5

Conclusion

The previous chapters have set out the basis on which it is contended that a restated doctrine of odious debt ought to be recognised, in the form stated there, as a part of international law. The claim that the doctrine lacks legal support is more tenuous than it first appeared. That odious debts do not pass in state succession, unless voluntarily assumed, is a reasonable conclusion with regard to both state practice and the drafting of the relevant UN convention on the matter. The non-enforceability of corruption debts – a prominent issue for advocates of the odious debt doctrine and the subject matter of the *Tinoco Arbitration*, one of the leading cases put forward by advocates – is now established both as a form of transnational public policy and as a general principle of law. The most difficult and contested claim made by the doctrine's advocates was that subjugation debts were non-binding in cases of change of government as well as in state succession. While there is admittedly a paucity of evidence that the terms 'odious debt' were used in any such context, the basis for the claim is not customary law recognition of that concept. The types of acts asserted as 'subjugation' are proscribed by a plethora of international law norms, including and especially *jus cogens* norms, but also conventions and declarations, including the UN Charter and Universal Declaration on Human Rights. These are the public policy of the international legal order, and a contract whose purpose violates them is *ex hypothesi* invalid or unenforceable under that legal regime.

Private lending almost invariably chooses the law of a domestic jurisdiction, and especially that of New York and England. This is a relatively recent phenomenon in the history of sovereign lending. There has been little opportunity to test how it is that debts that conform to the traditional definition of odious debt would or legally ought to fare under the law of such jurisdictions. But the inquiry was needed, and the reasons are plain. Such jurisdictions maintain doctrines of public policy that stipulate that

any contract that contravenes a domestic statute or other binding law is void or unenforceable. Yet the courts in such jurisdictions do not ordinarily apply their own public and criminal law to foreign public issuers who choose their law. The argument in chapter 4 of this book is that it is appropriate in applying domestic public policy to foreign sovereigns to have regard to fundamental public international law norms for interpretive guidance regarding domestic public policy. This is particularly important when dealing with foreign sovereigns whose actions are purported to be authorised by their own national laws. Using public international law to inform domestic public policy in such situations is not only appropriate, but would yield the conclusions I have set out in chapter 4. The conclusions there are that what is called 'odious debt' in international law would be unenforceable because they are contrary to public policy in New York and England.

One might ask whether this approach is really a restatement, or an entirely new doctrine. Some formulations of the doctrine of odious debt have suggested that it is sufficient to show that a debt is merely knowingly not for the benefit of the population of a debtor state, and adopted without their consent. This was the way in which Sack stated the idea, and it has been restated by other commentators (myself included) and even adopted as such by the UN Human Rights Council.[1] The approach in this book has been to offer a more circumscribed set of circumstances under which the debts may be regarded as odious. Yet I would argue that this restatement is not a major departure from earlier, particularly older treatments. Although the doctrine is at times stated as a broad principle of the non-bindingness of loans contrary to the benefit of a debtor state population, it is standard in legal practice to declare a general principle of apparently broad scope but in practice narrow its application to a strictly defined set of circumstances. The domestic law of agency, as examined in chapter 4, is such an example. Though the agent must act for the benefit of the principal, the courts only recognise a breach of the duty in a limited set of circumstances. The same is true of contracts that are unenforceable due to a breach what is sometimes called 'good morals' (*bonnes moeres* in French, *guten Sitten* in German).[2] No one ever thought it was sufficient to show that a contract relating to any form of immoral conduct would be unenforceable for that reason alone. The discussion in Chapter 4 was

[1] C Lumina, 'Guiding Principles on Foreign Debt and Human Rights' (10 April 2011), Human Rights Council, A/HRC/20/23 <www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20–23_en.pdf>, [86].

[2] Article 6, 1133, of the Civil Code of France; article 138 of the Civil Code of Germany.

candid in admitting precisely these kinds of limitations for odious debt arguments based on those concepts.

More importantly, the types of actions recognised as odious by previous commentators were those that have come to be defined more clearly in contemporary international law. Whereas they would speak of colonisation, subjugation, repression and domination, we now possess legal categories such as the prohibition on the use of force in international law, gross and systematic violations of human rights and grave breaches of the Geneva and Hague conventions, as well as the concept of 'serious' breaches of general international law. The use of such standards to give concrete meaning to the general principle of benefit (or what constitutes an infraction thereof) is an evolutionary step rather than clear break with past practice. We have every reason to think earlier commentators would view such an approach in precisely that way. Indeed, it seems to me that the report by Robert Howse for UNCTAD is entirely consistent with the approach developed in this book. For such reasons, the claim that the present work is a restatement rather than new theory is justified.

I. Some Difficult Questions about the Application and Merit of a Restated Odious Debt Doctrine

There are a range of policy considerations and questions that, though not strictly related to the legal status of the doctrine, ought to be addressed by way of conclusion. A discussion of odious debt would be remiss in ignoring them.

