

# ODIOUS DEBT WEARS TWO FACES: SYSTEMIC ILLEGITIMACY, PROBLEMS, AND OPPORTUNITIES IN TRADITIONAL ODIOUS DEBT CONCEPTIONS IN GLOBALIZED ECONOMIC REGIMES

LARRY CATÁ BACKER\*

## I

### INTRODUCTION

In the early 1980s, the People's Republic of China (PRC) resisted a lawsuit filed in U.S. federal court seeking to enforce obligations to pay on defaulted bearer bonds issued by the Chinese Imperial government in 1911.<sup>1</sup> The PRC maintained, in part, that it had no obligation to pay because “the Chinese view the bonds as an improper part of the Western powers’ domination of China at the beginning of this century and as a direct cause of the Revolution of 1911.”<sup>2</sup> This political reality, China argued, had a substantive legal consequence: “the PRC maintains that under the principle of non-liability for ‘odious debts’ China bears no responsibility for the bonds.”<sup>3</sup> The case was ultimately dismissed on other grounds.<sup>4</sup>

After the overthrow of Iraq’s leader Saddam Hussein, Perweez Mohammed of the Patriotic Union of Kurdistan urged the repudiation of Iraq’s sovereign debt incurred under the Hussein regime for the purpose of maintaining itself in power and invading Iran. He argued that the “creditors’ cooperation enabled Saddam to preside over atrocities such as Halabja. Saddam never spent money for the benefit of the Iraqi people, but just for himself and his followers.”<sup>5</sup>

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\* Professor of Law, Pennsylvania State University. The author may be contacted at [lcb911@gmail.com](mailto:lcb911@gmail.com). Special thanks to Mitu Gulati and to the staff of LAW & CONTEMPORARY PROBLEMS (L&CP), the organizers of the conference, *Odious Debts & State Corruption*, held at Duke University School of Law, January 26, 2007.

1. Jackson v. People’s Republic of China, 794 F.2d 1490 (11th Cir. 1986).

2. *Id.*

3. *Id.* at 1495.

4. *See id.* at 1497–99 (holding court had no subject-matter jurisdiction because the Foreign Sovereign Immunity Act of 1976 did not apply retroactively).

5. Justin Alexander, *Downsizing Saddam’s Odious Debt*, MIDDLE EAST REPORT ONLINE, Mar. 2, 2004, <http://www.merip.org/mero/mero030204.html> (last visited Oct. 1, 2007). For a defense of this position under international-law principles, see Kevin H. Anderson, *International Law and State*

Another opposition spokesman, “Hajim al-Hassani of the Iraqi Islamic Party said of the creditors that ‘the Gulf countries should not receive a single dinar. The Iraqi people lost hundreds of thousands of lives because of the Iran–Iraq war, which would probably have ended much earlier without the money they provided.’”<sup>6</sup>

This article examines how the traditional notion of odious debt as a method of repudiating sovereign debt may undergo a conceptual revolution as it changes focus from the illegitimacy of governments obtaining loans to the illegitimacy of the systems through which such loans are made and enforced generally. The focus of this analysis is the conceptual framework Fidel Castro sought to introduce into the debate about the legitimacy of sovereign debt and the extent to which this reframing might influence international institutional approaches.

It is only fitting that the focus of the analysis turns to developments in Cuba. The origins of the concept of odious debt can be traced at least as far back as the Spanish American War, when the United States used the notion successfully to resist recognition of war debt incurred by Spain in defense of its Cuban colony on the grounds that the debt had not been incurred for the benefit of the Cuban people, so they, the putative debtors, should not be responsible for these debts.<sup>7</sup> Amplified by Alexander Sack, an émigré Russian academic in 1920s Europe,<sup>8</sup> this Aristotelian construction of state debt, the state, and its apparatus (or government) as autonomous and separable objects or entities,<sup>9</sup> and the rules under which each would be tied to the others, has become the stuff of the general construction of global law since the end of the twentieth century.<sup>10</sup> But in the hands of the Cubans, it has become more than that. The concept has

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*Succession: A Solution to the Iraqi Debt Crisis?*, 2005 UTAH L. REV. 401, 431–41 (2005); Anna Gelpern, *What Iraq and Argentina Might Learn from Each Other*, 6 CHI. J. INT’L L. 391, 400–02 (2005).

6. Justin Alexander, *Downsizing Saddam’s Odious Debt*, MIDDLE EAST REPORT ONLINE, Mar. 2, 2004, <http://www.merip.org/mero/mero030204.html> (last visited Oct. 1, 2007).

7. See, e.g., Patricia Adams, *Iraq’s Odious Debts*, at 2–3, (Cato Inst., Policy Analysis No. 526, 2004), available at <http://www.cato.org/pubs/pas/pa526.pdf>. Adams notes the roots of the doctrine in the repudiation of Confederate debts in the Fourteenth Amendment to the U.S. Constitution. See U.S. CONST. amend. XIV, § 4.

8. See ALEXANDRE N. SACK, *LES EFFETS DES TRANSFORMATIONS DES ÉTATS SUR LEURS DETTES PUBLIQUES ET AUTRES OBLIGATIONS FINANCIÈRES* 158–65 (1927). In the discussion that follows, all citations to this work are from the French version and translated by the author. The French original may be accessed at [http://www.odiousdebts.org/odiousdebts/publications/dettes\\_publiques.html](http://www.odiousdebts.org/odiousdebts/publications/dettes_publiques.html) (last visited July 1, 2007).

9. See, e.g., ARISTOTLE, *A TREATISE ON GOVERNMENT* 111–19 (William Ellis, trans., J.M. Dent & Sons, 1912).

10. See, e.g., *World Duty Free, Ltd. v. Republic of Kenya* (ICSID, Oct. 2006) ¶¶ 180–182, available at [http://www.investmentclaims.com/decisions/WDF-Kenya\\_Award.pdf](http://www.investmentclaims.com/decisions/WDF-Kenya_Award.pdf). A great focus of new work in the field has been on the validity of debt obligations incurred by dictators in the developing world in the name of the state. “This suggests that a new and developing category of ‘odious debts’ are those contracted by the dictatorial leaders of developing nations, the proceeds of which are subsequently squandered in a way that provides no benefit to the population.” ASHFAQ KHALFAN, JEFF KING & BRYAN THOMAS, *CTR. FOR INT’L SUSTAINABLE DEV. LAW, ADVANCING THE ODIIOUS DEBT DOCTRINE* 19 (2003), [http://www.odiousdebts.org/odiousdebts/publications/Advancing\\_the\\_Odious\\_Debt\\_Doctrine.pdf](http://www.odiousdebts.org/odiousdebts/publications/Advancing_the_Odious_Debt_Doctrine.pdf).

begun to be deployed against its creators and primary beneficiaries—developed states and their financial organs. From a tactic in the struggle among imperial powers for control of subaltern and dependent territories, a means by which Americans and Spaniards could settle the financial consequences of their war for control of Cuba in 1898, the cluster of principles constituting modern odious debt doctrine has become a means to restructure hegemonic systems of transnational subordination.<sup>11</sup>

The odious debt doctrine traditionally focused on the circumstances under which a successor state or states could avoid the obligation to pay the debts incurred by a now-extinct predecessor state.<sup>12</sup> It focused as well, though less often, on the obligations of successor governments to repay the obligations of prior regimes (especially when succession occurred after civil wars, revolutions, or other contests for control of the state apparatus).<sup>13</sup> This doctrine had three principal effects. It reaffirmed the core responsibility of states to repay the debt obligations incurred by their governments through a presumption of payment.<sup>14</sup> It also shifted the burden of proving entitlement to relief onto successor governments. Last, it significantly bound the conduct that could constitute grounds for avoidance: debt could be avoided when it was essentially private (the debt of the individuals making up the discredited government) rather than public, but only if the lender had knowledge of the use of the funds.

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11. See, e.g., *Succession of States in Respect of Matters Other than Treaties*, [1977] 2 Y.B. Int'l L. Comm'n 67, U.N. Doc. A/CN.4/301 at 73 (describing odious debt as the “genus, whereas ‘war debts’ and ‘subjugation debts’ constitute different species within [it] . . . [W]ar debts are those contracted by a State to sustain its war effort against another State, and ‘subjugation debts’ are those contracted by a State with a view to subjugating a people and colonizing its territory”).

12. See, e.g., Volinka Reina, Note and Comment, *Iraq's Delictual and Contractual Liabilities: Would Politics or International Law Provide for Better Resolution of Successor State Responsibility?* 22 BERKELEY J. INT'L L. 583, 592–99 (2004). On the problem generally as resolved among the successor states to the Soviet Union, see Patrick Julliard, *The Foreign Debt of the Former Soviet Union: Succession or Continuation?*, in DISSOLUTION, CONTINUATION AND SUCCESSION IN EASTERN EUROPE 67–86 (Brigitte Stern ed., 1998). In the nineteenth century, the context was debt repudiation. “Usually, repudiations occurred in the context of revolutionary regime changes. A typical example is the repudiation of the external debt contracted by the Mexican emperor Maximilian by the republican government of Benito Juarez in 1866 after the overthrow of Maximilian.” CHRISTIAN SUTER, *DEBT CYCLES IN THE WORLD-ECONOMY: FOREIGN LOANS, FINANCIAL CRISES, AND DEBT SETTLEMENTS, 1820-1990* 81 n.12 (1992). The study of those repudiations served as support for the construction of the odious debt doctrine by Sack. See SACK, *supra* note 8, at 29.

13. The problem in traditional international law approaches to this situation, of course, is the traditional distinction made between states and governments. See Michael John Volkovitsch, *Righting Wrongs: Towards a New Theory of State Succession to Responsibility for International Delicts*, 92 COLUM. L. REV. 2162, 2165 (1992). This is a distinction that new approaches would seek to exploit, especially when corruption may be involved. See, e.g., *Kenyan Corruption Case a Step Forward for Odious Debt Campaign*, ODOUS DEBT ONLINE (Dec. 12, 2006), <http://www.odiousdebts.org/odiousdebts/print.cfm?ContentID=16728> (dismissing a suit against the Kenyan government on the grounds that the contract was procured through a bribe of the President of Kenya and thus void) (last visited Feb. 10, 2007) [hereinafter *Kenyan Corruption Case*]. For a further discussion of the case, see *infra* Part II.A and notes 59–69.

14. This doctrine is articulated nicely in a formal context. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 208 (1987) [hereinafter RESTATEMENT THIRD].

There have been attempts to rework the definition of nonlegitimate use, grounded in various theories of democratic government and popular sovereignty (essentially grounded in the application of a “would the people have consented” standard): violations of basic human rights, rights to development, corruption, and criminal activity have all been advanced as adequate grounds for applying the doctrine.<sup>15</sup> Lender due diligence has also become a dynamic area as a general global consensus moves from a schema requiring actual creditor knowledge of borrower wrongdoing to one predicated on a set of positive obligations centering on creditor surveillance and intelligence-gathering: lenders ought not to profit from their complicity in subsidizing illegitimate governments or in fund use and borrowers must accept regimes of greater transparency.<sup>16</sup>

But for all these developments, the odious debt doctrine appears to continue to serve the interests of the developed world, its globalized lending institutions, and its elites (political, economic, and academic). The basic pattern remains unaltered. The states of the developed world, the instrumentalities of those states, and the privileged legal and academic elites for the most part resident in those states, continue to assert a significant influence over the development and implementation of the doctrine. Thus, the doctrine has served to demonstrate the developed world’s largesse, and more importantly, its control of the mechanisms and rules by which capital must flow through *governments* and be demanded back from *states*. These periodic demonstrations of the generosity of the developed world have ranged from discretionary debt-forgiveness programs loosely based on odious debt principles to the use of those same principles to launch global anticorruption campaigns.<sup>17</sup> The genesis and amplification of such

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15. See, e.g., MICHAEL KREMER & SEEMA JAYACHANDRAN, *Odious Debt*, Apr. 2002, at 5–9, <http://www.imf.org/external/np/res/seminars/2002/poverty/mksj.pdf>. The platform of the Jubilee USA Network, a large umbrella group made up of nongovernmental organizations, nicely blends many of these themes. This platform emphasizes debt cancellation of sovereign debt as a strategic device to aid in the development of countries “burdened by high levels of human need and environmental distress” or where the debt can be characterized as odious “through a just and equitable process not controlled by the creditors,” and that is not conditioned on the desires of supranational financial organizations, either public or private. Jubilee USA Network, *About Us: What We Believe*, Jubilee Platform, <http://www.jubileeusa.org/about-us/what-we-believe/jubilee-platform.html> (last visited Apr. 29, 2007). Debt cancellation under this program is bundled with a positive development obligation imposed on lenders and borrowers that commands the return of diverted wealth, the eradication of poverty, and the fostering of democratic political institutions. *Id.*

16. The U.N.’s recent attempt to construct a global law for the regulation of multinational corporations and similar enterprises embraced these notions as a general matter. The international community appears to be more energetically embracing the notion that private actors have continuing surveillance and monitoring duties respecting the actions of all parties to agreements to which they are parties. This obligation appears especially acute when private entities or individuals deal with the apparatus of a state that in turn might apply the benefits of the contractual relation (including funds from loans) to the violation of human rights. For a discussion in the context of multinational corporations, see Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nation’s Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility as International Law*, 37 COLUM. HUM. RTS. L. REV. 287, 351–54 (2006).

17. The World Bank has been at the forefront of the most recent versions of these campaigns. See Paul Wolfowitz, World Bank President, *Good Governance and Development—A Time for Action*, Address Delivered in Jakarta, Indonesia (Apr. 11, 2006), <http://web.worldbank.org/WBSITE/>

generosity has been directed, in its most authoritative guises, from the comfort of academic conferences, not unlike this one,<sup>18</sup> as well as from the offices of the well- (and less-well-) intentioned functionaries sprinkled from New York and Washington to Geneva and Beijing, and from elements of civil society headquartered in the developed world.<sup>19</sup> None of this is either surprising or out of order—this observation is meant to serve not as an indictment but as context for the discussion that follows.

For while the developed world dominated the debate about and implementation of rules of the odious debt doctrine, developing states have come to see another basis for its application, one that turns the traditional analysis on its head. One of its principal architects has been Fidel Castro. Odious debt has escaped the confines of late nineteenth-century imperial conversations, as well as the global management concerns of the middle of the last century, and become a part of a larger discussion about the nature and construction of global law.

And it is in the construction of a global law that Cuba again stands at the crossroads of the global ambitions of developed and developing states. The language and context of those ambitions may have changed, but the operation of global political dynamics has not. What is new is that, in contrast to the discussion between the Spanish Kingdom and the American Republic in the late nineteenth century in which Cuba stood mute, Cuba now speaks. Since 1985, Castro has advanced a global conception of odious debt, one that takes the basic framework at face value and reconstitutes it at the global level.<sup>20</sup> The

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EXTERNAL/NEWS/0,,contentMDK:20883752~pagePK:34370~piPK:42770~theSitePK:4607,00.html (last visited Sept. 8, 2007). Some municipal regimes have resorted to similar campaigns for roughly similar aims, particularly the People's Republic of China. See TING GONG, *THE POLITICS OF CORRUPTION IN CONTEMPORARY CHINA: AN ANALYSIS OF POLICY OUTCOMES* 135–45 (1994).

18. See also Symposium, *Rebuilding Nation Building*, Case Western Reserve Univ. School of Law, Apr. 8, 2005; Conference, *Sovereign Debt Restructuring: The View from the Legal Academy*, Emory University, Georgetown Univ. Law Center, 2004; Conferences, *Illegitimate Debts*, German Jubilee Network (Berlin, Bielefeld, Essen, Frankfurt, Hannover, Leipzig, Stuttgart), June 21–30, 2002. A critic of the movement has complained that “[t]he most significant source of support for the doctrine stems from the scholarship of a select few writers, most of whom do not address the actual implementation of the doctrine via international law.” Emily F. Mancina, Note, *Sinners in the Hands of an Angry God: Resurrecting the Odious Debt Doctrine in International Law*, 36 GEO. WASH. INT’L L. REV. 1239, 1252–53 (2004) (“At present, the odious debt doctrine is not an example of *lex ferenda*, a norm that is coming into being. It is unlikely that the odious debt doctrine will become international law through this means.”).

19. For example, Probe International is a Canadian civil society actor headquartered in Toronto that “exposes the devastating environmental, social, and economic effects of Canada’s aid and trade abroad. In a democracy, there is no greater guarantee of justice than the free flow of information.” Probe International, About Us, <http://www.probeinternational.org/pi/index.cfm?DSP=subcontent&AreaID=52> (last visited Feb. 8, 2007). It maintains a website called “Odious Debts,” which is described as the “Internet source for information about the global odious debt movement.” Odious Debts, About Us, <http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=subcontent&AreaID=208> (last visited Feb. 8, 2007). The Odious Debt website identifies a large number of other civil-society organizations working in this area. See Odious Debts, Links, <http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=subcontent&AreaID=9> (last visited Feb. 8, 2007).

20. See Fidel Castro Ruz, *A Revolution Can Only Be Born from Culture and Ideas*, Cent. Univ. of Venez. (Feb. 3, 1999), <http://www.cuba.cu/gobierno/discursos/1999/ing/f030299i.html> (last visited Sept.

bases of these notions of debt repudiation are bound up in what this article labels “systemic odiousness” or “systemic illegitimacy.” Essentially, the doctrine shifts the focus of analysis from the borrowing regime (and its obligations to repay its debts) to the global financial systems through which lenders operate. It starts from the presumption that, like states, global capital systems must distinguish the system, which emanates ultimately from the people of the globe, from its apparatus (or governance system), which is legitimate only to the extent its authority is legitimately derived and used. But the global capital system, and especially its manifestation as markets for loans to sovereigns, was created to perpetuate the system of subordination and exploitation of the old European imperial system in economic form, and in this respect may be both odious and illegitimate. Moreover, because the apparatus of global capital systems is being used for illegitimate ends (for the benefit of creditors and creditor states and to subordinate and exploit debtor states and their citizens), its activities (and principally its lending activities) are not grounded in conduct with respect to which any public body (courts, legislatures, et cetera) could legitimately enforce (because such enforcement works to the detriment of the political communities they serve). If the current system of lending is illegitimate, then all public debts are also presumed illegitimate and unenforceable.

