

THE ODISIOUS DEBT DOCTRINE AFTER IRAQ

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I

INTRODUCTION

The odious debt doctrine has experienced renewed popularity in the past few years; it has been heralded by academics, political commentators, economists, and politicians as a mechanism to alleviate burdens imposed by illegitimate rulers. In its classic formulation, the doctrine provides that a regime's debt is odious, and thus unenforceable, if the state's people did not consent to the debt, the proceeds from the debt were not used for the benefit of the people, and the regime's creditors had knowledge of the first two conditions.¹ Scholars and policy makers have made advances in defining the doctrine and proposing mechanisms for its application to real-world problems, and there are now several leading theories on how the doctrine could be implemented.² To date, however, it is not clear how much traction, if any, the doctrine has gained in the real world.

The doctrine, in any form, has not been directly invoked in recent history,³ though not for lack of test cases. For example, South Africa's Apartheid debt is often cited as an ideal situation for the application of the doctrine: there was a

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1. The characteristics of odious debt have been discussed extensively in the literature. The definition that has gained considerable acceptance, and which is discussed here, was forwarded by Russian scholar Alexander Sack in 1927. Anna Gelpern, *What Argentina and Iraq Might Learn from Each Other*, 6 CHI. J. INT'L L. 391, 403 (2005) (discussing the Sackian definition of the odious debt doctrine). This note will not examine the difficult questions surrounding the determination of whether a debt is odious, but will rather focus on the motivations and implications of the doctrine's invocation.

2. Several of these proposals are discussed in Part II. For detailed discussions of the contours of the doctrine in its classic formulation, see ASHFAQ KHALFAN, JEFF KING & BRYAN THOMAS, CENTRE FOR INTERNATIONAL SUSTAINABLE DEVELOPMENT LAW, ADVANCING THE ODISIOUS DEBT DOCTRINE (Mar. 2003), available at http://www.odiousdebts.org/odiousdebts/publications/Advancing_the_Odious_Debt_Doctrine.pdf.

3. U.S. Chief Justice Taft's canceling of debt incurred by Costa Rican President Federico Tinoco in 1923 is often cited as the most recent direct application of the doctrine. See, e.g., Jubilee Iraq, Odious Debt, <http://www.jubileeiraq.org/odiousdebt.htm> (last visited Feb. 15, 2007) (listing the Tinoco arbitration as the most recent precedent-creating event for the odious debt doctrine). Although there are other cases that may have involved arguments for repudiation based on odiousness, the doctrine itself has not received explicit support from international or domestic tribunals since the Tinoco decision.

clear break between the overthrown Apartheid regime and the elected African National Congress government, there is general consensus in the international community that the Apartheid regime was oppressive, and the new regime had international support and the intent and capacity to repay any newly incurred debt obligations. Nonetheless, the country continues to repay its Apartheid-era debt due to fears that not paying would hinder its ability to borrow going forward.⁴ Many groups continue to advocate for the repudiation of South Africa's Apartheid debt; however, the South African government has given no indication of pursuing an Apartheid-era debt write-down. The companies and creditors that supported the Apartheid regime will be repaid, even if by the same people who were oppressed by it and worked to overthrow it.

In 2003, the newly instated Iraqi regime began negotiations to restructure that country's debt, much of which had been incurred by Saddam Hussein during his twenty-odd year tenure as its dictator. As with South Africa, there were many calls to invoke the odious debt doctrine to repudiate Iraq's Saddam-era debt,⁵ particularly because many saw Iraq, with its clear regime change and the general consensus on the unsavory nature of Saddam's regime, as an opportune situation under which to implement the doctrine. Again, as with South Africa, the doctrine was not invoked.

The similarities, however, end there. Unlike South Africa, Iraq was able to restructure its debt on very favorable terms—receiving an eighty percent write-off—by working through political channels with the backing of the United States. Despite the differences between the regime changes in Iraq and South Africa (Iraq's was precipitated by U.S.-led military operations whereas South Africa's was internally driven, though certainly encouraged by other countries through international sanctions and political isolation), the new Iraqi regime's more recent decision to back away from the odious debt doctrine similarly calls into question the usefulness and practicability of the doctrine in addressing inequities in sovereign debt burdens.

This note examines the doctrine's influence on Iraq's recent debt restructuring and whether the doctrine has become an effective debt repudiation tool for sovereign creditors. Part II reviews scholarship and commentary proposing to apply the odious debt doctrine to Iraq, and Part III gives an account of the Iraqi debt renegotiation process, focusing particularly on the Paris Club negotiations and the forces behind the process.

The note then addresses the implications of the Iraqi result for subsequent restructurings and the prospects for the implementation of the odious debt doctrine by other successor governments. More specifically, in Part IV the note argues that the doctrine, although it may have played some role in the Iraqi debt renegotiation process, does not currently supply a meaningful mechanism

4. Nicole Itano, *Apartheid Victims Point a Finger at Multinational Firms*, SEATTLE TIMES, Nov. 26, 2002, at A3.

5. As discussed in Part III, the calls to implement the doctrine came not only from political punditry, but also from key officials within the U.S. administration and World Bank.

for debt repudiation for those countries without sufficient political or strategic value to major world powers. Further, although the doctrine may provide a useful platform for political rhetoric or to sway public opinion, alone it has not proved to be a basis for debt repudiation. Governments may employ the language of odiousness in the face of impending sovereign debt restructurings, however it appears that sovereign creditors have not responded to arguments of repudiation based solely on odiousness. Perhaps not surprisingly, such arguments are most effective, or only effective, when accompanied by political, military, or economic backing from world powers, particularly the United States. Last, Part V concludes by discussing some recent developments in the implementation of the odious debt doctrine which are promising, but also deviate from the more traditional approach generally discussed in the literature.

II

PROPOSALS FOR IRAQ UNDER THE ODIIOUS DEBT DOCTRINE

In the time between the U.S.-led regime change in Iraq and the recent debt renegotiations, many scholars advocated the implementation of the odious debt doctrine as a mechanism for relieving the Iraqi people of debts incurred by Saddam Hussein. Many saw Iraq as a poster-child for odious debt and Hussein's ouster as an overdue opportunity to implement the long-dormant doctrine.