A. The Destabilising Effects of an Odious Debt Doctrine

Would recognising an odious debt doctrine destabilise international capital markets and make borrowing more expensive for developing countries? This concern is often raised and it is a difficult one.[3] It seems at first like a question for an economist or political scientist, but it is as much one for lawyers because the answer depends on the contours and predictability of the 'odious debt doctrine' that one has in mind. In their important book on international finance, Reinhart and Rogoff admit that some role for the doctrine seems plausible:

[3] For one example of many, from a distinguished commentator, see CG Paulus, 'Odious Debts vs. Debt Trap: A Realistic Help?' (2005) 31 *Brooklyn Journal of Int'l Law* 83, 91–92.

> Everyone might agree that if the leaders of a country engaged in genocide were to borrow to finance their military, the lenders should recognize the debt as odious and at risk of default in the event of regime change. [. . .] [However] [t]he practical guidelines regarding odious debt must be sufficiently narrowly construed to be implementable.[4]

It is significant that leading experts on the external sovereign indebtedness take such a view, though in another sense it is hardly surprising. As their work shows, the history of sovereign lending is so replete with serial default that it is hard to see why the recognition of the doctrine set out in this book would cause so much as a ripple in the stormy waters of international sovereign finance.[5]

In my contention, the doctrine restated in this book meets the burden suggested by Reinhart and Rogoff. It articulates a narrowly tailored approach using legal standards that are justiciable in international and domestic tribunals. Indeed, demonstrating that a debt is odious is quite difficult. It is so much so, that creditors finding themselves in a debt arrangement properly so described will certainly have known that the action was inappropriate (unless they thought that grave breaches of public international law were appropriate – in which case they should have known). And if stability is the concern, then there is no reason to limit the consideration to lending alone. Serious breaches of public international law affect the peace and stability of the international community, and foment war and revolution in the afflicted countries. Above all, if markets function as these critics contend, a narrowly tailored doctrine of odious debt can be easily avoided through a modicum of contractual propriety and thus competitive markets should readjust lending premiums downwards as the risk is neutralised. At any rate, any such risk pales in comparison with risks associated with state insolvency precipitated by internal or international financial crises. Indeed, the stronger challenge to this restatement is not that it will destabilise lending, but rather that it will capture too few illegitimate debts. I take up that challenge further below.

[4] CM Reinhart and K Rogoff, *This Time Is Different: Eight Centuries of Financial Folly* (Princeton: Princeton University Press, 2009), pp. 63–64.

[5] Though the recent defaults of Argentina, Ecuador, and Greece may hardly be described as mere 'ripples', it is also clear that the odious debt doctrine per se played a minor role in negotiations founded chiefly on debt legitimacy.

B. *Creditor Awareness and Dispersed Bondholders*

Are bondholders, as creditors, even 'aware' of the actual purposes of most loans these days? Many people hold bonds in complex portfolios and will have purchased them, or had them purchased for them, without knowing much about the bond's origins. Bonds are purchased over the phone or through agents, not in smoky backrooms or boardrooms buried deep within Wall Street skyscrapers. This raises the difficult question of whether the nature of contemporary sovereign debt is even amenable to the legal analysis set out in this book, which makes 'creditor awareness' an important factor. Notably, outstanding external indebtedness to the developing world is still primarily bilateral and multilateral, so this objection only reaches so far. Bonds only regained importance in the 1990s, a time when the era of egregious dictatorship was generally receding and democracy was in the ascendancy around the world. Nevertheless, bilateral lending is tapering off, and private creditors are taking an ever greater share of lending to the developed world.[6] In such cases, the highly liquid and diffuse nature of contemporary sovereign bonds may mean that investors possessed no intimate knowledge of the borrower's intended use of proceeds. And such investors would also rely on the intended use of proceeds of the debt as set out in the registration statement filed with (for example) the Securities and Exchange Commission in denying any knowledge of odious purposes.[7] These statements are ordinarily quite short and vague, and do not tend to list gross and systematic violations of human rights as among the debt's purposes.[8] Neither are they listed with the customarily identified risk factors associated with the sovereign issuer.

This is a real challenge for applying the odious debt analysis to bonded private lending, but its importance can be easily overstated. First, many purchasers of bonds are sophisticated, institutional investors with knowledge of the country's circumstances not dissimilar from the investment banks and law firms structuring and marketing the bonds. In my view, this factor likely explains the relative paucity of pariah state debt on bond

[6] See chapter 1, Figure 1.4.

[7] Such statements are filed under Section 7(a) of the Securities Act of 1933, as further specified under Schedule B of that Act.

[8] The practice seems in spirit inconsistent with the requirements of the 1933 Act. Section 7 and Schedule B(2) provide that 'specific purposes in detail and the approximate amounts to be devoted to such purposes, so far as determinable, for which the security to be offered is to supply funds, and if the funds are to be raised in part from other sources, the amounts thereof and the sources thereof, shall be stated'.

markets. Forgetting the question of legal validity for the moment, such debt is risky on macroeconomic as well as on political grounds. Second, any investor in international capital markets must be – or ought to be – presumed to have some degree of financial sophistication (or so should their portfolio managers). In principle, the question in such cases ought to be not simply about actual knowledge, but also about whether the investor knew of circumstances suggesting that further inquiries should have been made. Similar to civil liability for assisting a breach of a fiduciary obligation examined in chapter 4 above, knowledge might be imputed when there is a deliberate failure to make such inquiries as an honest and prudent investor might make. Ultimately, the question in such cases ought to come down to the notoriety of the acts alleged to be odious and the accessibility of such information to the prudent and diligent investor. Since the rise of bond lending in the 1990s, there has been a highly sophisticated and widely accessible range of sources about the politics, political risk, democratic and human rights record of all countries. Investors who buy bonds without regard to abuses reported in national broadsheet newspapers are simply being wilfully blind.

