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**The American University in Cairo**

**School of Global Affairs and Public Policy**

**ODIOUS DEBT DOCTRINE: A LEGAL PERSPECTIVE**

**A Thesis Submitted to the**

**Department of Law**

**in partial fulfillment of the requirements for the LL.M. Degree in  
International and Comparative Law**

**By**

**Hesham Mohamed Abozeid**

**June 2014**

The American University in Cairo  
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Hesham Mohamed Abozeid  
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ODIOUS DEBT DOCTRINE: A LEGAL PERSPECTIVE

A Thesis Submitted by

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Supervised by Professor Hani Sayed

ABSTRACT

International law obliges states to respect their obligations in accordance with the principle of *pacta sunt servanda* unless the obligation is odious. Citizens of any state should depend on state practice and judicial precedent to repudiate obligation that originated odiously. Jurisprudential and legal controversy arose about the extent of the state's commitment with debt arising from those obligations. Jurisprudence and the judiciary tried to set a definition of odious debt since the eighteenth century. The difficulty of the definition arises in determining when and how debt is odious, and what are the criteria of odious debt. Another difficulty arises in finding sources of international law to cancel and reject such debt. This paper will be primarily concerned with identifying the precise definition of and normative basis for the doctrine of odious debt in international law. It also concerned with the international legal standards that states can rely on to get rid of that debt. The legal principles are founded on the sources of international law laid down in Article 38 of the Statute of ICJ. Through a review of different sources of international law, the conclusion is that odious debts arise without the consent of the population, without benefit to them, and with the knowledge of the creditor. The paper also concludes that there are at least three legal grounds for repudiating odious debt.

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## I. Introduction

Generally, to be obliged by a loan contract the state must express its free consent.<sup>1</sup> This consent has a legal consequence: an obligation of the state to repay the debt it has contracted.<sup>2</sup> Any debt arises as a result of a contract that must be performed in good faith in order to be valid. Good faith means that parties must respect their contracts according to the principle of *pacta sunt servanda*.<sup>3</sup> However, this principle is not absolute. The existence of any defect to the will of the parties leads to the nullification of the contract. In addition, even if states are obliged to respect their contracts, there are strong arguments from state practice and judicial precedent to support a legal privilege to repudiate debts that originated odiously.

Historically, the odious debt doctrine dates back to the Mexican revolution. During the period between 1863 and 1867 Emperor Maximilian contracted debts with France at high interest rates in order to stabilize his rule and suppress any opposition. Pomeroy mentions that “[a] large part of those debts has been created to maintain that usurper in his place against the legitimate authority and all of them were most scandalously usurious.”<sup>4</sup> After the Mexican revolution, Benito Juarez, who won the presidential election, issued a decision, refusing to pay a sizable portion of the Mexican debt.<sup>5</sup> He based his decision on the grounds that the state was in a revolution and all these debts were odious debt committed by the former corrupt regime. He succeeded in suspending payment of the external debt for two years until the French intervention in Mexico led by Emperor Napoleon.<sup>6</sup>

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<sup>1</sup> CÉCILE LAMARQUE & RENAUD VIVIEN, SUSPENDING PUBLIC DEBT REPAYMENTS BY LEGAL MEANS 1, [http://cadtm.org/IMG/pdf/Comment\\_suspendre\\_paiements\\_sur\\_base\\_legale\\_EN.pdf](http://cadtm.org/IMG/pdf/Comment_suspendre_paiements_sur_base_legale_EN.pdf).

<sup>2</sup> *Id.*

<sup>3</sup> ANTHONY D’AMATO, GOOD FAITH, IN ENCYCLOPEDIA OF PUBLIC LAW 599, 600 (R. Bernhardt ed., 1992).

<sup>4</sup> JOHN NORTON POMEROY, LECTURES ON INTERNATIONAL LAW IN TIME OF PEACE 1, 75 (Theodore Salisbury Woolsey ed., Bos. & New York: Houghton, Mifflin, 1886).

<sup>5</sup> The Economic History of Mexico, available at <http://www.sjsu.edu/faculty/watkins/mexhist01.htm> (last visited May 9, 2013).

<sup>6</sup> Samuel Harrison Rankin, *Union And Confederate Diplomacy In Response To French Intervention In Mexico, 1861-1367*, 79 (University of Wyoming, August, 1966).

Other countries besides Mexico also invoked the odious debt. Twenty one years later following the Spanish-American war, Spain ceded to the United States Cuba, the Philippines and other territories. A debt problem emerged between the United States and Spain as to whether Cuba was responsible for the Spanish debt based on a contract signed during the Spanish rule of Cuba. This proposal was rejected, and the United States confirmed that Cuba was not committed to pay those debts under any condition. The United States refused to pay the Cuban debt that was concluded by Spain to finance its operation in Cuba and to be secured by Cuban revenue.<sup>7</sup> The amendment, which was incorporated in the U.S. Constitution on July 9<sup>th</sup> 1868 reflects the American commissioners'<sup>8</sup> desire to get rid of that debt. Section 4 of the 14 amendment states:

neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void<sup>9</sup>

The rejection was based on the odious nature of the debt and based on three points:the contract had not been signed for the benefit of Cuba, Cuba did not consent to such debt, and Spain knew when it signed the contract that the debt would not benefit the Cubans.<sup>10</sup> On December 10<sup>th</sup> 1898, in the Peace Treaty of Paris, Spain relinquished her sovereignty over Cuba to the United States. With that treaty the United States did not recognize the 1886 and 1890 Cuban debts that were ultimately rejected for odious reasons.<sup>11</sup>

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<sup>7</sup> In 1890, U.S. investments in Cuba amounted to \$50 million and 7% of U.S. foreign trade was with the island. Spain spent \$7 million on Cuban imported goods whereas U.S. imports from the archipelago amounted to \$61 million. U.S. economic interests entailed the need for the U.S. to closely control the Cuban market in order to protect U.S. investments. This was exactly at that time that the United States decided to intervene, when Spain was put to rout. The U.S. wanted to despoil the Cuban people of its independence, an independence that had been conquered with machetes. U.S. Democrat Senator from Virginia John W. Daniel accused the U.S. government of intervening to prevent a Spanish defeat: "When the most favorable time for a revolutionary victory and the most unfavorable time for Spain came the United States Congress is asked to put the U.S. army into the hands of the President to forcibly impose an armistice between the two parties, one of them having already surrendered." The armistice was signed on December, 10, 1898 in Paris, by the United States and Spain. The Cubans were excluded from the talks.

<sup>8</sup> American commissioners with Spain to drop all Cuban debt after the war.

<sup>9</sup> U.S. Const. amend. XIV, § 4.

<sup>10</sup> Christiana Ochoa, *From Odious Debt to Odious Finance: Avoiding the Externalities of a Functional Odious Debt Doctrine*, 49 HARVARD INT'L L. J. 109, 113 (2008).

<sup>11</sup> Stéphanie Collet, *How big is the Financial Penalty for Dictators? The Case of Cuban Bonds at the time of Independence 15* (Université Libre de Bruxelles, July 2010).



In 1900, the term war debt began to be formulated, particularly after the Second Boer War.<sup>12</sup> Britain refused to accept responsibility for those loan notes issued by the Boer Republics in order to finance their respective war. The Crown council denied compelling the British government any obligations during the war or in the contemplation of the war.<sup>13</sup> The Peace treaties after the First World War provided for dropping debt that was not for the benefit of the state. For example, the Versailles treaty concluded between Germany and the Allies exempted Poland from paying the debt owed to Germany attributable to the measures taken by the Government for the German colonization of Poland.<sup>14</sup>

In 1923, Tinoco arbitration case *Great Britain v. Costa Rica* was an example of rejecting odious debt after government succession.<sup>15</sup> “Costa Rica refused to honor loans made by the Royal Bank of Canada to the former dictator Federico Tinoco. This is an example of state practice with respect to a change of [G]overnment and not state succession. It is also an example of an instance where the issue of odiousness of the debt

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<sup>12</sup> The Second Boer War was fought from 11 October 1899 until 31 May 1902 between the British Empire and the Afrikaans-speaking settlers of two independent Boer republics, the South African Republic and the Orange Free State.

<sup>13</sup> David C. Gray, *DEVILRY, COMPLICITY, And GREED: TRANSITIONAL JUSTICE And ODIUS DEBT*, 70 L. & Contemp. Probs. 137, 139 (2007).

<sup>14</sup> NORMAN A. GRAEBNER & EDWARD M. BENNETT, *THE VERSAILLES TREATY AND ITS LEGACY* 141-166 (Cambridge Univ. Press 2011).

<sup>15</sup> Government of Costa Rica was ousted and the new government passed a law refuting all Ks and made another Constitution. When this administration fell Great Britain sued Costa Rica for obligations. Costa Rica's new government asserts no authority regarding what the old government did. Incredible Britain says that Tinoco (the leader of the old government) was the administration unquestionably and de jur – Cost Rica says Tinoco wasn't a legislature in worldwide law. Tinoco gotten a mess of remote obligation while running Costa Rica, incorporating with Great Britain. Indeed, an illicit government might tie a state to worldwide commitments. Global law looks to the State, not the government substance w/in the state. When government in force as opposed to worldwide law, not just local law, then regulation of state congruity won't usually apply. Tinoco was a sovereign government. In spite of the fact that a few satiates did not distinguish it – that can't exceed the confirmation unveiled that genuine it was an administration. The inquiry is not if the administration maintains a constitution however is: Has it made itself in such a path, to the point that all w/in the its impact distinguish its control, and that there is no contradicting compel expecting to be a government in its place. As long as it is the viable legislature of the state – it is the administration of the state. Obligations owed are not owed by the administration of the day yet between the state – the main lawful substance that is important is the state. Extraordinary Britain was ready to maintain a case against Costa Rica since the Ks were made with, *available* at REPORTS OF INTERNATIONAL ARBITRAL AWARDS RECUEIL DES SENTENCES ARBITRALES <http://www.un.org/law/riaa/> (last visited November 5, 2013).

became salient in a claim espoused on behalf of a private creditor.”<sup>16</sup> The chief justice Taft of the U.S. Supreme Court, sitting as an arbitrator, held that the political transition had affected the government existence but not to affect the obligations unless there is bad faith from the contracting parties:

The transactions in question, which in themselves did not constitute transactions of an ordinary nature and which were “full of irregularities,” were made at a time when the popularity of the Tinoco Government had disappeared, and when the political and military movement aiming at the overthrow of that Government was gaining strength. The payments made by the bank were either in favour of Frederico Tinoco himself for “expenses of representation of the Chief of the State in his approaching trip abroad,” or to his brother as salary and expenses in respect of a diplomatic post to which the latter was appointed by Tinoco. “The case of the Royal Bank depends not on the mere form of the transaction but upon the good faith of the bank in the payment of money for the real use of the Costa Rican Government under the Tinoco régime. It must make out its case of actual furnishing of money to the government for its legitimate use. It has not done so. The bank knew that this money was to be used by the retiring president, F. Tinoco, for his personal support after he had taken refuge in a foreign country. It could not hold his own government for the money paid to him for this purpose.” The position was essentially the same in respect to the payments made to Tinoco’s brother. The Royal Bank of Canada cannot be deemed to have proved that the payments were made for legitimate governmental use. Its claim must fail<sup>17</sup>

The refusal to pay the money was not only based on its being a transaction after an authoritarian regime, but on the existence of bad faith on the part of the bank when paying the money. Tinoco used the money for his interest and the bank knew at the time of lending the money that it would be used for personal benefit.

In 1927, Alexander Sack developed the first conceived theory for dropping all odious debt committed. A debt contracted by a regular government can nevertheless be odious if the new government can prove “a) that the purposes in the light of which the old government had contracted the debt in question were odious and openly contrary to the interests of the people. b) That the creditor at the moment when the loan was issued, were

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<sup>16</sup> Great Britain v. Costa Rica, 18 October 1923, (1924) 2 ILR 34–39; (1924) 18 AJIL 147–74; (1922) 116 BFSP 438-43; 1UNRILA369.

<sup>17</sup> *Id.*

aware of its odious destination.”<sup>18</sup> He states that creditors aware of the consequences “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.”<sup>19</sup>

In addition to the previous examples, the German repudiation of Austrian debts in 1938 reflects the criteria for determining its odiousness. To prevent a union between Austria and Germany, the United States claimed that Austria was loaded with a lot of debt and if the Union was committed, Germany would be responsible for that debt. The debate after that between Germany and the United States was about the reasons for that debt, and whether it was for the benefit of the Austrian citizens or not. Germany claimed that this debt was contracted against the benefit of Austrian citizens while the United States claimed that this debt was contracted for the purpose of food purchasing.<sup>20</sup>

In 1947, after the Second World War, the peace treaty between France and Italy provided that it was inconceivable that Ethiopia should bear the burden of debts contracted by Italy to guarantee its command on Ethiopian territory.<sup>21</sup> It should be kept in mind that the World Bank is directly involved in some colonial debts during the period 1950s and 1960s it loaned colonial countries to maximize the profits they derived from colonial exploitation. The debts granted by the World Bank to the colonial authorities within their colonial policies were later transferred to the newly independent states without their consent.<sup>22</sup>

Subsequent to these arguments, the doctrine was raised on occasion by international lawyers. In 1977, there was an international attempt to codify the theory of odious debt. The International Law Commission (ILC) worked on its draft articles on Succession of States in respect of matters other than treaties. There was an article at the end of the draft

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<sup>18</sup> Max Mader & André Rothenbühler, *How to Challenge Illegitimate Debt: Theory and Legal Case Studies* 68, (Aktion Finanzplatz Schweiz 2009).