It would follow from these understandings that, going forward, sovereign lending ought to be governed by norms drawing on developing notions of an international or universal collective human right of development<sup>21</sup> with the goal of eliminating power disparities between states and reducing the political, social, and cultural effects of power disparities in the current regime of globalized financial markets. The burden (and risk) of bad-purpose debt would fall on lenders because the principle of popular sovereignty as a basis for state organization would trump any principle of rights in contract or property.

For Cuba, this produces a curious result and a fortuitous opportunity. A successor regime to that currently installed in Cuba might argue that it has the right to avoid all the debts of the prior Marxist–Leninist state on traditional odious debt grounds; while itself adhering to the odious debt principles of that discredited regime, it attacks the legitimacy of the current system of state lending on odious debt grounds.

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8, 2007) [hereinafter FCR 1999 Speech]; Fidel Castro Ruz, Clausura del dialogo juvenil y estudiantil de America Latina y el Caribe sobre la deuda externa, celebrado en el Palacio de las Convenciones, el 14 de Septiembre de 1985, “Año del Tercer Congreso,” La Habana, Cuba (Sept. 14, 1985), <http://www.cuba.cu/gobierno/discursos/1985/esp/f140985e.html> (last visited Sept. 8, 2007) (translated as “Castro 15 Sept. Comments on Latin American Debt” at <http://www1.lanic.utexas.edu/la/cb/cuba/castro/1985/19850915> (last visited Sept. 8, 2007)) [hereinafter FCR 1985 Speech].

21. See, e.g., African (Banjul) Charter on Human and Peoples’ Rights, *adopted* June 27, 1981, 21 I.L.M. 58, *available at* [http://www.africa-union.org/official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Banjul%20Charter.pdf](http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Banjul%20Charter.pdf). Article 22 of the Charter provides: “All peoples shall have the right to their economic, social and cultural development.” *Id.* at art. 22(1). The obligation to protect this collective and individual right is directed to states. *Id.* at art. 22(2).

This article first briefly revisits traditional notions of odious debts. That visit focuses on the malleability of the notion of odious debt in two principal respects. First, it looks to the expansion of the grounds for odiousness—from a subject tinged with foundational sovereignty concerns to one that is essentially contractual. Second, it looks to the way the doctrine constructs legal personality as autonomous and responsible among the state, its apparatus, and its individuals. The article then examines how the foundational insights of that doctrine were turned upside down in the late twentieth century. Focusing primarily on the writing of Fidel Castro as an important figure in shaping and lending legitimacy to these transformations, this article suggests how the doctrine of odious debt, once so well tied to municipal law, the rights of state sovereigns, and the obligations of states, could be refocused on the institutionalized public and private international systems of capital markets. The article then briefly suggests the potential application of these two tracks to the obligations of a post-Castro Cuba.

It ends with a preliminary consideration of ramifications of a muscular doctrine of odious debt, focused on six key elements: *popular benefit*, *corruption*, *coercion*, *complicity*, *monitoring*, and *transparency*. Reform along these lines has extraordinary potential to reshape the sovereign-debt markets. Yet reform ostensibly in the interests of debtor states may make such capital markets even more profitable for the institutions of capital-generating states. This article ultimately maintains that Fidel Castro of Cuba and the other opponents of the current norms of economic globalization in general, and its systems of financial capital in particular, will be good for business—that is, good for the business of modern so-called neo-liberal global capital markets in general, and for the business of lending to sovereigns, in particular.

## II

### ODIOUS DEBT, LEGAL PERSONALITY, AND THE LAW OF GLOBALIZATION

The doctrine of odious debt was a creature of the state system of international organization. Its foundations rest on notions of the territorial state as the source of legitimate public commitments and on principles of legitimacy of the authority of those who control the apparatus of state (its government). Over the course of the twentieth century, these concepts have broadened considerably within academic discourse, in the understanding of important elements of civil society, and much more reluctantly among the community of nations and the factors in sovereign capital markets. The nature of legitimate public commitments is no longer determined solely by the preference of the people of a state or its elites. Instead, the legitimacy of those preferences is increasingly measured against international human-rights standards. Likewise, the nature of the legitimacy of the state apparatus, and of those in control of that apparatus, has come increasingly to be measured against democratic theories of state organization. The farther from the democratic ideal, the less likely the acts of the apparatus may be deemed to reflect the will of or be

undertaken for the benefit of the people. The identity of state and government becomes increasingly tenuous as the breadth of the doctrine of odious debt expands.

### A. The Traditional Doctrine and Municipal Law

Starting with Alexander Sack, and for a long time thereafter in the twentieth century, the idea of odious debt was considerably circumscribed, both as to definition and as to proof.<sup>22</sup> And in the current era of doctrinal inflation—for that, in a sense, is what has been the effect of a century of discussion of the doctrine of odious debt—it is important to remember the circumspect nature of the doctrine as originally understood. At its core, the doctrine derived from what would become an important element of international law—the conferring of distinct legal personality to a state, on the one hand, and to its apparatus, on the other.<sup>23</sup> It was also grounded in the construction of popular sovereignty as the basis for judging the character and legitimacy of the actions of the state apparatus. Finally, it was grounded on the contractual character of the obligation, as understood in civil-law jurisdictions at the time. Whereas contract in common law focused on compensation for breach rather than on action for enforcement, civil law tended to view contract obligations more strictly.<sup>24</sup> Sack approached public debt the same way as private contract.<sup>25</sup> But he was able to construct an exception to the usual private-law rule by applying the two “substance over form” presumptions of his approach. First, although state debt, like private debt, was to be treated in the first instance as an absolutely binding commitment, that commitment might fail when the public character of the debt also failed.<sup>26</sup> Second, a failure of purpose or use sufficient to trigger the application of the doctrine, in turn, would have to be based on proof that the

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22. This was meant to be an extraordinary sort of debt. However disagreeable the prior government or the uses to which debt was put, states were not meant to lightly repudiate their debts on odiousness grounds. SACK, *supra* note 8, at 160.

23. N. Politis, *Préface*, in SACK, *supra* note 8, at III (“The old doctrines had lost sight of the fact that the obligation of successor states, like those of the original debtor, exists with respect to the creditors and not with respect to their nation. They had allowed themselves to be influenced by the frequent spectacle of agreements between intervening governments to secure, in the event of succession, the allotment of debts and the methods of their payment, without endeavoring to see through these appearances to see that actually the intervention of the governments did have as its aim the defense of their own interests, but rather the protection of those of their subjects.”).

24. See, e.g., Steven Shavell, *Specific Performance Versus Damages for Breach of Contract: An Economic Analysis*, 84 TEX. L. REV. 831, 861–63 (2006); Charles Szladits, *The Concept of Specific Performance in Civil Law*, 4 AM. J. COMP. L. 208, 212–13 (1955).

25. SACK, *supra* note 8, at 30–41.

26. Sack explained: “Thus posed, the problem reaches conclusions fundamentally different from those one would reach if one considers it from the point of view of the relations among states. On the other hand, the succession of the public indebtedness of a State is an institution of public law, the rights of creditors and the obligations of government which derive from this institution ought not to be deemed to offer the kind of absolute and unconditional characteristics as the rights and ordinary obligations of private law; that or those circumstances of the political order, finance or practice can determine in certain cases the reach of particular contract terms in question.” *Id.* at XI–XII. On the rule with respect to changes in territorial integrity, see *id.* at 41–79.



debt itself was either personal rather than public in nature (conferring a private rather than public benefit) or that it did not otherwise reflect the will of the population now asked to bear the burden of the obligation.<sup>27</sup>

Sack was interested primarily in the changed status of government or the state in connection with debt. The trigger for the analysis is a change, either in the constitution of the state or in its territory.<sup>28</sup> He starts with an important limitation—the legitimacy of the state apparatus does not affect the legitimacy of the debt incurred on behalf of the state by individuals controlling that apparatus.<sup>29</sup> All regularly constituted governments—that is, all apparatuses asserting effective governmental power over a territory—may contract indebtedness on behalf of the people of the territory such apparatus controls.<sup>30</sup> Indeed, “In any case, neither international recognition [of a government’s legitimacy] nor the date of that recognition is necessarily pertinent to this problem.”<sup>31</sup>

Abandoning any attempt to import a formalist analysis on debt validity based on the rules of government recognition, Sack instead developed a functional approach<sup>32</sup> based on a separation between state and apparatus.<sup>33</sup> Sack’s approach assumed that validity of indebtedness had to be based on the compliance by the apparatus (and its agents) of their collective obligations to the state (and its citizens) in the context of the incurrence (and use) of any funds secured by debt.<sup>34</sup> Significant reliance was made on U.S. post–Civil War case law, as well as on the law resulting from governmental instability in Mexico

27. *Id.* at XII (“Lastly, in certain well defined circumstances, one will be able, for serious practical reasons, to abstain from their application, on condition, of course, that as a consequence the interests of the creditors do not suffer any unjustified damage.”).

28. *Id.* at 1–6. “At the time of a political transformation, do state debts contracted by the old government pass to the new government? Is this one obliged to assume the old public debt? At the time of a territorial transformation, is the new government . . . after having acquired whole or part of the territory of the old state, obliged to assume the debt of the last one (the total debt—in the event of total annexation or a part of the debt—in the event of acquisition of a part of the territory of the old state)? Thus the question of the succession of the debts arises.” *Id.* at 4–5.

29. “Whether this capacity is monarchical (absolute or limited) or republican; that it proceeds from the ‘grace of God’ or the ‘will of the people’ or not, the whole people or only a portion of the people; that it was established legally or not, etc., all of that is of no importance for the problem which occupies us.” *Id.* at 6.

30. *Id.* at 9. “The capacity of a government to represent the state in its international relations does not in any degree depend on the legitimacy of its origins . . . . The usurper who seizes power with the express or implicit assent of the nation acts and concludes treaties in the name of the state that any restored legitimate government would be obliged to respect.” *Id.* at 11 (internal citation omitted).

31. *Id.* at 12. “This right of government is grounded not on the nature of sovereign debt but on the supreme right of government to immerse itself in all social relations, in general, private and otherwise, whenever required by superior interests of public order.” *Id.* at 40.

32. *See id.* at 21 (after consideration of legal sources).

33. “After the definitive victory of the new government, its personal debts become state debts. The debts contracted by the old government before its end remain state debts, and those which it will have contracted after having ceased to exist, i.e., after it will have become a counter-revolutionary force, etc., are its personal debts.” *Id.* at 24.

34. *Id.* at 25–30 (Chapter III—Les dettes d’État doivent être contractées et les fonds qui en proviennent utilisés pour les besoins et dans l’intérêt de l’État) and especially the rule as summarized at *id.* at 26–27, the first place in the work that the notion of odiousness appears.

throughout the nineteenth and early twentieth centuries.<sup>35</sup> A debt is odious, then, not because of the nature or legitimacy of the state apparatus contracting the debt or because of any change in regimes,<sup>36</sup> but because of the absence of a legitimate relationship between the debt and the state itself. Legitimacy is based on demonstrating the application of the trust relationship between the state and its apparatus in relation to the debt. And debts odious to the state, as such, are not void; they merely change character from a state to a private debt, that is, they follow the agents of the apparatus that engaged in an illegitimate action in the name of the state. Thus Sack points to a connection between legitimacy and odiousness that parallels the construction of rule systems that distinguish between public and private obligations of “princes,” today’s public servants, in their role as such.<sup>37</sup> Sack understands this as modern innovation.<sup>38</sup>

The issue of the character of such debts arises only after a change of government, when creditors seek to hold the state (through its successor government) liable on the obligation incurred by a predecessor state apparatus. For Sack, the new government has the initial obligation to contest the validity of the debt as state debt. It has a double burden. First, the successor regime must show that the contested debt was not incurred for the public benefit—that, indeed, the debt is private in character—and, second, that the creditors were aware of the private nature of the loan they were making.<sup>39</sup> Upon such a showing, the burden shifts to creditors to show that some or all of the proceeds actually served a public purpose.<sup>40</sup>

A long discussion follows, focusing on the obligation of successor states to pay public debts of states or territories acquired by negotiation, treaty, or conquest, in whole or in part.<sup>41</sup> It is in that context that Sack develops an insight, thereafter substantially unmoored from its context and often quoted—the notion that debts incurred to oppress or colonize the people of a state are

35. These cases dealt with the debt obligations incurred by or on behalf of the government of the former Confederate States of America (now reabsorbed into the United States of America) or that of various governments claiming the right to act for or on behalf of the United States of Mexico in the late nineteenth and early twentieth centuries. *See, e.g.,* Williams v. Bruffy, 96 U.S. 176, 187 (1878); U.S. v. Ins. Cos., 89 U.S. 99 (1875); Sprott v. U.S., 87 U.S. 459 (1874); Texas v. White, 74 U.S. 700, 733 (1869); Baldy v. Hunter, 171 U.S. 388 (1898), *cited in* SACK, *supra* note 8, at 29. For a U.S. case dealing with the fallout of Mexican political instability, see Sokoloff v. Nat’l. City Bank, 145 N.E. 917 (N.Y. 1924), *cited by* SACK, *supra* note 8, at 29.

36. *See* SACK, *supra* note 8, at 46 (“It is thus obvious that the political transformation of the debtor state does not change anything with respect to its debts. Those are the debts of the state and not of a government. They must be dealt with by the new government of the state.”).

37. *See id.* at 41–45.

38. “The rule is grounded in the nature of the modern state.” *Id.* at 41.

39. *Id.* at 30 (“It is the new government which bears the burden to prove that particular debts contracted by the prior government were not in the interests of and to the advantage of the state and—this is uniquely important in these circumstances—that the creditors knew that these sums would be intended for odious ends.”).

40. *Id.* (“If that could be established, it is to the creditors, in their turn, to prove that, in spite of its ‘odious’ purpose of the loan and their knowledge thereof, all or part of its proceeds was in fact employed in a way that benefited the state.”).

41. *Id.* at 62–158.

odious (and thus personal to the government incurring them rather than public and binding on the people thus oppressed or colonized).<sup>42</sup> These are examples of debts that are not odious because they are personal to the maker (who seeks to bind the state to her personal obligations incurred while holding an office of trust within the state apparatus). Instead these are debts that, while not losing their public character, lose their legitimacy as debt binding the people of the territory on whose behalf or for whose welfare the debt was ostensibly incurred.<sup>43</sup> But Sack assumed that the characterization of debt as odious, even in cases of subordination, exploitation, or oppression, would be an exceptional occurrence—one that would require the concurrence of the family of nations, constituted as such and duly assembled.<sup>44</sup> As a consequence, Sack suggested an institutionalization, at the international level, of any framework to be used to make determinations about the character of sovereign debt as odious or as enforceable. Formal international institutionalization would assure that the majority of states would be complicit, as a formal matter, in any such determination, and thus provide both a safeguard against abuse and a basis the legitimacy of any determination made.<sup>45</sup>

The ideas synthesized by Sack proved extremely useful once—absolving Costa Rica of its obligation to British creditors for debts of an overthrown dictator.<sup>46</sup> But the grounds of the arbitral decision were narrow, focusing on the physical manifestation of the sovereign will of the people and the peculiar nature of the use of the funds, as well as on the knowledge of the lenders. Chief Justice Taft, as arbitrator, was careful to avoid the idea of illegitimacy of the state apparatus, standing alone, as a basis for avoiding the obligation of the

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42. “When the government incurs debts in order to control the population of a part of its territory or to colonize this one by nationals of dominant nationality, etc., these debts are *odious for the indigenous population of this part of the territory of the debtor State*.” *Id.* at 158.

43. “This is why, in the event of *political* transformation of the debtor state, these debts become the obligation of the new government. In the event of *territorial* transformation of the debtor state, these debts must be distributed between all its constituent territories, excepting only those which are directly odious.” *Id.* at 160.

44. “Let us not forget . . . that the same question of the ‘odious’ nature of this or that debt could be possessed only exceptionally, and when it appears, manifests itself in a completely undeniable way, that these debts are really ‘odious’ not only to the eyes of the new government of the whole or part of the territory of the old state, but also in the opinion of qualified and impartial representatives of the family of the nations.” *Id.* (citing Part V, Section 6 of his work).

45. *Id.* at 163. Sack was clear about the institutionalization of an international process meant to produce a general consensus among nation-states of the character of the sovereign debt at issue. First, the repudiating government would have the burden of proving before a duly constituted international tribunal both that the purposes for which the debt had been incurred was odious and that the creditors had knowledge of the odious purpose at the time of making of the loan. Second, the creditors will have to be unable to show that any part of the debt was used for the benefit of the state or its people. This system was not designed to make it easy either to permit unilateral characterization of debt as odious or to qualify as an odious debt. This was especially true with respect to a particular species of odious debt—war debt of a certain character, that is the debt of the loser in conflicts among, between, and within states. *Id.* at 166–70.