Patricia Adams, the Executive Director of Probe International and a frequent commentator on the odious debt doctrine, strongly advocated the application of the doctrine to Iraq's Saddam-era debt.⁶ In an article published by the Cato Institute in 2004, Adams recommended that the new Iraq administration first determine which of the Saddam-era debts were indeed odious and then simply refuse to pay them until creditors submit proof of non-odiousness.⁷

She rejects the Paris Club process as a "backroom political deal in which the creditors are the judges and Iraqis have to plead for mercy," arguing that negotiations for debt relief within the Paris Club context serve to legitimize an illegitimate debt, regardless of the end result.⁸ Furthermore, Ms. Adams argues that the Paris Club debt renegotiations serve only to bail-out creditors—bilateral creditors directly and commercial creditors indirectly—that should have known better than to lend to an odious regime. She pointedly notes that Paris Club creditors are inherently conflicted—they are the "judge, jury, and executioner"⁹ as they directly benefit from a less substantial debt reduction plan—and cannot be expected to act equitably in restructuring negotiations. Therefore, rather than working through the Paris Club, Ms. Adams promotes

6. *E.g.*, IN THE NAME OF PROGRESS: THE UNDERSIDE OF FOREIGN AID (1985); ODIIOUS DEBTS: LOOSE LENDING, CORRUPTION AND THE THIRD WORLD'S ENVIRONMENTAL LEGACY (1991).

7. Patricia Adams, *Iraq's Odious Debts* 12 (Cato Inst., Policy Analysis No. 526, 2004), available at <http://www.cato.org/pubs/pas/pa526.pdf>.

8. *Id.*

9. *Id.* at 11.

the unilateral adoption of the odious debt doctrine, and writes that the “new Iraqi administration should follow the rule of law to determine the validity of claims against their people”¹⁰

Nobel prize-winning economist Joseph Stiglitz takes a more moderate view regarding the application of the odious debt doctrine in Iraq. Seeing the ad hoc, highly political nature of debt relief proceedings as an impediment to economic recovery for Iraq, he calls for the establishment of an international bankruptcy court to enforce an odious debt principle.¹¹ This international bankruptcy mechanism would be administered by an international organization—Dr. Stiglitz proposes the United Nations—because of the inherent conflict faced by creditors and country-level advocates for creditors in determining debt-relief packages for their debtors. To this point, Dr. Stiglitz provides the example of the U.S. government’s insistence on the sanctity of contracts with the Suharto regime of Indonesia¹² after the overthrow of Mohamed Suharto in 1998.¹³ There, the U.S. government made no serious attempts to promote debt write-offs for Indonesia, under the rhetoric of odious debt or otherwise. The contrast with the U.S. position on Iraqi debt is clear; because of its particular political and strategic interests in the country, the United States seeks different treatment for Saddam-era debt, citing odiousness as a justification for repudiation. Dr. Stiglitz ties the uncertainty that results from the influence of political factors on debt relief outcomes to an “unfair burden” born by developing countries.¹⁴ Because debt relief for a given country is determined by political interests rather than need, many of the world’s poorest countries are left repaying debts unfairly while less poor, but strategically important countries are let off the hook.

Dr. Stiglitz writes that an international bankruptcy system would not only result in a more equitable process for poor countries, but would also address U.S. concerns with Iraqi debt relief. First, such a system would begin to rebuild U.S. ties with other Iraqi creditors. He suggests that the introduction of a formal international bankruptcy mechanism would likely garner increased cooperation from France, Russia, and Germany, the other largest sovereign Iraqi creditors.¹⁵ Second, the mechanism would likely produce an equitable result; some Iraqi debt would be upheld (for example, dollars used to build schools) while the vast

10. *Id.* at 12.

11. Joseph Stiglitz, *Odious Debts, Odious Rulers*, ATLANTIC MONTHLY, Nov. 2003, at 42.

12. Dr. Stiglitz characterizes the Suharto regime as corrupt, *id.*, a characterization widely shared in the international community. For example, Transparency International, a non-profit organization that describes itself as fighting corruption, named Suharto the most corrupt leader of the past twenty years. Press Release, Transparency Int’l, Plundering Politicians And Bribing Multinationals Undermine Economic Development (Mar. 25, 2004), available at http://www.transparency.org/content/download/4450/26759/file/GCR_2004_press_release_FINAL.pdf.

13. Stiglitz, *supra* note 11, at 42.

14. Dr. Stiglitz provides several examples, including debts incurred by Seske Mobutu in the Congo and South Africa’s apartheid-era obligations. *Id.* at 42–43.

15. *Id.* at 45.

majority would be repudiated. Also, the goodwill created by the formal mechanism would likely stave off a creditor rush on Iraqi oil assets.¹⁶

Such proposals to establish an international bankruptcy system enjoyed a brief period of popularity from 2001 until 2003, when an initiative to establish an International Monetary Fund (IMF)-based process was abandoned¹⁷—coincidentally just prior to the Iraqi debt negotiations. More recently, Seema Jayachandran, Michael Kremer, and Jonathan Shafter proposed an alternate system of ex ante implementation of the odious debt principle that addresses some of the concerns about fairness and predictability raised by Dr. Stiglitz.¹⁸ Their “due diligence” model proposes a system of loan sanctions (analogous to trade sanctions) enforceable against countries according to predetermined odiousness criteria. Once a country attains a sufficiently high odiousness rating, its creditors-to-be would be put on notice that any new debt contracts would not be enforceable.