So much is the case with subjugation debts. The situation with corruption debts is different. If the loan is procured through bribery of the state representative, then most bondholders would presumably be unaware of this fact. However, it would seem that direct bribery is likely to be rare in bonded lending. The corrupt ruler is more likely to just allow the deal to be structured cleanly by foreign counsel and then keep the theft local after the funds come in. What is the position, however, of bonds arranged for notoriously corrupt regimes? This is a difficult question and will depend on the domestic law relating to corruption in the jurisdiction governing the bonds. The laws of England and New York both seem to require more than that one is doing business with a known offender. For instance, in the case of *Abou Rahmah v Abacha*, the English Court of Appeal refused to find a bank liable for processing a transaction for a person it suspected was a money launderer.[9] In that case, the claimants were victims of fraud.

[9] *Abou-Rahmah and another v Abacha and others* [2006] EWCA Civ 1492; [2007] Bus. L R 220, [72] (per Arden LJ (Pill LJ concurring): '[The] lack of particular suspicions about the transactions in question, in my judgment, diminished [the manager's] general suspicions for the purpose of those transactions to an extent that it was no longer commercially unacceptable for the bank to implement the instructions that the bank had received'. Rix LJ took a different view of the underlying principles, finding at [37] 'I do not see why a bank which has, through its managers, a clear suspicion that a prospective client indulges in money-laundering can be said to lack that knowledge which is the first element in the tort [of knowing assistance]'.

The payments they made to the fraudster were routed through a London-based bank account. Since the manager of this bank suspected 'in a general way' that the person effecting the transaction (the fraudster) was involved in money laundering, the claimants brought an action against the bank for a dishonest assistance of a breach of trust. The bank had, however, already paid out the sums at issue and thus sought to rely on a defence of change of position to the claim for restitution. The principal question at issue was whether, on the facts of the case, mere knowledge that the customer of the bank was involved in money laundering was sufficient to constitute dishonest assistance of a breach of trust, or, whether the knowledge must pertain to the particular transaction at issue. Two of three judges found that the latter was required. This is consistent with American law both on complicity liability for violations of customary international law and the private law of contract. In both cases, the courts have found that 'merely doing business' with a known violator is insufficient.[10]

The situation may be different when bonds are arranged for regimes known to be notoriously corrupt and when the downfall of their leaders appears immanent. Such would be similar to the situation in Costa Rica under the Tinoco regime as detailed in the discussion of the *Tinoco Arbitration* above.[11] A more recent instance may have occurred in Ukraine when Russia agreed in December 2013 to facilitate a $3 billion loan to Ukrainian President Victor Yanukovich's government despite the latter's notorious personal corruption and his approaching downfall. The loan was structured as a Eurobond issue of non-tradeable bonds with a two-year maturity date. They were bought up by Russia and were part of a broader lifeline that Russia extended to assist Ukraine after President Yanukovich acceded to Russian pressure to prevent Ukraine from entering into a formal trading association with the European Union. Anna Gelpern argues that Ukraine should avoid the 'odious' debt,[12] and Ukraine itself has claimed that the debt is odious and non-binding.[13] The existence of enormous mass protests at the time the loan

[10] *In re South African Apartheid Litigation*, 617 F Supp 2d 228, 257ff (SDNY, 8 April 2009).

[11] Chapter 3, section IV.C. The loan in the Tinoco case was a bank loan, however.

[12] A Gelpern, 'Ukraine's Odious Bonds: Part I', RealTime Economic Issues Watch, Peterson Institute for International Economics Blog, 14 March 2014, <http://blogs.piie.com/realtime/?p=4251>, accessed 30 July 2015; A Gelpern, 'Ukraine's Odious Bonds: Part II', RealTime Economic Issues Watch, Peterson Institute for International Economics Blog, 14 March 2014, <http://blogs.piie.com/realtime/?p=4252>, accessed 30 July 2015.

[13] E Moore, 'Ukraine Takes 'Odious' Path to Default', Financial Times.com, 27 May 2015 <www.ft.com/cms/s/0/c12c7286-046a-11e5-95ad-00144feabdc0.html>, accessed 30 July 2015.

was given, combined with Yanukovich's infamous lavish personal lifestyle, may have put the (very knowledgeable) creditor on notice that it was a corruption debt and possibly a subjugation debt.[14]

C. *Restructured Odious Debt*

A restructured or rescheduled debt is one in which the repayment terms have been altered by mutual agreement of the creditor and debtor. The altered terms of the loan (or bonds) may be of the principal (face value), interest (coupon), or payment schedule (maturity date) as well as other important terms. In such a process, public debts are often rolled together and renegotiated en masse. Consider, for example, the case of Nigeria. Suppose it had contracted an odious debt in 1970, but had rolled this debt into the list of debts it restructured under the Brady plan in 1989. In determining whether a portion of the outstanding indebtedness is odious, do we analyse the purpose of the original loan or the restructuring that took place in 1989? This is an important issue. A range of countries with potentially odious debts benefited from the Brady plan.[15] And the Paris Club had by 2012 restructured 447 debt agreements.[16] The answer appears to turn on questions of both law and policy.