46. See *Great Britain v. Costa Rica*, 1 R. Int’l. Arb. Awards 375 (1923) (Tinoco Arbitration), reprinted in *Arbitration Between Great Britain and Costa Rica: Opinion and Award of William H. Taft, Sole Arbitrator*, 18 AM. J. INT’L L. 147 (1924).

state to repay debts incurred in its name by that (even illegitimate) apparatus.<sup>47</sup> And he gave great weight to the knowledge of the creditors as essentially complicit in a scheme to impose on the Costa Rican people the “retirement” arrangements of the former dictator.<sup>48</sup>

But even as Sack synthesized a system of odious debt, the reality of such a system “on the ground” was getting away from him, showing the potential for expansion based on evolving moral- and human-rights notions. These notions would, in the ensuing century, serve as a basis for extending the utility of the theory (notionally first, and then, to a limited extent, factually) well beyond the confines constructed for it by Sack. Sack himself saw it coming. He argued that it was wrong to characterize as odious German bond debt meant to buy out Polish landowners from territory seized from Poland by the German Empire. Though the funds went to a purpose odious to the successor Polish state (the colonization by Germans of formerly Polish territory), the Polish landowners had been fairly paid, and the funds thus transferred and traced back to the loans had effectively remained in the hands of the Polish polity. Such debts, while morally repugnant, should not have been deemed odious as a matter of “law.”<sup>49</sup> Current proponents of odious debt doctrine tend to side against Sack and use this instance as one among others that support a substantially broader reach of the doctrine.<sup>50</sup> The moral component of the doctrine is evident in some of this current writing.<sup>51</sup>

By the beginning of the twenty-first century, Sack’s suggested limitations of the application of the doctrine had substantially fallen by the wayside. This article focuses briefly on a synthesis of two recent, important efforts. The first is private and academic, involving a campaign by elements of civil society and academics to bring about changes in municipal and global law.<sup>52</sup> The second effort was through the actions and programs of institutional and supranational actors.<sup>53</sup> As a consequence, the modern understanding of the doctrine of odious

47. “To hold that a government which establishes itself and maintains a peaceful administration, with the acquiescence of the people for a substantial period of time, does not become a *de facto* government unless it conforms to a previous constitution would be to hold that within the rules of international law a revolution contrary to the fundamental law of the existing government cannot establish a new government.” *Arbitration Between Great Britain and Costa-Rica*, 18 AM. J. INT’L L. 147, 154 (1924).

48. See *id.* at 168. Chief Justice Taft, as arbitrator, explained: “The bank knew that this money was to be used by the retiring president, F. Tinoco, for his personal support after he had taken refuge in a foreign country. It could not hold his own government for the money paid to him for this purpose.” *Id.*

49. SACK, *supra* note 8, at 163–64.

50. See Adams, *supra* note 7, at 4; KHALFAN, KING & THOMAS, *supra* note 10, at 18, 27, 31.

51. See KHALFAN, KING & THOMAS, *supra* note 10, at 28 (distinguishing the 1938 German repudiation of Austrian debt on grounds of no benefit).

52. See KREMER & JAYACHANDRAN, *supra* note 15.

53. See WORLD BANK GROUP, GOVERNANCE AND ANTI-CORRUPTION (2001), <http://www.worldbank.org/wbi/governance/index.htm> (last visited Oct. 1, 2007) (“The World Bank views good governance and anti-corruption as central to its poverty alleviation mission.”). As Anthony Anghie has noted, the World Bank, through its control of authoritative knowledge, “aspires to maintain its authority and legitimacy by becoming sovereign over the entire subject of development . . . . Deviations . . . are accompanied frequently by economic disciplining . . . . Though the Third-World

debt, broadly conceived (there are of course adherents to any flavor of stricter interpretation of the limits of the doctrine), revolves around several points:

1. A focus on the will of and benefits to territorial sovereigns—the people. The issue has been characterized as “a sensitive one.”<sup>54</sup> There appears to be a growing impetus to “consider ‘odious’ any ‘debt that has been incurred by a government without the informed consent of its people, and one that is not used in the legitimate interest of the State,’” although this is by no means the present position of positive international law.<sup>55</sup>
2. An adherence to the basic contractual context of transactions and consequential emphasis on lender and borrower due diligence.<sup>56</sup>
3. A shift of responsibility to the lender, with a move away from state (and borrower) obligation to lender responsibility, and a greater willingness to tolerate imposition of significant penalties for failures of lenders to monitor the use of their funds.<sup>57</sup>
4. A deepening notion of the passivity of the polity and a greater willingness to excuse a failure to act in the face of oppression or illegitimate conduct on the part of those in control of the state apparatus;<sup>58</sup> the people of a jurisdiction need do nothing to evince their disagreement with the practices later used as the basis for repudiation.
5. An embrace of the idea, now rationalized, that odiousness is universal and not contextual; in some circumstances, even the populace may not

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states . . . are ostensibly sovereign states . . . , these states, in fact, only have doubtful control over their economies.” Antony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy and the Mandate System of the League of Nations*, 34 N.Y.U. J. INT’L L. & POL. 513, 625 (2002).

54. Guido Acquaviva, *The Dissolution of Yugoslavia and the Fate of its Financial Obligations*, 30 DENV. J. INT’L L. & POL’Y 173, 188 (2002).

55. *Id.* (quoting JULIETTE MAJOT, *THE DOCTRINE OF ODIOUS DEBTS, in FIFTY YEARS IS ENOUGH: THE CASE AGAINST THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND* 35 (1994)).

56. The contractual nature of the issue continues to be recognized especially by civil lawyers. See Christoph G. Paulus, “*Odious Debts*” vs. *Debt Trap: A Realistic Help?*, 31 BROOK. J. INT’L L. 83, 90–91 (2005) (“[T]he principle of democracy . . . is being taken as a ground to justify the cancellation of long-standing contracts, although no reason exists to terminate the contract under either its agreed upon terms or other valid legal provisions.”). For a discussion of the trend toward cultures of private surveillance within municipal law, see Larry Catá Backer, *Surveillance and Control: Privatizing and Nationalizing Corporate Monitoring After Sarbanes-Oxley*, 2004 MICH. ST. L. REV. 327 (2004); Larry Catá Backer, *The Duty to Monitor: Emerging Obligations of Outside Lawyers and Auditors to Detect and Report Corporate Wrongdoing Beyond the Federal Securities Laws*, 77 ST. JOHN’S L. REV. 919 (2003).

57. See Robert K. Rasmussen, *Integrating a Theory of the State into Sovereign Debt Restructuring*, 53 EMORY L.J. 1159, 1177 (2004) (“However, to the extent that the monies received were spent on the follies and fancies of the erstwhile leaders, it is far from obvious that the citizens should remain burdened by the debt. In this situation, lenders may be better positioned to reduce the agency costs that arise between citizens and their rulers than are the citizens themselves.”).

58. For the naturalization of this assumption in the international law of human rights and state responsibility, see Larry Catá Backer, *The Führer Principle of International Law: Individual Responsibility and Collective Punishment*, 21 PENN ST. INT’L L. REV. 509, 527 (2003).

legitimately undertake obligations to engage in certain activities funded by debt to which the state is later bound to repay.

6. A sharpening of the autonomy and distinctions between the legal personalities of state, government, and government officials and a simultaneous openness to the power of public and private persons to engage in acts tinged with both public and private characteristics.
7. An extension of the applicability of the doctrine of odious debt to all public obligations, even those of sitting regimes.

All of this is well captured in a recent corruption case out of Kenya.<sup>59</sup> An arbitral tribunal of the International Center for Settlement of Investment Disputes (ICSID)<sup>60</sup> determined that an individual businessman (a citizen of Canada based in Dubai) could not enforce a contract with the Republic of Kenya that he had secured by paying \$2 million to former President Daniel arap Moi.<sup>61</sup> The ICSID tribunal rejected the argument that the money constituted a personal gift, even one ostensibly intended for public use.<sup>62</sup> Rather, it found, the money had been paid as a bribe to the president to ensure that he would cause the Kenyan state to enter into a contract that furthered the interests of the businessman and of the president in his personal capacity, but that might not have provided a benefit to the Kenyan state.<sup>63</sup> The tribunal determined that it could not hold the Kenyan *state* liable on an obligation incurred for the benefit of the Kenyan *head of state*, and therefore tinged with illegitimacy in its inception.<sup>64</sup> It was careful to distinguish between the acts of President Moi in his personal capacity (taking the bribe constituted a personal act) and as president (having authority under the Kenyan Constitution to bind the Kenyan state and its people to the obligations represented by the contract).<sup>65</sup>

In rejecting the businessman's claim, the tribunal rejected as well the notion that the bribe might have been excused by "any local custom in Kenya purporting to validate bribery committed . . . in violation of international public policy."<sup>66</sup> Nor could the contract be viewed as distinct from and thus untainted by the bribe: it was "an intrinsic part of the overall transaction, without which

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59. See *Kenyan Corruption Case*, *supra* note 13.

60. For a discussion of the International Center for Settlement of Investment Disputes, see *infra* Part III.A and note 134.

61. *Kenyan Corruption Case*, *supra* note 13.

62. *Id.*

63. *Id.*

64. *Id.* ("[I]n the tribunal's words, he could not '[find] a cause of action on an immoral or illegal act.' The tribunal thus ruled that, 'claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.'").

65. *Id.* ("The tribunal rejected Mr. Ali's argument that Mr. Moi had been 'one of the remaining Big Men of Africa who, under the one party state Constitution, was entitled to say, like Louis XIV, that he was the State,' as unfounded since under Kenyan and English law, which Mr. Ali was relying on, the president was regarded as being bound by the law and the constitution.").

66. World Duty Free, Ltd. v. Republic of Kenya (ICSID, Oct. 2006) ¶ 172, *available at* [http://www.investmentclaims.com/decisions/WDF-Kenya\\_Award.pdf](http://www.investmentclaims.com/decisions/WDF-Kenya_Award.pdf).

no contract would have been concluded between the parties.”<sup>67</sup> This case reflects not only the typical, “odious” loan to a despot to the benefit of his personal purse, but it might also suggest the power of the Western-oriented universalism inherent in the doctrine as it has come to be extended to corruption.<sup>68</sup> There is irony in the way that an award that appears to benefit a developing state and former colony of the United Kingdom can also serve to solidify the imposition of a hierarchy of law in which municipal law and custom become increasingly subordinated to global custom.

Civil-society advocates seeking an extension of the odious debt doctrine hailed the decision.<sup>69</sup> Odious debt has been transformed into illegitimate debt.<sup>70</sup> And contract is used to reinforce the notion that only democratically elected governments, abiding by all international human-rights norms, can legitimately incur debt that binds the state they control, but only to the extent such debt actually benefits the polity.<sup>71</sup> Yet all of this assumes the legitimacy of the

67. *Id.* (alteration in original).

68. The plaintiff’s argument paralleled an argument raised generally by Professor Ala’i. See Padideh Ala’i, *The Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Current Crusade Against Corruption*, 33 VAND. J. TRANSNAT’L L. 877, 898 (2000) (“[I]n some societies, cultural practices that we may consider ‘corrupt,’ may be closer to their traditional way of doing things.”).

69. *Id.* (“Legal experts Ashfaq Khalfan and Jeff King, of the Canadian based Centre for International Sustainable Development Law (CISDL) and co-authors of the 2003 landmark analysis of the legal doctrine of odious debts, say the tribunal’s ruling is an important one for the global campaign. ‘This case,’ says Mr. King, ‘adds to precedent such as the Tinoco Arbitration (1924) and numerous international conventions in clarifying that contracts for personal enrichment, or those procured by bribery, are against international public policy and are thus unenforceable.’”). The article also emphasized the importance of the adoption of a rule distinguishing the personality of the President of the Kenyan Republic from that of the man holding the office. *Id.* (“‘This decision dissolves the fiction,’ says Jeff King, ‘that a head of state is capable of binding the state to any sort of contract.’”).

70. See JOSEPH HANLON, *DEFINING ILLEGITIMATE DEBT AND LINKING ITS CANCELLATION TO ECONOMIC JUSTICE* 36 (2002), <http://english.nca.no/filemanager/download/197/Defining%20illegitimate%20debt,%20understanding%20the%20issues.pdf> (discussing illegitimate debts in Argentina and South Africa as “odious”). Hanlon notes that:

The term “illegitimate debt” seems not to have been used in any law or court ruling until an Argentine Federal Judge in 2000 ruled that debt contracted during the period of the military dictatorship (1976–1983) was illegitimate. Patricia Adams, a specialist in “odious debt,” noted that “[t]he implications of this ruling extend beyond Argentina and send a clear message to the citizens of all the highly indebted countries that international creditors were responsible for ensuring that the money loaned was used for the interests and needs of the state.”

*Id.* at 6 (citations omitted). See also KHALFAN, KING & THOMAS, *supra* note 10, at 53–81 (analyzing legal remedies for illegitimate debt).

71. See HANLON, *supra* note 70, at 5 (“Odious loans to dictators and apartheid South Africa are examples of *unacceptable loans*. Usury and requirements to violate national law are *unacceptable conditions*. Loans to a poor country for consumption could be argued to be *inappropriate loans* on the grounds that it was imprudent to lend to a country which had no chance of repaying the loan. Conditions imposed by the IMF could be argued to be *inappropriate conditions* if they created an economic environment which made it impossible to repay the loan.”) (emphasis in original); see also KREMER & JAYACHANDRAN, *supra* note 15, at 26–29 (“Under this definition, for debts to be odious the borrowing government has to both be undemocratic and loot the funds or use them for repression. Clearly, these stringent conditions create a strong case for blocking borrowing, but one could also consider cases when the government is undemocratic but spends in the people’s interest; is democratic but loots the proceeds from borrowing; or is democratic but spends incompetently so its borrowing does not benefit the people.”).

systems through which debt is incurred. The fault lies with the apparatus of a state—an illegitimate apparatus (antidemocratic or lawless)—and not with the system producing debt. Even broadened, the system is grounded on the legitimacy of the global capital markets—an assumption subsumed under the general presumption that all sovereign debts must be repaid.<sup>72</sup>

But it is just a small step from the transformation of odious debts into illegitimate debt, to a doctrine of global systemic illegitimacy. As applied to the capital markets for sovereign debt, that notion can become a powerful tool for the recasting of those markets and the relationships of sovereigns to them. It is this idea that Fidel Castro develops as a theory of global illegitimacy.

## B. Moving Traditional Doctrine to the Global Plane

Castro illustrates the development of a theoretical justification for the concept of “odious debt” on a vastly expanded scale. This justification counts among its sources Marxist–Leninist ideological perspectives combined with strains of nationalist and post-colonial writings of the post World War II period.<sup>73</sup> From the perspective of this framework, the odious debt doctrine, often cited and little applied after the nineteenth century in either its classical or current forms, serves as little more than a fig leaf over the great objectives of what Castro and others characterize as the global neo-liberal project,<sup>74</sup> to perpetuate Western hegemony over developing states. The odious debt doctrine, as part of that project, is designed deliberately to advance Western hegemony. This is accomplished through its elaboration as creditor-oriented in scope and application. In this way traditional odious debt doctrine has served to advance the interests of global capital and the creditor states. These creditor states, “civilized” nations who traditionally occupied the highest echelons of sovereign-state authority under traditional systems of international law,<sup>75</sup> applied the doctrine as a mechanism for cementing their place within the hierarchy of states, the integrity of systems of capital that protected their interests, and the interests of their instrumentalities. Paralleling pre–World War II notions of an international system consisting of a family of nations overseeing and civilizing a community of less-civilized states to development sufficient to

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72. Thus, one academic commentator could with confidence assert, other than in connection with the financing of decolonization, “the clear general rule is that debts ought to be paid. This seems a foregone conclusion in the contemporary world, a world where countries compete with each other primarily in trustworthiness before financial institutions and private investors, and not primarily through the actual use of force anymore.” Acquaviva, *supra* note 54, at 213–14.

73. See, e.g., JEAN-PAUL SARTRE, *COLONIALISM AND NEO-COLONIALISM* (Azzedine Haddour, Steve Brewer & Terry McWilliams, trans., 2001) (stressing the need for decolonization). See generally BILL ASHCROFT, GARETH GRIFFITHS & HELEN TIFFIN, *POST-COLONIAL STUDIES: THE KEY CONCEPTS* 110–15 (2000).

74. See, e.g., Henk Overbeek & Kees van der Pijl, *Restructuring Capital And Restructuring Hegemony: Neo-Liberalism And The Unmaking Of The Post-War Order*, in *RESTRUCTURING HEGEMONY IN THE GLOBAL POLITICAL ECONOMY: THE RISE OF TRANSNATIONAL NEO-LIBERALISM IN THE 1980S* 14–23 (Henk Overbeek ed., 1993).

75. See WESTEL W. WILLOUGHBY, *THE FUNDAMENTAL CONCEPTS OF PUBLIC LAW* 307–09 (1924).



merit entry into the “family of nations,”<sup>76</sup> odious debt served as a recognition of both the inability of lesser states and territories to order their affairs in a sufficiently civilized manner, and as a mechanism to bring these states to a more civilized level. Its principal focus was on the maintenance of a stable global capital system within this hierarchical, subordinating, and hegemonic family-of-nations system in which “less” equal states were increasingly made civilized by inducements to mimic the conduct and mores of developed states. Thus, though the doctrine might be substantially expanded in coverage through application of the current literature, the odious debt doctrine remains focused on both of these projects: to protect the system of sovereign lending and to reinforce a particular culture of state governance norms and behavior.<sup>77</sup>

Castro is representative of a group of statesmen from the developing world, and of those academics who have supported their projects, who have argued that this broadening is not enough. This group of junior members of the family of nations, those who were the objects of unequal treaties and trusteeships, all suffered within the parameters of a system of international law that before 1945 systematically rationalized and legitimated such actions and subordinations. All have embraced the expanded scope of the odious (now illegitimate) debt doctrine. But they have refocused the analysis, conflating classic odious debt doctrine with current notions of illegitimacy and illegality as legitimate bases for debt repudiation in both a private (corruption) and public (violation of human-rights norms) context.

These new participants in the debate over the scope and application of odious debt notions to sovereign debt have developed another basis for applying the doctrine that turns current doctrinal developments on their heads. Rather than focus on the objects of lending, they focus first on the source of loans and then on the system that rationalizes the rules under which those loans are made. Applying traditional doctrine in this other direction, they attempt to make the case that the loan system itself is odious. It is odious, that is, as an integral part of a larger economic system designed to perpetuate the subordination of developing states to the economic and political instrumentalities of developed states.