Anna Gelpern endorses the Jaychandran-Kremer-Shafter shift from the traditional odious debt doctrine stance (ex post treatment of debt) or a bankruptcy scheme to a loan-sanction system. Like Dr. Stiglitz, she notes that the current, ad hoc system of debt restructuring—while perhaps being effective under certain conditions—generally ignores the broader policy issues of sovereign governance, governmental corruption, and misappropriation of debt proceeds.¹⁹ She observes that in the case of Iraq, the politically driven restructuring effort resulted in the country receiving significant protection from its creditors in the form of U.N. resolutions and stays against U.S. creditor actions put in place by Presidential Executive Order.²⁰ Iraq received special treatment because the “international community would step in to shield a government when its financial distress presents an extraordinary political threat, but not when it stems from periodic misfortune or mismanagement.”²¹

In Ms. Gelpern’s view, although the odious debt doctrine may satisfy moral concerns, the doctrine in its current form is unusable. She points out that while Iraq may have had a strong hand with respect to the repudiation of a significant portion of its debt under the odious debt doctrine, choosing to play its odiousness cards would have only complicated an already contentious restructuring and negotiation process. Iraq would have had to engage its

16. *Id.*

17. Patrick Bolton & David A. Skeel, Jr., *Redesigning the International Lender of Last Resort*, 6 CHI. J. INT’L L. 177, 178 (2005).

18. Jonathan Shafter, *The Due Diligence Model: A New Approach to the Problem of Odious Debts*, 21 ETHICS & INT’L AFF. 49 (2007). An earlier draft of this article named Seema Jayachandran and Michael Kremer as co-authors. See *Applying the Odious Debts Doctrine While Preserving Legitimate Lending*, http://www.stanford.edu/~jayachan/applying_odious_debt.pdf.

19. Gelpern, *supra* note 1.

20. *Id.*

21. *Id.* at 400.

creditors in a debt-by-debt analysis, determining what was odious enough to be written off.²²

Compared to the favorable results it obtained from the need-based Paris Club negotiations, pursuing relief via the odious debt doctrine would likely have taken longer, been more expensive, and may not have yielded as favorable results. Ms. Gelpern argues that as long as the ad hoc, “backdoor” bankruptcy system exists, through which politically-favored debtors enjoy relatively smooth paths to debt relief, the odious debt doctrine will remain unused.²³ Countries powerful enough exert control over their debt relief negotiations have better options—they do not need the odious debt doctrine. In the meantime, there are less strategically important countries (at least to creditor nations) that would benefit from, and perhaps deserve, relief from “odious” debts.

Ms. Gelpern asserts that this “doctrinal gap”—the lack of options for nonstrategic countries carrying odious debt—could be lessened by a reformed odious debt doctrine in the form proposed by Jayachandran, Kremer, and Shafter; there are countries that would greatly benefit from, and perhaps legitimately deserve, relief from debts as would be prescribed by the odious debt doctrine.²⁴

With respect to Iraq, Ms. Gelpern views the restructuring of its debt as an opportunity to advance the implementation of ex ante loan sanctions based on odious debt doctrine principles. With the United States’ significant political support of Iraqi debt relief, she believes that significant inroads could have been made to close the doctrinal gap, perhaps leading to a functioning implementation of the odious debt doctrine.

III

WHAT HAPPENED

Regardless of the concerted push by participants in the odious debt debate, the new Iraqi administration chose to distance itself from the odious debt doctrine. At least in the public forum, it instead pursued need-based debt relief from the Paris Club, and was highly successful in doing so.

What happened? If, as commentators suggest, Iraq was in a prime position to advance the doctrine, why did it turn back to traditional ad hoc debt relief negotiations? This Part will provide a brief overview of the debt-relief process for Iraq, beginning with regime change and the Paris Club negotiations and ending with an analysis of the commercial debt negotiations.

During Saddam Hussein’s tenure, Iraq incurred vast amounts of public debt, which generally can be categorized as bilateral (owed to other nations), commercial (owed to corporations), and multi-lateral (generally owed to the

22. Of course, even before getting to a debt-by-debt analysis, Iraq and its creditors would have had to settle upon rules by which to measure odiousness, a complicated task in itself.

23. Gelpern, *supra* note 1, at 401.

24. *Id.*

IMF and the World Bank).²⁵ Estimates of the total Iraqi debt load in 2003 ranged from \$125 billion²⁶ to more than \$300 billion.²⁷ Following the 2003 ouster of Saddam Hussein, the U.N. charged the interim Iraqi administration with engaging its creditors to renegotiate Iraqi debts and to “implement such agreements and other arrangements as may be necessary in this regard, and request[] creditors, institutions and donors to work as a priority on these matters”²⁸ In order to facilitate the reconstruction and provide the Iraqi government with leverage over its creditors, the U.N. had also immunized Iraqi oil assets from attachment by creditors until December 2007.²⁹ In passing these resolutions, the U.N. emphasized the rebuilding of Iraqi infrastructure, its economy, and humanitarian and social services. Notably, the U.N. made no mention of justification for the asset immunization under a theory of odiousness; instead, the focus was on providing the new administration with the tools it would require to rebuild the nation.

A. Paris Club Negotiations

The primary mechanism for bilateral debt relief for sovereign borrowers is through negotiation with the Paris Club, an informal group of creditor nations with the nineteen largest sovereign creditors among its members. Formed in 1956, the Paris Club is tasked with renegotiating sovereign debt on behalf of its member nations and has the authority to enter into agreements with borrower nations for debt relief and restructuring, contingent upon the “consensus” of its members.³⁰ Paris Club representatives lead negotiations with sovereign debtors, establish terms for restructurings, and issue recommendations. Although the Club does not have the authority to enter into binding agreements on behalf of its members, its members have sufficient incentive to follow the recommendations and generally do so.³¹ The Paris Club also conditions its

25. MARTIN A. WEISS, CONG. RESEARCH SERV., IRAQ’S DEBT RELIEF: PROCEDURE AND POTENTIAL IMPLICATIONS FOR INTERNATIONAL DEBT RELIEF 1 (Apr. 21, 2006), *available at* <http://fpc.state.gov/documents/organization/65761.pdf>. Here, however, the debt will be addressed in only two sections, Paris Club and non-Paris Club. Because Iraq completed its negotiations with the Paris Club first, both the commercial and bi-lateral debt restructurings were subject to the Paris Club’s comparable treatment requirement, discussed *infra* Part III.A. Therefore, the terms of restructuring of all the non-Paris Club debt were largely set by the Paris Club negotiations.