<sup>19</sup> Ochoa, *supra* note 10, at 116.

<sup>20</sup> Robert Howse, *The Concept Of Odious Debt In Public International Law* 12, (United Nations Conference on Trade and Development Discussion Paper No.185, July 2007).

<sup>21</sup> Treaty of Peace with Italy, Signed at Paris, (10 February 1947), *available at* <https://treaties.un.org/doc/Publication/UNTS/Volume%2049/v49.pdf>.

<sup>22</sup> Kema Irogbe, *Bretton Woods Twins and the Odious Debts of Poor Countries*, 1-12 (Clafin University, 2005).

not to transfer odious debts to the new state. Article 18 section D provided that “[Except in the case of the uniting of States,] odious debts contracted by the predecessor State are not transferable to the successor State.”<sup>23</sup> This section provides for succession of state and change of state personality. During that period of time political transactions is not acceptable as a reason for dropping debt. For instance, seven years later, in *Jackson v. People’s Republic of China*<sup>24</sup> the district court held for the validity of the odious debt only when there was a change in the state personality. It held that “It is an established principle of international law that changes in the government or the internal policy of a state does not as a rule affects its position in international law.”<sup>25</sup> The court established that international obligation is ranked higher than a change of government or a regime. A state remains responsible for its obligation and treaties that it has signed, even if there is a change in its political system.

In contrast to the previous court decision, in 1982 the United States claimed that Iran owed a large sum of money as a result of a contract concluded by Iran in 1948 to buy some surplus military property from World War II. The Islamic Republic of Iran refused to carry that debt on the grounds that it was odious debt and could not be transferred to the Islamic Republic of Iran. In this case the Iran claims tribunal rejected the claim of the Islamic Republic of Iran on the ground that state personality does not change after a revolution. The tribunal provided that

In any event, the Tribunal will limit itself to stating that the said [odious debt] concept belongs to the realm of law of state succession. That law does not find application to the events in Iran. The revolutionary changes in Iran fall under the heading of state continuity, not state succession. This statement does not exclude a realist approach that recognizes that in practice the border between the concepts of continuity and succession is not always rigid. In spite of the change in head of

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<sup>23</sup> Mohammed Bedjaoui, Ninth Report on Succession of States in Respect of Matters Other Than Treaties, reprinted in (1981)2 V.B. INT’L L. COMM’N, para 2, U.N. Doc. A/CN.4/30111981/Add.1 of 13.

<sup>24</sup> This case is an agreeable universal law case spinning around the potential sway of the People’s Republic of China. It was discovered that the PRC does have sway far from the US Courts and was conceded Absolute Invulnerability. This is a continuation of six different claims that happened preceding 1952. These incorporate suits against the USSR, Mexico, Poland and two against the PRC for bonds issued soon after 1920. One new imperative attention of the case is China’s conflict that an elucidation giving the FSIA retroactive impact soon after 1952 might damage due process. This case is generally dependable right up ‘til the present time, yet diverse understanding of pivotal words from the FSIA can yield distinctive running the show, *Jackson v. People’s Republic of China*, 794 F.2d 1490 (11th Cir. 1986).

<sup>25</sup> James V. Feinerman, *Odious Debt, Old And New: The Legal Intellectual History Of An Idea*, 70 L. & Contemp. Probs.193193, 194 (2007).

State and the system of government in 1979, Iran remained the same subject of international law as before the Islamic Revolution. For when a Government is removed through a revolution, the State, as an international person, remains unchanged and the new Government generally assumes all the previous international rights and obligations of the State<sup>26</sup>

In addition to the previous example, in 2003, after the fall of the Saddam Hussein regime, the idea of odious debt turned back to the corruption of the previous regime. The concept of odious debt developed to include not only state debt, but also regime debt.<sup>27</sup> Patricia Adams claimed that all Iraq debt, about \$125 billion, was used to finance dictatorship and military aggression.<sup>28</sup> In addition, Paul Wolfowitz, former President of the World Bank, stated that most of Iraq's debt "had been used to buy weapons and to build palaces and to build instruments of oppression."<sup>29</sup> He agrees that the new regime is not responsible for the debt arising from the previous regime. To get around this, the Iraqi government decided not to rely on the theory of odious debts and instead pursue need-based debt relief from the Paris Club and has succeeded in doing so.<sup>30</sup>

For the development of the odious debt concept, state benefit is the main reason to reject odious debt. In 2006, Norway cancelled about \$80 million of debt owed by five developing countries. Although the countries benefit from the debt but the development recognized does not achieved.<sup>31</sup> In December 2008, Rafael Correa, President of the Republic of Ecuador, declared Ecuador's national debt odious, grounded on the argument that it was contracted by despotic and corrupt prior regimes. He succeeded in reducing the amount of the debt before continuing to pay the balance.<sup>32</sup>

The concept of odious debt refers to a set of considerations of equity used to justify the abolition or modification of debt obligations in the context of political changes on the grounds that the former regime is odious and citizens have not benefited from these debts

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<sup>26</sup> *The United States of America v. The Islamic Republic of Iran* (Case No. B36), Award No. 574-B36-2, 3 December 1996), 32 Iran-United States C.T.R. 162 (1996):175–176.

<sup>27</sup> Howse, *supra* note 20, at 2.

<sup>28</sup> Patricia Adams, *Iraq's Odious Debts* 12 (Cato Inst., Policy Analysis No. 526, 2004).

<sup>29</sup> Sarah Ludington & Mitu Gulati, *A Convenient Untruth: Fact and Fantasy in the Doctrine of Odious Debts*, 48 Va. J. of Int'l L. 595, 601 (2008).

<sup>30</sup> Jai Damle, *The Odious Debt Doctrine After Iraq*, 70 L. & Contemp. Probs. 139, 144 (2007).

<sup>31</sup> Mader, *supra* note 18, at 18.

<sup>32</sup> Arturo C. Porzecanski, *When Bad Things Happen To Good Sovereign Debt Contracts: The Case Of Ecuador*, 1 DUKE U. L. & CONTEMP. PROBS. 1, 5 (2010).

or to suppress them with the knowledge of the creditor.<sup>33</sup> During the last century, especially during the post-colonial era to the present time, many changes occurred for political systems, whether through revolutions, such as the Mexican Revolution, or wars such as the Spanish-American war, or secession, or the peaceful evolution of societies. All these transitions gave rise to a question on the ability of the successor regimes to repudiate the obligations of previous regimes. The claim is that debt must not be fulfilled, since it is a personal debt borne by the regime only to serve its interest. There are different criteria to consider these debts as odious. Some scholars argue that the criteria should be about the debt itself, not the parties. There must be a determination of the validity of the debt, whether the parties are odious or not.<sup>34</sup> Other scholars set a condition that a creditor state must know at the time of lending that this money will not be used in the interest of the people of the state, rather for personal interest.<sup>35</sup>

The following two chapters will explore the doctrine of odious debts in international law. The first chapter will discuss different definitions of odious debt and their criteria. The second chapter will focus on the normative basis for canceling odious debt in international law. Accordingly, the article will focus on the sources of international law laid down in Article 38 of the Statute of ICJ as grounds for determining the legal basis for canceling odious debt. The focus here is on international treaty and international customary law. The paper argues that there are sufficient grounds from state practice, precedent, and treaty law to base the doctrine of odious debts on customary international law as opposed to on ad hoc considerations of equity.

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<sup>33</sup> Jonathan Shafter, *The Due Diligence Model: An Executive Approach to Odious Debt Reform*, 32N. Carolina J. of Int'l L. & Com. Reg. 669, 671 n. (2007); Howse, *supra* note 20, at 5.

<sup>34</sup> Paul B. Stephan, *The Institutional Implications of an Odious Debt Doctrine*, 70 L. & Contemp. Probs. 214, 220 (2007).

<sup>35</sup> *Id.*

## II. The Concept of Odious Debt

### A. Types of State Debt

The state debt means the entire sum of the outstanding debt obligations of a country's central government, in which the debtor is required to refund the amount and its interest on the deadlines that are agreed on.<sup>36</sup> In the context of state succession, the Vienna Convention on the Succession of States in respect of State Property, Archives and Debts (not yet in force) defined state debt as “any financial obligation of a predecessor state arising in conformity with international law towards another state, an international organization or any other subject of international law.”<sup>37</sup>

In addition to the definition of state debt set by the Vienna Convention, Gaston Jeze uses the term public debt to refer to state debt. He states that “public debt is the individual legal situation of the State's administrative patrimony: it is the legal obligation of the administrative patrimony to pay a certain sum of money to a given creditor.”<sup>38</sup> Alexandre Sack defined the legal consequence of state debt as contractual obligations of the state guaranteed by it:

[D]ebts of the state, of a political community organized as a State ... these debts are contractual obligations of the State. By lending to the State or purchasing State bonds, public creditors become the possessors of acquired rights, namely, debt-claims against the debtor state ... state debts are guaranteed by the entire patrimony of the State.<sup>39</sup>

The International Law Association offers another definition of state debt: “the national debt, that is, the debt shown in the general revenue accounts of the central government and unrelated to any particular territory or any assets.”<sup>40</sup> This definition describes only the cases in which the debt is concluded by the central government and not related to any particular territory, however, there are cases in which the debt is concluded by the central government and used for a particular territory. This is called localized debt.

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<sup>36</sup> Ugo Panizza, *Domestic And External Public Debt In Developing Countries* 14, (United Nations Conference on Trade and Development Discussion Paper No. 188, March 1, 2008).

<sup>37</sup> Vienna Convention on Succession of States in respect of State Property, Archives and Debts, art. 33, 22 ILM 306 (1983) / UN Doc A/CONF.117/14 (1983).

<sup>38</sup> Bedjaoui, *supra* note 23, at 57.

<sup>39</sup> *Id.* at 57.

<sup>40</sup> International Law Association, *Report of the Fifty-Fourth Conference held at the Hague, 23rd-29<sup>th</sup> August, 1970* 108 (1971).

The debtor is the State and the user is a given province.<sup>41</sup> The Special Rapporteur to the International Law Commission, Mohammed Bedjaoui, proposes that state debt can be defined as “(a) [a] debt contracted by the central government of the state and therefore legally binding on the state itself, and (b) [a] debt chargeable to the central treasury of the state.” He suggests a simple point about state debt that defines state debt as “a financial obligation contracted by the central government of a state and chargeable to the treasury of that State.”<sup>42</sup> Within state debt, debt obligations are generally divided into three categories: public state debt, localized debt, and debt of public enterprises. These distinctions are particularly relevant in moments of political transitions in the context of state succession, change of governments.

### **1. Public State Debt**

Article 33 of the 1978 Vienna Convention on Succession of States in Respect of State Property defines state debt as “any financial obligation of a predecessor State arising in conformity with international law towards another State, an international organisation or any other subject of international law.”<sup>43</sup> States are the contracting parties; the debtor is a state, and the creditor is another state or an international organization. Financial responsibilities are based on a contract or a treaty governed by international law. Although there are representatives of the state signing this debt, the state assumes all the obligations and benefits arising from such debt.<sup>44</sup> Hence, the debt must be for the benefit of the state not the benefit of its representatives.

### **2. Localized Debt**

The second kinds of state debts are localized debts. These debts are contracted by the state to use in specific locations of its territory. It is not contracted by the local authority as the local debt, rather by the state itself. Localized debt differs from local debt that is contracted by a local body usually not the central government authority. This debt may be contracted by “a territorial authority inferior to the State used by that authority in its own name. Such territory has a degree of financial autonomy; with the result that these debts

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<sup>41</sup> Bedjaoui, *supra* note 23, at 58.

<sup>42</sup> Bedjaoui, *supra* note 23, at 69.

<sup>43</sup> Vienna Convention on Succession of States in respect of State Property, Archives and Debts, *supra* note 37, at art.35.

<sup>44</sup> Panizza, *supra* note 36, at 14.



are identifiable.”<sup>45</sup> Thus, these debts are not by the name of the state and cannot oblige the state as a whole. Simply the difference between localized and local debt is that:

A local debt incurred by a municipality or an organized section of the community with local autonomy would, if backed by a guarantee from the central Government, be only one step removed from a State debt .... [A] localized debt, which meant one incurred by the central Government for a particular part of the country, was very similar to a debt of a local community or entity guaranteed by the State .... Consequently, the difference between a local debt and a localized debt, when such debts were guaranteed by the central Government, tended to be blurred.<sup>46</sup>

In short, the mere distinction between local and localized debt can be based on the authority that conclude the debt and the purpose for its use.