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76. See ANTHONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW 59–61 (2005) (arguing that the notion of a family of nations to which the mutual obligations and protections of international law applied was developed to preserve the privileged position of European states and provide a legal basis for European colonialism as an effort to civilize and bring colonial peoples into the family of nations under universal rules devised by the civilizers). Cf. MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 (2001).

77. And for those reasons, its actual application remains extraordinary even as the potential range of its application widens. On the other hand, the in-terrorum effect of an expanded doctrine appears to have begun to induce settlement rather than repudiation or a compulsion to pay a debt in full. See generally Kevin H. Anderson, *International Law and State Succession: A Solution to the Iraq Debt Crisis?* 2005 UTAH L. REV. 401, 436–439 (2005); Emily F. Mancina, Note: *Sinners in the Hands of an Angry God: Resurrecting the Odious Debt Doctrine in International Law*, 36 GEO. WASH. INT'L L. REV. 1239, 1252–62 (2004). In this form it functions well enough as a support for the current system and as a means of reinforcing conduct norms useful for the perpetuation of the current system.

Castro does not reject the traditional application of broadened notions of the odious (illegitimate) debt doctrine. Indeed, he joins those who have argued that the odious debt notion ought not to be limited to successor states or treated as a narrow argument bounded by the legalisms of Western-oriented international law. Instead, the notion must be tied to the realities of lending at the international level and the legitimacy of the government to which a loan is made.<sup>78</sup> Adopting the framework of current odious debt theory, Castro asserts that whereas civilian governments that succeeded military dictators cannot be held liable for the financial, and particularly the debt, crises they inherited, military dictators ought to be accountable. “Pinochet can be blamed for a large part of them, because of his fratricidal coup and his enthusiastic contributions to and cooperation with [International Monetary Fund] policy for nearly twelve years.”<sup>79</sup>

Thus, even when there is no issue of “successor state,” to which the concept is usually and traditionally has been limited,<sup>80</sup> the odious debt concept ought to apply to determine the lender’s complicity in subsidizing the government of an illegitimate ruler and limit the lender’s ability to profit thereby—especially after the overthrow and establishment of a legitimate state apparatus.

But this justification of debt repudiation on the basis of its particular characteristics (its use to maintain the government in power to the detriment of the subject population) veils its more revolutionary aspects. First, Castro suggests complicity by the creditor states through their private-sector capital markets.<sup>81</sup> This does not, by itself, expand current versions of a broadly applied

78. See Fidel Castro Ruz, *Latin America’s Foreign Debt Must Be Canceled*, in FIDEL CASTRO SPEECHES 1984-85: WAR AND CRISIS IN THE AMERICAS 206, 211 (Michael Tabor ed., 1985) (text of interview of Fidel Castro Ruz conducted by Regino Díaz, editor of the Mexican newspaper *Excelsior*, Mar. 21, 1985) (“The military men are withdrawing from public administration. If the economic situation had been less serious, they would have resisted.... Now they have turned state administration over to the civilians and have left them a terrible inheritance, to be sure.”).

79. *Id.* at 219–20. Castro is making two points here. One, of course, is that the dictators entered into the sovereign debt market for their own benefit (to perpetuate their rule). The other is that the dictators were serving the interests of the international lending establishment as well as their own (and thus the reference to the IMF). Odiousness here, then, is meant in both its traditional sense and in the sense of systemic illegitimacy focused on the creditor.

80. See, e.g., P.K. MENON, THE SUCCESSION OF STATES IN RESPECT TO TREATIES, STATE PROPERTY, ARCHIVES AND DEBTS 161–63 (1991) (explaining the concept of odious debt in relation to successor states); Hubert Beemelmans, *State Succession in International Law: Remarks on Theory and Statepraxis*, 15 B.U. INT’L L.J. 71, 73–74 (1997). See generally Paul Williams & Jennifer Harris, *State Succession to Debts and Assets: The Modern Law and Policy*, 42 HARV. INT’L L. REV. 355, 356 (2001) (discussing “the legal rules governing the allocation of debts and assets among successor states, and . . . the manner in which the political objectives of the various parties influence the development and application of the relevant legal rules concerning state succession to debts and assets.”).

81. “As a result of all of these mathematical calculations and moral, historical, political and economic reflections, I have come to the conclusion that the Latin American debt is unpayable and should be canceled.... I suggest that the industrialized creditor countries can and should make themselves responsible for the debts of their own banks.” Castro, *supra* note 78, at 228. This finds its echo in the work of some commentators, for example, out of Africa. See, e.g., Chris N. Okeke, *The Debt Burden: An African Perspective*, 35 INT’L LAW. 1489 (2001).

odious debt doctrine. Second, Castro suggests systemic illegitimacy.<sup>82</sup> The notion, expressed in speeches from the late 1970s through the turn of the century, increasingly suggested that the system of lending itself created not merely institutional complicity in odious lending, but was itself geared to the imposition of public indebtedness of no benefit to the borrowing state. Castro effectively makes the case that loans profiting the lender but not the borrower (in a public-debt context) must by nature constitute a class of debt that is odious, as that notion is classically understood.<sup>83</sup> Four principal characteristics of this systemic hypercycle produce an unavoidable need for developing states to borrow, and their perpetual inability to repay those loans outlined by Castro was described in earlier studies.<sup>84</sup> Labor specialization, overproduction, capital migration, and consumerism produce a global system that compels poor states to borrow for the benefit of developed states.<sup>85</sup>

The modern system of private orderings, of global capital in the service of undefined global markets, it is argued, serves to benefit creditor states to the ruin of borrower states.<sup>86</sup> “In effect, developing states acquire as a debt obligation a portion of the wealth that represents the required subsidy of global production at the heart of the neo-liberal system. Thus the spiral deepens.”<sup>87</sup> In this way, the system of sovereign lending manages to reinforce the old international-law system that sought to legitimize colonialism and the unequal treatment of states without invoking the old imperialist norm system directly. Fidel Castro nicely distilled this insight in the 1980s: “we have analyzed all of the variations suggested to resolve the problem of state debt . . . the result of all of these analyses is that sovereign debt, like an enormous and monstrous cancer, . . . tends to reproduce itself and grow without limit.”<sup>88</sup>

Unable to tax sufficiently to repay prior loans, “States must borrow additional sums of money to pay the portion of prior loans which are unpaid

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82. For a fuller treatment of the construction of this systemic illegitimacy, as constructed by Castro, see Larry Catá Backer, *Ideologies of Globalization and Sovereign Debt: Cuba and the IMF*, 24 PENN ST. INT'L L. REV. 497, 515–33 (2006).

83. See *supra* text accompanying notes 23–52.

84. Backer, *supra* note 82, at 531.

85. *Id.* Overproduction misallocates resources for the benefit of consumers in the wealthiest states by depressing the price of these goods, making them more affordable in the developed world but beyond the reach of people elsewhere. Free movement of capital makes it harder for developing states to tax consumption or income of the entities producing goods for the global market. Consumerism as an ideology keeps the wheels of overproduction going and fuels a constant if false aspirational hope among those in developing states. *Id.*

86. “States, without wealth to tax and with critical needs to meet, must borrow. Developing states borrow directly, in the debt markets, and indirectly, through the IMF, from developing states.” *Id.*

87. *Id.*

88. Fidel Castro Ruz, Commander in Chief, First Secretary of the Central Committee of the Cuban Communist Party, President of the Council of State and Ministers, Discourse Delivered at the Eighth Summit Conference of Non-Aligned States (Sept. 2, 1986), <http://www.cuba.cu/gobierno/discursos/1986/esp/f020986e> (last visited Sept. 9, 2007) (author’s translation).

while meeting continuing need, or sell their wealth (in the form of natural resources or other wealth) in an effort to pay their loans.”<sup>89</sup>

Castro has long questioned the legitimacy of the structure of sovereign lending.<sup>90</sup> Indeed, for Castro, the essential problem of sovereign debt within the context of the neo-liberal global order is that it is designed to make it impossible for the debtor state to extricate itself from debt or from dependence on the creditor. “We say that the debt is unpayable for mathematical and economic reasons, but this does not represent a moral judgment of the situation, or a legal, or political appraisal of the problem. We say that the payment of the debt is a political impossibility.”<sup>91</sup>

In a world that formally abandoned systems of hierarchy, subordination, and hegemony after 1945 in favor of a system of horizontal equality among all states (which is to say a rejection of imperialism in favor of transnational solidarity, democracy and self-determination), the system of freely moving capital and the obligations thrust upon developing states by reason of their coerced borrowing effectively re-imposes the old system in fact. The only differences between old and new systems of subordination were in the nature of the dependency. Financial subordination, Castro explains, now substitutes for traditional “gunboat diplomacy.” The instrument of that financial subordination is “the IMF, for all the states it seeks to help, for all the states that it pretends to help, actually drowns those states economically and destabilizes them politically. There is no better way to put it than that the aid of the IMF is the devil’s kiss.”<sup>92</sup>

It follows, for Castro, that state failure—essentially any state’s inability to pay sovereign debt—ought to trigger an investigation to determine the nature of the debt, the conditions under which the debt was incurred, and the equities of continuing the obligation. In many cases, states should be free to repudiate debt without further effect as a natural consequence of the exploitative character of the debt itself as an important factor in the impediments to development of poorer countries. “The debts of the countries with less relative development in a disadvantaged situation are unbearable and do not have a solution, and they should be canceled. The indebtedness is financially overwhelming the rest of the developing countries and that burden should be eased.”<sup>93</sup>

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89. Backer, *supra* note 82, at 532.

90. Fidel Castro Ruz, Speech at the Sixth Summit Conference of the Nonaligned Countries (Sept. 3, 1979), <http://www.lanic.utexas.edu/la/cb/cuba/castro.html> (search for “Sixth Summit Conference Nonaligned Countries”) (last visited Aug. 7, 2007). As early as 1979, Castro suggested that progressive governments “are crushed and, at times, apparently even overwhelmed by the economic difficulties and the one-sided and antipopular conditions imposed by international loan organization. Haven’t many of you had to pay a political price because of IMF regulations?” *Id.*

91. Fidel Castro Ruz, Speech at the Foreign Debt Dialogue (Aug. 8, 1985), <http://lanic.utexas.edu/la/cb/cuba/castro/1985/19850804> (last visited Aug. 7, 2007) (“No Latin American government is in any condition to implement the IMF measures. None of them. Not even with bullets and blood can they.”).

92. FCR 1999 Speech, *supra* note 20 (author’s translation).

93. Fidel Castro Ruz, Speech at the Continental Dialogue on the Foreign Debt (Aug. 4, 1985), <http://www1.lanic.utexas.edu/la/cb/cuba/castro/1985/19850804> (last visited May 28, 2007). “Some say:

For Castro, even debt-forgiveness programs themselves would tend to expose the illegitimacy of the current system of international finance. It might serve, in the first instance, as others have pointed out, to hide developed-state complicity in violations of national or international laws and norms facilitated by the extension of credit for illegitimate (or odious) purposes.<sup>94</sup> Moreover, forgiveness on these terms provides a means for creditor states to retain power to control forgiveness, so that it remains an extraordinary act controlled wholly by creditor states. Debtor states are reduced to begging for debt forgiveness. The problem is systemic and beyond the control of debtor states, who have little choice but to participate in this global system of exploitation.<sup>95</sup> And thus, forgiveness on its current terms retains the hierarchies of power and dependence that serve to perpetuate the power disparities between states.<sup>96</sup> Like other relations of subordination, debt forgiveness programs use the weakness of the debtor—in this case, to mask the dependency of the lender on the profitable functioning of these debt markets.<sup>97</sup> Indeed, even assuming a total cancellation of sovereign debt among developing states, in the long term such states would inevitably wind up indebted again as if the original cancellation had not occurred.<sup>98</sup>

Systemic illegitimacy, then, should serve as the foundation, not only of a right to repudiate all sovereign debt—all such debt is odious in the sense that it

Sacrifice to pay the debt. We say: Sacrifice for development, yes. Sacrifice for development. You can ask the people to make sacrifices to develop but sacrifices to pay the debt? Never. Sacrifice for the plundering to continue? Never.” Fidel Castro Ruz, Statements During FELAP Session (July 6, 1985), <http://www1.lanic.utexas.edu/la/cb/cuba/castro/1985/19850707> (last visited May 23, 2007).

94. See *Inter-American Development Bank Debt Relief A Smoke Screen*, ODIIOUS DEBTS ONLINE (Dec. 12, 2006), <http://www.odiousdebts.org/odiousdebts/print.cfm?ContentID=16758> (last visited Dec. 16, 2006) [hereinafter *Smoke Screen*] (“Bailouts of the soft loan windows . . . says Ms. Adams . . . help bail out the Banks themselves. Debt forgiveness also rids the banks of embarrassingly unsuccessful and corruption-plagued loans from their portfolios and helps them avoid demands for independent audits.”). For a discussion from the perspective of the IMF, see Jack Boorman, Speech at the Carnegie Council on Ethics and International Affairs: Dealing Justly With Debt (Apr. 30, 2003) <http://www.imf.org/external/np/speeches/2003/043003.htm> (last visited Sept. 7, 2007).

95. FCR 1985 Speech, *supra* note 20 (“In conclusion, even though one can not find an end to this situation, and above all, of these politics, we resolve nothing even were we to eliminate all debt.”)

96. See *Smoke Screen*, *supra* note 94 (according to Patricia Adams, “debt write-offs, such as these, will also help the five debtor countries continue to service their loans to the hard loan window of the Bank (or Ordinary Capital). Borrower defaults on the hard loan window of the IDB—which raises its capital on international bond markets—would threaten the triple-A credit rating of the institution and possibly force the rich countries to pony up billions to pay back bondholders”).

97. Castro and others have attacked the “blame the victim” trope as indicative of the illegitimacy of the system. See, e.g., Fidel Castro Ruz, Discourse Delivered to the Delegates at the Conference of Latin American and Caribbean Labor Unions Regarding External Debt (July 18, 1985), <http://www.cuba.cu/gobierno/discursos/1985/esp/f180785e.html> (last visited May 21, 2007) (author’s translation). Referring to the emerging global economic system, dependant on export trade and debt based finance, Castro suggested: “We are slaves and worse than slaves. Slaves were cared for. Their owners were preoccupied least they die, but who worries because some worker dies in Latin America, with more than 100 million unemployed and underemployed.” *Id.*

98. FCR 1985 Speech, *supra* note 20 (“Let’s say, tomorrow they are cancelled—and I say cancelled—, they are forgotten, all debts are erased, and within a few years we are the same or worse than we are now because, what are the causes of those debts, what are the causes of underdevelopment, what are the factors that engender this debt?”).

was incurred for the benefit of the lender and to the detriment of the citizens of the debtor states—but also as the basis for the construction of an alternative system of global finance and integration.<sup>99</sup> Sovereign debt is bound up in the illegitimacy of the current economic world order, of both public and private law. This illegitimacy, imposed for the benefit of the developed states, requires the erasure, not the cancellation, of sovereign indebtedness as the first step towards dismantling the system itself.<sup>100</sup> But not all sovereign debt is tainted with this systemic illegitimacy. Castro makes a point of distinguishing between what he calls debts owing to “Third World” countries and other sovereign debt. Debts to Third World countries would not be illegitimate and ought to be paid—“We are even thinking that once we erase the debts, our policy with regard to the Third World countries—as creditors—would be different, and we would pay those debts.”<sup>101</sup>

Some academics in the United States have advanced suggestions that echo this approach from time to time in the form of a broadened method of constructing a binding global law of odious debt. Thus, for example, Anupam Chander suggested that any sovereign debt should be odious (and thus voidable at the option of the state) when incurred “(1) without the consent of the people; (2) not for the benefit of the people; and (3) both of the above with the knowledge of the creditors.”<sup>102</sup> This standard would be applied broadly to all obligations incurred in the name of the state, even if the debt actually provided some benefit to the population.<sup>103</sup> It represents efforts to expand the classical approach of Sack by adding the element of popular consent (rule of law elements) and a presumption that illegitimate means or ends gives rise to voidability, whether or not a benefit was actually conferred. Debt incurred for the benefit of lenders, to perpetuate national subordination of debtor states, or

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99. “That is why we have put forward the notion that there are three essential things within these theses: one is erase the debt, as a first pass, another, fight for the New International Economic Order, and third the economic integration of Latin America.” FCR 1985 Speech, *supra* note 20. Indeed, the New International Economic Order to which Castro referred, abandoned at the United Nations after the 1970s, appears to have been revived in the form of the Bolivian Alternative for Latin America trade agreement between Cuba, Venezuela, Bolivia, and Nicaragua in 2006. See discussion *infra* Part IV and note 184.

100. FCR 1985 Speech, *supra* note 20. Systemically illegitimate debt thus serves as both the focal point and the symptom of a greater problem. “And what is that which can give us that strength? Unity. And what can provoke that unity? Debt, the most immediate problem, crisis, catastrophe. Logic posits, given that we are on the edge of the precipice and must chose between struggle or death, that we decided to struggle against the debt, that is why this is a strategy, it is not about a slogan: we gather everything around the debt, the countries of Latin America and the Third World. With that force we can liquidate the debt, we can liquidate it—to liquidate does not mean to pay it, rather to erase it.” *Id.*

101. “Part of it is with Third World countries: Argentine credit—that is part of our convertible debt—which is part of our direct commercial debt; credits with other Third World countries. Well, we are not proposing to not pay anyone or not pay our debts with the Third World countries.” FCR, 1985 Speech, *supra* note 20.

102. Anupam Chander, *Odious Securitization*, 53 EMORY L.J. 923, 923 (2004).

103. *Id.* at 924. This represents a substantial broadening of the doctrine as originally envisioned by Sack. See *supra* text accompanying note 45.

to maintain authoritarian government would also be subject to this voidability standard.

