

Odious Debt: Old and New

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In a sense, all debts are odious; that is, to use the dictionary definitions, “hateful, horrible, abhorrent and/or obnoxious.” Yet insofar as international economic law today is concerned, only a certain few debts can be considered “odious debts” in order to contest and perhaps eventually to repudiate them. In this paper, the concepts of odious debt and related international legal phenomena will be examined, in both historical and contemporary context, with a view of determining the role that denomination of certain debts as odious may play in the overall process of sovereign debt re-scheduling.

The paper begins with a brief description of the concept of odious debt. It then proceeds to assess other fundamental doctrines of international law which relate to the ultimate determination of some debts as odious. Once this basis has been established, the paper undertakes a brief historical survey of both the de facto and de jure invocation of odious debt as a rationale for renunciation of sovereign debt obligations, culminating with a quick tour of recent reconceptualizations of odious debt doctrines in connection with both Jubilee 2000 and the Iraqi debt incurred by Saddam Hussein’s regime.

Analysis of the International Law Issues

At international law, a successor government is liable for the financial obligations incurred by a prior regime. Changes in the government of a state do not usually alter previously existing rights and obligations.¹ Thus, as a general matter, successor governments must honor the debts incurred by predecessor regimes. Many new revolutionary regimes, on the other hand, have asserted both the longevity and wide acceptance of the principle that successor governments could renounce “odious debts” contracted by predecessor regimes. Having risen to power as a revolutionary regime, such polities characterize all financial obligations of previous reactionary governments as such “odious debts” and refuse to pay

The history and the development of the doctrines in this area--state succession--must be carefully analyzed in order to establish some benchmarks for assessing the international acceptance of this position. In considering the merits of the different claims, it must also be kept in mind that widely varying historical experience, both with international law and with foreign relations and trade, have had significant impact on the current stances not only of the United States but also of large groupings of nations such as the developed countries, on the one hand, and the developing, or third, world, on the other. Only a careful analysis of the present international legal doctrine which also takes into account the breadth of global culture underlying it will permit a proper understanding of the future direction of international law.

STATE SUCCESSION AND ODIIOUS DEBTS

One fairly typical case, involving a claim of repudiation of sovereign debt as odious was

¹ Jackson v. Peoples Republic of China, 550 F. Supp. at 872 (N.D. Ala. 1981).

the 1980s case, Jackson v. People's Republic of China.² In determining that the government of the PRC was liable to holders of the bonds, the district court in the Jackson default judgment briefly summarized its analysis of the international law of state succession. Citing only a single case³ decided over fifty years ago, the court announced that "[i]t is an established principle of international law that "[c]hanges in the government or the internal policy of a state do not as a rule affect its position in international law."⁴ Following that principle, the court simply deduced that the PRC government as the successor to the Imperial Chinese government was therefore the successor to the prior government's obligations and thus liable for the payments due on plaintiffs' bonds. The court summarily disposed of the issue in a single paragraph.⁵

A. *Theories of State Succession*

In fact, there does not appear to be any universal rule of international law with regard to state succession. Although there is considerable support for the position that a successor government should be liable for the obligations incurred by its predecessors,⁶ there is a competing minority argument that succession of one government severs it so completely from its predecessors that it has no responsibility for the acts and obligations of preceding governments.⁷ However, several nations whose governments came to power as a result of revolutionary activity

² *Id.*

³ Lehigh Valley R. Co. v. State of Russia, 21 F.2d 396, 401 (2d Cir. 1927) (Manton, J. opinion) (quoting Moore, Digest of International Law) [hereinafter cited as Moore]. The quoted passage from Moore, supra, states:

Changes in the government or the internal policy of a state do not as a rule affect its position in international law. A monarchy may be transformed into a republic, or a republic into a monarchy; absolute principles may be substituted for constitutional, or the reverse; but, though the government changes, the nation remains, with rights and obligations unimpaired.

Lehigh Valley R. Co. v. State of Russia, 21 F.2d 396, 401 (1927) (Manton, J. opinion).

⁴ Jackson, 550 F. Supp. at 872 (quoting Moore, supra note 38).

⁵ Id.