In civil law jurisdictions, when a new agreement is aimed at extinguishing a previous one with a view to substituting new legal obligation between the same parties, or passing on a legal obligation to a new party with the consent of the old parties, the event is considered a novation. The concept is derived from Roman law, and is found in both civil and common law traditions. It was noted by the Judicial Committee of the House of Lords in the nineteenth century case of *Scarf v Jardine:*

> In the Court of first instance the case was treated really as one of what is called 'novation', which as I understand it means this – the term being derived from the Civil Law – that there being a contract in existence, some new contract is substituted for it, either between the same . . . or between

[14] I take no view on whether the bonds were in fact odious. More facts about how the proceeds were ultimately used and what Russia's intentions were in providing the loan would be needed. In Gelpern's treatment and in the media, the facts reported fall well short of a subjugation debt as defined in this book.

[15] Brady bonds were issued (in an aggregate face amount of over US$ 160 billion) by Argentina, Brazil, Bulgaria, Costa Rica, the Dominican Republic, Ecuador, Ivory Coast (Cote d'Ivoire), Jordan, Mexico, Nigeria, Panama, Peru, the Philippines, Poland, Russia, Uruguay, Venezuela and Vietnam.

[16] See chapter 1, section I.D.

> different parties; the consideration mutually being the discharge of the old contract.[17]

Lord Selborne's understanding of the civilian concept was indeed correct. Article 1271 of the Civil Code of France, for example, explicitly provides that novation between the same parties is possible. However, since *Scarf v Jardine* the common law in both Britain and North America has gradually if perhaps not conclusively come to understand novation to involve the substitution of a new party for an old one. The Restatement (2nd) on the Law of Contract, for instance, states that '[a] novation is a substituted contract that includes as a party one who was neither the obligor nor the obligee of the original duty'.[18] The Supreme Court of Canada held that 'the essence of novation is the substitution of debtors'.[19] And the position in English law now is that novation requires the substitution of a new party,[20] and furthermore that variations of contract terms between the same parties do not rescind the earlier contract.[21] It is thus not clear whether such jurisdictions would view a rescheduled debt between the same parties as a new obligation entirely. Yet whether or not it is called a novation, the issue of whether restructured debt between the same parties constitutes a new contract or merely a variation of the earlier contract is a question that would likely be both fact specific and depend on interrelated questions in commercial, tax and bankruptcy law. At any rate, it would seem that a number of debt rescheduling instruments such as exchange offers and debt buy-backs (both used in the Brady plan) would without doubt be regarded by common law courts as the creation of new debt obligations through entirely new debt instruments. The civilian analysis of novation is clearer, and applied in Rutsel Silvestre J Martha's treatise on financial obligations in international

[17] (1882) 7 App Cas 345, 351 (per Lord Selborne LC).

[18] *Restatement (2nd) on the Law of Contract* (St. Paul, MN: American Law Institute, 1981), § 280.

[19] *National Trust Co. v Mead et al.*, [1990] 2 SCR 410, 430 (Wilson J, for the Court). See further, J Bernstein, K Leung, H Chong, 'Tax Consequences of Debt Restructuring and Workouts in Canada', [2005] Tax Notes International 287, 290 ('At common law, altering the terms of a debt obligation generally does not result in a novation'.)

[20] H Beale (ed.), *Chitty on Contracts: General Principles*, 31st edition, 2 vols. (London: Sweet & Maxwell, 2012), vol. I, p. 1515 [19-086].

[21] *United Dominions Corp (Jamaica) v Shoucair (Michael Mitri)* [1969] 1 AC 340 (Where the interest rate payable on a moneylending loan is temporarily varied, the fact that the variation may be unenforceable does not mean that the loan, as originally made, is unenforceable. The significance here is that despite the new agreement being unenforceable by reason of illegality, the old one continued to apply).

law.[22] He finds that debt rescheduling agreements are quintessentially acts of novation, the Paris Club reschedulings being clear-cut cases.[23]

The essential feature of novation is that it extinguishes the old contract and substitutes a new one in its place. It would thus seem likely that a number of debt rescheduling agreements would be found to be acts of novation, or having similar legal consequences, namely, the extinguishing the original debt and with it any legal inquiry into the validity of that debt. On that analysis, old odious debts would become history. As harsh as that may seem at first, there are also good policy reasons for it. Debt reschedulings often settle competing and disputed claims, usually in the effort of achieving of debt sustainability and securing repayment. They may well be run by non-democratic governments in a way that can have the effect of whitewashing odious debts. Yet the opposite concern is that public and private creditors alike would, by any other type of rule, be discouraged from agreeing helpful concessions in debt reschedulings if they felt the sovereigns could unpick those agreements down the line after a change of government. Given the enormously important role of debt rescheduling, and the nascent but limited role for odious debt arguments, policy leans substantially towards treating restructuring agreements as a new beginning.

My view is that the odious debt doctrine should be a factor in negotiating the rescheduling itself, rather than an argument used to back a default on restructured debt. Of course, if the restructuring itself were for odious reasons, then that is a quite different story.