26. *Id.*

27. *Paying for Saddam’s Sins*, ECONOMIST, May 17, 2003, at 68. The estimates varied to such a large extent because of country creditors’ differing treatment of interest and penalties due. There was also disagreement about whether interest could legitimately be charged at all for debt initiated after 1990, when the U.N. imposed sanctions on Iraq. WEISS, *supra* note 25, at n.1.

28. S.C. Res. 1546, ¶ 28, U.N. Doc. S/RES/1546 (June 8, 2004).

29. S.C. Res. 1483, ¶ 22, U.N. Doc. S/RES/1483 (May 22, 2003).

30. Paris Club, Rules and Principles, <http://www.clubdeparis.org/en/presentation/presentation.php?BATCH=B01WP04> (last visited Sept. 5, 2006).

31. Perhaps a member country could benefit in a particular circumstance from stepping outside of the Paris Club-negotiated terms, though it would likely result in other Paris Club members receiving less, or nothing, in any given restructuring. Paris Club creditors are repeat players, and unilateral action by a country would have negative repercussions for later renegotiations. It is more beneficial in the long term for members to adhere to the Club’s negotiated terms.

restructuring agreements on “comparability of treatment,” requiring all non-Paris Club lenders—including commercial lenders—to match the terms agreed to by the Club in subsequent rounds of restructuring.³²

Historically, the Paris Club process has been opaque and expressly ad hoc, though in recent years there has been an effort to increase transparency, particularly to non-Paris Club lenders.³³ The ad hoc nature of its process allows the Paris Club to be particularly flexible in considering political factors for granting debt relief; some have argued that political factors are among the dominant considerations in Paris Club deals.³⁴

In addition, the Paris Club ratified its “Evian Approach” in October 2003, a significant shift in the Club’s stance toward non-HIPC³⁵ (Heavily Indebted Poor Country) restructurings. Prior to 2003, the Club had promulgated a series of special terms targeted at HIPCs and “highly-indebted lower-middle-income countries.”³⁶ Evian provides a framework for the Paris Club to negotiate debt relief for middle-income countries too wealthy to qualify for the terms specified for HIPCs. However, unlike the terms for HIPC restructuring, which are to follow its pre-set “Cologne” terms that specify up to a ninety percent reduction in debt, Evian calls for debt relief for middle-income countries to be conducted on a case-by-case basis.³⁷ Unlike the previous series of terms, there are no guidelines regarding the maximum or minimum debt relief allowed; under Evian, after an initial IMF review of the debtor country’s financial needs and determination of eligibility for Evian, the terms provide no further guidelines for restructuring.

The Evian terms formalized ad hoc treatment for middle-income countries. As one commentator noted, this shift took place “just in time for Iraq.”³⁸ Indeed, the timing of the announcement of the new terms and the strong U.S.

32. Paris Club, Rules and Principles, *supra* note 30.

33. The first listed principal of the Paris Club is renegotiation on a case-by-case basis. *Id.* In an overview of the Evian Approach, discussed *infra*, the Club highlights its interest in increasing transparency of the renegotiation process to private creditors. Paris Club, Evian Approach, <http://www.clubdeparis.org/sections/termes-de-traitement/approche-d-evian> (last visited Apr. 5, 2007).

34. *Paris Club Members Adapt to New Rules*, EUROMONEY, Sept. 2005, at 206, 206–11.

35. In 1999, the IMF and World Bank launched an initiative aimed at providing more extensive debt relief to countries qualified as Heavily Indebted Poor Countries (HIPCs). The Paris Club participated in this initiative, and therefore HIPCs have received preferential treatment in Paris Club restructurings compared to more developed, affluent countries. Iraq, with its significant oil resources, does not qualify as an HIPC.

36. The Paris Club approved “Naples” and “Cologne” terms for HIPCs in 1994 and 1999, respectively, and “Houston” terms for lower-middle-income countries in 1990. Paris Club, Standard Terms of Treatment, <http://www.clubdeparis.org/en/presentation/presentation.php?BATCH=B02WP03>.

37. For a discussion of the Evian terms and the U.S. role in developing them, see WEISS, *supra* note 25, at 7–8.

38. *Paris Club Members Adapt to New Rules*, *supra* note 34.

backing for the approach suggest that they were developed with the Iraqi restructuring in mind.³⁹

Levered by the U.N. resolutions and the backing of the United States, in November 2004 the then Iraqi Finance Minister, Adil Abdul Mahdi, approached the Paris Club seeking a ninety-five percent reduction in Iraq's outstanding bilateral debt stock.⁴⁰ Minister Madhi justified the size of the requested "haircut" with a two-pronged argument: first, if Iraq did not receive substantial debt relief, the burden of servicing the debt would be reflected in oil prices, which would disproportionately burden Paris Club members. Second, Paris Club members would see economic benefits from a successful reconstruction of Iraq in the form of an invigorated trade partner and consumer of imports.⁴¹

The Minister's argument, based on economic need rather than inability to pay or odiousness, was forwarded at the initial Paris Club meetings; however, the underlying argument—and for many Paris Club members, the more compelling argument—was the one based on security. In short, Iraq was a continuing security risk to western countries and a destabilizing force in the Middle East. A quick economic recovery would facilitate political stabilization in Iraq, which would in turn lead to a more stable Middle East. Stability in the Middle East was a priority not only for the United States in conducting its war on terror, but also a national security matter for other western countries.

Following military operations in Iraq, the Bush Administration took the lead in advocating for Iraqi debt relief. Prior to the Paris Club meetings in late 2004, the United States engaged in a lobbying campaign on behalf of the new Iraqi administration. Former Secretary of State James Baker, appointed by President Bush as Special Envoy, solicited and secured commitments from France and Germany to work towards substantial debt reduction for Iraq.⁴² Secretary Baker also engaged in discussions with Japan, China, and two U.S. Iraq war allies, Italy and the United Kingdom.⁴³ Each indicated its willingness to move forward with significant debt reductions for Iraq.