⁶ See, e.g., D. P. O'Connell, 1 State Succession in Municipal and International Law 4-14; 369-415 (2d ed. 1967) [hereinafter cited as O'Connell]; H. Wilkinson, The American Doctrine of State Succession 71-96 (1934) [hereinafter cited as Wilkinson]; E. Feilchenfeld, Public Debts and State Succession 623-642 (1931) [hereinafter cited as Feilchenfeld]. See also 2 Whiteman, Digest of International Law 810-811 (1963) (obligation of the successor state is to respect the acquired rights of the predecessor state) [hereinafter cited as Whiteman].

⁷ See, e.g., O'Connell, supra note xx, at 14-17; Wilkinson, supra note xx, at 71-96; Feilchenfeld, supra note xx, at 535-545. See generally, Hoeflich, Through a Glass Darkly: Reflections Upon the History of the International Law of Public Debt in Connection with State Succession, 1982 U. Ill. L. Forum 39, especially 60-65. See also Tinoco Case (Gr. Brit. v. Costa Rica), 18 Am. J. Int'l. L. 147 (1924) (Law of Nullities passed by restored Costa Rican government rendered oil grant concession granted by predecessor government invalid, but, with respect to debt owed by predecessor government to British bank, successor government ordered to assign interest in mortgage upon Tinoco estate to bank and bank to then deliver money owed to successor

have developed a legal theory between these two extreme views of international law. This intermediary view holds that revolutionary regimes may succeed to certain obligations of their predecessors but do not have any responsibility for so-called "odious debts," a term used to describe debts incurred in opposition to the revolution or for other oppressive purposes.⁸

The United States interpretation of international law places it clearly among the group of nations - most of them creditor countries - which upholds state succession to a predecessor's debts, no matter what the change of government. The interpretation of revolutionary regimes, such as the People's Republic of China (PRC),⁹ though borrowing some of the "odious debt" rhetoric of other countries, seems to adopt the most extreme non-succession theory in regard to external debts. Underlying these competing statements are certain equitable considerations that may furnish a common ground for explaining and reconciling their differences.

The principles evinced by those nations maintaining that successor governments inherit the obligations of their predecessors are most often discussed under the rubric of "acquired rights."¹⁰ International law imposes the relationship between the lender of money to sovereign borrowers (or, in this situation, the buyers of government-issued bonds) to the successors of such

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See O'Connell, *supra* note x, at 458-462; Wilkinson, *supra* note x, at 83-86; Feilchenfeld, [cite], at 337-342; 450-452; 701-705; 862. The commentators generally divide "odious debts" into two types, hostile debts and war debts. Hostile debts are those debts imposed upon a community against its will, without consent and adverse to the community's best interests. The leading example of a hostile debt is the Cuban debt, which caused controversy between the United States and Spain in 1898. The American government vigorously took the position that the debts resulted from the actions of the Spanish government for its own colonial ambitions and that Cuba had no say in these actions. The then-prevailing American political philosophy did not acknowledge that incurring such a debt might actually be beneficial; these debts were considered repugnant. War debts are those debts used to finance aggressive campaigns against other states or the successor state. A war debt of this type was incurred following the annexation of the Boer Republics by Great Britain in 1900. The British government refused to repay notes issued as security for loans, the proceeds of which were used to wage war. As to both kinds of debts, the theory is that such debts were raised for purposes other than the needs and interests of the state and that since there was thus no benefit from the indebtedness incurred the successor has no obligation to repay such debts.

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See *Aide Memoire* [of U.S. Dep't of State in *Jackson* - cite]. The PRC has taken note of United States invocation of "odious debt" rationales for refusing to honor predecessor regime obligations in several instances. See, e.g. Hsu, *The Invalidity of the Default Judgment in Jackson v. People's Republic of China*, *supra* note 21, at 575-576 (discussing Cuban and Texas debt).

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O'Connell, *supra* note xx, at 237-268. Discussing the working of the theory to protect a lender's interest in repayment where the predecessor government to which he lent has been succeeded, O'Connell writes:

What is always 'inherited' is the state of facts which the now extinguished legal relationship has brought about; and the equitable interest which the lender has in this factual situation is as much an 'acquired right,' 'property right' or 'vested right' as the interest of a titleholder in tangible property. The obligation of the successor state is to respect this interest. It is not an obligation derived from the predecessor, but one imposed *ab exteriore* by international law. It rises when the successor, through its own action in extending its sovereignty, becomes competent to destroy the titleholder's interest. The general principle in which this obligation is embodied, and which underlies the whole problem of state succession, is the principle that acquired rights must be respected.