This notion echoes similar constructions of the doctrine advanced by elements of global civil society. And it has proven especially alluring to those who might seek a solution to African states' debt dilemmas.<sup>104</sup> And some elements of civil society, authoritative sources in the production of knowledge about the odious debt doctrine, have actually at least begun an analysis of the responsibility elements of the global financial sovereign-debt markets for the production of odious debt.<sup>105</sup> But even these commentators have not yet suggested that the system itself might presumptively produce odious debt. Ironically, members of the U.S. Senate have come closest to embracing the framework of Fidel Castro, but with a twist: Whereas Castro posits active complicity, the U.S. Senate amasses testimony suggesting that the complicity is passive.<sup>106</sup>

Indeed, the implications of Castro's systemic notion of global structural illegitimacy, combined with conflating notions of illegitimacy and odiousness, have potentially significant consequences for the legitimacy of all debt to developing states. Together, the notions crafted by Sack a century earlier are now inverted. Sack and those who came after focused on the *borrowers*—dictators, corrupt officials, rogue states—that use loans to fund militaristic behavior and human-rights violations. Iraq's debt might be voided because of the illegitimacy of Saddam Hussein's government or the illegitimate uses to which the loan funds were used. Chinese imperial bonds might be repudiated because they were issued to foreign investors who controlled the imperial government machinery for their own benefit.

Castro and those who adhere to his conceptions of illegitimacy focus on the lenders—states, financial institutions, and the instrumentalities of global lending, including the IMF and the World Bank. These lenders are either complicit in the actions of illegitimate state borrowers, or, more likely, they engage in lending for their own benefit, rather than for the benefit of the people of the states who bear the burden of the debts incurred by their governments. The financial system makes it virtually impossible to borrow for the benefit of anyone but the lender. Thus inverted, odious (now illegitimate) *lending* can

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104. See, e.g., Nsongurua J. Udombana, *The Summer Has Ended And We Are Not Saved! Towards A Transformative Agenda For Africa's Development*, 7 SAN DIEGO INT'L L.J. 5, 25 (2005).

105. See KHALFAN, KING & THOMAS, *supra* note 10, at 100 (offering "evidence to suggest that agents of these IFIs have indeed turned a blind eye to corruption, and as a result may have contracted odious debts").

106. See Emad Mekay, *Poorest Pay for World Bank Corruption—US Senator*, COMMONDREAMS.ORG, May 14, 2004, <http://www.commondreams.org/headlines04/0514-07.htm> (last visited Sept. 8, 2007) ("It is critical that every development bank dollar reaches its intended recipient," said Sen[.] Dick Lugar, chairman of the Senate Foreign Relations Committee, on Thursday. "Unfortunately, that is not happening—corruption remains a serious problem."). The story was reproduced by the influential NGO, the Global Policy Forum. See Carol Giacomo, *World Bank Corruption May Top \$100 Billion*, GLOBAL POLICY FORUM, May 13, 2004, <http://www.globalpolicy.org/soecon/bwi-wto/wbank/2004/0513corrupt.htm> (last visited Sept. 8, 2007).

become a substantial weapon against the very lenders the doctrine was meant to protect. Rather than providing a narrow basis for avoiding repayment, the doctrine thus reconstituted becomes a means for imposing heavy obligations on lenders to ensure that loans maintain a certain character for which lenders, rather than the citizens of the debtor state, now must bear the risk of violation. By effectively shifting the burden of monitoring and supervision from citizen to lender, the doctrine would substantially reduce its protections to lenders.

Odious debt doctrine thus becomes bound up in the debate about the legitimacy of development lending.<sup>107</sup> Patricia Adams, an influential voice in this context, especially with respect to African debt,<sup>108</sup> reasons, “The argument is that, just as individuals do not have to repay if others illegitimately borrow in their name, the population of a country is not responsible for loans taken out by an illegitimate government that did not have the right to borrow ‘in its name.’”<sup>109</sup> That approach also serves to shift the focus of legitimacy (and odiousness) as well as the basis for repudiation away from the system of institutional lending. Instead, the focus on the character of the debt (or of the governance apparatus of the debtor state) provides a means for lending institutions to assert greater power over debtor states. The extension of the odious debt doctrine in this manner again turns the attention to the debtor state and away from the lending system. Lenders concentrate on the character of the debtor state and systems are constructed for the purpose of sorting potential debtor states into “creditworthy” and not “creditworthy” states on the basis of the criteria used to permit repudiation on odious debt grounds.<sup>110</sup>

### C. Revealing the Two Faces of Odious Debt: Illegitimate Borrower, Illegitimate Lender

Now consider a Cuba four years after the death of Fidel Castro. Assume that Cuba has managed to avoid revolution or military intervention from the United States or its surrogates. Raul Castro is very ill and unlikely to survive long. Assume further that in the course of transformation, the surviving Cuban elites have managed to come to an understanding with various powerful cliques of the Cuban émigré community, but that Cuba needs additional sources of revenues. Indeed, during the period after Fidel Castro’s death assume that

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107. See, e.g., Okeke, *supra* note 81, *passim*.

108. See *id.* at 1502–03 (citing PATRICIA ADAMS, ODIUS DEBTS: LOOSE LENDING, CORRUPTION, AND THE THIRD WORLD’S ENVIRONMENTAL LEGACY (Earth Scan Publ’ns Ltd. 1991) (1993) (“The creditors have committed a hostile act with regard to the people; they can’t therefore expect that a nation freed from a despotic power assume the ‘odious’ debts, which are personal debts of that power. Even when a despotic power is replaced by another, no less despotic or any more responsive to the will of the people, the ‘odious’ debts of the eliminated power are not obligations for the new power. . . . One could also include in this category of debts the loans incurred by members of the government or by persons or groups associated with the government to serve interests manifestly personal—interests that are unrelated to the interests of the State.”).

109. KREMER & JAYACHANDRAN, *supra* note 15, at 1.

110. See *id.* at 3–4 (arguing “that an institution empowered only to declare *future* loans to a particular government illegitimate” would avoid “potential biases in the adjudication process”).



Cuba began to borrow extensively in the private global financial markets. A significant amount of funds have been borrowed. Much of those funds were used to effect the transition to a free-market economy, though one still tightly controlled by the state.<sup>111</sup>

On the eve of a change in government, ending in whatever form, over a half-century of dictatorship by the Castro family, the Cuban state might be in a position to argue convincingly, on the basis of the traditional, Sackian theory of odious debt,<sup>112</sup> that all contracts and debts incurred purportedly by or on behalf of the Cuban state are debts personal to its makers and illegitimate as obligations of the Cuban state. All such obligations would have been incurred to prop up a tyrannical regime (it would be argued to Western, and especially U.S., audiences) and used to oppress the people who are now asked to bear the burden of repayment or fulfillment of contractual obligations. And on the basis of traditional odious debt theory elaborated above, the Cuban State could make a strong case for this position. All obligations of the Cuban State, including those concluded with or through its socialist trading partners—Venezuela, Nicaragua, and Bolivia—could be repudiated on those grounds.<sup>113</sup>

Simultaneously, the Cuban state could seek to repudiate all debts to private creditors incurred after the death of Fidel Castro on two grounds. First, the Cuban state might argue that the creditors were aware of the illegitimate uses of the funds. For this reason the lenders ought not be permitted to profit from their complicity in the nonpublic use of purportedly public loans. Second, the Cuban state might argue that the loans made by private financial institutions were void as presumptively illegitimate. The loans were made for the benefit of the lenders and to burden the borrower. They were a critical component of a system of financial dependence through which states like Cuba were made to divert their wealth to the production of income for the financial institutions of other states and indirectly for the governments in which those institutions reside. As such, the entire system of loans represents attempts both to oppress the indigenous population and to colonize the Cuban state. The colonization, to be sure, takes a form different from that of German colonization of seized Polish territory in the nineteenth century, but it amounts to colonization all the same: the wealth of Cuba is mortgaged for the benefit of others. The individuals in the Cuban apparatus who agreed to participate in this system of colonization profited individually from such agreements, and the people of the Cuban state become bondmen and bondwomen in a never-ending cycle of dependence and obligation to global creditors.

To strengthen these arguments, the successor Cuba would focus on the corruption attendant on the loans, and the great gulf between the individuals

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111. For a sense of this possible transformation, see Larry Catá Backer, *Cuban Corporate Governance at the Crossroads: Cuban Marxism, Private Economic Collectives, and Free Market Globalism*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 337 (2004).

112. See *supra* Part II.A.

113. For a discussion of those relationships, see discussion *infra* note 134.

leading the state and the population itself—after all, these successors might be tempted to argue, the Castro state apparatus was neither democratically elected nor did it provide a means of ascertaining popular preferences for policy choices. Last, a successor government would emphasize the coercive element in the obligations incurred. Like the Chinese Imperial state of 1911, the Cuban state, weak and dependant from the time of the late period of Fidel Castro's rule through the end of the rule of Raul Castro, would be obliged to act in the interests of those foreign elements seeking to derive advantage from relationships with individuals with power in the state for legitimate or illegitimate aims.

A century ago, these arguments would have been laughable, with the possible exception of their referring to a narrow group of loans that might be proven to have been made as the remnants of a predecessor government made arrangements to flee. Sack would have suggested that, despite strong moral justification, Cuba lacked legal grounds for avoidance of the debts. Sack's successors might suggest that the Cuban state was on stronger grounds with respect to at least some of the debt. And ironically, Fidel Castro would be the strongest source for repudiation of debt incurred by his own successors in a government he created. But above all, arguments based on corruption or on knowledge of wrongfulness chargeable to lenders, would now be fair game for avoidance.

The force of this approach to odious debt might be nicely exemplified by the difficulties Ecuador has recently experienced respecting the loss of control of its natural resources, in particular its petroleum, to the global capital markets that required their use to service Ecuador's external debt.<sup>114</sup> This saga also suggests the potential importance of an approach that fuses legitimacy and odiousness in the context of sovereign debt. In 2005, it was revealed that loans from the International Monetary Fund and the World Bank<sup>115</sup> included a series of secret terms. These terms, arguably oppressive, included an obligation that Ecuador pay its bondholders seventy percent of any spike in oil prices and that Ecuador set aside another twenty percent of such oil-spike revenue as a reserve against contingencies, effectively preventing Ecuador from using the funds for other purposes.<sup>116</sup> By July 2005, the Ecuadorian government, responding to these revelations, enacted legislative changes to the provisions, effectively reducing

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114. For a richer treatment of these issues as they relate to odious debt, see Larry Catá Backer, *Advancing the Application of Odious Debt Doctrine in Ecuador: Unconscionable Terms, Illegitimate Debt and the Obligation to Repay Sovereign Debt*, LAW AT THE END OF THE DAY (May 29, 2007), <http://lcbackerblog.blogspot.com/2007/05/advancing-application-of-odious-debt.html> (last visited Aug. 7, 2007).

115. *See For A Proposed Second Fiscal Consolidation and Competitive Growth Structural Adjustment Loan in the Amount of US\$100 Million to the Republic of Ecuador*, International Bank Project Document for Reconstruction and Development, ¶¶ 4, 23 & Annexes B, Q available at [http://www-wds.worldbank.org/servlet/WDSPContentServer/WDSP/IB/2005/02/17/000112742\\_20050217090523/Rendered/PDF/31516.pdf](http://www-wds.worldbank.org/servlet/WDSPContentServer/WDSP/IB/2005/02/17/000112742_20050217090523/Rendered/PDF/31516.pdf).

116. *See* Greg Palast, *Ecuador Gets Chavez'd*, May 11, 2005, <http://www.gregpalast.com/ecuador-gets-chavezdrn-bush-has-someone-new-to-blame/> (last visited May 15, 2007).

the amounts Ecuador would be required to devote to pay down its debt.<sup>117</sup> In response, the World Bank suspended a \$100 million loan to Ecuador.<sup>118</sup> The stage was set for the development of positions grounded in notions of legitimacy. The World Bank appeared to argue that Ecuador's actions constituted unilateral changes that violated the terms of the loan agreement and also undermined its security.<sup>119</sup> The Ecuadorian government also argued legalities—first that the World Bank had itself unilaterally breached its agreement to make the loans available, and second, that the terms themselves were illegitimate (or better put that the terms were legitimately the subject of legislative repudiation).<sup>120</sup>

This dispute took a sharper turn when, in April 2007, President Correa ordered the expulsion of the World Bank representative in Ecuador.<sup>121</sup> Again systemic illegitimacy claims were central to Ecuador's justifications—that the lending system the World Bank forms coerces loans solely for their own benefit, and that the people of the borrowing states receive only incidental benefits. Correa suggested that this justified a threatened default on other sovereign loans.<sup>122</sup> He has sought to legitimize these actions in two ways. First, of course, is the emphasis on the illegitimacy of the lender's actions through an invocation of the rhetoric of “blackmail” and of a usurpation of public benefit from the people of Ecuador. Systemic illegitimacy in general, and the oppressiveness of the specific terms imposed by the World Bank in particular, support Ecuador's determination to repudiate (or more likely in this case, pay off) its debt obligations and be done with multilateral lenders.<sup>123</sup> Second, and perhaps more importantly, is the heavy reliance on popular ratification as the basis for taking

117. A *Financial Times* report published by the *New York Times* noted that the oil-stabilization fund would be substantially diverted from debt reduction to social-sector spending. FT.com, *World Bank Poised to Suspend Loan to Ecuador*, N.Y. TIMES, Aug. 4, 2005, [http://www.nytimes.com/financialtimes/business/FT20050804\\_21670\\_98553.html](http://www.nytimes.com/financialtimes/business/FT20050804_21670_98553.html) (last visited Sept. 7, 2007).

118. See *World Bank Set to Suspend Loan After Ecuador Changes Oil Fund*, World Bank, News and Broadcast (Aug. 5, 2005), <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,date:2005-08-05%7EmenuPK:34461%7EpagePK:34392%7EpiPK:64256810%7EtheSitePK:4607,00.html> (last visited Aug. 7, 2007).

119. See *Ecuador Expels World Bank Representative*, PEOPLE'S DAILY ONLINE (Apr. 27, 2007), [http://english.people.com.cn/200704/27/eng20070427\\_370298.html](http://english.people.com.cn/200704/27/eng20070427_370298.html) (last visited Aug. 7, 2007); FT.com, *World Bank Poised to Suspend Loan to Ecuador*, N.Y. TIMES, Aug. 4, 2005, [http://www.nytimes.com/financialtimes/business/FT20050804\\_21670\\_98553.html](http://www.nytimes.com/financialtimes/business/FT20050804_21670_98553.html) (last visited Sept. 7, 2007) (undermining security argument).

120. See Anonymous, *Wolfowitz at the World Bank: A New Leaf?*, MR ZINE MONTHLY REVIEW (Aug. 25, 2005), <http://mrzine.monthlyreview.org/anonymous250805.html> (last visited Aug. 7, 2007). Mr. Correa emphasized national sovereignty over contract terms. See FT.com, *World Bank Poised to Suspend Loan to Ecuador*, N.Y. TIMES, Aug. 4, 2005, [http://www.nytimes.com/financialtimes/business/FT20050804\\_21670\\_98553.html](http://www.nytimes.com/financialtimes/business/FT20050804_21670_98553.html) (last visited Sept. 7, 2007).

121. See *Ecuador Expels World Bank Envoy*, BBC News (Apr. 26, 2007), <http://news.bbc.co.uk/1/hi/world/americas/6598027.stm> (last visited Aug. 7, 2007).

122. See Hal Weitzman, *Correa Threatens to Expel “Blackmailing” World Bank*, FIN. TIMES, Apr. 17, 2007, <http://www.ft.com/cms/s/8b4ed80e-ec7f-11db-a12e-000b5df10621.html> (last visited Sept. 8, 2007) (describing Correa's threat to expel the World Bank from Ecuador).

123. See Marcela Sanchez, *IMF, World Bank, Face Irrelevance*, WASH. POST, May 11, 2007, available at [http://www.cgdev.org/files/13674\\_file\\_SuarezWashPost5.11.07.pdf](http://www.cgdev.org/files/13674_file_SuarezWashPost5.11.07.pdf).

action that might lead to the repudiation terms deemed inconsistent with expressions of the popular will within Ecuador.<sup>124</sup> Correa effectively broadens Sack's legitimacy arguments by its elaboration within the context of a hierarchy of interests—public political interests trump nongovernmental economic interests and human welfare trumps private obligations in determinations of the legitimacy of debt terms or of an obligation to be imposed on a state. This represents an important attempt, the success and elaboration of which remains to be seen, of the legitimacy principles developed from out of early constructions of odious debt, combined with a form of Castro's development of notions of (lender-conduct-focused) systemic illegitimacy (whether or not shorn of their Marxist–Leninist referents). This is the emerging face of odious debt doctrine in action. We have come a long way from the narrow principles developed by Sack.

### III

#### CONTEXTUALIZING THE DOCTRINE WITHIN INTERNATIONAL AND MUNICIPAL LAW: THE TRANSNATIONAL ELEMENT OF ODIUS DEBT

##### A. A Protean Doctrine Expanding in a Global Setting

As the example of post-Castro Cuba suggests, the doctrine of odious debts has become substantially elastic. It can serve borrowers and lenders, the global financial system, or the people of the poorest states. On one point in particular, Sack appears to have been prescient. As the author of the preface to Sack's work suggested almost half a century before Philip Jessup made the first attempt to capture the essence of the field,<sup>125</sup> the basic character of sovereign debt in general, and odious debt in particular, was essentially a problem of transnational law.<sup>126</sup> "However, our problem is not a question of relationship between States, but a question of the legal relationship between the creditors of the public debt and the new government (or new governments) established on whole or part of the territory of the old State."<sup>127</sup> As a consequence, international law—as then understood, at least—could not be applied.<sup>128</sup> The problem of odious debt was a first appearance of what, almost a century later,

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124. See, e.g., *Ecuador Leader Celebrates Win*, BBC News (Apr. 16, 2007), <http://news.bbc.co.uk/2/hi/americas/6558547.stm> (last visited Aug. 7, 2007).

