54–64.
[130] Ibid., p. 63, [7]. [131] Ibid., p. 55, [38]. [132] Ibid., p. 64, [12]. [133] Ibid., p. 63, [6].
[134] Ibid., pp. 62–3, [4] and 54–55, [33]–[35].
[135] ILC, 'Yearbook of the International Law Commission 1981, vol. II, Part One, Documents of the Thirty-third Session (Excluding the Report of the Commission to the General Assembly)', UN Doc A/CN.4/SER.A/1981/Add.1 (Part 1) p. 19, [135]. See also p. 22, [160].
[136] Ibid., p. 19, [136].

> debts, but was of the opinion initially that the rules formulated for each type of succession might well settle the issues raised by the question and might dispose of the need to draft general provisions on it. In completing the second reading of the draft, the Commission confirmed that initial view.[137]

Thus the Commission decided that it could avoid controversy by omitting the clauses on odious debt, on the explicit basis that the rest of the Convention would likely not protect such debts anyway. In reading the rules that were ultimately adopted, with their focus on equitable apportionment and agreement, and a clean slate for newly independent states, the capacity for odious debts to be excluded is rather obvious. The exception to this interpretation, however, is that of the unification of states, namely, either an equal federation of states or when one state is wholly absorbed by another. Excluding odious debts even from this seemingly absolute rule under the Convention becomes, nevertheless, not only tenable, but almost inevitable in light of the revisions undertaken at the next stage of drafting.

The third and final stage took place when the ILC forwarded its draft convention and commentary to the UN General Assembly, and recommended it convene a conference of plenipotentiaries that would discuss the text with a view to adopting a final version.[138] The question of odious debts arose again when this conference discussed what ultimately became article 33 of the Convention. The ILC draft originally recommended the following article:

> **Article 31 – State Debt**
>
> For the purposes of the articles in the present Section, 'State debt' means any financial obligation of a State towards another State, an international organization or any other subject of international law.[139]

[137] ILC, 'Yearbook of the International Law Commission 1981, vol. II, Part Two, Report of the Commission to the General Assembly on the Work of Its Thirty-third Session', UN Doc. A/CN.4/SER.A/1981/Add.1 (Part 2).

[138] The proceedings of the conference and summary records of meetings are collected in *United Nations Conference on Succession of States in Respect of State Property, Archives and Debts: Vienna, 1 March–8 April 1983, Official Records, Volume I* (New York, United Nations, 1995). The discussions about odious debt took place principally during three meetings, the summary records of which are produced at pp. 193–200 (31st meeting), pp. 200–207 (32nd meeting) and pp. 207–212 (33rd meeting). Hereinafter, references are to paragraph numbers in the summary records to each of these meetings.

[139] ILC, 'Draft articles on Succession of States in Respect of State Property, Archives and Debts with Commentaries' (1981), p. 72.

This was ultimately revised during the conference of plenipotentiaries and the following was adopted:

> **Article 33 – State Debt**
>
> For the purposes of the articles in the present Section, 'State debt' means any financial obligation of a predecessor State *arising in conformity with international law* towards another State, an international organization or any other subject of international law. (emphasis added)

The words added to the final text were the subject of a controversial amendment proposed by the delegation of Syria.[140] The original Syrian proposal included (1) a requirement that debts arise in 'good faith' and thus exclude odious debts and (2) a statement that financial obligations incurred by a state must be in conformity with international law, as a 'logical extension of the requirement of good faith'.[141] There was no clear line separating the two concepts in the statement of the Syrian delegate, but there was widespread objection to the idea of including the concept of good faith, including from Bedjaoui himself.[142] A small number of states also objected to the idea on grounds of revisiting the odious debt doctrine.[143] By contrast, a strong majority favoured keeping the reference to debts arising in conformity with international law. Thus the Syrian delegate bowed to the majority's desire and excluded the reference to good faith in an oral amendment, while keeping the reference to conformity international law. As amended thus, the draft article passed by a vote of 43–0, with 20 abstentions.[144]

The question thus is, was the phrase 'arising in conformity with international law' meant, on the basis of this *travaux préparatoires*, to exclude odious debts from the protection of the Convention? Analysis

[140] Namely, UN Doc. A/CONF.117/C.1/L.37, introduced orally in the 30th meeting, 188–193, para. 82.