### 3. Debts of Public Enterprises

The third kind of state debt is the debt of public enterprises. Public enterprises can be defined as “institutions which have their own legal personality and autonomy of administration and management, and are intended to provide a particular service or to perform specific functions.”<sup>47</sup> Bejudoi states that, although the debt of public enterprises has a public character it is not considered as being a state debt. In the case of state succession, a state is not responsible for such debts.<sup>48</sup> Contrary to the previous opinion another scholar proposes that the debt of public enterprises is the debt of the state: “Under certain constitutional arrangements, public enterprises were sometimes completely autonomous, but more often a public enterprise was simply an arm of the central government that had limited financial autonomy and was usually indirectly accountable to the central Government, which kept watch over its activities.”<sup>49</sup> According to this view, the debt of the public enterprise is guaranteed by the state, and the successor state is responsible for it.<sup>50</sup>

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<sup>45</sup> P. K. Menon, *The Succession of States and the Problem of State Debts*, 6 Bos. C. Third World L. J. 111, 114 (1986).

<sup>46</sup> *Id.*

<sup>47</sup> Bedjaoui, *supra* note 23, at 54.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 115.

<sup>50</sup> *Id.*

## **B. Definition of Odious Debt**

Since the doctrine has been dealt by a number of scholars, it is useful to survey earlier treatments and restate the doctrine in an analytical precision. Accordingly, this section traces the legal history of the doctrine, review the definitions provided by legal scholars. Finally, it combines acceptable types of odious debts, and identifies contemporary definition of odious debts.

### **1. Definition of Odious Debt in International Legal Scholarship**

International law scholars do not share a definition of odious debts. Their definitions are sometimes over-inclusive and broad, and in others under inclusive and narrow. Broad definitions have negative impact on international financial stability, narrow definitions might make economic recovery after political transitions more difficult to achieve. Hence, it is essential to review the evolution of the concept of odious debt to assess its ideal legal formulation.

Sack provided the first modern formulation of odious debts; he used the expression to refer to regime debt. He stated that

If a despotic power incurs a debt not for the needs or in the interest of the State, but to strengthen its despotic regime, to repress the population that fights against it, etc., this debt is odious for the population of all the State. This debt is not an obligation for the nation; it is a regime's debt, a personal debt of the power that has incurred it, consequently it falls with the fall of this power.<sup>51</sup>

Thus, any debt concluded to enhance the power of the autocratic authority of the ruling group and is not in the interest of the people is odious debt. This debt only obliges the contractor personally and not the state. He states the reasons for which he considers these debts to be odious. They are the debt must be against the consent and interests of the borrower and the lender know at the time of lending.

The reason these 'odious' debts cannot be considered to encumber the territory of the State, is that such debts do not fulfill one of the conditions that determine the legality of the debts of the State, that is: the debts of the State must be incurred and the funds from it employed for the needs and in the interest of the State. 'odious' debts, incurred and used for ends which, to the knowledge of the creditors, are contrary to the interests of the nation, do not compromise the latter –

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<sup>51</sup> Howse, *supra* note 20, at 12.

in the case that the nation succeeds in getting rid of the government which incurs them – except to the extent that real advantages were obtained from these debts. 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 responsible to the will of the people, the 'odious' debts of the eliminated power are not any less their personal debts and are not obligations for the new power... One could also include in this category of debts the loans incurred by members of the government to serve interests manifestly personal interest that are unrelated to the interest of the State.<sup>52</sup>

Sack identified three conditions that must be achieved collectively in order to consider a debt odious. For him, the debt is odious when there is a combination of an odious regime and the non-benefit use of the debt.<sup>53</sup> More specifically, Sack claimed that a regime is entitled to repudiate any debt obligations entered into by its predecessor provided the following three conditions are satisfied: the debt was contracted without the consent of the population; it was acquired for a purpose that would not benefit that population; and the creditor was aware of the foregoing points (i.e. the lack of popular consent and benefit) when advancing the loan monies. The people of the state in question obtained no benefit from the debt – that is, the loan proceeds need not actually have been employed contrary to the interests of the population; it is sufficient that they were used in a way which did not advance them. Of course, even debts which merely fail to confer any benefit may be worthy of the appellation odious by virtue of the fact that the people of a state will suffer harm if they are forced to repay debts which did not actually serve their interests.

According to these three criteria, any debt beneficial to the state is not considered odious even if it is concluded by a brutal authority. It is mandatory to have the three criteria present to consider a debt odious. These terms are arranged logically; hence, any debt resulting from an odious act of a regime is not considered odious in advance unless it does not benefit the state. The non-existence of a public beneficiary is not sufficient to

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<sup>52</sup> *Id.*

<sup>53</sup> That is, the population of the state as a whole, as opposed to a minority – normally members of a corrupt government and their families and cronies – who may indeed have personally benefited from the acquisition of such debts (often by diverting all or part of loan funds for their personal use).

consider a debt odious without being concluded by an odious regime. Buchheit, Gulati & Thompson respond to Sack's three argument that

the idea of loans that were used only to "strengthen" the governing regime, "suppress a popular insurrection" or were otherwise "hostile" to the interest of the people of the country. From Taft's decision in the Tinoco Arbitration, Sack gleaned the requirement that the lender know about the illegitimate purpose of the borrowing before the loan could be branded objectionable, as well as the notion that such a debt was "personal" to the ruler who commissioned it<sup>54</sup>

Sack's perspective was that state should not bear the debt of tyrannical regimes. An authoritarian regime, which does not represent the nation, lacks the legitimacy to act on its behalf. However, not all debt concluded by those regimes are repugnant, as the debt must not be of benefit to the state.

Sack tried to protect the innocent creditor. It is not logical to oblige creditor acting in good faith to forgive the debt unless he knows the misuse of those debts. Accordingly, only a creditor who knew at the time of concluding the contract that the ruling party was despotic and the debt would not benefit the state may be called to commit a hostile act and is responsible for canceling the debt.<sup>55</sup> The burden of proof would switch to the relevant lenders to adduce evidence that their loans had in fact benefited the population of the state in some way and therefore merited repayment.<sup>56</sup> If the creditors were unable to do so, then the new sovereign would be justified in not repaying them.<sup>57</sup>

Unlike Sack who used the term subjugated debt interchangeably with odious debt, Bustamante differentiates between subjugated debt and war debt. He defines subjugation debts as any "public debts created by the former state before the war of independence and charged to [the] general treasury of the region that subsequently became independent, with the direct or indirect intention of maintaining or ensuring its domination and preventing the birth of a new State."<sup>58</sup> Whereas war debt is debt used to finance the preparation or prosecution of the war:

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<sup>54</sup> Lee C. Buchheit et al., *The Dilemma of Odious Debt*, 56 Duke L. J. 1203, 1225 (2007).

<sup>55</sup> Bradley N. Lewis, *Reconstructing the Odious Debt Exception*, 25 B.U. INT'L L.J. 297, 329 (2007).

<sup>56</sup> It is to the creditors, in their turn, to prove that, in spite of the "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.

<sup>57</sup> PATRICIA ADAMS, ODIUS DEBTS: LOOSE LENDING, CORRUPTION, AND THE THIRD WORLD'S ENVIRONMENTAL LEGACY 167 (Energy Probe Research 1991).

<sup>58</sup> Bedjaoui, *supra* note 23, at 67.

debts contracted during a war of independence by the previous sovereign to cover the costs of that war ... It would be said in private law that the costs of a lawsuit cannot be imposed on the winning party, and in public law it cannot be claimed that one of the parties should assume the obligations engendered or created to prevent, directly or indirectly, its birth and its existence.<sup>59</sup>

In contrast, some scholars try to narrow the concept of odious debt. Vikram Nehru and Mark Thomas support the idea that even if the parties on the issue lender and creditor do not agree on the definition of odious debt, they should be confident that these debts are not used for the benefit of the borrowing state.<sup>60</sup> The concept of odious debt is too broad, and the lending state may not accept these cases as odious debts. They think that the concept of odious debt may include criminal, unfair, and ineffective debts. They propose support for the doctrine of odious with national bodies from civil society organizations and cooperation from lenders to prevent corruption in the state and to follow the debt to ensure its effectiveness to the society.<sup>61</sup> Each debt not subject to this procedure would be considered an odious debt.

Feilchenfeld, on the other hand, uses the term imposed debts to refer to odious debt. He uses this term instead of the term subjugation debt. Imposed debts do not mean debts contracted without the consent of the rulers or the representatives of the state. Rather, they mean debts created without the consent of debtor state citizens who are totally responsible for paying those debts.<sup>62</sup> Thus, there must be a legitimate purpose for public borrowing; he contends that

For practical purposes, an investigation of the just grounds for the creation of debts may be restricted to those which for centuries have been regarded as sufficient or necessary in most systems of positive law of most of the civilized nations. A survey of these systems shows that the creation of debts is justified either by the necessity of raising money for public purposes, by the doctrine that compensation is owed for tortious acts to injured persons, by consent of the debtor, or by benefits received by the debtor<sup>63</sup>

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<sup>59</sup>*Id.*

<sup>60</sup> VIKRAM NEHRU & MARK THOMAS, THE CONCEPT OF ODIUS DEBT: SOME CONSIDERATIONS 12, [siteresources.worldbank.org/INTDEBTDEPT/Resources/468980-1184253591417/OdiousDebtPaper.pdf](http://siteresources.worldbank.org/INTDEBTDEPT/Resources/468980-1184253591417/OdiousDebtPaper.pdf).

<sup>61</sup>*Id.* at 31.

<sup>62</sup> ERNST H. FEILCHENFELD, PUBLIC DEBTS AND STATE SUCCESSION 615, (Macmillan company, New York 1972) (1931).

<sup>63</sup>*Id.*

Although he does not distinguish the absence of benefit and the absence of consent, he concludes that borrowing for private enrichment is sufficient for absence of benefit.

As we see here, definitions of odious debt vary but based on these definitions any debt obtained against the will and benefit of citizens with the knowledge of the creditor can be considered as odious debt. This includes the typology of four types of odious debt: war debt, subjugation debt, illegal occupation debt, and fraudulent, illegal, or corruption-related debt.

## **2. Contemporary Usage: The Three Criteria**

After reviewing several scholars' definitions of odious debt, as well as reviewing numerous cases in which various countries tried to repudiate debts on the basis of their odious character, it is essential to review the exact criteria for determining a debt to be odious. Several recent treatments of odious debt focusing on the three elements inherent in the American Commissioner's repayment of the Cuban loans, and in Sack's statement of the doctrine are relevant for a debt to be odious; it must be against the will and benefit of the state with the knowledge of the creditor. There must be a connection between the debt and the regime. The following explores these three conditions.

### **a. Odious regime**

There are two ways to prove that a regime is odious either through international recognition or through citizens' non-consent. The mere use systematic oppression<sup>64</sup> or organized looting by any regime or state makes it odious.<sup>65</sup> The odiousness of a regime

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<sup>64</sup> International Convention on the Suppression and Punishment of the Crime of *Apartheid*, G.A. res. 3068 (XXVIII), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1974), 1015 U.N.T.S. 243, 1976. Article 1 provided that "inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination" Article 2 defines the crime of apartheid – "which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa" – as covering "inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them". It then lists the acts that fall within the ambit of the crime. These include murder, torture, inhuman treatment and arbitrary arrest of members of a racial group; deliberate imposition on a racial group of living conditions calculated to cause it physical destruction; legislative measures that discriminate in the political, social, economic and cultural fields; measures that divide the population along racial lines by the creation of separate residential areas for racial groups; the prohibition of interracial marriages; and the persecution of persons opposed to apartheid. *available at* [http://legal.un.org/avl/pdf/ha/cspca/cspca\\_e.pdf](http://legal.un.org/avl/pdf/ha/cspca/cspca_e.pdf).

<sup>65</sup> Patrick Bolton & David Skeel, *Odious Debts or Odious Regimes*, 70 L. & Contemp. Probs. 84, 95 (2007).

might be difficult to prove in practice. Some “objective” indicators can be useful in this respect. The recognition of international organizations carries a great deal of weight to prove the odiousness of that regime. The mere recognition of international institutions such as the United Nations about the existence of systematic repression in a state makes the ruling regime odious, even if individuals do not express their dissatisfaction; citizens may be unable to express oppression.<sup>66</sup> The regime may appear to be a fair regime and not repress its own citizens, but the regime commits organized looting. In that situation, there may be no popular anger against the regime, but the mere recognition from an international organization or community such as the International Monetary Fund is sufficient. This international organization can acknowledge the organized looting committed by the regime making it adequate enough to consider the regime odious.<sup>67</sup>

In addition to international recognition of regime odious acts, absence of the borrower state citizens’ consent is a reflection of odious regime. This indicator has origins in Sack’s concern with authoritarian regimes and was a main component of the Cuban debt affair. Finding a debt odious must include a finding of lack of citizens’ consent, and it is not limited to dictator regimes. Bedjaoui also include an implied condition for the existence of lack of citizens’ consent in subjugation debts.

Protesting to the policies of the existing regime is not enough to consider the regime odious. Citizens must perform appropriate legal action exhibiting the necessity of removing the odious regime and debts incurred by it.<sup>68</sup> It is essential to prove the existence of an act to reject the regime by citizens in a legal manner accepted by international law.

A third indicator of odiousness of the regime relates to whether or not the debt is consistent with international law. Mohammed Bedjaoui contends that a debt must not be against the principle of contemporary international law: “From the standpoint of the international community, an odious debt could be taken to mean any debt contracted for purposes that are not in conformity with contemporary international law and, in

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<sup>66</sup> *Id.* “Odious regimes sometimes suppress a subgroup of the population, as with blacks in Apartheid South Africa and Jews in Nazi Germany, and they sometimes suppress the entire population, as with Idi Amin's Uganda.”