125. See PHILIP C. JESSUP, *TRANSNATIONAL LAW* 1–16 (1956).

126. N. Politis, *Préface*, in SACK, *supra* note 8, at I ("The effects of the economic interdependence of peoples, the extension and intensity of which is determined by that vast movement of capital. It conditions, to a certain extent, the foreign policy and also the internal policy of all nations. It gives rise to practices, to institutions and to new legal difficulties.").

127. SACK, *supra* note 8, at VIII (Author's Preface).

128. *Id.* at VIII–IX, 84–87 ("It is obvious that the relationship between private individuals and a government cannot be determined within the field of the public international law, which applies only to the questions relating to the relationships among States.").

Harold Koh would suggest is transnational or globalization law<sup>129</sup>—a problem at the intersection of public and private law; of municipal and international law; of contract and entity theory; of sovereign authority and legal personality; of individuals wearing multiple hats (like directors), both personal and representative.<sup>130</sup> It comes as little wonder, then, that a theory, initially so circumscribed, could expand in an era of economic globalization—the foundational assumptive character of which is free movement of capital and law based on contract.<sup>131</sup>

And the solution? The temptation, having posited a choice of law binary of sorts (international or domestic law, private or public law, state or global interest and the like), is to choose between oppositions. That is far too simplistic. Rather, the binary posited suggests the complexity inherent in the notion of odiousness, one that may be difficult for law, as an exercise in positivism, to control.<sup>132</sup> Determinations of illegitimacy require exposition of municipal law, including constitutional law. That was part of the analytical framework of the Kenyan case before the ICSID tribunal.<sup>133</sup> But so was the exposition of international law and practice. The case also deployed local custom—custom not necessarily reduced to positive law but binding or legitimate in its own right. And the dispute was settled outside the judicial system of any state system. That system of dispute resolution itself has arisen in response to such complexity, as a hybrid public–private, municipal–

129. See Harold Hongju Koh, Luncheon Address at the American Law Institute 83rd Annual Meeting (May 17, 2006) at 65–89. As the author of the introduction to Sack’s treatise noted, Sack was producing a supranational law (“d’un droit supra-étatique”). N. Politis, *Préface*, in SACK, *supra* note 8, at IV (speaking of odious debt doctrine as invoking law beyond municipal and international law).

130. SACK, *supra* note 8, at XI (Author’s Preface) (“Thus posed, the problem leads to conclusions fundamentally different from those reached if one considers it from the point of view of the relationships among states.”).

131. On the increasing theoretical turn, at the institutional international level, to contract as a basis for the construction of international law (and especially customary international law), see Backer, *supra* note 16, at 290.

132. As has been suggested elsewhere, fragmentation of legal regimes affect the self perception of law. “The immediate consequence is that high expectations of our ability to deal adequately with legal fragmentation must be curbed since its origins lie not in law, but within its social contexts.” Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search For Legal Unity In The Fragmentation Of Global Law*, 25 MICH. J. INT’L L. 999, 1045 (2004) (“Rather than secure the unity of international law, future endeavors need to be restricted to achieve weak compatibility between the fragments. In the place of an illusory integration of a differentiated global society, law can only, at the very best, offer a kind of damage limitation.”). There is, of course, irony in the particular case of the use of the ICSID framework for arbitration. From the perspective of Castro, such a framework, though ostensibly autonomous, is formally and potentially informally tied to one of the great instrumentalities of systemic illegitimacy—the World Bank. As such, its framework might be suspect. Yet, it should be borne in mind that there is a double bind of sorts here. First, resolution by domestic legal systems is likely unpalatable because of the tendency of the instrumentalities of such frameworks to favor local law. Second, ICSID is not the only mechanism for transnational dispute resolution on the world stage today. Third, the ICSID framework, like those of other arbitral bodies, provides a flexibility permitting a blending of local and transnational elements. Thus, ICSID provides a space where the domestic and transnational can be blended in ways that would be harder for purely international or purely domestic institutions. See discussion *infra* at note 134.

133. See discussion *supra* Part II.A and notes 13, 59–69.

international mechanism for the resolution of disputes and the construction of a new system of global law.<sup>134</sup> Nor has contracting for sovereign debt lost its connection to private networks of rulemaking, whose actors have a hand in shaping norms, including defining the conditions for odiousness.<sup>135</sup> Even among conservative elements of the global economic order, the doctrine of odious debts begins to exhibit a protean quality that might provide utility in excess of its traditional boundaries.<sup>136</sup>

But the context of the debate is not necessarily one-sided. The entry of China into the global lending market, and its lending to states most likely to be candidates for the use of the odious debt doctrine against their lenders, adds an additional wrinkle to the development of the doctrine.<sup>137</sup> Though opposed in principle to the doctrine of odious debt, Western lenders squeezed out of the lending market might seek to revitalize the doctrine as a strategy against Chinese entry into the public lending market by, for example, cutting off aid to those debtor states on the grounds that the Chinese debts will not be incurred for the benefit of the people later saddled with debt repayment.<sup>138</sup> Yet doing so might also have the effect of strengthening the arguments advanced by Fidel Castro that the system itself is illegitimate. Indeed, purported Chinese lending practices might of their own accord add legitimacy to this argument. “China is not against using its financial muscle to bully African states. In the run-up to

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134. The importance of systemic autonomy is clearly expressed in the construction of the ICSID system. “ICSID [International Centre for Settlement of Investment Disputes] was established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Convention) which came into force on October 14, 1966 . . . . ICSID is an autonomous international organization. However, it has close links with the World Bank. All of ICSID’s members are also members of the Bank.” ABOUT ICSID, WORLD BANK GROUP, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, <http://www.worldbank.org/icsid/about/about.htm> (last visited Feb. 10, 2007). ICSID is charged with the task of facilitating the resolution of disputes between states and foreign investors. See ICSID Convention, Regulation, and Rules, Part A, ch. 1, sec. 1, art. 1, World Bank Group, <http://www.worldbank.org/icsid/basicdoc/partA-chap01.htm#s01> (last visited Sept. 8, 2007) (“The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States . . . .”). ICSID has become a “hybrid source of rights [that] is generating new questions.” KATIA YANNACAS- SMALL, IMPROVING THE SYSTEM OF INVESTOR-STATE DISPUTE SETTLEMENT: AN OVERVIEW, OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT 3 (2006), <http://www.oecd.org/dataoecd/3/59/36052284.pdf> (paper prepared as background information for Symposium, *Making the Most of International Investment Agreements: A Common Agenda* (Dec. 2005)).

135. For a discussion of the significance of private-group-network norm-making, see Robert B. Ahdieh, *The Role Of Groups In Norm Transformation: A Dramatic Sketch, In Three Parts*, 6 CHI. J. INT’L L. 231 (2005).

136. Thus, influential commentators have observed: “When the international community wishes to penalize a government without recourse to war, it often imposes economic sanctions. Limiting an odious regime’s ability to borrow can be considered a new form of economic sanction that has several attractive features relative to existing sanctions.” KREMER & JAYACHANDRAN, *supra* note 15, at 18.

137. See Stuart Simpson, *Starving Africa of Money*, SPIKED ONLINE, Dec. 12, 2006, <http://www.odiousdebts.org/odiousdebts/print.cfm?ContentID=16834> (last visited Sept. 8, 2007) (explaining the significance of China being “the largest single source of finance to the poorest countries in Africa”).

138. *Id.* (“Western development banks, rather than celebrating the large-scale infrastructural development that Chinese funding has allowed, are threatening to cut development funds to Africa’s poorest nations that take on Chinese loans.”).

Zambia's elections this September, China threatened to cut diplomatic ties and withdraw investment if the opposition party came to power."<sup>139</sup> In this case, the notions underlying odious debt doctrine would be deployed as a barrier to entry into creditor markets, rather than as a means of protecting the position of the people of debtor states. Legitimacy of objective thus can expose the foundational illegitimacy of the system itself.

There is great irony here in the odious debt context. China appears willing to employ in Zimbabwe those tactics that served as the basis of the vigorous Chinese argument before the American federal courts that such action rendered the resulting obligations of the Imperial Chinese government unenforceable for odiousness.<sup>140</sup> But the motives of those who would use the odious debt doctrine to prevent exploitative and subordinating lending by the Chinese suggests that the issue might be market share and hegemonic advantage (among lenders) rather than protection of beneficiaries of lending. Thus, the strategic use of even moral doctrine might itself serve to make the use immoral and thus illegitimate. The transnational element of the odious debt doctrine and its future development will be worth considerably more study within the context of rules that cross traditional boundaries vertically and horizontally and between private and public actors and networks.

The transnational elements of the odious debt doctrine, especially in its current protean forms, suggest the likely approaches to the further evolution, and even to the eventual institutionalization, of the doctrine. Sack's solution from international law—to create a body of international law that occupies the field of odious debt to be managed by a formal or informal international institutional apparatus—is realistic in the absence of the creation of a unified system of law (and the preemption of all other law) within a legal hierarchy which such international legal regimes and international institutions can assert (and enforce). But so are other proposed solutions that are grounded in an assumption of monopoly control of the “problem” of the debts of sovereigns—from the IMF's sovereign bankruptcy system,<sup>141</sup> to the long “dead” New International Economic Order.<sup>142</sup> At the other extreme, in the absence of conflation of public and private law and the equivalence of private and public bodies, it is also unrealistic to envision a pure “market” solution to the issue of sovereign debt.<sup>143</sup> Political communities remain substantially different from other communities—economic, religious, social, and affective (that is, grounded in some other set of unifying norms). Although those differences are certainly

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139. *Id.*

140. See discussion *supra* Part I and notes 1–4.

141. See Anne O. Krueger, *A New Approach to Sovereign Debt Restructuring*, Int'l Monetary Fund, Apr. 2002, <http://www.imf.org/external/pubs/ft/exrp/sdrm/eng/index.htm> (last visited Sept. 8, 2007).

142. On the New International Economic Order and the reincorporation of its ideas in other forms relevant here, see discussion *infra* note 170 and *supra* note 99.

143. Cf. Omri Ben-Shahar & Mitu Gulati, *Partially Odious Debts?* 70 LAW & CONTEMP. PROBS. 47, 48–51 (Autumn 2007) (proposing a substantially market-based approach to the regulation of illegitimate public lending).

falling away, they remain important—as does the political theory that places democratically constituted states at (or near) the apex of a system channeling the legitimate use of power to coerce individuals or institutions to bend to the will of the collective (within limits of course). Purely private, networked systems of regulation, which posit a purely horizontal relationship between states, on the one hand, and lenders and the private capital markets, on the other, are also unrealistic.

## B. Global Rules for Odious Debt: Regulation Wearing Two Faces

The regulation of odious debt, like other issues of transnational regulation, must “wear two faces.” Odious debt doctrine regulation has become multi-sourced and multi-perspective. The focus of the doctrine moves among now unbundled sovereign borrowers—constituting an autonomous state and its autonomous apparatus (as institution and individuals). Responsibility for debt and the character of that debt is more complicated: Who is responsible for Cuban debt? Fidel Castro personally? The members of the government negotiating and profiting from the debt? The state of Cuba itself? But it also embraces lenders—from private lenders to global institutions like the World Bank. Responsibility for monitoring the debt, for choosing the “right” borrower becomes increasingly the concern of the lender: does a loan made to Cuba actually constitute a personal loan to Fidel Castro? Will a loan to Cuba change its character if the proceeds of the loan are intended for particular purposes or are, after payment, directed to particular illegitimate purposes? And responsibility focuses on the systems of lending, within which lenders and borrowers operate. This goes to the heart of the construction of public and private governance networks: Do private or public systems of finance have a purpose? Are those purposes directed by individuals seeking to maximize their private positions or by principles of national advantage or international human rights? Tied to this issue is that of legitimacy—as a substance concept shaping behavior or as a procedural concept shaping the obligations of lenders and borrowers and the system in which each transacts business.

Systems of rules for odious debt, then, would be constructed from the aggregate of practices, customs, and rules instituted among all stakeholders producing sovereign debt and the rules for the limits or character of the obligations they represent. What some see as a problem in the disjunctive, I see as one in the conjunctive.<sup>144</sup> Public, private, formal, customary, odious, legitimate, and systemic rules originating from stakeholders and the institutional systems within which each operates will together constitute a

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144. See, e.g., Lee, C. Buchheit, G. Mitu Gulati & Robert B. Thompson, *The Dilemma of Odious Debts*, 56 DUKE L.J. 1201, 1230 (2007) (“A principle of public international law concerning odious debts does not now have, nor is it likely to achieve, the consensus necessary for it to claim the title of “doctrine.” It is equally unlikely to attain the degree of clarity necessary for it to be of much use in invalidating purportedly odious loans without simultaneously discouraging many legitimate cross-border financings. We instead propose to investigate the extent to which relying on well-established principles of private (domestic) law can address the problem.”).



protean system defining the increasingly complex rules for determining both the validity of sovereign debt and its character (whether or not valid) as public or private (and therefore the identity of the obligor).

What some critics of odious debt cite as its major failing—its propensity to disrupt settled financial markets in sovereign debt by creating ambiguity where none otherwise existed—actually suggests the power of the doctrine and points to the basis for the construction of the elements of its implementation. Sean Hagan, the General Counsel and Director of the Legal Department of the IMF and an authoritative agent of critical stakeholders in the sovereign-debt system, explained, “One of the reasons why the ‘odious debt’ doctrine has not become a well-established principle under international law is that, being both difficult to define and to implement, there is a concern that it will create considerable uncertainty in the international financial system.”<sup>145</sup> Hagan raised the now-usual alarm: “From a policy perspective, the introduction of an ‘odious debt’ exception would most likely do considerable damage to the capacity of developing countries to borrow responsibly and to access capital markets.”<sup>146</sup>

For capital markets in general, and public and private lenders specifically, the reorientation of the odious debt doctrine to focus first on illegitimacy as its touchstone and second on creditors and the creditor market system as a source of illegitimacy, provides both a challenge and an opportunity. The challenge, of course, follows from the “nuclear” threat in the modern indictment of the system as illegitimate. That threat would see the system itself dismantled and replaced with something else.<sup>147</sup> The shape of the “something else” is already being developed in regional organizations like the Bolivarian Alternative for the Americas (ALBA) (a trade and mutual support organization among Cuba, Venezuela, Bolivia, and Nicaragua), grounded in principles of state supremacy, the subordination of private markets for public control and the reduction of state debt to another aspect of aggregated transactions among states.<sup>148</sup> It may be further developed by Hugo Chavez to the extent he takes a role in the Ecuadorian debt repudiation “crisis” of 2007.<sup>149</sup>

The opportunity may be lost in the reactions of Westerners to a doctrine dripping with old-fashioned Marxist–Leninist rhetoric. But it is not lost on everyone. That opportunity comes from the possibilities of blending the foundational normative bases of contemporary odious debt notions—coercion,

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145. Sean Hagan, *The IMF's Role in a Post-Conflict Situation*, 38 CASE W. RES. J. INT'L. L. 59, 60 (2006) (“Is debt odious simply because it is judged to be immoral by the successor regime? Or is it odious because it is inconsistent with some standard established by the international community? If the latter criterion applies, which institution will be responsible for making this judgment?”).

146. *Id.* (“When faced with the possibility that debt that has been legally contracted could be nullified *ex post* on the grounds that its proceeds were used for purposes that may be considered immoral by the successor regime, investors will be less willing to either provide new financing or purchase claims on the secondary market.”).

147. See discussion *infra* note 170 (on the application of the principles of the U.N.'s New International Economic Order).

148. See discussion *infra* Part III.B.2d and note 184.

149. See discussion *supra* notes 114–124.

legitimacy, corruption, popular benefit, transparency, and monitoring—to fashion a system of safe-harbor terms and obligations, presumptions, and accepted forms of diligence and reporting that can effectively insulate sovereign loans from challenge even on systemic illegitimacy grounds (from either the creditor or debtor side). As Thucydides suggested in the context of the international relations among Greek states during the Peloponnesian War, “right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must.”<sup>150</sup> So, too, systemic illegitimacy claims arising out of a new application of odious or illegitimate debt notions will be met by solutions devised by creditor states that appear to address the criticisms without affecting the system through which such debts are generated, and all the while money is made for the developed states and their instrumentalities.

### 1. Components of Odious Debt

The ways in which systemic illegitimacy notions of odious debts might be turned to make such debts more difficult to repudiate deserve closer analysis. The objective here is neither to indict nor support such a move, but to suggest that rhetorical or normative stances in this emerging area of policy discourse do not, of themselves, inevitably yield a particular result. This possibility is grounded in well established socio-cultural understandings of the nature of the relationship of law, as system, to substantive result. Every system of power, no matter what the substantive objective, can be bent to the will (and objectives) of those with the power to assert control. This is an ancient postulate of institutional behavior that in the West was nicely captured by Thucydides: “Of the gods we believe, and of men we know, that by a necessary law of their nature they rule wherever they can.”<sup>151</sup>

The starting point is the normative components of the expanded odious debt doctrine. This article groups the components into six categories, each of which focuses on a different aspect of the problem and the objective to which the application of the doctrine is aimed:

First, *popular benefit*. The ideal of popular benefit, central to the traditional notion of odious debt as developed in the early part of the last century, now focuses more heavily on the use of funds, popular ratification, and presumptions of popular ratifications in democratic states.<sup>152</sup> In this aspect, the doctrine of odious debt carries with it an implicit condemnation of nondemocratic (authoritarian or dictatorial) regimes. The doctrine is thus to be used to further civilized states whose governance systems do not yet embrace universally accepted values for the construction of the apparatus of states—a set of

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150. THUCYDIDES, THE PELOPONNESIAN WAR, 331 (bk. V, ch. XVII) (Robert B. Strassler ed., Richard Crawley trans., 1996) (1874).

151. *Id.* at 334 (“And it is not as if we were the first to make this law, or to act upon it when made: we found it existing before us, and shall leave it to exist for ever after us . . .”).