D. *The Fungibility Problem*

The idea that any loan to an odious regime is an odious debt is advocated by Joseph Hanlon and, under her *jus cogens* approach, by Sabine Michalowski.[24] They argue that loans to dictators for 'beneficial' purposes merely free up other funds for illicit ones. This is due to the fungible

[22] RSJ Martha, *The Financial Obligations in International Law* (Oxford: Oxford University Press, 2015) ch.54 and p. 273.

[23] Ibid. See further JM Garrido, 'Out-of-Court Debt Restructuring' (Washington, DC: The World Bank, 2012) <http://elibrary.worldbank.org/doi/abs/10.1596/978-0-8213-8983-6>, accessed 25 July 2015. ('A rescheduling of payments constitutes a novation of the former debts for the creditors that participate in the restructuring agreement'.)

[24] Hanlon, 'Defining Illegitimate Debt', 113–14, 120–21, 125–26, 128. Michalowski, *Unconstitutional Regimes and Sovereign Debt*, ch. 3 and p. 83ff. Michalowski rejects the language of odious debt but advances a view that is comparable to the position taken on subjugation debts in this book.

or interchangeable nature of money. Unlike trade in goods, money is deposited in banks and becomes part of a general all-purpose means at the disposal of the dictator. Indeed it would be easy for dictators to cover providing essential services with foreign loans and thus use their own national revenue to finance oppression. The point appears compelling in principle. But the view taken here is different for both analytical and normative reasons. In my contention, we must look to the intended purpose of the loan rather than the character of the regime.

As an analytical matter, it simply is not true that in giving someone money, one is endorsing or enabling all the expenditures a person makes. By paying taxes, we do not endorse all the state's expenditures, including its foreign wars. And neither does one support in any legally or morally recognisable way a bank's suite of investments when one repays a mortgage. Social security benefits paid to a known alcoholic are not *intended* to further the recipient's decline – they are aimed at offering sustenance. There is a clear analytical distinction between payments provided for particular purposes, and those given for no particular purpose or in consideration of an outstanding obligation. The fact that one payment enables a greater general liquidity does not change that fact. This position certainly accords with domestic law precedents on illegal lending, as well as nearly all the earlier formulations of the doctrine.

There are sound policy reasons behind that position as well. A broader rule would preclude offering humanitarian aid and assistance, whether in loans or otherwise, to governments engaged in hostilities that could be described as subjugation (e.g. oil for food in Iraq under Saddam Hussein, or food aid to North Korea during times of famine, or disaster relief in any number of scenarios).[25] It would also ensnare many creditors who thought in good faith that their lending was innocent and who may even have taken steps to ensure proceeds were for responsible purposes. A wider principle might also imperil lending to non-democratic regimes that are engaged in helpful economic development, but which are arguably also engaged in some activities that some regard to be subjugation. The use of conditionality and sectoral or project-based lending is a major development tool, and the question of whether to isolate or make constructive engagement (including trade) with powerful human rights violators is an ongoing debate in international relations. On the whole,

[25] Even the provision of food itself can enable government spending on other items. Even the most awful dictatorships will take some efforts to stem starvation, and the contribution to that effort arguably enables it to divert its own resources towards its military capability.

it would be unduly simplistic to forget that even states ruled by dictators normally have complex economies, trade internationally and often deliver a broad range of public services to tens if not hundreds of millions of people. It is unlikely the people of such countries wish to be wholly isolated in the way this view might demand. This has been the experience of trade sanctions, but trade sanctions are far more tailored to the particular features of a regime, can be 'smart', and at any rate ad hoc exceptions can be made legislatively on an as-needed basis.[26] The fungibility point about odious debt is stated as a conceptual matter relating to the purpose of loans, and hence is broader and would be a rule and thus indiscriminate in application.

Such a conclusion by no means implies that lenders can just easily whitewash a loan with a few words in the use of proceeds clause. Concealing odious purposes may appear easier on paper than it is in reality. Large sums advanced for what are actually if not contractually odious purposes end up facilitating large purchases that are themselves not always so easy to cover up (assuming a later change of government and vigorous forensic search). In cases of contracts for illegal purposes, judges do look past the contract itself to see and attach consequences to the scheme that it carries out. So it may be that the totality of circumstances shows that the creditor was in fact complicit in a scheme when it lent money that was contractually specified to be for other purposes. One instance where such a presumption would seem clearly made out is when international crimes against a civilian population are committed by the government of the country, in particular genocide, crimes against humanity ('a widespread or systematic attack directed against any civilian population'), and war crimes that are part of a 'plan' or 'policy' or 'a large-scale commission'.[27] Any sophisticated state or investor knows that when governments resort to such tactics against their own population, the state's entire budget is effectively mobilised for the engagement of

[26] Notably, they often do not and inflict a massive amount of harm. Hence the push for the development of 'smart sanctions' – see D Cortright and GA Lopez, *Smart Sanctions: Targeting Economic Statecraft* (Lanham, MD; Oxford: Rowman & Littlefield, 2002) and United Nations Secretariat, *Compilation of general comments and general recommendations adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.7 (12 May 2004), General Comment 8 of the UN Committee on Economic, Social and Cultural Rights ('On the Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights').