[141] Ibid.

[142] Bedjaoui (31st meeting, at [4]), USSR (31st meeting, at [16]), GDR (31st meeting, at [19], expressing some doubts, but ultimately supporting it), India ([23]), UK ([26]), Tunisia ([31]), Switzerland (31st meeting, at [40]), Israel (31st meeting, at [53], saying it was implicit and referring to the invalidation of contracts created under conditions of fraud, duress or coercion), Greece (31st meeting, at [55]), Brazil (31st meeting, at [60]), Denmark (31st meeting, at [66], 'vague and imprecise'); Byelorussian SSR (31st meeting, at [69]), USA (32nd meeting, at [1]), Italy (32nd meeting, at [5]), Vietnam (32nd meeting, at [17]), Bulgaria (32nd meeting, at [24]), France (32nd meeting, at [34]), Egypt (32nd meeting, at [41]), Mozambique (32nd meeting, at [46]).

[143] Federal Republic of Germany (31st meeting, at [33]), France (32nd meeting, at [34], announcing its concern about the reference to international law bring the doctrine back into the Convention) and Portugal (32nd meeting, at [64]).

[144] 33rd meeting, at [12].

confirms that this is undoubtedly the view of the member states that supported the motion. First, it was the interpretation of the expression advanced by Syria in its admittedly confusing introduction of the amendment. Second, it was explicitly pointed out as the reason why the amendment should be carried by a number of other states.[145] Third, it was the vocal reason that the motion was not supported by a number of abstaining states.[146] And finally, it is notable that the phrase 'in conformity with international law' is identical to that used in the second paragraph of Bedjoui's original articles on odious debt. The conclusion can only be that that the issue was live at the time of voting, and a large majority voted in favour of carrying the amendment. Therefore, the claim that the Convention is silent on the issue of odious debts is false. It is both facially consistent with the doctrine, and the *travaux* show a deliberate amendment to the key article on state debts to ensure that odious debts would not gain protection from the Convention.

[145] Republic of Korea (32nd meeting, at [74]. '[T]he inclusion of the phrase "in conformity with international law" would significantly improve the text by excluding odious debts from the scope of the definition. In [the delegate's] view, non-transferability of odious debts in cases of State succession was a principle of international law which had already been established.'); Algeria (33rd meeting, at [41], 'voted in favour of the Syrian amendment because it endorsed the explanation given by the Syrian representative concerning its scope, including the exclusion of odious debts from the concept of State debts'). See also German Democratic Republic (31st meeting, at [19]), Morocco (31st meeting, at [45]), Iran (32nd meeting, at [5]). Other states were more equivocal but supportive: Indonesia (34th meeting, at [27], 'improved the [ILC's] text'); Tunisia (34th meeting, at [35], 'improved the [ILC's] text').

[146] The Federal Republic of Germany said that it abstained from voting in favour of the Syrian amendment more because of the delegation's explanation of it rather than the wording (33rd meeting, at [17]); The United States said it abstained because of the 'drafting monstrosity' created by the superfluous addition of the wording, but added that it was 'sympathetic to some, but not all, of the reasons given for the submission of the amendment'(33rd meeting, [19]); United Kingdom (33rd meeting, at [25], 'found disturbing the statement made by the Syrian representative in explanation of the reasons for that amendment'); other abstentions came from Pakistan (33rd meeting, [28]), France (33rd meeting, [34]), Israel (33rd meeting, [37]) and Australia (33rd meeting, [39]).