152. These principles serve as the foundation of Ecuador’s recent efforts to reform its debt relations with the World Bank. *See supra* notes 114–124 and accompanying text.

universal values now being fashioned within the international community through its various organs.<sup>153</sup>

Second, *corruption*. Corruption combines moral, ethical, political, and aspirational norms. It focuses on distinctions between the state, its apparatus, and the individuals who serve within that apparatus.<sup>154</sup> Proceeding from a notion of the autonomy of the state from its apparatus, and the autonomy of the apparatus from the individuals who serve it, corruption notions serve as a proxy for individuals' need to serve the apparatus above their own personal interests and for the apparatus of state to serve the state above its own institutional interests.<sup>155</sup> Diversions of benefit from state to apparatus or from apparatus to individual are corrupt because they are a breakdown of this basic rule of behavior. Corruption is a form of theft—the use of a power or position meant to benefit one entity for the benefit of another. Again, the doctrine is to be used to discipline developing or debtor states—it rationalizes a series of behavioral norms under the rubric “corruption” that are meant to create a stronger culture of policing the behavior of institutions and individuals acting in a representative capacity, as well as strengthening the legitimacy of systems based on actions in representative capacities.

Third, *coercion*. Like corruption, coercion focuses on unfairness. It targets the function *or effect* of lending. It condemns an abuse of process or of power to unfairly derive benefit from another in a way that, like corruption, can appear, in effect, to amount to theft. Implicit in this limitation is the attempt to reduce the legitimacy of assertions of power to enable bad conduct on the part of debtors or to repudiate such enabled loans by successor regimes.<sup>156</sup> The object here is to prevent a threat to the system from the actions of creditors; loans must be made to be repaid and debtors must be subject to terms that they will, however reluctantly, be willing to meet. Moreover, in the long term, the system must be capable of regenerating loans. A system based on constant streams of making, paying, and remaking loans cannot afford debtors who are unable or unwilling to borrow or repay. It is a method which, though appearing to limit the logic of traditional notions of subordination, actually strengthens subordination by softening its hardest edges. In effect, lending, by its nature generally is coercive to the extent that a borrower needs something that a lender is free to withhold (and thus to set terms) but ought not, in specific cases, appear to so disadvantage a debtor as to affect demand for debt. Coercion by creditors, to the extent that it may affect the demand for debt, is thus

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153. See Patrick Bolton & David Skeel, *Odious Debts or Odious Regimes?*, 70 LAW & CONTEMP. PROBS. 83, 98–106 (Autumn 2007) (assessing the ability of the United Nations and International Monetary Fund to implement an odious debt doctrine).

154. See Susan Rose-Ackerman, *Governance and Corruption*, in GLOBAL CRISES, GLOBAL SOLUTIONS 301, 310–11 (Bjørn Lomborg ed., 2004).

155. See Deborah A. DeMott, *Agency by Analogy: A Comment on Odious Debt*, 70 LAW & CONTEMP. PROBS. 157 (Autumn 2007).

156. See Tai-Heng Cheng, *Renegotiating the Odious Debt Doctrine*, 70 LAW & CONTEMP. PROBS. 7 (Summer 2007).

controllable as it benefits creditors (and provides an incidental benefit to debtors as well). Its marketing as a device principally for the protection of debtors can also be seen as aiding in the sustaining of demand for credit (because it is “safe” from coercion).

Fourth, *complicity*. Complicity values focus on the relationships between lenders and the state, its apparatus, and the individuals who serve within that apparatus. In this aspect, the odious debt doctrine carries an implicit condemnation of loans that the lender knew *or should have known* were to be used for personal, rather than state, benefit.<sup>157</sup> The objective, in part, perhaps, is focused on enlisting creditor states, and their instrumentalities, in a more positive role in policing the behavior of debtor states and their apparatus.<sup>158</sup> As a positive obligation to investigate before loan approval and to monitor after disbursement, this significantly extends the notion of creditor responsibility so much more passive in Sack’s original formulation. But with the power to monitor comes the power to control.<sup>159</sup> What appears as a burden to lenders thus can also serve to maintain the existing hierarchy of power inherent in the state system. Creditor states or their instrumentalities that become complicit in the actions of the debtor state apparatus or of its functionaries threaten the order of power by causing such creditors to appear to be acting like the partners of such apparatus or individual. Complicity thus suggests weakness on the part of creditor states (whether or not acting through their private instrumentalities) and creates the potential for weakening the framework within which payment compulsion is maintained. For the global system of sovereign lending to maintain its superiority, it cannot be seen to partner with the objects of its activities (extensions of credit to states) without being seen to be just another actor among them. Hegemony requires control, not participation. Complicity levels support hierarchy. The international financial system ought not to seek partners; it requires clients. Odious debt doctrine in this way can serve to discipline the financial community and protect its dominant position.

Fifth, *monitoring*. Monitoring serves a civilizing function. It is based on a presumption that actors will behave badly and that such an inclination to bad behavior can be reduced by exposing their conduct to the observation of others. These ideas are well known in the United States.<sup>160</sup> In a sense, monitoring transfers governance and accountability functions from the polity to those states, groups, or instrumentalities whose task it is to monitor. But this transfer

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157. See David C. Gray, *Devilry, Complicity, and Greed: Transitional Justice and Odious Debt*, 70 LAW & CONTEMP. PROBS. 137, 152 (Summer 2007) (discussing how the expansion of odious debt doctrine obscures lender responsibility).

158. See Tom Ginsburg & Thomas S. Ulen, *Odious Debt, Odious Credit, Economic Development and Democratization*, 70 LAW & CONTEMP. PROBS. 115, 125–28 (Summer 2007) (noting the difficulty in convincing undemocratic regimes to further the concept of odious debt).

159. The monitoring function is treated more fully *infra* notes 160–161.

160. See generally, Larry Catá Backer, *Surveillance and Control: Privatizing and Nationalizing Corporate Monitoring After Sarbanes-Oxley*, 2004 MICH. ST. L. REV. 327 (2004) (discussing the trend toward private surveillance within municipal law).

is in accord with a normative value set that simultaneously views political communities as essentially passive—the principal beneficiaries of actions undertaken by a state apparatus—and as the ultimate source of all political power. That power, usually vested in the government, is now to be shared among the state, its apparatus, and a host of nonstate actors increasingly responsible for ensuring that the state is run appropriately. The sovereignty of creditor states is thus ensured, ironically enough, by redirecting its (otherwise potentially) sovereign activities to those outsiders more capable of serving the interests of the state. “There is nothing alien, or even novel, in proposing to use private-law concepts to articulate limits on the legitimate powers of states.”<sup>161</sup> Monitoring also deepens the structures of subordination to nonstate and transnational actors. In particular, it transfers public functions to lenders as a principal stakeholder in the functioning of the state and the use of borrowed funds.

Sixth, *transparency*. Transparency is related to monitoring but does not share the same set of values. Transparency is an antisubordination device, meant to function as a means of inclusion by exposing the action taken by decisionmakers and the information used to arrive at such decisions. It makes popular response more efficient. It is thus tied to popular determinations of public benefit as well as to efficiency issues in policing against corruption, complicity, and coercion. It is meant to discipline markets and advance ideals of antisubordination in state-to-state relations within global capital markets.<sup>162</sup> For example, the exposure of the repayment terms in the World Bank’s loan to Ecuador had a considerable effect on the relationship between creditor and debtor and provided the context in which Ecuador attempted to modify the terms of that loan.<sup>163</sup> But transparency works only within the parameters of accepted values and behavioral norms. To some extent, those values (especially understood as the values and norms under girding the current system of globalization) can serve to reinforce the legitimacy of those markets. It has great value, whether or not transfers to debtor states are made as private “loans” or as state-to-state “transfers,” however denominated.<sup>164</sup>

## 2. Implementation of Odious Debt Components

These components and the values each represents might be used as the foundations for specific changes in the approaches of global capital markets to the origination, maintenance, and monitoring of sovereign loans. Indeed, many

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161. Jedediah Purdy & Kimberly Fielding, *Sovereigns, Trustees, Guardians: Private-Law Concepts and the Limits of Legitimate State Power*, 70 LAW & CONTEMP. PROBS. 165, 210 (Summer 2007).

162. See Ben-Shahar & Gulati, *supra* note 142, at 49 (Autumn 2007) (“[C]reditors can make information regarding loans and the lack of accountability public, empowering domestic and international watchdog groups and according the populace or the international community some leverage to prevent the wasteful use of the debt.”).

163. See *supra* Part II.C and notes 114–124.

164. See Anna Gelpern, *Odious, Not Debt*, 70 LAW & CONTEMP. PROBS. 81, 90–93 (Summer 2007) (noting distinctions between private and sovereign debt).

of the contributions to this symposium have done just that—providing the conceptual framework for the sort of technical changes that will continue to insulate lenders from the risk of repudiation, even as that framework recognizes a broadened legal basis for repudiation of sovereign debt on the basis of the illegitimacy of the sovereign-lending system in general or in the conduct of any individual lender from time to time.<sup>165</sup> This article highlights five categories of specific changes that might be made to insulate loans from attack on illegitimacy grounds: (1) mandatory terms and safe harbors, (2) presumptions of benefits and burden of proof shifting, (3) responsibility-shifting rather than repudiation, (4) complicity limits, and (5) normalizing systems of managing global debt.

*a. Mandatory terms and safe harbors.* Academic discourse, at least, as well as the discourse of the political leaders of the developing world, has advanced the notion that sovereign debt, as a class, may be odious or illegitimate (and thus voidable by the state, but not by the individuals who entered into the agreements) because the terms of such debt are presumptively coercive in theory and occasionally so in fact. Consequently, such loans serve to provide no benefit to the people of the state upon which liability for the debt is sought to be imposed. Just as the Cubans were not required to pay Spanish war debts that benefited Spain (but not Cuba), any state may repudiate an obligation to pay debts that benefited someone other than the debtor state itself.

But the systemic illegitimacy of public debt can be overcome (and thus “managed”) sufficiently in a number of ways that can serve to deepen the legitimacy of the current system, at least with respect to its application to particular loans. Drawing on analogies from commonly understood usury notions and unconscionability doctrine, both grounded in principles of international human-rights norms, it is possible to craft a series of “universal” rules and principles of construction of sovereign loans that effectively insulate such loans against characterization as not benefiting the people of debtor countries, thus preserving such loans as a class from effective repudiation on those grounds.<sup>166</sup> Such mandatory terms could include mechanisms for limiting interest and repayment terms, distinguishing between permissible and impermissible covenants and other loan conditions, and creating safe harbors protecting certain lender actions against charges of meddling or control claims.

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165. “[I]llegitimate debt’ is not yet a well-defined and generally accepted term . . . . Differences between illegitimate and other types of debts, such as odious or legal debts, must be clarified.” Kunibert Raffer, *Odious, Illegitimate, Illegal or Legal Debts—What Difference Does it Make for International Chapter 9 Debt Arbitration?*, 70 LAW & CONTEMP. PROBS. 221, 225 (Autumn 2007).

166. See, e.g., Mechele Dickerson, *Insolvency Principles and the Doctrine of Odious Debts: The Missing Link in the International Human Rights Debate*, 70 LAW & CONTEMP. PROBS. 53, 67 (Summer 2007) (“[T]he focus for any insolvency analysis of the odious debts doctrine should be on the use of the loan proceeds by the odious regime rather than a blanket declaration that all debts incurred by an odious regime can be repudiated.”).

Omri Ben-Shahar and Mitu Gulati take a stab at this objective.<sup>167</sup> Contract, then, can create a system of “trade practices,” “trade expectations,” and common terms and definitions that would provide a basis for lenders to more effectively insulate individual loans from attacks on grounds of coercion or lack of public benefit. Most importantly, perhaps, such an approach could effectively generate a system of something like *jus cogens* principles of legitimate debt terms and practices. Proceeding from general principles to application is not unfamiliar to civil-law practitioners.

*b. Presumptions of Benefits.* Sovereign debt is presumptively illegitimate within the discourse of systemic illegitimacy because it provides no benefit to the people on whom the burden of repayment is placed. But drawing on analogies of democratic theory in the construction of loans can substantially reduce the efficacy of arguments of systemic illegitimacy by appearing to meet the criteria of popular benefit, monitoring, complicity, and transparency. For example, it would be possible to construct a series of presumptions of legitimacy that would shift burdens of proving illegitimacy. Debt undertakings by democratically elected governments would be presumed to serve a substantial public benefit, unless the state itself could show no benefit. In addition, in such circumstances, the state would have to show that the lender ought to have the burden of seeking compensation or payment from those individuals within its apparatus who diverted funds away from publicly beneficial functions. On the other hand, debts to undemocratic governments might give rise to a presumption that such loans do not benefit the public. Such debts would shift the burden of showing public benefit to the lender, who then would bear the burden of recovery from those individuals with whom it dealt in placing the loan. In addition, it would be possible to construct systems of safe harbors against repudiation for lenders who are responsible for a certain well-defined quantum of monitoring and tracing of funds.<sup>168</sup> Such systems would require the generation of universally accepted lists of uses with a public benefit and transparency-enhancing systems.<sup>169</sup>

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167. See Ben-Shahar & Gulati, *supra* note 143. Ben-Shahar and Gulati pose the question: “Who, then, is more responsible for the dictator’s opportunities to steal, the populace or the creditors?” *Id.* at 57. They suggest that creditors ought to bear the burden of loss with respect to those aspects of lending over which they might be the more efficient vehicle of control—monitoring, disclosure and governance—and suggest in general terms a number of contract provisions and assurances through which creditors might discipline state debtors. *Id.* at 57–59. But they take a more conservative view of systemic illegitimacy, suggesting that states ought to bear the burden of showing absence of popular benefit. *Id.* at 59–62.

168. See Seema Jayachandran, Michael Kremer & Jonathan Shafter, *Applying the Odious Debt Doctrine While Preserving Legitimate Lending* (2005), at 20, [http://www.economics.harvard.edu/faculty/kremer/papers/Odious\\_Debt\\_Doctrine.pdf](http://www.economics.harvard.edu/faculty/kremer/papers/Odious_Debt_Doctrine.pdf) (describing a system in which lenders, aware of a regime’s corrupt tendencies, must monitor the use of funds to ensure the furtherance of legitimate purposes to guarantee payment by a successor regime).

169. For a step in that direction see Ben-Shahar & Gulati, *supra* note 143, at 68–69 (maintaining that creditors should request better information to discern improper uses of loan proceeds).

c. *From repudiation to responsibility-shifting.* The “nuclear option” of systemic illegitimacy theory is the call for wholesale debt repudiation from which a new system of wealth-transfers to developing states might be created (perhaps along the lines of the U.N.’s now-abandoned New International Economic Policy).<sup>170</sup> But the increasing focus on the consequences of more acutely recognizing the autonomy of actors who have a hand in the acquisition of sovereign debt might well provide a basis for ameliorating this option in favor of systemic changes that enhance the power of the current system at little cost. Thus, the current development of global systems of monitoring and enhanced transparency in connection with financial crime and antiterrorism campaigns can be easily deployed to the odious debt context.

The problem of odious debt, reconceived as a matter of criminal activity on the part of individuals, lends itself to easy control within the current systems of global sovereign lending. The focus thus shifts from systemic illegitimacy to personal responsibility for actions and obligations that cannot be ascribed to the state as an autonomous actor. For this purpose, the developing global systems of chasing and retrieving illicitly diverted funds can be useful as a basis for diverting attention from system to actor. And, indeed, most financial institutions are already devoting a certain amount of effort to reorienting their operations to this new reality of transnational operation.<sup>171</sup> For these purposes, private-law doctrines like equitable subordination might prove useful.<sup>172</sup> They

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170. See Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201-01 (S-VI) (May 1, 1974); Programme of Action on the Establishment of a New International Economic Order, G.A. Res. 3201-02 (S-VI) (May 1, 1974). The main tenets of the New International Economic Order stressed the power of states to regulate multinational corporations, to expropriate property in the national interest, and to develop markets and trading systems for commodities and raw materials that favored developing states. See generally CRAIG N. MURPHY, GLOBAL INSTITUTIONS, MARGINALIZATION AND DEVELOPMENT 107–13 (2005). The themes and principles of the New International Economic Order have been an almost constant referent in the speeches of Fidel Castro since the 1980s, especially with reference to the systemic illegitimacy of sovereign debt. See, e.g., Fidel Castro Ruz, First Secretary of the Central Committee of Communist Party of Cuba and President of the Councils of State and Ministers, Discourse at the Fourth Congress of the FELAP (July 6, 1985), <http://www.cuba.cu/gobierno/discursos/1985/esp/f070785e.html> (last visited May 26, 2007) (on file with author) (author’s translation).

171. See, e.g., Larry Catá Backer, *Odious Debts and Vulture Funds: Making a Case for Repudiation of Sovereign Debt*, LAW AT THE END OF THE DAY (Feb. 16, 2007), <http://lcbackerblog.blogspot.com/2007/02/odious-debt-and-vulture-funds-making.html> (last visited Mar. 10, 2007). These efforts are reflected in voluntary programs such as the due diligence project of the International Finance Corporation, part of the World Bank Group. See Int’l Finance Corporation, Due Diligence: Anti-Corruption and Anti-Fraud, [http://www.ifc.org/ifcext/about.nsf/Content/Due\\_Diligence](http://www.ifc.org/ifcext/about.nsf/Content/Due_Diligence) (last visited May 15, 2007). Some of this changed behavior is a by-product of the legal framework for bank due diligence in connection with the post September 11, 2001 “War on Terror” and the Financial Crimes Enhancement Network (FinCEN). For a descriptive discussion, see Aaron R. Hutman, Matthew J. Herrington & Edward J. Krauland, *Money Laundering Enforcement and Policy*, 39 INT’L LAW. 649 (2005). The effects of these legislative efforts suggest some consequences in the field of illegitimate debt: “many banks are now refusing to open accounts for smaller ‘money services businesses’ (MSBs) (e.g., check cashing services, currency exchangers, and issuers of travelers checks and money orders).” Corporate Compliance Committee, ABA Section of Business Law, *Corporate Compliance Survey*, 60 BUS. LAW. 1759, 1787–88 (2005).