[27] Rome Statute of the International Criminal Court, Rome, 17 July 1998, 2187 UNTS 90, in force 1 July 2002, articles 5–8. The statute provides considerable further detail on the nature of such crimes, as does the jurisprudence and treatises on the matter.

such hostilities and a contribution to it is one to that campaign. Whether there might be other, less egregious situations in which any contribution seems like an inevitable contribution to the subjugation is not clear, but certainly not out of the question.

E. The Ex Ante Proposal: Designating Odious Regimes

'As attractive as it is in theory' Patrick Bolton and David Skeel Jr. assert, 'a debt-by-debt strategy would be devilishly difficult to apply'.[28] They rightly show that, in addition to the problem of fungibility, many loans will have mixed motives. Beneficial projects can be bought with bribes, as for example with President Ferdinand Marcos of the Philippines. It was shown in chapter 4 that contracts demonstrably procured through bribery are unenforceable. Yet it is true that insisting on a strict showing that knowledge that an individual debt's purpose is odious will limit the field of application. This is a complaint about the usefulness of the doctrine rather than its legal status. For the complaint to succeed, it is necessary to show that there is another alternative for addressing odious debts that is more promising. The ex ante model is offered as just that.

Michael Kremer, Seema Jayachandran, and Jonathan Shafter set aside the question of whether the doctrine of odious debt exists in international law, preferring to show that in their view it would be a sub-optimal choice for deterring odious lending.[29] They rather advocate the creation or use of an international institution that would designate certain regimes as odious, and that thereafter, lending would be restricted unless particular transactions were pre-authorised by the institution.[30] Bolton and Skeel Jr. offer a similar proposal.[31] Its great advantage is that there is a clear scheme for identifying odious regimes, it provides creditors with certainty, and any lending must be pre-authorised rather than be left to the creditors and borrowers (which is in principle if not practice a more efficient way of dealing with the fungibility problem). Since, moreover, it proposes to use forward-looking legislation to establish the scheme, it is not hamstrung by the inequities and pro-creditor legal technicalities found in customary international law and domestic private law. Yet

[28] P Bolton and D Skeel, 'Odious Debts or Odious Regimes?' (2007) 70 *Law and Contemporary Problems* 83, 89.

[29] *See* M Kremer and S Jayachandran, *Odious Debt* (Washington, DC: International Monetary Fund, 2002) <www.imf.org/external/np/res/seminars/2002/poverty/mksj.pdf>, accessed 22 July 2015, p. 14.

[30] *See id.*, pp. 18–22. [31] Bolton and Skeel, 'Odious Debts or Odious Regimes?'.

despite its great merits, my view is that the proposal's problems may outweigh its advantages.

The major problem is that such an institution will likely designate very few regimes as odious. It might take years to establish, must be internationally representative, and will be composed of states acting (as Kremer and Jayachandran explicitly advocate) on a super-majority basis, and in any event in their self-interest and never on the basis of impartial assessments.[32] If the body were established within the United Nations, it would have international legitimacy but take years to establish, and due to geopolitics act only in the most outrageous instances. The most plausible organ of the United Nations would be the Security Council.[33] Yet this is tantamount to giving the major powers a veto over any odious regime designation. In an IMF paper, Kremer identifies Anastasios Somoza (Debayle) of Nicaragua, Ferdinand Marcos of the Philippines, Jean Claude Duvalier of Haiti and Mobutu Sese Seko of (then) Zaire as those who incurred potentially odious debts. Each was a notorious ally of the United States at the time and would have been backed by the United States at the United Nations. In more recent conflicts, whether in the Balkans, Iraq, Zimbabwe, North Korea, Syria or Ukraine, the respective regimes at issue all enjoyed or enjoy the backing of a veto-carrying permanent member of the Security Council. A second problem is that declaring a regime, rather than a set of actions, to be odious is a rather 'nuclear' type of option and is unlikely to be deployed until the regime reaches ultimate pariah status. The international community's apathetic responses to crises in Rwanda, Darfur, the Congo and East Timor are testament to the difficulty of securing the requisite votes.[34]

Both the first and second problems lead inexorably to the third, and indeed perhaps the most significant problem: if a given regime is not so

[32] In my view, contra Kremer and Jayachandran, *Odious Debt*, the super-majority requirement clearly risks more false negatives than false positives. It is not clear to me whether these authors consider the super-majority to be different from the use of a veto. At any rate, the Security Council would not change how it acts.

[33] As advocated by Bolton and Skeel, 'Odious Debts or Odious Regimes?', 91, 98ff.

[34] See e.g., Rory Caroll, 'US Chose to Ignore Rwandan Genocide: Classified papers Show Clinton was Aware of 'Final Solution' to Eliminate Tutsis' *The Guardian* (31 March 2004), p. 14. Even after through enormous effort the Security Council was finally persuaded to direct the International Criminal Court prosecutor to investigate crimes relating to the Sudanese genocide in Darfur, the prosecutor later shelved the investigation: D Smith, 'ICC Chief Prosecutor Shelves Darfur War Crimes Probe' *The Guardian* (14 December 2014) (The Guardian Online).

designated, a creditor can rely on this fact in lending to it. In other words, calling this model the 'due diligence' model is misleading.[35] In most cases where the doctrine in this book might find application, it would eliminate the need for diligence by providing the certainty an odious creditor would want.