Having secured the support of many of Iraq's largest creditors, the remaining opposition facing the United States and Iraq—primarily Russia—became largely a question of the extent of debt relief that would be procured. Russia's resistance was quickly mitigated: U.S. President Bush and Russian President Vladimir Putin discussed the topic at APEC's annual meeting in

39. MARTIN A. WEISS, CONG. RESEARCH SERV., IRAQ: PARIS CLUB DEBT RELIEF 3 (Jan. 19, 2005); *see also* Jubilee Iraq News, The Paris Club's New Evian Approach, http://www.jubileeiraq.org/blog/2003_10.html (last visited Aug. 13, 2007).

40. *How the Iraq Deal Was Done*, EUROMONEY, Sept. 2005, at 206.

41. *Id.*

42. Press Release, The White House, Statement on Iraq's Debt Burden (Dec. 16, 2003), *available at* <http://www.whitehouse.gov/news/releases/2003/12/20031216-8.html>.

43. ESTHER PAN, COUNCIL ON FOREIGN RELATIONS, IRAQ: THE REGIME'S DEBT, <http://www.cfr.org/publication/7796/> (last visited Aug. 25, 2007).

November 2004, and President Putin agreed to go along with the renegotiations toward substantial debt relief for Iraq.

Although these discussions are customary precursors to the Paris Club process, in the case of the Iraqi restructuring, many of the most difficult aspects of the negotiations—and strategic positioning—were resolved before the official Paris Club proceedings and followed highly political channels. Notably, U.S. advocacy for Iraq was conducted at a very high level; among others, then-Secretary of Treasury John Snow, then-National Security Advisor Condoleezza Rice, and President Bush himself engaged with their Paris Club member counterparts in advance of official proceedings.⁴⁴ These high-level U.S. officials did not argue for Iraqi debt relief on the basis of ability to pay, but instead applied necessary political pressure and emphasized Iraq's strategic importance to all Western countries.⁴⁵

This is not to say that other arguments were not forwarded by the United States to support Iraq's debt restructuring. Saddam Hussein was certainly portrayed as a ruthless dictator, and often language associated with the odious debt doctrine was invoked.⁴⁶ However, arguments based on Saddam's odiousness, and the inherent illegitimacy of Iraq's debts, served only to provide a humanitarian gloss—the heavy lifting, at least publicly, was done by focusing on concerns about the consequences of an economically stagnant Iraq and ongoing instability in the Middle East. According to Iraq's current Finance Minister Ali Allawi, the United States did not focus on the use of the odious debt doctrine in approaching the Iraqi restructuring because it did not find the argument compelling and thought it would likely lead to a more involved analysis of which debts should be repudiated due to odiousness. As Minister Allawi noted, “The ‘odious debt’ argument doesn’t carry much favour either with the US Treasury or with the [International Monetary Fund]. It could have been made successfully but not all debt of odious regimes is odious debt.”⁴⁷

The U.S. and Iraqi strategy paid off for the new Iraqi regime. Although France and Russian initially advocated a fifty percent reduction of debt, in November 2004, the Paris Club entered an agreement with Iraq providing for an overall eighty percent write-off in three stages. An initial thirty percent reduction would occur upon signing of the bilateral agreements with individual member countries, the second thirty percent would be written off upon

44. *How the Iraq Deal Was Done*, *supra* note 40.

45. See, e.g., Online News Hour, *Iraq Contract Policy Complicates Planned Debt Talks*, http://www.pbs.org/newshour/updates/iraq_12-12-03.html, Dec. 12, 2003 (reporting President Bush's response to questions regarding the strategy for the then-upcoming Iraqi debt relief discussions: “I asked [French] President Chirac and Chancellor Schroeder and [Russian] President Putin to see Jim Baker to talk about debt restructuring. If these countries want to participate . . . in helping the world become more secure, by enabling Iraq to emerge as a free and peaceful country, one way to contribute is through debt restructuring”).

46. E.g. Press Release, The White House, Statement on James A. Baker III (Dec. 5, 2003), available at <http://www.whitehouse.gov/news/releases/2003/12/20031205-3.html>.

47. Joanna Chung & Stephen Fidler, *Restructuring Under Fire: Why Iraqi Debt Is No Longer a Write-Off*, FIN. TIMES, July 17, 2006, at 15 (quoting Iraqi Finance Minister Ali Allawi).

agreement on an IMF program, and the final twenty percent write-off would be implemented upon the completion of a three-year review of the implementation of the IMF program.⁴⁸ In addition, the Paris Club agreement called for a rescheduling of the remaining debt for a period of twenty-three years.⁴⁹ Overall, the Paris Club agreements reduced Iraqi debt owed to the Club from \$38.9 billion to \$7.9 billion.⁵⁰

Following the Paris Club deal, Iraq immediately began negotiating debt reductions with its non-Paris Club creditors. These creditors included Gulf States, which forwarded claims for more than \$50 billion (though Iraq claimed it had documentation for only \$11.4 billion), other non-Paris Club sovereign lenders claiming approximately \$10 billion, and commercial creditors, which were owed \$22.4 billion.⁵¹ Although these lenders held more Iraqi debt, in terms of dollars, than Paris Club members, the Paris Club's comparability of treatment required Iraq to seek terms at least equal to the Paris Club eighty percent write-off.

B. Non-Paris Club and Commercial Debt

Despite many creditors' unhappiness with the imposed baseline haircut, it is not surprising that Iraq has been successful in reaching agreements with its non-Paris Club and commercial creditors. Before the restructuring, Iraq was not servicing its debt at all; after the Paris Club deal, creditors were faced with the choice of taking an eighty percent reduction or continuing not to get paid. In addition, the ongoing violence and instability in Iraq pushed creditors to accept. Iraq restructured its commercial debt through a debt exchange where approximately \$14 billion of commercial paper was swapped for a \$2.7 billion Eurobond issue.⁵² The exchange, completed in January 2006, had the participation of one hundred percent of Iraq's commercial creditors.⁵³ As of late 2006, Iraq had settled all but four percent of its private claims.⁵⁴

Although progress has been somewhat slower with Iraq's non-Paris Club bilateral creditors, Iraq has entered into negotiations with key creditors, such as

48. WEISS, *supra* note 25, at 8.

49. *Id.*

50. *Id.* As with the original estimates of the Iraqi debt, other tallies of pre- and postrestructuring debt amounts differ. For example, a recent article pegged the original debt owed to the Paris Club at \$36.6 billion and the write-off reducing the burden to \$11.5 billion. Richard Jory, *Seeking Sovereign Agreements*, INT'L FINANCING REV., Feb. 5, 2005.