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

particular, the principles of international law embodied in the Charter of the United Nations.<sup>69</sup> For example, any debt which violates the basic rules of human rights is an odious debt. Further, any debt which leads to the violation of the sovereignty of nations is odious debt. Generally, any loan or debt between a state and another state, or the International World Bank used contrary to *jus cogens* is an odious debt. One example are loans granted by the World Bank to the Government of Uzbekistan, which has a terrible record on human rights and the United Nations has confirmed that what is happening there is systematic torture.<sup>70</sup> However, the World Bank report did not specifically refer to human rights violations there and just talked about the unfriendly business environment and that the obstacles to growth are about macroeconomic stability, removing barriers to trade, and privatization.<sup>71</sup> Indeed, the debt that violates *jus cogens* is a debt not for the benefit of the citizens. In Ecuador, the commission of integral audit of public debt (CAIC) stated that conditions attached to the loan programs enforced by the World Bank and other multilateral institutions means denying state sovereignty and interfering in its internal affairs. Many multilateral loans also violate economic, social and cultural rights. The CAIC recommended stopping paying server debt claimed by multilateral institutions.<sup>72</sup>

International conventions provides for the nullification of treaties violating *jus cogens*. The Vienna Convention on the Law of Treaties nullifies any agreement that against *jus cogens*. Article 53 of the treaty provides that:

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

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<sup>69</sup> Bedjaoui, *supra* note 23, at 69.

<sup>70</sup> Despite a massacre of hundreds of protestors on 13 May 2005 and widespread press coverage of human rights violations, the World Bank had not amended its country brief when it was last accessed on 1 October 2005 and it still made no mention of human rights issues. The World Bank committed \$75 million in new loans in 2002, when human rights violations were well known, followed by \$60 million in 2003, \$75 million in 2004, and \$40 million in 2005.

<sup>71</sup> World Bank, *Uzbekistan Country Brief*, available at <http://www.worldbank.org.uz>.

<sup>72</sup> Mader, *supra* note 18, at 68.



The existence of such a clause explicitly or implicitly in the contract nullifies the contract for violating the rules of *jus cogens*; it can be avoided by removing such violation. This simple example is not ambiguous because it is a hateful debt raised for an odious purpose. The problem arises when the regime contracts to purchase weapons without determining the purposes for which they will be used. For example a regime may take a loan from an international bank without defining the purpose and after that use this loan in operations against its own people, or at least against their benefit, and for the benefit of the system itself.

**b. The absence of the benefit**

A common problem of the doctrine is of the difficulty of defining absence of benefit. It is essential to determine how and when the debt is not beneficial. The debt must be non-beneficial both in purpose and in effect.<sup>73</sup> The amount of debt which is forgiven is determined according to the extent the state actually benefited. The absence of benefit is a central aspect to all proposed definitions. In the various definitions proposed so far, scholars such as Sack, Feilchenfeld, and Bedjaoui discuss three main elements: “the intensity or the hostility of the harm/lack of benefit; whether the loan must be non-beneficial [i]n purpose and in effect, or if either of the two is sufficient in of itself; whether and when general purpose loans might be deemed non-beneficial.”<sup>74</sup> A country may seek the extent of its commitment to implement contracts signed by the previous regime and the extent of mandatory debt arising from those contracts.

Mohammed Bedjaoui contends that a debt must not be against the principle of contemporary international law: “From the standpoint of the international community, an odious debt could be taken to mean any debt contracted for purposes that are not in conformity with contemporary international law and, in particular, the principles of international law embodied in the Charter of the United Nations.”<sup>75</sup> For example, any debt which violates the basic rules of human rights is an odious debt. Further, any debt

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<sup>73</sup> Jeff King, & Bryan Thomas, *Advancing the Odious Debt Doctrine* 43-46 (CISDL Working Paper No. COM/RES/ESJ, 2003).

<sup>74</sup> Miyazaki Takashi, *Recognition Of States And Governments In International Law: Theory And Practice* Y.B. Int'l L. & Aff (2010).

<sup>75</sup> Bedjaoui, *supra* note 23, at 69.

which leads to the violation of the sovereignty of nations is odious debt. Generally, any loan or debt between a state and another state, or the International World Bank used contrary to *jus cogens* is an odious debt. One example are loans granted by the World Bank to the Government of Uzbekistan, which has a terrible record on human rights and the United Nations has confirmed that what is happening there is systematic torture.<sup>76</sup> However, the World Bank report did not specifically refer to human rights violations there and just talked about the unfriendly business environment and that the obstacles to growth are about macroeconomic stability, removing barriers to trade, and privatization.<sup>77</sup> Indeed, the debt that violates *jus cogens* is a debt not for the benefit of the citizens. In Ecuador, the commission of integral audit of public debt (CAIC) stated that conditions attached to the loan programs enforced by the World Bank and other multilateral institutions means denying state sovereignty and interfering in its internal affairs. Many multilateral loans also violate economic, social and cultural rights. The CAIC recommended stopping paying server debt claimed by multilateral institutions.<sup>78</sup> Indeed, I believe that not all international institutions debt must be cancelled, but only those debts that violate *jus cogens* norms of international law.

International conventions provides for the nullification of treaties violating *jus cogens*. The Vienna Convention on the Law of Treaties nullifies any agreement that against *jus cogens*. Article 53 of the treaty provides that:

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

The existence of such a clause explicitly or implicitly in the contract nullifies the contract for violating the rules of *jus cogens*; it can be avoided by removing such violation. This

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<sup>76</sup> Despite a massacre of hundreds of protestors on 13 May 2005 and widespread press coverage of human rights violations, the World Bank had not amended its country brief when it was last accessed on 1 October 2005 and it still made no mention of human rights issues. The World Bank committed \$75 million in new loans in 2002, when human rights violations were well known, followed by \$60 million in 2003, \$75 million in 2004, and \$40 million in 2005.

<sup>77</sup> *World Bank, Uzbekistan Country Brief*, available at <http://www.worldbank.org.uz>.

<sup>78</sup> Mader, *supra* note 18, at 68.

simple example is not ambiguous because it is a hateful debt raised for an odious purpose. The problem arises when the regime contracts to purchase weapons without determining the purposes for which they will be used. For example a regime may take a loan from an international bank without defining the purpose and after that use this loan in operations against its own people, or at least against their benefit, and for the benefit of the system itself.

The problem here is finding a relationship between the debt emerging from the contract and the work carried out by the state without the benefit of individuals. The existence and proof of this relationship is very significant. In fact, when determining whether citizens benefit from such a debt or not, it is not only essential to look at the provisions of the contract or the intent of the contract; there must also be consideration of the consequences resulting from the contract. The matter here is the result of such a debt. International law does not allow any violation of the *jus cogens* rules or cause any damage to the interests of individuals, or even not-benefiting them, regardless of the form of this debt. Therefore, the debt causing a violation of international norms or non-benefit to citizens is odious debt, whether the violation is agreed upon or not in the contract.<sup>79</sup>

It is essential to determine whether and when general purpose loans might be deemed non-beneficial; a state faces three scenarios;

The first is the case in which a creditor signs a contract with a predecessor regime, carries out its full obligations, and the debt is deserved. The successor regime claims that these debts are odious because it was not for the interest of the people. In addition, the current regime alleges that the predecessor regime was an odious one, and the lender knew that. Moreover, the lender knew that this debt would not be used for the benefit of the people or at least not essential to citizens. This is the common situation of the problem of odious debts, whereby the debtor state tries to get rid of all the debts.<sup>80</sup>

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<sup>79</sup> Sabine Michalowski & Juan Pablo Bohoslavsky, *Ius Cogens, Transitional Justice and Other Trends of the Debate on Odious Debts: A Response to the World Bank Discussion Paper on Odious Debts*, 48 Columbia J. of Transnat'l L. 60, 69 (2009).

<sup>80</sup> Carsten Thomas Ebenroth & Matthew James Kemner, *THE ENDURING POLITICAL NATURE OF QUESTIONS OF STATE SUCCESSION AND SECESSION AND THE QUEST FOR OBJECTIVE STANDARDS*, 17 U. of Pa. J. of Int'l L. 754, 783 (1996).

The Second is the case in which a creditor signs a contract with a predecessor regime, and part of the obligation is implemented. The debt is not entirely due and may be undeserved until the creditor complies with its full obligation.<sup>81</sup> This situation raises two initial problems; on the one hand, there is a problem on the part of the creditor. Is it possible for the debtor state to claim that the debt is odious and did not benefit the citizens, although the commitment is not complete? On the other hand, there is a problem with the part not implemented by the creditor. Is it permissible for the debtor state to get rid of this debt under the pretext that this debt would not benefit the people and it had been signed by an odious regime?

In both of the above cases, the opinion is to declare the invalidity of the entire contract. The sole purpose of avoidance of the contract is the deterrence of the creditor to be sure about the purpose for which the debtor took the money. This requires a detailed explanation of the reasons for the loan from the borrower and the purpose, in which the money will be used to allow the creditor to be aware of the total context to avoid the invalidity of the contract. The problem with this opinion is that it leaves the loan contract itself alone and seeks the knowledge of the lender about the purpose of lending. Therefore, the element here is not only to prove the knowledge of the lender about the purpose of the borrowing, but also to prove the relationship between the money and its use. This relation is essential before allowing the current regime to ask for the voiding of the contract, in cases where the money was already used by the predecessor regime. This brings us to the timing at which moment should the utility be evaluated? At the time of lending, or when making a decision on whether or not the debt is odious, and did not benefit citizens? It only makes sense from the legal perspective to look at the timing of the lending – otherwise its obligation the monitoring function to lenders, which obviously, they are either unable to do or would make the loan too expensive.<sup>82</sup>

The third scenario a country may face is the case in which a creditor signs a contract with a predecessor regime and does not implement any part of the obligation. The current regime may claim that it is not responsible for the debt arising from this contract since the

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<sup>81</sup> *Id.*

<sup>82</sup> Menon, *supra* note 45, at 117.

contract and the debt emerging from it does not benefit the citizens and was signed by an odious regime for its interest only. The debt does not violate the international *jus cogens*, and cannot, until now, be considered odious, but the money is likely to be used for odious purposes and against the benefit of citizens. If so, there is no need to prove that the lender knew the reasons for that debt because any violation of peremptory norms of international law must be prevented or terminated. Furthermore, there must be prevention of any debt used against the interest of the people, whether it was with the knowledge of the lender and/or the borrower or not. Hence, there are two scenarios: the first scenario is when the money does not transfer to the borrower; there is no obligation to the lender, who can prevent the transfer of money to the borrower without any sanctions. In the second scenario, the money has been transferred to the borrower, but did not been used for odious purposes. In this case, it is the right of the lender to demand the return of the money from the borrower because it will be used against the borrower's citizens' benefit or for odious purposes. This is due to the inaccurate knowledge of the lender at the time of signing the contract, in this case, the purpose in which the borrower will use the debt.<sup>83</sup>

**c. The creditor awareness that debt is odious.**

The idea that creditors must be aware of the debt is mentioned by most authors. Generally, it is the right of the borrower to get the debt from the state, either after war, revolution, succession, or the peaceful evolution of societies, unless otherwise agreed to.<sup>84</sup> According to Article 34 of the Vienna Convention, "The passing of State debts entails the extinction of the obligations of the Predecessor State and the arising of the obligations of the Successor State in respect of the State debts which pass to the Successor State, subject to the provisions of the articles in the present Part."<sup>85</sup> Moreover article 36 of the convention states "A succession of States does not as such affect the rights and obligations of creditors."<sup>86</sup> In contrast, the knowledge of the lender that debt is

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 119.

<sup>85</sup> Vienna Convention on Succession of States in respect of State Property, Archives and Debts, *supra* note 37, at art.34.

<sup>86</sup> *Id.* at article 36.

odious prevents the bearing of the obligation by the successor state, particularly in returning the debt.

The gravity of this condition is controversial among scholars, especially from the side of defenders of the lending party. Some scholars do not hold the lender responsible. For example, Wolfowitz does not hold the World Bank responsible.<sup>87</sup> He contends that the World Bank does not have any responsibility to know for what purposes a debt will be used for.<sup>88</sup> He said that Iraq debt has been used to “buy weapons and to build palaces and to build instruments of oppression,”<sup>89</sup> and the debt has to be cancelled not on the odious ground, rather for reasons of debt sustainability.<sup>90</sup> He differentiates between international lending and domestic lending. In the first situation, there is no responsibility on the lender. However, in domestic lending, total responsibility is on the lender, who has no responsibility to get back the money, which is illegitimate. He assumes trust between countries, and that a lender should not look to the past when dealing with corrupt or odious debt, rather to look to the future only. A lender may learn the corruption of the borrower who governs other countries, but it “really could not talk about the word in public.”<sup>91</sup> This may be based on the idea that it is prohibited to interfere in the internal affairs of other states.