The advocates of this idea suggest that even if very few regimes were so identified, it would be an improvement over doing nothing. However, the alternative is something rather than nothing. There has been a shift in international attitudes towards lending to dictators in the last twenty years, as well as the crystallisation of ever clearer legal standards in international human rights and humanitarian law. The adoption of the UNCTAD principles on responsible sovereign lending are one such manifestation of this development, as is the 2007 report on odious debt by Robert Howse adopted for UNCTAD.[36] The Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System expressly advocates that a newly constituted International Debt Restructuring Court apply the doctrine of odious debt,[37] a proposal also advanced by an independent expert and adopted by the UN Human Rights Council.[38] The type of doctrine restated in this book has some chance of being taken seriously in the law and diplomacy of sovereign lending. If so, a general, principled legal doctrine could discourage

[35] Cf. J Shaftner, 'The Due Diligence Model: A New Approach to the Problem of Odious Debts' (2007) 21 *Ethics & International Affairs* 49.

[36] United Nations Conference on Trade and Development (UNCTAD), 'Principles on Promoting Responsible Sovereign Lending and Borrowing' (10 January 2012) <www.unctad.info/upload/Debt%20Portal/Principles%20drafts/SLB_Principles_English_Doha_22-04-2012.pdf>, accessed 3 August 2015; Robert Howse sees the UNCTAD Principles as contributing to the evolution of the odious debt doctrine: R Howse, 'Concluding Remarks in the Light of International Law' in C Espósito, Y Li, and JP Bohoslavsky (eds.) *Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing* (Oxford University Press, 2013), p. 385. See further, 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.

[37] J Kregel and others, Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System (Stiglitz Commission) (21 September 2009), <www.un.org/ga/econcrisissummit/docs/FinalReport_CoE.pdf>, accessed 2 August 2015, p. 124. The Report is also published as J Stiglitz, *The Stiglitz Report: Reforming the International Monetary and Financial Systems in the Wake of the Global Crisis* (New York: The New Press, 2010).

[38] Lumina, 'Guiding Principles on Foreign Debt and Human Rights', [86].

lending in more cases and encourage greater due diligence to avoid such debts.[39]

In the perfect world, one might be able to have both an ex ante model as well as the classical, ex post model as defended in this book. The rationale for having both is clear, because the ex ante regime offers a much stronger suite of sanctions and thus enhances the possibility of inducing important reforms. This would be ideal, and legally speaking, it would be easy to structure the ex ante model without prejudice to the operation of any other legal scheme under general legal principles. An affirmation of the doctrine (or some cognate version of international public policy) could be set out in the preamble of any pertinent Security Council resolution introducing or applying the ex ante regime. If so, the ex ante approach, similar to existing financial sanctions regimes, would be another tool with great merit that could function alongside the legal doctrine. However, this preambular proviso seems unlikely to occur if the views of creditors are given the weight they ordinarily are.

F. Odious Debt Proof Lending

The legal definitions of 'odious debt' presented in this book make clear that it would in fact be rather difficult to prove the existence of a subjugation or corruption debt. That means that a good faith lender instructed by competent counsel could very easily avoid contracting an odious debt. Indeed, one would have to knowingly help further acts of subjugation, corruption, illegal occupation or wars against states that may assume sovereignty over the territory afterwards. The question for the creditor and counsel is whether the creditor either knows that the proceeds of the loan will be applied to an odious purpose or is aware of circumstances that make that a distinct possibility. If the latter, then the creditor should either not lend or avoid lending for general, unspecified purposes. If they wish to lend, it should be for specific public purposes (e.g. projects, sectoral lending) rather than general governmental

[39] Cheltenham: Y Wong's *Sovereign Finance and the Poverty of Nations: Odious Debt in International Law* (Edward Elgar, 2012) is an interesting variation on an ex ante model. It focuses on voluntary participation in a scheme of disclosing the use of proceeds and engaging in careful auditing thereafter, followed up with an ex post element of judicial oversight of compliance with stated loan purposes. However, it seems voluntary participation would be discouraged by cost and uncertainty associated with the process and especially the ex post review. It is also unclear to me how much transparency it adds to the practice currently adopted under US securities law.

purposes or loan refinancing. They would also need to institute an auditing procedure to ensure that the loan's proceeds are applied to such purposes. This is hardly a radical proposal. It is in effect best practice and endorsed in the UNCTAD principles of responsible sovereign borrowing and lending.[40] Having taken such steps, and provided that the country is not engaged in a campaign of widespread and active hostilities against its own civilian population (as described in the section above on fungibility), the loan would be safe from any legal application of this doctrine. Debtor states that would try to apply the broader idea would be rebuffed in doctrine and would be faced by a paper trail demonstrating good faith in the attempt to ensure that the loans were applied to proper public purposes.