51. Chung & Fidler, *supra* note 47, at 11; WEISS, *supra* note 48, at 4. Again, debt estimates vary significantly; Iraq's non-Paris Club debt has also been estimated at \$74.6 billion, with commercial creditors holding \$15.0 billion. Jory, *supra* note 50.

52. The notes have a face value equal to twenty percent of the original amount owed, mirroring the Paris Club deal. Kathryn Wells, *Iraq Restructures Saddam Debt*, EUROMONEY, Feb. 2006, at 1.

53. *Id.*

54. INTERNATIONAL MONETARY FUND, IMF COUNTRY REPORT NO. 07/115 26 (Mar. 2006), <http://www.imf.org/external/pubs/ft/scr/2007/cr07115.pdf>.

China and the Gulf States, to enter into debt reduction agreements according to the Paris Club terms.⁵⁵

IV

IMPLICATIONS FOR THE ODISIOUS DEBT DOCTRINE

From the perspective of the new Iraqi regime, the restructuring was a success. Iraq received an unprecedented write-off of Saddam-era debt without facing the same type of credit uncertainty that would result from a unilateral repudiation. Because of its position as a key strategic power in the Middle East and its support from the United States, Iraq did not need to depend on the odious debt doctrine to receive an odious debt-like write-off.

However, is it really the case that the odious debt doctrine played no part in Iraq's successful write-down? The better analysis is that the odious debt doctrine provided a debtor-friendly default position, which allowed the new Iraqi regime to take a relatively aggressive stance with the Paris Club. The story goes as follows: the default position was established early in the restructuring process by the U.S. and Iraqi governments' frequent use of political rhetoric invoking odiousness as a basis for debt relief. Spurred by the favorable political climate, the international development and academic communities began advocating for the doctrine's use; the situation in Iraq provided an ideal opportunity to revive the odious debt doctrine. Following the regime change in Iraq, there was an increase in conferences and articles on odious debt. The renewed interest in and awareness of the doctrine established a new baseline for the Iraq debt renegotiations.

As the argument goes, whether or not the threat of invoking the doctrine was credible, reframing the discussion of debt relief to include moral considerations—in the form of the odious debt doctrine—as well as economics and international security gave the new Iraqi regime far more leverage than it otherwise would have had. Thus, analogous to Chapter 11 bankruptcy in the United States, the odious debt doctrine provided the necessary encouragement for creditors to engage in serious restructuring negotiations with a struggling sovereign. Iraq's creditors realized that a possible alternative to a debt write-off acceptable to Iraq and the United States was Iraq's invocation of the doctrine and unilateral repudiation of its Saddam-era debt—with creditors receiving nothing.

Although it may be the case that the doctrine played a role—even if behind the scenes—in Iraq's debt restructuring, it is difficult to separate any effect of an odious-doctrine baseline from that of arguments based on Middle East stability and national security. Indeed, both arguments were made before Iraq entered into restructuring talks; however once Paris Club negotiations began, talk of

55. *Id.*

odiousness subsided and economic and strategic considerations were pushed into the forefront.

Furthermore, to assume Iraq would have actually invoked the odious debt doctrine—or even that the international community believed invocation of the doctrine to be a credible threat—overstates the practicability of the use of the doctrine by Iraq and understates the negative repercussions for Iraq and the wider international community. Presumably, to implement the doctrine, Iraq would have had to conduct an in-depth, debt-by-debt analysis to determine which proceeds were used for odious ends.⁵⁶ The difficulty of the analysis would have been exacerbated by the lack of recordkeeping by Saddam's regime with respect to loan proceeds. Defining what purposes and uses were sufficiently odious would be a separate and equally difficult task. The odious debt route would have been much slower than obtaining debt relief through the traditional Paris Club process and would also likely stir up sensitive political issues within Iraq, such as the funding behind Saddam's killings of Iraqi Kurds. Creditors, though unhappy with accepting the large "haircut," also prefer an expedient process that avoids prolonged uncertainty regarding the status of their loans.

The problems with the odious debt doctrine extend beyond its post-invocation application and illuminate another reason it was not invoked on behalf of Iraq. By accepting a designation of "odious" for debts incurred by Saddam Hussein, the international lending community would be setting a standard for odiousness on which other new regimes could base their repudiation claims. Other new regimes would compare their predecessors with Saddam's regime and assert the doctrine as a basis for their own debt repudiation. In the short-term, this odious-by-comparison strategy would be disruptive for financial markets as countries moved to unilaterally repudiate debt (or at least threaten to do so). In the longer-term, giving debtor nations the odious debt tool, backed by precedent, would take control over the restructuring process away from creditor countries. Sovereign creditors are understandably reluctant to relinquish this control; the more flexibility they have for their decisions, the more political and strategic interests can be incorporated into restructuring negotiations.

Any traction the odious debt doctrine gained after Iraq should be evidenced in the debt negotiations and restructurings of countries following Iraq. More specifically, we should see historically high debt-reduction packages for non-HIPCs in which there has been a regime change and where the overthrown regime is alleged to be odious. The doctrine was indeed tested almost

56. Under the classic formulation of the odious debt doctrine, absence of benefit from the debt proceeds is one part of a three-prong test to determine odiousness. Although as Lee Buchheit, Mitu Gulati, and Robert Thompson note, there has been an informal relaxation of this requirement in academic literature, and some now advocate for all debts incurred by an odious regime to be unenforceable. See Lee Buchheit, Mitu Gulati & Robert Thompson, *The Dilemma of Odious Debts*, 56 DUKE L.J. 1201, 1201 (2007). However, as there has not been another formulation of the doctrine offered, the odious-use prong will be assumed to carry weight for the purposes of this note.

immediately following the Paris Club's agreement with Iraq, when the Club considered debt relief for Nigeria.