On the other hand, other scholars believe those creditors are totally responsible for such debt if they knew its hateful nature. Lenders providing loans to regimes, which they know there corrupt, help in their corruption. After that, they return to talk on democracy and oblige citizens of those countries to pay the price of corruption.<sup>92</sup> Wolfowitz and the

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<sup>87</sup>Joseph Hanlon, *Wolf Owitz, The World Bank, And Illegitimate Lending* 4, 13 *Brown J. World Aff.* 41, 43 2007.

<sup>88</sup> *Id.*

<sup>89</sup> Howse, *supra* note 20, at 15.

<sup>90</sup> *Id.*

<sup>91</sup>*Id.* at 42.

<sup>92</sup>*Id.* at 47. “Suharto was announced the most degenerate lawmaker of the past two decades by transparency International in 2004.the association assessed that he stole \$15-35billion. Planet Bank credits to the degenerate Suharto government totaled about \$30 billionbetween 1966 and 1998, and pretty nearly a third of this, or \$10 billion, wassystematically stolen with the World Bank's full learning. A World Bank internalpaper in 1997 said, "We appraise that no less than 20-30 percent of Goi [government of indonesia] improvement plan trusts are redirected through casual installments to Goistaff and politicians."the issue broadened past debasement, to political loaning by the Worldbank expected to back a cool war associate of the United States. The point when Suharto movedmillions of Javanese individuals to populate different islands in the "transmigration" program(including huge numbers of the civilian army parts who battled

supporters of the lenders cannot avoid responsibility by “saying they have no responsibility or liability for past improper lending, and they are only willing to consider the narrow question of corruption.”<sup>93</sup> The error of the defenders of the non-responsibility of the lenders is that they treat international debt like the internal debt.<sup>94</sup> In domestic loans, the lender must make sure of the capacity of the borrower to repay the debt. For example, British law requires banks to “respect the ordinary principles of fair dealing”<sup>95</sup> and must assess that borrower's "age, experience, business capacity and state of health.”<sup>96</sup>Of course, this is different from international loans; if it is reasonable to ask banks in domestic lending situations to be sure of the possibility of a person to pay off their debts, this cannot be a requirement of international banks that commonly help poor countries and people most in need. Consequently, there is a role in the international lending community to help borrowing countries, even if they are not able to fulfill their obligations, to be sure that the money will be used fairly.

Omri Ben-Shahar and Mitu Gulati say that the party best placed to prevent the accumulation of odious debt is a party who should bear the cost of that debt. Accordingly, even if the population has benefited from part of those debts, the creditors must share the responsibility for the rest of the debt that is not beneficial reflecting relative blameworthiness and benefits of each.<sup>97</sup> It is the role of international institution to determine the extent of the benefit of each part and the creditor to be aware of the odious nature of such debt.

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against East Timor's independence), despite protestations about human rights and natural issues, the World Bank provided almost \$1 billion in loans. 1° Many of the transients were put on negligible area where they couldn't survive, so the World Bank loaned more cash to attempt to back them. The transmigration program was as of now being executed, and the World Bank was as of now making new credits for it, while Wolfowitz was minister there. In this manner Indonesia undertakes an extremely uncommon put in any exchange of Wolfowitz's anticorruption extend in the World Bank. Not just does the World Bank not have clean hands, yet Wolfowitz has individual learning of World Bank complicity in defilement. Yet his World Bank is attempting to gather on those illegitimate and degenerate advances.”

<sup>93</sup> *Id.* at 43.

<sup>94</sup> *Id.* at 49.

<sup>95</sup> *Id.* at 45.

<sup>96</sup> *Id.* at 45.

<sup>97</sup> Omri Ben-Shahar & Mitu Gulati, *Partially Odious Debts? A Framework For An Optimal Liability Regime*, 70 L. & Contemp. Probs. 1, 12 (2007).

However, this role of international bodies is not suitable in all cases, especially when the creditor is one of the international institutions and aware of the odious nature of the debt. This is appearing in the case of the Congo during the 1960s:

In 1965 General Joseph Mobutu took power in the Congo (which he renamed Zaire). Mobutu became one of the world's most corrupt dictators. In 1978 the IMF appointed its own man, Irwin Blumenthal, to a key post in the central bank of Zaire. He resigned in less than a year, writing a memo which said that corruption was so serious that there was 'no (repeat no) prospect for Zaire's creditors to get their money back'.<sup>19</sup> Shortly afterwards, the IMF granted Zaire the largest loan it had ever given an African country; over the next decade it gave Mobutu \$700 million. Zaire had virtually stopped repaying its debts in 1982, but in the next decade the World Bank lent \$2 billion to Zaire. Western governments were the biggest lenders, and continued to pour in new money. When Blumenthal wrote his report, Zaire's debt was \$4.6 billion. When Mobutu was overthrown and died in 1998, the debt was \$12.9 billion<sup>98</sup>

Although the IMF sent a representative who wrote a report on the extent of corruption that exists in Zaire and the impossibility of returning such money, the IMF continued to lend money. The IMF and other shareholders are not fit to determine the liability because in most cases they are the lenders. There is a conflict of interest. The UN Conference on Trade and Development emphasized that the IMF "is not a neutral body and cannot, therefore, be expected to act as independent arbiter."<sup>99</sup> The creation of a special court independent from international funding agencies, and which have the ability to identify the liability of the creditor and the amount of such liability is indicated.

### 3. Regime Debt

As a general principle in international law, and in normal situations governments adhere to commitments with financial obligations incurred by previous governments. " [c]hanges in the government or internal policy of the state do not as a rule affect its position in international law[;] though the government changes, the nation remains, with rights and obligations unimpaired."<sup>100</sup> A change of a government does not alter the rights and obligations incurred by previous governments, and as a general principle, the successor

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<sup>98</sup> Mader *supra* note 18, at 71.

<sup>99</sup> C.P. CHANDRASEKHAR ET AL., *SDRM: DEBT RESTRUCTURING OR LIQUIDATION?* 5, <http://www.macrosan.org/fet/jan03/pdf/SDRM.pdf>.

<sup>100</sup> Jeff A. King, *Odious Debt: The Terms of the Debate*, 32 N.C. J. INT'L L. & COM. REG 606.614 (2007).



governments adhere to commitments made by the prior government. This based on the fact that international relations are built on stability and a mere changing of governments is not enough, in itself, to end obligations and terminate rights.

The succession of a government means just a change at the head of government or even, at most a change in the ruling regime of the state, but this does not affect the legal personality of the state. There are illustrations:

[t]he dissolutions of Yugoslavia and the unification of Germany are examples of state and not government succession. By comparison, the regime changes in Afghanistan and Iraq in the twenty-first century are examples of government and not state succession. Pursuant to a positivistic international law rule, a successor government is always responsible for the debts of its predecessor government.<sup>101</sup>

In fact, some scholars, like Ian Brownlie, claim that international law recognizes only states not governments. Even if the debt was incurred by the government to act, the state is still responsible for such debts.<sup>102</sup> This is based on the fact that the officials incurred debts on behalf of the state. Thus, any change in the government does not affect the identity of the state that is still responsible for such debts. This claim may be true, but it has not considered revolutions<sup>103</sup> of one of the conditions for the termination of obligations.

The change of government may not be achieved normally, but in a revolutionary way. After changing the political regime in a country, not the government alone but the system as a whole through a revolution or secession, the country may question the extent of its commitment to implement contracts signed by the previous regime and the extent of mandatory debt arising from those contracts. For instance, on December 22, 1792 after the French revolution, France refused to pay the debt of the previous regime under the claim that "sovereignty of peoples is not bound by the treaties of tyrants."<sup>104</sup> After negotiation, it consented paying only one- third of the debt. Moreover, in 1918, the Soviet government issued a decree annulling all foreign loans contracted under the Czarist and

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<sup>101</sup> Tai-Heng Cheng, *Renegotiating The Odious Debt Doctrine*, 70 L. & Contemp. Probs. 8, 12 (2007).  
<sup>95</sup> *Id.*

<sup>103</sup> Revolution is a radical change of modification of the government the lead to the overthrow of an established political system. In that context we mean it by peaceful evolution of societies.

<sup>104</sup> James L. Foorman & Michael E Jehle, *Effects Of State And Government Succession On Commercial Bank Loans To Foreign Sovereign Borrower*, 1 U. of Ill. L. Rev.9, 20 (1982).

Kerensky governments. The Soviets stated “Governments and systems that spring from revolution are not bound to respect the obligations of fallen governments.”<sup>105</sup>

For that reason, debt is odious when there is an absence of popular consent, absence of the benefit, and the creditor is aware of these two elements. “It may be said that all odious debts are regime debts, whereas not all regime debts are odious debts.”<sup>106</sup>

Accordingly, successor regimes are responsible for ordinary debt resulting from a legal manner from the predecessor regimes, but they may not be responsible for odious debt.

The government after political transition argues that they form a new state, which is totally independent of the predecessor state. The former treaties are concluded without an intention or interference from the revolutionary leaders; the revolutionary leaders have no role in concluding any prior treaties. These treaties may be one of the causes of such revaluation. Thus, the revolutionary leaders come with a policy different from the predecessor's policy, and repudiate the authority that concluded such treaties.<sup>107</sup>

A revolution or an unconstitutional change in the system of governance is not sufficient to get rid of the debt, as there must be odious or illegitimate use of those funds to consider the debt odious. William H. Taft explained in the Tinoco Arbitration case,<sup>108</sup> the case that was raised to determine the extent of the responsibility of states for the debt

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<sup>105</sup> *Id.*

<sup>106</sup> *Succession Of States In Respect Of Matters Other Than Treaties*, U.N.Y.B. Int'l L. Comm'n 1 (1980).

<sup>107</sup> *Revolutions, Treaties, and State Succession*, 76 *Yale Law J.* 1676 (1967)..

<sup>108</sup> Great Britain (P) guaranteed that the previous legislature of Costa Rica (D), the Tinoco administration, had allowed oil concessions to a British organization that must be respected by the present administration. The Tinoco administration had seized power in Costa Rica by upset. Incredible Britain (P) and the United States never distinguished the Tinoco administration. The point when the Tinoco administration fell, the restored government invalidated all Tinoco contracts, incorporating an oil admission to a British organization. Incredible Britain (P) guaranteed that the Tinoco government was the main government in presence around then the agreement was marked and its acts couldn't be disavowed. Costa Rica (D) asserted that Great Britain (P) was estopped from authorizing the agreement by its nonrecognition of the Tinoco administration. The matter was sent for assertion. Does nonrecognition of another government by different governments devastate the true status of the legislature? An administration that builds itself and keeps up a serene absolute organization require not to adjust to past constitution and nonrecognition of the govt. by other govt's. does not crush the unquestionably status of the govt.the authority discovered there was no estoppel. The proof of nonrecognition did not exceed the confirmation of the unquestionably status of the Tinoco administration. Unrecognized governments accordingly might have the ability to shape quality contracts. No. An administration that makes itself and upholds a tranquil absolute organization require not adjust to a past constitution and nonrecognition of the administer ment by different governments does not obliterate the accepted status of the legislature. Extraordinary Britain's (P) nonrecognition of the Tinoco administration did not debate the unquestionably presence of that administration. There was no estoppel since the successor government had not been headed by British nonrecognition to transform its position.

resulting from succession, that the disputed transactions were for personal interests and not for the public interest and it could not be implemented. The tribunal stated that the debt could be implemented because the bank failed to prove that the debt is for legitimate government use.

The change by revolution upsets the rule of the authorities in power under the existing fundamental law, and sets aside the fundamental law in so far as the change of rule makes it necessary.... The same government continues internationally, but not the internal law of its being.<sup>109</sup>

Predecessor regime can get rid of the debt arising from the corrupt regimes even if there has been no change in the state.<sup>110</sup> “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.”<sup>111</sup>

In addition to political transition, changed circumstances may be the cornerstone for the dropping of odious debt after a revolution. A change of the circumstances is sufficient for the application of the *maxim rebus sic stantibus*. For example, the change of circumstances in the Republic of South Africa allowed it to approve all acts before independence. The Republic of South Africa gained its independence from Britain in 1934, and in 1994 South Africa gained its independence from the white minority rule.<sup>112</sup> The identity of South Africa did not change after independence, but the change of circumstance has allowed the state to drop the debt that not complies with the provision of the new constitution. It is the right of the parliament to reject debt that is concluded according to the previous constitution. Article 231(1) of the South African constitution states that:

All rights and obligations under international agreements which immediately before the commencement of this Constitution were vested in or binding on the Republic within the meaning of the previous Constitution, shall be vested in or

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<sup>109</sup> Emily F. Mancina, *Sinners in the Hands of an Angry God: Resurrecting the Odious Debt Doctrine in International Law*, 36 *George Wash. Int'l L. Rev.* 1239, 1244 (2004).

<sup>110</sup> King, *supra* note 100, at 616.

<sup>111</sup> Mancina, *supra* note 109, at 1246.

<sup>112</sup> *Report of the Seminar on the Legal Status of the Apartheid Regime in South Africa and Other Legal Aspects of the Struggle Against Apartheid*, UN Doc. A/AC.115/L.616 (1994)

binding on the Republic under this Constitution, unless provided otherwise by an Act of Parliament<sup>113</sup>

In short, revolution is considered an implied cause for the termination of odious debt; there is no need for a change of the identity of the state. Revolution is an emergency situation that affects the will of one of the contracting parties. The termination of treaties according to revolutionary conditions is based on two criteria: “a radical change in national policies and identity, and the lack of "legal continuity" between the old and the revolutionary regimes usually accompanying such policy upheavals.”<sup>114</sup> The legal discontinuity occurs when there is a change of the powers of the state.