172. See generally Adam Feibelman, *Equitable Subordination, Fraudulent Transfer, and Sovereign Debt*, 70 LAW & CONTEMP. PROBS. 171 (Autumn 2007).



might also apply in the context of state-to-state transactions, which might be characterized as either debt or “something else,” as well.<sup>173</sup> The discursive parameters thus shift from a simple binary—that is, to pay or repudiate—to a more complex analysis involving issues of who pays, when, and in what order.

*d. Limiting the bite of complicity while managing its occurrence.* Complicity concerns tend toward issues of self-regulation within an industry (sovereign finance) whose long-term best interests are maximized by avoiding the appearance of running an amoral system. Such systems are geared to exploit the weak by leveraging the power of developed states (from which the systems operate) to subordinate the people of debtor states by effectively contributing to the lawlessness of those regimes. This self-monitoring, perhaps once confined to the realm of state-to-state relations, now appears increasingly able to reach private entities, as well.<sup>174</sup> And international organizations are attempting to use private entities and individuals to discipline state and other international actors.<sup>175</sup> There is an economic component to this program, too—one that is grounded in patterns of traditionally applied and powerful policy choices and that seeks to impose the cost on the parties that take fewest steps to avoid loss.<sup>176</sup>

Lenders can avoid charges of complicity in systemic illegitimacy as well as the potentially powerful arguments for repudiation that flow from this charge, by applying, for example, principles of joint tortfeasor or conspiracy rules from private law to fashion a series of limiting principles and norms that define, with sufficient particularity, conduct that avoids and conduct that embraces complicity (and its resulting obligations vis-à-vis sovereign debt). Transparency and monitoring efforts can be defined in a way to produce a sufficiently effective system of behavioral safe harbors. Complicity thus defined can include a substantive element (what conduct constitutes complicity) and a process component (what systems must be created and efforts made to avoid characterization of conduct as complicit). Necessarily defining complicity narrowly affords the last bit of protection to lenders and the lending system.

*e. Normalizing systems of management of global debt in global institutions.* One of the great ironies of the odious debt doctrine—among both its defenders and critics—is the consensus that debate on this topic appears to generate respecting the solution of the “problem,” however conceived. And that solution has changed little in general from that proposed by Sack in the

173. See Gelpern, *supra* note 164, at 90–93 (describing differences between private and sovereign debt).

174. See generally ANITA RAMASASTRY & ROBERT THOMPSON, FAFO, COMMERCE, CRIME AND CONFLICT (2006), <http://www.fafon.org/pub/rapp/536/536.pdf> (concluding that “it is possible to hold business entities liable for the commission of international crimes”).

175. See generally Backer, *supra* note 16, at 287 (summarizing “ramifications of current efforts to internationalize the regulation of corporate social responsibility”).

176. See Ben-Shahar & Gulati, *supra* note 143, at 61–62 (“If creditors are the better preventers of the loss . . . [they] should bear the loss of their failure to take care.”).

1920s. Few theorists are willing to leave matters to the private market,<sup>177</sup> though many are satisfied to import private-law principles to whatever mechanism they advocate. Even fewer are willing to leave resolution to the current disordered system of territorially bounded creditor and debtor states. What most propose is some form or another of international or supranational organization for the resolution of disputes about debt and, more precisely, for its enforcement as against states otherwise unwilling to pay. Many of these propose a supranational system of insolvency to which all sovereign states would be bound.<sup>178</sup> These systems have been characterized as efforts to reduce political considerations in sovereign debt relief (for the reasons such reduction is necessary in U.S. corporate-law restructuring).<sup>179</sup> They might incorporate human-rights values in discussion of debt-payment obligations.<sup>180</sup> Such systems might reduce systemic incentives toward bad behavior among the individuals clothed with public power in debtor states.<sup>181</sup> Whatever the system chosen, the result will be the same: the production of an autonomous transnational system for the disciplining of states through the leverage of its indebtedness into conformity with globally coercive behavioral norms. Odious debts doctrine, and the systems its spawns, are in this sense, a means to a greater end.

### 3. A Horse with Many Saddles

By now one gets the essential point. Odious debt is a horse with many saddles. It pits older hierarchical notions of the state system against the rising network of multiple public and private global (but functionally differentiated) systems of governance. The odious debt doctrine exposes creditor as well as debtor to liability. Its broad application, at least in theory, will not likely do much to destabilize the rising system of global capital. But it may produce a series of structural adjustments in how that system operates that might be of value to debtor states even as it strengthens that system and provides a mechanism by which it can emerge autonomous from the state system which it services.

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177. But see Paul D. Carrington, *Law and Transnational Corruption: The Need for Lincoln's Law Abroad*, 70 LAW & CONTEMP. PROBS. 109, 111 (Autumn 2007) (suggesting "private enforcement of public law" to curb transnational corruption).

178. See, e.g., Anne O. Krueger, First Deputy Managing Director, Int'l Monetary Fund, Address at the Indian Council For Research On International Economic Relations, A New Approach to Sovereign Debt Restructuring (Apr. 30, 2002), <http://www.imf.org/external/pubs/ft/exrp/sdrm/eng/sdrm.pdf> (discussing the IMF's potential role in sovereign debt restructuring).

179. See Robert Rasmussen, *Sovereign Debt Restructuring, Odious Debt, and the Politics of Debt Relief*, 70 LAW & CONTEMP. PROBS. 249, 256 (Autumn 2007) ("The proponents of new systems to address the problems of odious debt . . . seek to move the availability of relief . . . from the realm of politics to that of law.").

180. See Dickerson, *supra* note 166, at 59–60 ("[M]any outside of the financial community maintain that any insolvency framework involving sovereign debts should be based on principles related to justice, morality, and human rights . . .").

181. See Kunibert Raffer, *What's Good for the United States Must be Good for the World: Advocating an International Chapter 9 Insolvency*, in FROM CANCÚN TO VIENNA, INTERNATIONAL DEVELOPMENT IN A NEW WORLD 68 (Bruno Kreisky Forum for International Dialogue ed., 1993), available at <http://homepage.univie.ac.at/kunibert.raffer/kreisky.pdf>.

## IV

## CONCLUSION: MUCH ADO ABOUT LEGITIMACY?

Several things become clear from this summary which together nicely frame the discussion presented in this article. One is the difficulty of naturalizing the doctrine of odious debt within the current framework of international capital markets for sovereign debt. The doctrine is difficult to implement precisely because it tends to shift the burden of enforceability from borrower to lender. At its limit, no loan is completely secure, at least until repaid. All loans are potentially subject to collateral attack by successor governments or states, or even by current governments, when the agent or apparatus of state used to secure the loan, or the purposes to which it was directed, are deemed illicit. A jurisprudence of licit and illicit use, and a new, more proactive culture of lending, would have to emerge. Hagan suggests that this might severely and deleteriously affect markets for borrowing by developing states.<sup>182</sup> Or it might affect the cost of capital. Or it might require new lending practices—including perhaps that the population must bind itself directly to repay the loan by plebiscite.<sup>183</sup>

Or it might, as Fidel Castro long ago suggested, produce a fundamental change in the character of the sovereign-debt capital markets as part of an overall transformation of global-law structures. Ironically, this view has already begun to become a reality from two very distinct quarters. On the one hand, the World Bank under the leadership of Wolfowitz has begun to reshape the character of transactions with state actors through its anticorruption campaigns. On the other, a post-Castro Cuba may serve as a founding member of new forms of state-to-state financial relationships that directly compete with global capital markets on a command-economy model through newly constituted organizations like ALBA.<sup>184</sup> Its most recent member, Nicaragua, who joined

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182. This judgment appears to reflect the current consensus among members of the global elite interested in this subject on all sides of the issue. See, e.g., *FIXING FINANCIAL CRISES IN THE TWENTY-FIRST CENTURY* (Andrew G. Haldane ed., 2004) (publishing conference papers from “The Role of the Official and Private Sectors in Resolving International Financial Crises” hosted by the Bank of England in 2002 and discussing the traditional approaches to sovereign debt crises); Thomas I. Palley, *Sovereign Debt Restructuring Proposals: A Comparative Look*, 17(2) *ETHICS & INTERNATIONAL AFFAIRS* 26 (2003). Palley argues that a regime of binding arbitration about the character of sovereign debt might reduce available capital for sovereign lending but might also create incentive to added monitoring and thus increase the quality of sovereign lending (and also its value). See, e.g., MICHAEL PETTIS, *THE VOLATILITY MACHINE: EMERGING ECONOMIES AND THE THREAT OF FINANCIAL COLLAPSE* (2001).

183. The referendum movement in the United States provides a potential template for such practices. For a discussion of the use of referendums to further popular democracy, see, for example, the essays in *REFERENDUM DEMOCRACY: CITIZENS, ELITES, AND DELIBERATION IN REFERENDUM CAMPAIGNS* (Matthew Mendelsohn & Andrew Parkin eds., 2001).

184. “[I]n April 29, 2006, Bolivia joined Cuba and Venezuela in signing Chavez’s Bolivarian Alternative for Latin America (ALBA) trade agreement. ALBA presents a socialist vision for regional commercial cooperation, although at this point its value is largely political, symbolic and somewhat short on economic specifics.” Press Release, Council on Hemispheric Affairs, *Cuba Comes in From the Cold* (July 31, 2006), <http://www.coha.org/2006/07/31/cuba-comes-in-from-the-cold/> (last visited Feb. 12, 2007). But the effects of ALBA are beginning to be felt. “ALBA arose out of the developing

ALBA in January 2007,<sup>185</sup> had its sovereign-debt burden firmly in mind when entering into this alternative sovereign-activity structuring effort.<sup>186</sup> Indeed, the notion of odious debt, now no longer moored to the idea of the state and state succession, either through revolutionary or other change in governmental status or territorial integrity, has become irrevocably bound up in the efforts to construct networks of capital systems and the rules for their operation on a global basis. That now forces the discussion of odious debt into the more general discussion of networked global governance.<sup>187</sup>

The World Bank's current campaign suggests that global capital markets will survive a change in the fundamental character of sovereign lending to one more receptive to a broadly applied doctrine of odious debt. And, indeed, the World Bank has effectively implemented its conception of odious debt as illegitimate obligations arising from corruption within its global system of lending. This portion of the odious debt doctrine is already a reality of sorts. Such a change might ultimately be in the best interests of both lenders and borrowers. Such a regime serves developing states and their financial institutions well. A developed jurisprudence of odious debt would in the first instance increase the costs of sovereign-debt capital or reduce funds available to the 'neediest' states, but ultimately it would increase the safety of lending though the eventual development of a jurisprudence of safe-harbor rules. But as the move to ALBA suggests, it might also wean states away from the debt markets, or at least provide an incentive to diversification. And thus the great irony of the move to an odious debt regime based on principles of global law: everyone will continue to make money, and the apparatus of states will continue to engage in risky behavior as long as the sovereigns permit it and the

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Venezuelan socialist revolution, in alliance with socialist Cuba. ALBA sets as its primary aim not 'free trade' but the elimination of poverty and other major social problems in Latin America. Unlike Mercosur, ALBA agreements—which have been put into effect between revolutionary Venezuela and socialist Cuba—explicitly prioritiz[e] social needs over corporate profits." Aaron Benedek, *Cuba, Venezuela Use Mercosur to Promote ALBA*, GREEN LEFT WEEKLY, BILATERALS.ORG, Sept. 20, 2006, [http://www.bilaterals.org/article.php3?id\\_article=6052](http://www.bilaterals.org/article.php3?id_article=6052) (last visited Sept. 8, 2007). The roots of ALBA can be traced back to at least the mid 1980s and Cuba's efforts to institutionalize the programs of the U.N.'s New Economic Order. See FCR 1985 Speech, *supra* note 20.

185. Gregory Wilpert, *Nicaragua Joins Venezuela in Regional Association and Cooperation Agreements*, VENEZUELANALYSIS.COM, Jan. 12, 2007, <http://venezuelanalysis.com/news.php?newsno=2190> (last visited May 27, 2007).

186. See Prensa Latina, *Nicaragua Follows ALBA Path*, LATIN AMERICAN NEWS AGENCY [http://www.plenglish.com/article.asp?ID=%7BF4C8567F-5976-4880-A5A3-127754940607%7D"\)&language=EN](http://www.plenglish.com/article.asp?ID=%7BF4C8567F-5976-4880-A5A3-127754940607%7D) (last visited Jan. 12, 2007). As a friendly American commentator suggested hopefully: "'According to any reasonable definition of the term, this is not a trade agreement.' Michael Shifter, a political analyst with the Inter-American Dialogue in Washington, said of last year's deal, 'It's an attempt to pose a real counterweight to the U.S. role and agenda in Latin America.'" PoliticalAffairs.net, *Bolivia, Cuba, Venezuela Reject U.S. Trade*, <http://www.politicalaffairs.net/article/view/3340/1/165> (last visited Feb. 12, 2007).

187. See, e.g., Fischer-Lescano & Teubner, *supra* note 132, at 1032–34. The authors criticize the current framework of state-based analysis, favoring what they term global societal law. *Id.* at 1032 (citing Andreas Fischer-Lescano, *Odious Debts und das Weltrecht*, 36 KRITISCHE JUSTIZ 225 (2003); Gunther Teubner, *Global Bukovina: Legal Pluralism in the World Society*, in GLOBAL LAW WITHOUT A STATE 3 (Gunther Teubner ed., 1997)).

financial and political communities are willing to live with the risk (now amply compensated in a reconstituted basis of return).<sup>188</sup>

Like Sack, Fidel Castro, Paul Wolfowitz, and the IMF through its recent attempts at creating a system of public-entity bankruptcy, are looking, at an institutional level, to the creation of one or more systems of regulation for what had been, until the late twentieth century, an ad hoc system of public, private, municipal, and international law. Sack in the 1920s hoped for the creation of a supra-national system of public-debt regulation. “Il s’agit d’un ensemble de règles de droit de portée universelle, ayant valeur de normes reconnues par tous les États civilisés et offrant un caractère pour ainsi dire supra-étatique: le crédit public doit être doté, pour ainsi dire, d’une constitution d’ordre international, adoptée par la famille des nations.”<sup>189</sup> The IMF’s recent attempts at global public-bankruptcy rules suggest that those efforts, though still unsuccessful, remain potentially powerful.<sup>190</sup> Paul Wolfowitz points to the construction of global private regimes of public-debt validity. These regimes are based on notions of specific forms of illegitimacy (corruption) that derive from the ideas in Sack of the fiduciary duty or trust notions that permit distinctions between the illicit private debt of public officials (when the debt is foisted on the state) and licit state debt incurred on its behalf by its agents as servants of the state.<sup>191</sup> Fidel Castro looks with nostalgia to the state as the source of authority and to the international system as a protection against itself when it permits the uncontrolled growth of private global orderings. State debt tied to illegitimate private systems of capital are no more valid than private systems asserting the power of states over the factors of production and the welfare of the people.<sup>192</sup>

Despite vigorous protestations to the contrary, coming especially from international-law formalists inside and outside the legal academy, the doctrine of odious debt does exist. Though still considerably small in scope, as a purely formal matter, it has been gathering force. That force has been acquiring additional legitimacy at the hands of authoritative academics, elements of civil society, and even states and instrumentalities of states at the national and intergovernmental levels, none of which can resist resorting to the doctrine from time to time as their national interests dictate. Networks of academics

188. There is a long and honored history of markets accommodating the realities of new normative practices for their collective advantage. For one example, see William W. Bratton & G. Mitu Gulati, *Sovereign Debt Reform and the Best Interest of Creditors*, 57 VAND. L. REV. 1 (2004); Stephen J. Choi & G. Mitu Gulati, *Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Bonds*, 53 EMORY L.J. 929 (2004).

189. “It acts as a set of universal safe harbor rules, having value as norms recognized by all civilized States and suggesting so to speak a supra-national character: public credit must be equipped, so to speak, with a constitution of an international nature, adopted by the family of the nations.” SACK, *supra* note 8, at XIV (author preface).

190. See Krueger, *supra* note 178.

191. Wolfowitz, *supra* note 17 (“That is why fighting corruption requires a long-term strategy that systematically and progressively attacks the problem, and that is why any strategy for solving the problem requires the commitment and participation of governments, private citizens, and private businesses alike.”).

192. FCR 1999 Speech, *supra* note 20; FRC 1985 Speech, *supra* note 20.

have bolstered the solidity of the concept. Networks of civil society have advanced the doctrine as an action item in their communication with political and economic networks. Networks of states have sought refuge in the concept as they begin to distinguish more acutely between the state and its apparatus (especially its apparatus controlled by individuals who work as much to retain control as for the benefit of the state). Global networks of capital have begun to use the concept as a basis for protecting their security interests in their loans. For them, anticorruption campaigns are good for business. Even the development of safe harbors for due diligence and use of funds would work to their economic advantage and further the stability of the global system of capital. Networks of international and supranational institutions have begun to see in the system, as Sack suggested, the possibility of using odious debt as part of a complex of subjects through which control of rulemaking can be shifted from the state on the one hand and global private networks on the other to globally competent international institutions.

The two faces of odious debt thus provide a window onto another and vastly more complicated development in global governance. With international capital systems now potentially subject to the same legitimacy expectations as private and municipal systems, the simpler days of binary contractual arrangements between states, or between states and private entities for the provision of capital, are soon to pass into history. “The principle of the succession of public debt is thus a principle, not of public international law regulating the relationship between States, but of financial law and general public law.”<sup>193</sup> That law of finance and general public law now assumes a global character whose stakeholders have expanded far beyond the reckoning of Sack in the 1920s—but the insight remains true. As Fidel Castro has not tired of explaining, these global systems now have acquired the burdens of legitimacy once limited to state actors. Development of the odious debt doctrine, like sovereign-debt forgiveness, may be as good for the banks as it is for the borrower, as each seeks to maximize the strategic value of this doctrine. Welcome again to the future.

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193. SACK, *supra* note 8, at 87.