Nigeria was ruled by a military dictatorship until 1999, when it elected its first democratically chosen government in more than twenty years. After being reelected in 2003 and having instituted significant economic and anticorruption reforms,⁵⁷ Nigeria's President Olusegun Obasanjo sought substantial debt relief from the Paris Club.⁵⁸ The government made the case that much of its \$35 billion of sovereign debt was odious and illegitimate because it had been incurred by a corrupt, authoritarian dictatorship;⁵⁹ however it also made its debt-relief case based on economic need and on the new government's commitment to fighting corruption.⁶⁰ In March 2005, the Nigerian House of Representatives passed a resolution to repudiate the country's foreign debts.⁶¹ Later that year, the Paris Club and Nigeria reached an \$18 billion agreement on debt relief, representing approximately sixty percent of its Paris Club debt and using terms parallel to Naples terms,⁶² which are usually reserved for HIPC's.⁶³ Nigeria agreed to repay approximately \$12.4 billion.⁶⁴

The deal was hailed by many as a victory for Nigeria,⁶⁵ however debt cancellation advocates cited concerns about the \$12 billion repayment requirement and the accompanying IMF economic program, to which Nigeria would have to adhere to be eligible for debt relief.⁶⁶ Interestingly, some commentators separate the issue of odiousness from that of repudiation: "[I]t took the threat of repudiation to get this cancellation—as if the obvious need of the people and the odious nature of much of the debt were not enough."⁶⁷

57. James Eades, *Nigeria: At The Mercy Of Debt: Nigeria's Finance Minister Is Campaigning Hard For Debt Relief For The Country And Finding Plenty Of Sympathy But Little Action So Far*, THE BANKER, Mar. 1, 2005, at 118.

58. *Id.*

59. *Nigeria to Get \$18bn Debt Relief*, ECONOMIST, June 30, 2005, available at <http://news.bbc.co.uk/1/hi/business/4637395.stm>.

60. Eades, *supra* note 57.

61. *Debt; The Debt Question*, AFRICA NEWS, Mar. 27, 2005.

62. *Id.*

63. Nigeria was removed from the HIPC list in 1998. Some believe this was due to the high cost creditors would incur if Nigeria were to receive Paris Club HIPC treatment, Jubilee Research, *What is the HIPC Initiative?*, http://www.jubileeresearch.org/hipc/what_is_hipc.htm (last visited Dec. 14, 2006), while others attribute the declassification to a technicality, Center for Global Development, *Nigerian Debt Relief Now a Done Deal: Q&A with Todd Moss*, Apr. 24, 2006, <http://www.cgdev.org/content/opinion/detail/7423/> (last visited Aug. 30, 2007).

64. Press Release, Paris Club, Nigeria (Oct. 20, 2005), http://www.clubdeparis.org/en/press_release/page_detail_commupresse.php?FICHIER=com11297988840.

65. *E.g.*, Center for Global Development, *Nigerian Debt Relief Now a Done Deal: Q&A with Todd Moss*, Apr. 24, 2006, <http://www.cgdev.org/content/opinion/detail/7423/> (characterizing the Nigerian debt relief agreement as "absolutely historic") (last visited Aug. 30, 2007); *Nigeria to Get \$18bn Debt Relief*, *supra* note 59 (quoting British international development minister Hilary Benn describing the deal as a "major step in bringing a better future for the people of Nigeria").

66. Press Release, Jubilee USA Network, *Nigerian Threat to Repudiate Helps Force Paris Club to Deliver Debt Cancellation* (Oct. 20, 2005), <http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=content&ContentID=13931>.

67. *Id.* (quoting Sony Kapoor, Senior Advisor at Christian Aid, U.K.).

Did Nigeria benefit from the odious debt doctrine? As with Iraq, there was a reluctance to afford too much credit or to emphasize debt relief based on odiousness. Nonetheless, raising the specter of the doctrine could have pushed the negotiations forward. It is difficult to measure the effect of the doctrine as several concurrent events—Iraq's Paris Club agreement, the Nigerian Congress' threat of repudiation, and the step-up of governance and economic reforms in Nigeria—because each worked in the same direction, toward a more favorable Paris Club deal. We have not seen the doctrine acting alone, and it is likely that other countries will follow Iraq and Nigeria's lead in restructurings, emphasizing economic need and regional stability while leaving the doctrine to work in the background. While this may be a use for the doctrine, it is a far cry from the original formulation.

Where do these events leave the odious debt doctrine? It is clear that unilateral implementation, as advocated by Patricia Adams, is unlikely to gain traction. Debtor countries have consistently been unwilling to damage their reputations and take on the credit risk that would necessarily flow from outright repudiation. Again, Iraq was unique as a politically empowered debtor; if it was unwilling to invoke the doctrine, it is difficult to imagine when the stars would be better aligned for another debtor. In addition, the international community will continue to discourage any upset of the current balance of power.

The international bankruptcy court system advocated by Joseph Stiglitz, whether administered by the United Nations or another, more independent international organization seems similarly problematic. Although this proposal has the benefits of providing predictability and the same types of protections to debtor nations as Chapter 11 bankruptcy provides corporations in the United States, creditor countries have been unwilling to submit to binding decisions promulgated by an independent international authority—the closest they have come is, of course, the Paris Club, which does not have the authority to create binding agreements and instead firmly rests on the ad hoc nature of its negotiations process. As Dr. Stiglitz himself point out, the IMF's proposal to create precisely such a bankruptcy system in 2003 was blocked by the United States.⁶⁸ With the successful ad hoc restructuring of Iraq and the adoption of the Evian Approach by the Paris Club, the international lending community appears to be moving away from a more structured ex post restructuring system in favor of greater flexibility; there is no reason to believe that this trend will reverse in the near future. An international bankruptcy system seems less plausible after Iraq than when it was proposed by the IMF.

Perhaps the most likely route for the odious debt doctrine will be in the implementation of an ex ante system, such as the loan sanctions proposed by Jayachandran, Kremer, and Shafter. Generally, given a choice between ex post and ex ante rules, creditors prefer the latter because they provide greater predictability: ex post systems—whether a bankruptcy court or the current Paris

68. Stiglitz, *supra* note 11, at 42.

Club-driven process—necessitate a prolonged restructuring process before payment outcomes are determined. Also, as demonstrated by Iraq, commercial creditors can subsidize the highly political deals that result from flexible, ex post determinations lead by sovereign creditors. Ex ante designations are relatively attractive because creditors would be given notice of debt impairment due to odiousness.