The Next chapter looks at the legal grounds to cancel odious debt based on international law. The chapter is divided into three parts: The Vienna Convention on the Law of Treaties (1969), the peace treaties, particularly the Versailles Treaty (1919) and the peace treaty between France and Italy, and the general principles of international law.

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<sup>113</sup> ZA. *Const. art.231(1)*.

<sup>114</sup> *Id.*

### III. Legal Grounds to Cancel Odious Debts

This chapter explores the normative basis for repudiating odious debts in international law. The parties to a contract are bound by it according to the principle of *pacta sunt servanda*; this international principle contradicts the odious debts theory. Accordingly, it is important to determine the legal basis that could justify repudiating odious debts. Scholars of international law depend on Article 38 of the International Court of Justice to determine the sources of international law. They are four sources:

- a. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. International custom, as evidence of a general practice accepted as law;
- c. The general principles of law recognized by civilized nations;
- d. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.<sup>115</sup>

Treaties are the agreements concluded by sovereign states and may use different names such as; protocol, agreement, or charter.<sup>116</sup> Article 2 of the Vienna Convention on the Law of Treaties defines a treaty as any “agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”<sup>117</sup>

The parties to a treaty are bound by it according to the principle of *pacta sunt servanda*. However, the principle of *pacta sunt servanda* is not absolute. *pacta sunt servanda* does not mean such unduly rigid and formal principle that a state should abide by in all circumstances regardless of the contract content, and no matter how severely circumstances have changed. The principle of *pacta sunt servanda* is not absolute whenever the existence of a severe threat to the existence of the state and its performance. The change in circumstances and conditions gives the state a right to review its contractual.<sup>118</sup>

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<sup>115</sup> The International Court of Justice, art. 38, 3 Bevens 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215 (1945).

<sup>116</sup> All Babatunde Ahmad, *Ratification And Domestication Of Treaties: The Role Of The Legislature* 2 (The International Conference Centre Abuja, 2013).

<sup>117</sup> Vienna Convention on the Law of Treaties art. 2, May 23, 1969, 1155 U.N.T.S. 331.

<sup>118</sup> Jason Webb Yackee, *Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality*, 5 FORDHAM INT'L L. J. 1550, 1570 (2008).

It is wrong to suppose that *pacta sunt servanda* must apply *tout court* in all cases or in none. No mature law of contract is absolute, and few principles of law are to be understood without qualification. The undoubted fact that there exist cases where a State is entitled to change a contractual relationship with an alien does not mean that the principle *pacta sunt servanda* is altogether inapplicable to State contracts.<sup>119</sup>

On the other hand, treaties require host states to accord fair and equitable treatment to the other contracting state. For instance the Abs-Shawcross Draft Convention on Investments Abroad (Abs and Shawcross, 1960) and the Draft Convention on the Protection of Foreign Property (the OECD Draft Convention) proposed by the Organisation for Economic Co-operation and Development (OECD) in 1967 (OECD, 1967) provide for fair and equitable treatment as the basic protection for foreign investors.<sup>120</sup> It is difficult to reduce the words fair and equitable treatment to a precise statement of all legal obligations. They grant considerable discretion to tribunals to review the fairness and equity of government actions in light of all facts and circumstances of the case without necessarily deliberating on the requirements of either national or international law.<sup>121</sup>

The tribunal in *Tecnicas Medioambientales TECMED SA v United Mexican States* concluded that equitable treatment requires the contracting parties not to act against the basic expectation of the other party:

The fair and equitable provision of the agreement in the light of the demands of good faith required by international law requires the contracting parties to the agreement to accord a treatment to foreign investment that does not go against the basic expectation on the basis of which the foreign investor decided to make the investment.<sup>122</sup>

In order to qualify for protection, the investor's expectation must be reasonable be based on the conduct of the state and reliance by the investor in making the investment. In

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<sup>119</sup> R.Y.Jennings, *State Contracts in International Law*, 37 BRIT. Y.B. INT'L L. 156, 177 (1961).

<sup>120</sup> *Fair And Equitable Treatment: Unctad Series On Issues In International Investment Agreements* 15, UNCTAD/ITE/IIT/11, Vol. 3 (United Nations Conference on Trade and Development Discussion Paper No.185, July 1999).

<sup>121</sup> ALAN REDFERN & MARTIN HUNTER, *INTERNATIONAL COMMERCIAL ARBITRATION* 125, (Sweet & Maxwell, Oxford University Press, 2004).

<sup>122</sup> *Id.*

determining the fair expectation of the other party the tribunal In *LG&E Energy Corp.v Argentina* held that fair expectation of the contracting parties must be achieved:

The investor's fair expectation have the following characteristics: they are based on the conditions offered by the host state at the time of the investment; they may not be established unilaterally by one of the parties; they must exist and be enforceable by law; in the event of infringement by the host state, a duty to compensate the investor for damages arises except for those caused in the event of state of necessity<sup>123</sup>

Fair expectation is based on the moral and legal standards that contracts must be respected. There is a duty to respect the legitimate expectation of the other party. The parties to the contractual relationship are barred from taking any action that would affect the legitimate expectations of the other party. To improve the investment process in any country, there must be legal protection for other countries and their investors.

The second source of international law is customary international law. Most of the rules of international law are customary rules that are codified later in the framework of international treaties. Customary rules to be formed, "not only must the acts concerned amount to a settled practice, but they must be accompanied by the *opinio juris* sive necessitat."<sup>124</sup> Either the states taking such action or other states in a reaction to it, must have behaved in a manner that their conduct is sufficiently observable. Scholars of international law establish custom as a source of international law on two pillars; there must be a widespread and uniform practice of nations, and an engagement in the practice out of a sense of legal obligation.<sup>125</sup>

As mentioned above, according to Article 38 of the Statute of the International Court of Justice, the general principles of law is one of the primary sources of international law. Those principles are common to all legal systems. There are different examples of those principles such as, the principle of enforcing contracts or commitments in good faith, the

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<sup>123</sup> LG & E INTERNATIONAL INC. v ARGENTINE REPUBLIC, ICSID Case No. ARB/02/1,3 October 2006.

<sup>124</sup> Nicaragua v United States of America, para. 207 , ICJ Rep 14 (1986).

<sup>125</sup> Jack L. Goldsmith & Eric A. Posner, *A THEORY of CUSTOMARY INTERNATIONAL LAW*, 1998 Chi. J. of Int'l L. 1, 5 (1998).

principle of responsibility in the event of a breach in obligations, the principle of non-abuse of the right, and the principle of the invalidity of legal acts to the lack of the will.<sup>126</sup>

In addition, judicial decision and juristic writings are a source of international law. The decisions of international and municipal courts and the publications of academics can be referred to as a means of recognizing the law established in other sources. Courts and tribunals can refer to their past decisions and advisory opinions to support their explanation of a present case. Moreover, the scholarly works of prominent thinkers are essential in developing the rules that are provided for in other sources.

### **A. The Legal Basis for Repudiating Odious Debts in the Law of Treaties**

The Vienna Convention on the Law of Treaties establishes general rules to govern all international treaties. It also codifies the reasons and the legal basis for the invalidating international agreements.

#### **1. General rules**

Each state has an international personality which presupposes its capability to bear international rights and obligations. Article 6 of the Vienna Convention on the Law of the Treaties affirms that “Every State possesses capacity to conclude treaties.”<sup>127</sup> A state must express its free consent to be bound by the treaty. The capacity to conclude treaties is an essential attributes of states. Once a territorial entity is recognized as a state, it essentially implies an acceptance by the entire community of states of its ability to conclude treaties.<sup>128</sup>

The consent of the state can be shown in various manners. According to article 11 of the VCLT “The consent of a state to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.”<sup>129</sup> There are no required forms to express

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<sup>126</sup> Christina Voigt, *The Role Of General Principles In International Law And Their Relationship To Treaty Law* 6, [http://www.retfaerd.org/gamle\\_pdf/2008/2/Retfaerd\\_121\\_2008\\_2\\_s3\\_25.pdf](http://www.retfaerd.org/gamle_pdf/2008/2/Retfaerd_121_2008_2_s3_25.pdf).

<sup>127</sup> The Vienna Convention on the Law of Treaties, *supra* note 117, at art. 6.

<sup>128</sup> BIN CHENG, *INTRODUCTION TO SUBJECTS OF INTERNATIONAL LAW IN M BEDJAOUI (ED) INTERNATIONAL LAW* 23 (Martinus Nijhoff Publishers 1991).

<sup>129</sup> The Vienna Convention on the Law of Treaties, *supra* note 117, at art. 11.



consent; a state can express its consent in any form. States can freely express consent to conclude treaties as long as they respect preemptory norms of international law.<sup>130</sup>

Parties must observe their agreements. Article 26 of the Vienna Convention on the Law of Treaties refers to one of the most essential legal bases for commitment to agreements. Article 26 of VCLT provides that “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”<sup>131</sup> *Pacta sunt servanda* is the key element for observing agreements in international law. It creates an obligation on a state to follow what it signed.<sup>132</sup> According to the same article, the parties should not only abide by the provisions of the treaty, but also implement its provisions in good faith. For settling disputes arising between state parties, there must be a determination as to whether the parties acted in good faith or not. The ICJ interprets Article 26 of the Vienna Convention: “[t]he purpose of the Treaty, and the intentions of the [P]arties in concluding it ... should prevail over its literal application. The principle of good faith obliges the [P]arties to apply it in a reasonable way and in such a manner that its purpose can be realized.”<sup>133</sup>

Good faith is used in a variety of contexts, and its meaning can be understood from various perspectives. Good faith can be achieved under the following conditions; "honesty in belief or purpose, absence of intent to defraud or to seek unconscionable advantage, and in a general approach it denotes faithfulness to one's duty or obligation or observance of reasonable commercial standards of fair dealing in a given trade or business."<sup>134</sup> O'Connor proposes that the principle of good faith is of a fundamental importance that must be achieved:

The principle of good faith in international law is a fundamental principle from which the rule *Pacta Sunt Servanda* and other legal rules distinctively and directly relate to honesty, fairness and reasonableness are derived, and the application of these rules is determined at any particular time by the compelling standards of

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<sup>130</sup> Alexandru Bolintineanu, *Expression of Consent to Be Bound By a Treaty in the Light of the 1969 Vienna Convention*, 68 Am. J. of Int'l L. 672, 678 (1974).

<sup>131</sup> The Vienna Convention on the Law of Treaties, *supra* note 34, at art. 26.

<sup>132</sup> Yenjong H. Ngangjoh, *Pacta Sunt Servanda And Complaints In The Wto Dispute Settlement*. 2 Manchester J. Int'l Econ. L. 75 2004.

<sup>133</sup> Hungary v Slovakia, Judgment, Merits, ICJ GL No 92, 25 th September 1997.

<sup>134</sup> Ngangjoh, *supra* note 132, at 78.

honesty, fairness and reasonableness prevailing in the international community at that time.<sup>135</sup>

Good faith is evidence that states must respect each other's sincerity and without any kind of deception. Each party to the contract is committed to fulfilling his obligations without causing any frustration to the terms of the contract. A state must implement its obligation honestly and with integrity. The term honestly, which entails an obligation be performed by a state, is ambiguous, yet this ambiguity can be removed by tracing government measures designed to implement those commitments and whether they are compatible with international law or not.

The principle *pacta sunt servanda* does not stop at the limit of the contract parties to the treaty, but beyond to any other third party within the limits of their rights and duties:

*Pacta sunt servanda* was emphasized in both the cases of the German unification and the Yugoslav dissolution in agreement with the Vienna Treaties. In the case of the German unification, debts and assets transferred to the federal government in accordance with *pacta sunt servanda* and the Unification Treaty. During the Yugoslav dissolution, the Bandinter Commission ruled that debts and assets must be distributed equally following bona fide negotiations between the successor states and their creditors<sup>136</sup>

A manifest violation of internal law is recognized if it would be objectively evident to any state:

A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.<sup>137</sup>

Each state has the right to determine the organs and procedures by which its consent to be bound by a treaty is expressed. On the other side, there is a risk to the stability of international relations if they rely only on the domestic law of the state. Hence, when

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<sup>135</sup> Andrew D Mitchell, *Good Faith In Wto Dispute Settlement*, 7 Melbourne U. L. Rev.1, 15 (2006).

<sup>136</sup> Kevin H. Anderson, *International Law and State Succession: A Solution to the Iraqi Debt Crisis?*, 2 Utah L. Rev. 401, 405 (2005).