II. The Doctrine of Odious Debt: Pious or Possible?

Some of the practical dimensions of applying the odious debt doctrine have just been considered. Yet there is a further practical problem not yet addressed. What likelihood would such a restated doctrine have of being taken seriously by authoritative institutions? And why should it matter? Taking the second question first, it is a clear if reluctant conclusion of this book that even if the principles outlined in this book were accepted and applied by states, international tribunals or national courts, there would still be a lot of illegitimate debt left standing in global markets. There have been many loans issued for illegitimate purposes or patently unwise development projects, and many others that supported grave crimes but under circumstances not easily amenable to proof in a court of law. Where, furthermore, odious debt has been restructured, the likelihood that the injustice is rectified and accounted for is slight. If much injustice remains in these situations, it will often not be captured by the doctrine restated in this book. Part of the reason for this cold comfort is that one need not be a Marxist to recognise that international law, and even much of domestic law, has been shaped historically by the interests of states and of powerful domestic interests.[41] It has been possible to identify legal principles that even any powerful and self-interested contracting party

[40] See United Nations Conference on Trade and Development (UNCTAD), 'Principles on Promoting Responsible Sovereign Lending and Borrowing', Principle 13 (Adequate Management and Monitoring).

[41] For a potent critique of the doctrine along these lines, see LA Perez Jr and D Weissmann, 'Public Power and Private Purpose: Odious Debt and the Political Economy of Hegemony' (2007) 32 *North Carolina J of Int'l Law & Comm Reg* 699.

would wish to see enforced, and extract the outline of an odious debt doctrine from such principles. The claim that the conservative nature of any such odious debt doctrine would serve to legitimise illegitimate debts that cannot be considered 'odious' recalls an old and unconvincing critique of 'bourgeois' law and adjudication. If the law furnishes the tools to limit some injustice, it should be pressed into service. We should not become prisoners of the naivety of those who suppose that justice is co-extensive with what the courts are willing to recognise.

This book, in this light, has not sought to answer more than a small fraction of the interrelated moral and political questions relating to whether nations should have to repay their debts in all other circumstances. That is a complex question related to questions of capacity, the debt's origins, the state's other legal obligations, the consequential effects of disputing a debt, the likely gains from a rescheduling and much else. The more myopic concern has been whether either international or national law require states to repay a certain and ultimately small class of sovereign debt obligations called 'odious debts'. As defined in this book, my conclusion was that they mostly do not, neither in cases of state succession nor with respect to changes of government.

As to the first the questions posed above, some courts would no doubt feel great unease about such a conclusion. Yet the discomfort would in my view be for prudential rather than legal reasons. No judge, one hopes, will say outright that a debt whose purpose it was to facilitate a serious and flagrant breach of a fundamental norm of international law is wholly enforceable in the court. And we know already that a contract procured by bribery is unenforceable. The recalcitrant judge is more likely to find that the breach of law is not clearly made out, or the matter is non-justiciable or is a political question, or that the act of state doctrine blocks the claim. Whatever the value of those reasons, and I have shown that they should not ordinarily block the claim, they are not a denial of the substantive legal principles that condemn odious debts as unlawful.

One may feel that even if the law has been interpreted plausibly, these arguments are remote from the practice of the courts, and that fact isolates them as interesting curiosities rather than legal categories with real purchase. That type of argument might be used to leverage claims about the legality of torture and discrimination that are frequent fare among many modern states. But it also, at the very least, admits that a door has been left unlocked, and that it may be pushed open. An analogy here with the Alien Tort Claims Act (also called the Alien Tort Statute (ATS)) and its modern renaissance is apt. The ATS was

adopted by the US Congress in 1789, as part of the Judiciary Act. It set out the following rule: 'the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.[42] For centuries, this statute lay dormant, but in 1980, in the important case of *Filártiga v Peña-Irala*,[43] some brave lawyers argued in the Federal Court of the Eastern District of New York that the ATS ought to be applied to find that a Paraguayan police inspector could be sued by the parents of a young man that he tortured to death in Paraguay. The judge baulked. After two hundred years, the lawyers could only produce two cases where the ATS had been relied upon for jurisdiction.[44] But they appealed, and the Court of Appeals reversed. Those judges chose not to allow conservative inertia to determine the outcome of the argument. They rather asked whether the law on its face purported to offer a remedy and whether legal arguments, buttressed by the more modern law of nations concerning torture and human rights then prevailing, reasonably supported the conclusion contended for. The Court of Appeals found that it did. And twenty-four years later, the Supreme Court affirmed jurisdiction under the ATS and cemented its place in the American civil justice landscape.[45]

That experience holds out a lesson and an inspiration for the doctrine of odious debt. The lesson is that one should not reject a legal interpretation because it is based on principle rather than on practice. And the inspiration is that when the conditions are right, the substantive law may come together at the right time in the hands of brave decision-makers – whether judges or statespersons – and move from legal but aspirational, to legal and enforceable. As for the odious debt doctrine, it is hoped that this book has shown reasonably clearly that there is good law on the books, relevant and ready to be applied. Perhaps the doctrine of odious debt is merely awaiting its *Filártiga* moment.

[42] 28 USC § 1350. [43] 630 F 2d 876 (2d Cir 1980). [44] 630 F 2d at 887 & n 21.
[45] *Sosa v Alvarez-Machain*, 542 US 692 (2004). See above, chapter 4, note 84, for references discussing how much sand the *Kiobel* decision mixes into the 'cement'.