Of course, among the largest hurdles to the adoption of the odious debt doctrine in any form are the international lending community's reluctance to relinquish control over the debt relief process and the difficulty in defining "odious."⁶⁹ Nonetheless, recently there have been steps taken by the World Bank in moving towards an ex ante categorization of governments. In April 2006, World Bank President Paul Wolfowitz introduced a revised plan for fighting government corruption. Originally, the plan would have conditioned disbursement of loans and grants on a country's anticorruption efforts; however the World Bank's Development Committee softened the proposal to provide for incentives for anticorruption measures rather than sanctions.⁷⁰ The proposal has already drawn criticism for being overbroad and ineffective.⁷¹ At the heart of the criticism are the definition of "corruption" and questions over who is to decide what constitutes corruption⁷²—the same issues facing the implementation of the odious debt doctrine in a broader context. Although the steps taken by the World Bank certainly work in the same direction as an ex ante odious debt doctrine, there continues to be significant reluctance on the part of the international community to condition lending on subjective, politically based measures.

The World Bank plan is still in its early stages. Whether it is a first step to a wider institutionalization of the odious debt doctrine (or something analogous) has yet to be seen. While the ex ante route is politically the most palatable for sovereign and commercial creditors, it is likely that political considerations will supersede any rules that will take power away from sovereign creditors.

V

CONCLUSION

The Iraq debt restructuring presented a unique opportunity to test the palatability of the odious debt doctrine. Bolstered by political and economic backing from the United States, the new Iraqi regime could have invoked the

69. For a discussion of the definitional problem, see Patrick Bolton & David Skeel, *Odious Debts or Odious Regimes?*, 70 LAW & CONTEMP. PROBS. 83 (Autumn 2007).

70. Simon Robinson, *How Wolfowitz Is Struggling to Lead the World Bank*, TIME, Sept. 20, 2006, available at <http://www.time.com/time/world/article/0,8599,1537088,00.html>.

71. E.g., BRETTON WOODS PROJECT, BANK ANTI-CORRUPTION FRAMEWORK: "A LOT OF RHETORIC AND ARM-WAVING?", <http://www.brettonwoodsproject.org/art.shtml?x=542334> (last visited Aug. 30, 2007).

72. *The World Bank's Anti-Corruption Effort Has Critics on the Inside*, ECONOMIST, Sept. 16, 2006, at 85, available at http://www.economist.com/finance/displaystory.cfm?story_id=7914921.

doctrine to repudiate its Saddam-era debts. Its backing away from the doctrine in favor of the more traditional route of debt restructuring through the Paris Club is indicative of a wider reluctance to rely on the doctrine as a mechanism for debt repudiation. The doctrine may have provided an additional incentive for creditors to negotiate with Iraq—and then later with Nigeria; however, uncertainty surrounding the definitions of odiousness and the disruptive nature of unilateral repudiation make a direct application of the doctrine unlikely.

There are, however, several promising odious debt proposals, such as an ex ante loan-sanction system or anti-corruption initiatives. In addition, just as this note was going to press, two particularly interesting developments—neither forwarded in literature—have emerged, reinvigorating proponents of odious debt repudiation. First, Norway announced that it will unilaterally cancel debt owed to it by Ecuador, Egypt, Jamaica, and Peru (and possibly several other countries) because it determined that the debt, incurred as part of an earlier, failed development plan, was “illegitimate.” In repudiating the debt, the Norwegian development minister explicitly called on other creditor countries to reassess their roles in lending to developing nations, and he used the cancellation as a pulpit from which to advocate for creditor responsibility, saying, “By canceling these debts, [Norway] want[s] to give rise to an international debate on lender responsibility.”⁷³ Second, Ricardo Patino, Ecuador’s new finance minister, has also seized upon illegitimacy as a reason for debt repudiation, but from the borrower’s perspective. He announced a new policy allowing Ecuador to unilaterally refuse to make payments on portions of Ecuador’s debt because they are illegitimate.⁷⁴ Although the country did make its scheduled debt payments in January 2007, Patino has reiterated his position that certain debts—including some from the Interamerican Development Bank and the IMF—are illegitimate and will only be repaid if there are sufficient funds left over after paying for new social and welfare programs.⁷⁵

At this time, it is unclear whether other creditors will follow Norway’s lead or if Ecuador will be successful in implementing its interpretations of the odious debt doctrine. Perhaps these initiatives will result in others adopting “illegitimacy” as functional criterion by which to judge the enforceability of sovereign debt. On the other hand, the doctrine may continue as an ill-defined, amorphous notion, used by the major world powers at their convenience to further political and strategic goals.

Although Iraq and Nigeria may have been helped in their restructuring efforts by the shadow of doctrine, because of the intensely political nature of restructurings, it is difficult to draw any concrete conclusions. It is clear,

73. Krishna Guha, *Norway Debt Cancellation Hailed by Activists*, FIN. TIMES, Oct. 5, 2006, at 43.

74. Lester Pimentel, *Ecuador, Calling Debt ‘Illegitimate,’ May Repay 40%*, BLOOMBERG.COM, Jan. 18, 2007, <http://www.bloomberg.com/apps/news?pid=20601013&sid=aLG4apB1PU0&refer=emergingmarkets>.

75. Monte Hayes, *Ecuador to Try and Make Debt Payment*, INT’L BUS. TIMES, Jan. 17, 2007, <http://www.ibtimes.com/articles/20070117/ecuador-debt-payments.htm> (last visited Aug. 25, 2007).

however, that the doctrine in its classic formulation is sufficiently problematic to render it inoperable to debtors without sufficient political or strategic value to warrant special favor by powerful creditor nations. Though sovereigns have consistently declined to directly invoke the odious debt doctrine in restructuring efforts, the new initiatives mentioned above—from that of the World Bank focused on fighting corruption to the unilateral repudiation policies advocated by Ecuador and Norway—may gain more traction than the doctrine has previously enjoyed.