<sup>137</sup> The Vienna Convention on the Law of Treaties, *supra* note 117, at art. 46.

there is a manifest violation of the internal law of the state, this violation must be taken into consideration to terminate the treaty.<sup>138</sup>

## 2. Manifest Violation

The state can reverse the consent to be bound by the treaty if the violation is manifest and has fundamental importance. This is based on the fact that good faith refers to both the justification for and the limits of the principle of ostensible authority.<sup>139</sup> If the violation is manifest, the other party has to know that the representative of the state acted wrongfully. The other contracting party cannot claim that it acted on good faith according to the proper authority of the representative, since the violation was against fundamental importance and manifest.<sup>140</sup>

The rules which the violation invokes must be of fundamental importance. Violations affect minor legal principles and administrative rules are not considered of fundamental importance.<sup>141</sup> There must be a violation of fundamental rules such as constitutional provisions.<sup>142</sup> An example of fundamental importance was set by the ICJ court in the case of *Land and Maritime Boundary Cameroon v. Nigeria*. The court held that “[t]he rules concerning the authority to sign treaties for a State are constitutional rules of fundamental importance.”<sup>143</sup> This statement does not mean that each provision relating to the competence of concluding treaties is of fundamental importance. The rule concerning the authority to sign treaties that was invoked by Nigeria qualifies as a constitutional rule in the substantive matter and is of fundamental importance since it invokes the right of the government to be involved in the conclusion of treaties by the head of State.<sup>144</sup>

In addition to the violation against a fundamental principle, it must be manifest.<sup>145</sup> The state must act in good faith. The principle’s good faith allows the state to invoke the

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<sup>138</sup> MARK EUGEN VILLIGER, 1 COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 1, 588 (2008 ed. BRILL 2009).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> OLIVER DÖRR & KIRSTEN SCHMALENBACH, VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 789 (Berlin [etc.]: Springer, 2012).

<sup>142</sup> *Id.*

<sup>143</sup> *Nigeria vs. Cameroon*, ICJ Rep 303, para. 265 (2002).

<sup>144</sup> Gregory H. Fox, *Constitutional Violations And The Validity Of Treaties: Will Iraq Give Lawful Consent To A Status Of Forces Agreement?*, (Wayne State University Law School Research, 8, 14 (August 4, 2008).

<sup>145</sup> Supreme Court (Bangladesh) *Kazi Mukhlesur Rahman v Bangladesh* 70 ILR 37, paras 31–39 (1974);

violation committed against its internal law. Good faith is used in a variety of contexts, and its meaning can be understood from different perspectives. Hence, when the other contracting state ought to know the violation, it is considered manifest. For instance, the violation is considered manifest if the representative of the state lacks the authority. In that case, the lack of the authority must easily be known to the other party.<sup>146</sup>

### 3. Fraud

Fraud is another matter that affects the consent of the state and can lead to the termination of a treaty; it is the antithesis of good faith.<sup>147</sup> Article 49 of the VCLT provides that “If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke fraud as invalidating its consent to be bound by the treaty.”<sup>148</sup> a state contracting under fraud with another country, has the right to get rid of its obligations arising from the contract. Fraud not only affects the consent, but the agreement itself. It destroys the foundation of trust between the contracting parties.<sup>149</sup> The condition of fraud, to be sufficient for invalidating consent, is different from one national law to another, but the general principle is that fraud is able ground accepted for invalidating agreements by the international community.<sup>150</sup>

A treaty is void if there is a fraudulent behavior by one state that influenced the other country to conclude it. A causal relationship must exist between the fraudulent conduct and conclusion of contract. The conduct is fraudulent “if it is intended to lead the other party into error and thereby gain an advantage to the detriment of the other party.”<sup>151</sup> Two elements must be achieved to consider a conduct fraudulent: intent by the defrauding state, and an error from the defrauded state. A state commits a fraud when it leads another state into an error that forces the latter to conclude the agreement. The intent is the key element in the fraud. Fraud which results in a contracting error occurs through

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Supreme Court (India) In re The Berubari Union and Exchange of Enclaves 53 ILR 181, 203–204 (1960).

<sup>146</sup> VILLIGER, *supra* note 138, at 602.

<sup>147</sup> BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, 375 (Cambridge University press 2006) (1953).

<sup>148</sup> The Vienna Convention on the Law of Treaties, *supra* note 117, at art. 49.

<sup>149</sup> Renata Szafarz, Succession Of States In Respect Of Treaties In Contemporary International Law 12, Polish Y.B. Int'l L. 119, 120 (1983).

<sup>150</sup> *Id.*

<sup>151</sup> M FITZMAURICE & O ELIAS, CONTEMPORARY ISSUES OF THE LAW OF TREATIES 36 (Utrecht: Eleven International Publishing, 2005).

misrepresentation. Misrepresentation is an impression created in mind of the representative of the defrauded state not in accord with reality whether explicitly or implicitly. Concealment or non-disclosure of information is one of the elements of misrepresentation. Although there is no duty to provide all information, the principle of good faith requires parties to provide all of the information they have.<sup>152</sup>

Fraud and misrepresentation should not only exist at the end of the misrepresentation of opinion or law, but extent to the misrepresentation of fact. Article 49 of the VCLT does not explicitly state the reasons for the invalidity of the treaty in the case of misrepresentation of facts. The misrepresentation of the opinion or the law requires, of course, misrepresentation of facts. Article 49 does not only include the freedom to consent, but goes beyond to a sanction for bad faith committed by a defrauding party. Intention is the main element to prove fraud. Innocent misrepresentation or negligence does not constitute fraud even if it leads the other party to consent to the agreement.<sup>153</sup>

Fraud does not only affect the mutual consent of the contracting parties, but also destroys the entire relationship and the mutual confidence between the contracting parties. If a fraudulent conduct affects a clause in the agreement, the defrauded state can choose either invalidating the clause or the entire agreement. Here, the defrauding party is not entitled to demand the re-establishment of the status quo ante. This is due to the full bad faith through using fraudulent methods to convince the other party to agree.<sup>154</sup>

#### **4. Corruption**

Beside the fraud that may occur and lead to invalidating treaties, the corruption of a state's representative is a major reason for invalidating treaties. Article 50 of the VCLT provides that "If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty."<sup>155</sup> The main purpose of the article is to maintain the freedom of consent of the contracting state in the case of corruption of its representative. Contractual

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> VILLIGER, *supra* note 138, at 610.

<sup>155</sup> The Vienna Convention on the Law of Treaties, *supra* note 117, at art. 50.

obligations expressed by a state representative through corruption do not represent the true will of the state. In fact, the representative of the State reflects the will of the corrupting state not the will of his state.

There are many forms of corruption. Today, in the international community, corruption may be based on the abuse or entrusted power of a public officer for private profit. Also, corruption may be expressed in a promise, offer or provision of favors and gifts presented to the representative of the other party to obtain personal benefits in return. Corruption represented in that article is that corruption that leads state representatives to seek approval to conclude the agreement for personal profit, which he/she would otherwise not have given. A direct benefit is not required; an indirect benefit is also considered corruption.<sup>156</sup> There is no required form of the gain of the benefit. The gain may be pecuniary or non-pecuniary. The promise of a particular position for the representative of the state is a kind of corruption. On the other hand, mini gifts to maintain good relations between the countries do not live up to the level of corruption.<sup>157</sup> There must be a direct relation between the profit gained and the conclusion of the agreement. Intention to influence the will of the representative of the State is the key element for proving corruption.<sup>158</sup>

There must be a causal relationship between the corruption of the representative and the expression of consent. It does not require that the impact of corruption affect any clause of the contract to render the agreement voidable.<sup>159</sup> The mere existence of corruption of the representative of the state makes the agreement voidable.<sup>160</sup>

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<sup>156</sup> DÖRR, *supra* note 141, at 851.

<sup>157</sup> *Id.* at 852.

<sup>158</sup> VILLIGER, *supra* note 138, at 611.

<sup>159</sup> ADAMS, *supra* note 57, at 163. "The World Bank and Inter-American Development Bank have also turned deaf ears to tales of corruption involving an Argentine project to which they have both lent millions of dollars. The Yacyretá hydro dam on the Paraná River between Argentina and Paraguay, one of the largest public works projects under way in the world, was conceived under the government of Juan Perón. But only under the military government of the late 1970s did money start to really flow. Within a few years, more than \$1 billion had been spent without land being broken for the main project. Most of the money went to build two towns to house 7,000 workers and for other preliminary work. The dam is now expected to cost \$12 billion, 800 per cent of its original cost estimate. Although the Inter-American Development Bank and the World Bank sometimes raised questions about accounting and record-keeping procedures, they eschewed extensive oversight. Nor was the Inter-American Bank deterred in 1990 when, just minutes before its officials were about to sign a new \$250 million loan to the dam, Argentinean President Menem called for the dam to be canceled, saying, "Here's a monument to corruption."; Mader,

## 5. Coercion

Corruption of the representative of the State is not the only reason for invalidating an agreement; the coercion of the state representative is a further reason to invalidate the agreement. An agreement concluded under coercion or a threat of state representative is void. Article 51 of the VCLT provides that “The expression of a State’s consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.”<sup>161</sup> There is no free will under coercion; the representative of the state is an instrument in the hand of the coercing state and in expressing its will. Coercion may be defined as “the procurement of consent through acts or threats, which induce such fear in the representative, which he or she feels compelled to express the represented State’s consent to be bound by the treaty in a manner which he or she would not have done without such compulsion.”<sup>162</sup> Hence, there must be an act of coercion directed against the representative of the state. In most cases, the coercion is mental not physical, yet both of them are accepted as a threat against the representative.<sup>163</sup>

Any form of objection which does not include the use of force or threat of use is not considered coercion. The use of veto in any form does not mean coercion against the other party. This can be seen in the the Dubai-Sharjah Border Arbitration:

Of course, this does not mean that some pressure may not have been brought to bear upon the Rulers in order to secure their consent to the delimitations of the boundaries. Every kind of international negotiation is subject to influences of this kind. Mere influences and pressures cannot be equated with the concept of coercion as it is known in international law.<sup>164</sup>

The coercion must be against the personality of the representative. This happens if the coercion is against one’s life, physical well-being or reputation. Coercion does not require being directly against the representative of the State. Any coercion against a person closely related to the representative of the State such as coercion against a

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*supra* note 18, at 65. “The legal effects of corruption are multiple and recognized under general principles of law cited above, in particular with reference to article 50 of the Vienna Convention.”

<sup>160</sup> *Id.*

<sup>161</sup> The Vienna Convention on the Law of Treaties, *supra* note 117, at art. 51.

<sup>162</sup> VILLIGER, *supra* note 138, at 625.

<sup>163</sup> *Id.*

<sup>164</sup> Dubai–Sharjah Border Arbitration 91 ILR 543, 569 (1981).

member of his family is sufficient. In all cases there must be a causal relationship between the act of coercion and the signing of the agreement. The consent of the state after the coercion of its representative is void. The invalidity affects the whole agreement not only specific clauses even if the coercion is against specific clauses.<sup>165</sup>

Coercion against the representative as an official is a coercion against the state. Furthermore, coercion happening after the signing of a treaty is coercion against the state. Any coercion exists in a ratification process or any process after signing the agreement is coercion against the state. Article 52 of the VCLT provides that “A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.”<sup>166</sup> The treaty is void if there is a threat or use of force against a state party to that treaty. The nonexistence of free consent from an organ of the state or the representative of the state as an official person leads to the invalidity of the treaty. The entire treaty is void even if the coercion is for a certain cause. The oppressed state can claim the invalidity of the entire state if there is a threat or use of force against any of its organs. This can be seen in *Lockerbie and Libya* citing of art 52 of the Vienna Convention:

The principle of the prohibition of force set out, inter alia, in Article 52 of the 1969 Vienna Convention on the Law of Treaties concerning the conclusion of treaties, and therefore force with respect to the conclusion of treaties, applies equally to their performance. If, as Article 26 of this Convention stipulates, ‘[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith’, this provision – Article 26 – is a fortiori violated when a States Parties to a convention resorts to threats in order to force the other contracting party to renounce its rights under that Convention.<sup>167</sup>

There must be a causal relationship between force and the conclusion of a treaty. Unlawful force is required to invalidate the agreement. A treaty between Germany and Czechoslovak was void as a result of the use of force the Dutch District Court of The Hague stated in 1955: “The German-Czechoslovakia Nationality Treaty was invalid because it was concluded under clear and unlawful duress – the effect of which

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<sup>165</sup> VILLIGER, *supra* note 138, at 626.

<sup>166</sup> The Vienna Convention on the Law of Treaties, *supra* note 117, at art. 52.

<sup>167</sup> ICJ Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (*Libya v United States*) (Preliminary Objections) Verbatim Record, CR 1997/20, 17 October 1997, 45.



Czechoslovakia could not escape – exercised by Germany.”<sup>168</sup> Accordingly, there must be coercion and a use of force to conclude the treaty. This use of force must be clear and the treating party must intend to use such force to conclude the treaty. There is no degree of force in international relations; a powerful state can impact another state with any act that affects its consent to conclude a treaty.<sup>169</sup>

There are multiple ways for the use of force by the big power; the mere threat of force by the major powers against a small state may be sufficient in itself to consider the occurrence of coercion on the will of the state. In international relations, just sending threatening messages from a major state or use force against smallest countries is enough for the occurrence of coercion. In all cases, there must be proof of coercive intent against the consent of the state.

## **B. Peace treaties**

Although the Vienna Convention on Succession of States in respect of State Property, Archives and Debts has not yet come into force, it is considered a source for the determination of the debt arising from the state succession. Article 8 of the treaty defines state property as “property, rights and interests which, at the date of the succession of States, were, according to the internal law of the Predecessor State, owned by that State.”<sup>170</sup> The purpose of that article is not merely to identify state property, but also to set standards for the properties of the state after succession. Each case difference from one to another and the circumstances of the case determines the property of the predecessor state. International customary law does not specify the meaning of the property of the predecessor state. The Franco-Italian Conciliation Commission<sup>171</sup> provided that, "customary international law has not established any autonomous criterion

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<sup>168</sup> Benedetto Conforti & Angelo Lobelia, *Invalidity And Termination Of Treaties: The Role Of National Courts* 51 (University of Rome 1 EJIL 1990).

<sup>169</sup> DÖRR, *supra* note 141, at 862.

<sup>170</sup> Vienna Convention on Succession of States in respect of State Property, Archives and Debts, *supra* note 37, at art. 8.

<sup>171</sup> Anglo-Italian (1948) and Italo-United States (1950) Conciliation Commissions have been constituted, but, apart from drawing up their Rules of Procedure, they remained practically inactive. In 1951, the Italo-Netherlands Commission was established. This Commission, having drawn up its Rules of Procedure, hopes to enter upon its duties shortly. Franco-Italian Conciliation Commission, verdict of 26 September 1964.

for determining what constitutes State property."<sup>172</sup> International treaty law has consequently taken precautions against this inevitable deficiency and provided a special definition suitable to each case dealt with.<sup>173</sup> Accordingly, the internal law of the predecessor state is used to determine the property of the successor state. To prevent the control of the predecessor state of the property of the successor state, the latter has the right of the position and concept of the property according to the limit of international law. The successor state considered here is an independent state with total sovereignty not a successor state.

State property is passed from the predecessor state to the successor state with the extension of all rights and duties. The successor state exercises all rights over the property within the territory of the new state. The Treaty of Versailles expresses an idea about state property in an article which specifies that "Powers to which German territory is ceded shall acquire all property and possessions situated therein belonging to the German Empire or to the German States."<sup>174</sup> The date of passing state property is determined from the day of succession unless otherwise agreed upon. The date of succession means according to Article 2 of the convention "the date upon which the successor state replaced the predecessor state in the responsibility for the international relations of the territory to which the succession of States relates." State debt is an issue transferred according to the succession of the state. Article 33 of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts defined state debt as "any financial obligation of a predecessor State arising in conformity with international law towards another State, an international organization or any other subject of international law."<sup>175</sup>

The above is the main basis for the transfer of debts, obligations and rights to the successor states. However, in the peace treaties specifically, successor states may be

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<sup>172</sup> Mohammed Bedjaoui , Third Report On Succession Of States In Respect Of Matters Other Than Treaties - Draft Articles With Commentaries On Succession To Public Property 134, Vol 2, UN/A/CN.4/226.

<sup>173</sup> *Id.*

<sup>174</sup> The Versailles Treaty, art. 256, 225 Parry 188; 2 Bevens 235; 13 AJIL Supp. 151, 385 (1919).

<sup>175</sup> Vienna Convention on Succession of States in respect of State Property, Archives and Debts, *Supra* note 37, at art. 33.

exempted from debts concluded by predecessor states. War debts are definitely one of the categories of odious debts. Peace treaties that have been approved after World War I expanded the concept of war debts. This expansion includes all debts incurred by the states during the war, as well as those debts contracted during the war. Expansion here was inevitable in order to exempt the successor states from the debt that was incurred during the war. Under the Versailles Treaty, “Denmark which had succeeded to Schleswig after the separation of that territory from Germany had been exempted from the war debts of the German Empire, although it had remained neutral during the 1914-1918 war.”<sup>176</sup> Article 255 states exceptions to the main principle, ruling the transfer of public debts of the predecessor state. It provides that

- (1) As an exception to the above provision and inasmuch as in 1871 Germany refused to undertake any portion of the burden of the French debt, France shall be, in respect of Alsace-Lorraine, exempt from any payment under Article 254.
- (2) In the case of Poland that portion of the debt which, in the opinion of the Reparation Commission, is attributable to the measures taken by the German and Prussian Governments for the German colonisation of Poland shall be excluded from the apportionment to be made under Article 254.
- (3) In the case of all ceded territories other than Alsace- Lorraine, that portion of the debt of the German Empire or German States which, in the opinion of the Reparation Commission, represents expenditure by the Governments of the German Empire or States upon the Government properties referred to in Article 256 shall be excluded from the apportionment to be made under Article 254<sup>177</sup>

Hence, any debt concluded for the war or subjugation is not mandatory for the successor state. The Versailles Treaty exempted Poland from debt contracted by Germany for the purpose of economic subjugation of Poles. The treaty exempted Poland because Germany contracted the loan for exercising its power over Poland as a dominion.

The extension of the meaning of war debt extends to World War II. The Peace treaty between France and Italy provided that Ethiopia does not have to bear any part of the debt undertaken by Italy during the period of occupation in order to increase its colonial control. The colonial powers in that period contracted with the World Bank for huge

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<sup>176</sup> MENON, *supra* note 45, at 116.

<sup>177</sup> The Versailles Treaty, *supra* note 175, at art. 255.

loans to increase their colonial control.<sup>178</sup> The World Bank generously lends those countries to increase their colonial abilities. The lending of such money is to ensure the continuation of colonial policy and of course without the consent of the colonized states.

The Italian Treaty provides:

The Government of the Successor State shall be exempt from the payment of the Italian public debt, but will assume the obligations of the Italian State towards holders who continue to reside in the ceded territory, or who, being juridical persons, retain their *siège* social or principal place of business there, in so far as these obligations correspond to that portion of this debt which has been issued prior to June 10, 1940, and is attributable to public works and civil administrative services of benefit to the said territory but not attributable directly or indirectly to military purposes.<sup>179</sup>

In short, debt concluded for the war or subjugation is not obligatory for the successor state. The successor state is exempt from the payment of such debt.

### **C. The Normative Basis of the Doctrine of Odious Debts in International Human Rights Law**

Mohammed Bedjaoui defines odious debt as “any debt incurred for uses that contradict contemporary international law, particularly the principles of international law incorporated in the UN Charter.” Those principles of international law are such as those included in the Charter of the United Nations, the Universal Declaration of Human Rights, and the two complementing covenants on civil and political rights and economic, social and cultural rights of 1966, as well the peremptory norms of international law.

Human rights must be respected, and most treaties provide for the protection of human rights. The Universal Declaration of Human Rights<sup>180</sup> as an international instrument defines the basic human rights. Article 28 provides that “everyone is entitled to a social and international order in which the rights and freedoms set forth in this declaration cannot be to be fully realized...the elimination of unjust systems is a prerequisite for human rights and fundamental freedoms to be realized.”<sup>181</sup> There must be

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<sup>178</sup> Nana Adu-Pipim Boaduo FRC, *Africa's Political, Industrial and Economic Development Dilemma in the Contemporary Era of the African Union*, 2THE J. OF PAN AFR. STUD. 93, 96 (2008).

<sup>179</sup> Treaty of Peace with Italy, Signed at Paris, (10 February 1947), available at <https://treaties.un.org/doc/Publication/UNTS/Volume%2049/v49.pdf>.

<sup>180</sup> Universal Declaration of Human Rights, art. 28 G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

<sup>181</sup> Topicality of the odious debt doctrine, available at <http://cadtm.org/Topicality-of-the-odious-debt>.

a protection of all forms of human rights. One of these protections is to guard citizens from odious regimes. Supporting citizens to revolt and separate from the odious regime is an international duty. It is vital to end all odious regimes.

Toppling the regime alone is not enough, but must also cancel all illicit and odious debt originating from the rule of this regime. The International Covenant on Economic, Social and Cultural Rights<sup>182</sup> provides that each state "undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."<sup>183</sup> These duties are universal, both in terms of ethical, and law, and cannot be subject to the loan contract, which is illegal. In short, the state has an obligation to save and protect human rights as an international obligation which prevails over its previous contractual duties signed by an odious regime.

#### **D. Odious Debts and International Public Policy**

A treaty which is against public policy is illegitimate and unenforceable. This treaty is unenforceable for both parties whether or not both or one of them are aware of such violation. The court in *Oom v Bruce* asserts that the insurance contract will be unenforceable for both parties because the insurance was concluded for the enemy after the declaration of the war. Although both parties were not aware at the time of concluding the contract, the war had been declared. Lord Ellenborough CJ said that "the plaintiffs had no knowledge of the commencement of hostilities by Russia, when they affected this insurance; and, therefore, no fault is imputable to them for entering into the contract; and there is no reason why they should not recover back the premiums which they have paid."<sup>184</sup>

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<sup>182</sup>International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

<sup>183</sup>*Id.*

<sup>184</sup>ILLEGALITY AND THE REVERSAL OF UNJUST ENRICHMENT, 64, [http://lawcommission.justice.gov.uk/docs/cp189\\_Illegality\\_Defence\\_Consultation.pdf](http://lawcommission.justice.gov.uk/docs/cp189_Illegality_Defence_Consultation.pdf).

The mere knowledge of one party that an illegal act will be committed is sufficient for nullification of the contract. In *Langton v Hughe*, a defendant sold the plaintiff goods with the knowledge of their use for making beer. Although there is a statute in the contract prohibiting beer making, the knowledge of the defendant that goods will be used in an illegal act is sufficient for not recovering the goods. There must be knowledge that there is illegal activity committed. Mere knowledge may be insufficient for uncovering the money or goods. The knowledge of the parties about illegal activities is subject to the discretion of the court. The innocent party should bring the contract to an end when he/she knows the existence of the offense even if part of the duty is completed. He/she can demand their rights on the part completed.

Any contract against public order should not gain legal support. Lord Mansfield in *Holman v Johnson* stated that

The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; *ex dolo malo non oritur actio*. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*.<sup>185</sup>

Odious debts violate international public policy. It is almost implausible for any court to deny that odious debt as a form of corruption contravenes international public policy. Judge Lagergren in ICC Case No. 1110 (1963) provided that "corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations."<sup>186</sup> Most legal systems distinguish between two

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<sup>185</sup> *Holman v Johnson*, 1 COWP. 341, 98 ENG. REP. 1120.

<sup>186</sup> Luis Alberto González García, *Corruption, Money Laundering And International Arbitration*, 1 Latin Am. J. of Int'l Trade L. 509, 526 (2013).

types of contracts: those procured by corruption, and those that provide the basis for corruption. The first contract is considered voidable, and the last is a null and void contract. The contract that provides the basis for corruption is null and void because there is an intention to commit corrupt acts. The Paris Court of Appeal in *Westman* recognized that "[a] contract having as its aim and object a traffic in influence through the payment of bribes is... contrary to French international public policy as well as to the ethics of international commerce as understood by the large majority of States in the international community."<sup>187</sup> It is commonly known that odious debts are committed intentionally against the benefit of the citizens and with the knowledge of both parties. Accordingly, there is no need for a step by any party to consider the contract null and void. The court has the right not to enforce the contract or provide for any contractual remedies.<sup>188</sup> In short, any breach of international public policy voids a contract.

#### **IV. Conclusion**

This research reviews various aspects of the doctrine of odious debts. The purpose is to draw attention to key areas of disagreement about the status of the doctrine, particularly

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<sup>187</sup>*Id.* at 526.

<sup>188</sup>*Id.*

the definition, and the international legal grounds supporting such a definition. In another version of the scenario sketched at the outset of this article, the doctrine of odious debt is an exception to the rule of repayment. The development of the concept was influenced by the origins of scholarly treatment of odious debts by Sack, Feilchenfeld, Howse and Bedjaoui. Through a review of their opinions, the conclusion is that odious debts arise without the consent of the population, without benefit to them, and with the knowledge of the creditor. Scholars are aware that odious debt is not required to be apportioned after political transitions. Although, odious debt doctrine has difficulty being applied in government succession, there is a little authority for the doctrine's application in cases of government succession. There is no change in the identity of the state, but the change of the circumstances must be taken into consideration. The change in circumstances such as a revolution is sufficient to apply the doctrine of odious debt.

The sources of international law support the existence of such a doctrine. There are various international treaties relevant for the odious debt doctrine. Though, it should be noted that throughout history states have not openly acknowledged that they apply odious debt doctrine by name. The term odious debt is merely a label used to reflect a debt committed under three main conditions which are absence of benefit, consent, and creditor awareness of both to be an exception to the rule of repayment. Accordingly, this research focused on the Vienna Convention of the Law of Treaties and peace treaties as international grounds for cancelling odious debt. Although consent is the cornerstone of international relations, there are certain cases where a debt committed under consent is considered odious. If the violation is manifest, the other party must know that the representative of the state acted wrongfully. Moreover, general principles of law such as abuse of rights, equitable obligations and defenses, and violation of human rights and public policy show qualified promise as sources for an odious debt exception to the rule of repayment.

The final conclusion from all of this is that the doctrine of odious debt has a diverse pedigree, but supporters have based their claims on a considerable number of legal bases. It is hoped that this article has simplified the terms of the debate and highlighted remaining areas of difference. Whether the doctrine as conventionally considered or as



reaffirmed by various authors will ultimately be recognized in cases of state and government succession remains to be seen. The reality is that it is beyond any commentator's doubt that odious debts are morally odious.