O'Connell, *supra* note xx, at 238-39.

sovereign governments, if one accepts the "acquired rights" analysis, to prevent the unjust result of extinguishing the lender's (or buyer's) interest in repayment because of the sovereign borrower's disappearance.¹¹ Respect for "acquired rights" at international law has been described as "no more than a principle that change of sovereignty should not touch the interests of individuals more than is necessary."¹² A further argument under the "acquired rights" analysis is that a successor government recognizing such rights retains the power to permit them to continue or to alter or to cancel them, with appropriate provisions for compensation if it alters or cancels previously-existing rights.¹³ This analysis does not extend the principles so far as to limit

¹¹. Id. See also Whiteman, supra note xx, at 810-811 (obligation to honor acquired rights arises when successor is enabled through its own action to eliminate title holder's interest).

¹² .O'Connell, supra note xx, at 266.

¹³. Id.:

This does not mean that these interests may not be interfered with at all. The doctrine merely indemnifies titleholders from complete and arbitrary destruction of their interests, and secures for them an impartiality on the part of the successor State in the exercise of its discretion. There can be no general immunity from expropriating legislation. Such expropriation, however, is only justified when accompanied by a recognition of the equities involved. If the doctrine of acquired rights does not protect the titleholders from expropriation, it at least guarantees them restitution. The successor State, once it extends its sovereignty over the absorbed area, has a choice as to the course it will adopt. On the one hand it may permit acquired rights to continue in existence; on the other hand, it may legislate to alter or entirely cancel them. If it adopts the latter course it must then comply with the minimum standards set by international law, and either pay compensation or grant new titles of some equivalent

the successor sovereign's discretion to nationalize or to expropriate property.

value. A successor State thus stands in the same position with respect to acquired rights as any other State, and the fact that the rights have come into existence under its predecessor is immaterial.

O'Connell, supra note xx, at 266.

The original position of countries such as the PRC as to foreign debts upon its succession to power appears to have been one of total renunciation.¹⁴ The PRC proclamation issued in 1949 left little doubt that the PRC would ever feel itself bound by obligations assumed by previous Chinese governments. The revolutionary nature of the PRC government, both in its announced policies and in its methods of acquiring power, make this position unsurprising. Moreover, in renouncing the debts of its predecessors, the PRC was merely following the example of several other revolutionary regimes which came to power in the twentieth century.¹⁵ Renunciation was also a practical and understandable course for a new government emerging from years of war and civil strife with little or no foreign exchange and considerable debts.

B. *Odious Debts*

¹⁴ Cf. The Common Program of the Chinese People's Political Consultative Conference (1949), art. 3, translated in A. Blaustein, *Fundamental Legal Documents of Communist China* 36 (1962) [hereinafter cited as Blaustein]: "The People's Republic of China must abolish all the prerogatives of imperialist countries in China. It must confiscate bureaucratic capital and put it into the possession of the people's state. . ." Id. See also J. Cohen and H. Chiu, *People's China and International Law* 681-682 (1974).

¹⁵ Successor regimes that have renounced the debts of their predecessors include those in the Soviet Union, Yugoslavia, and East Germany. For a discussion of renunciation of predecessor debts see O'Connell, supra note xx, at 19-21.

In justifying its position once the Jackson suit began, however, the PRC came to rely on the additional argument that the Huguang bonds were "odious debts" that the PRC was not obligated to repay.¹⁶ In several leading articles in the Chinese press, various commentators¹⁷ took considerable pains to explain how the principle of "odious debts" provided a generally acceptable rationale at international law for renouncing these types of obligations. The Huguang bonds were also analogized to the "unequal treaties"¹⁸ imposed on the Qing dynasty government by a

¹⁶ See Aide Memoire, supra note 21, at B2, para. 2. The Chinese analysis of "odious debts" is drawn from various sources discussed in the commentaries listed at note 43, supra. See also Whiteman, supra note 42, at 860-861.

¹⁷ See Fu Zhu, The U.S. Court's Trial of and Judgment on "The Case of Huguang Railway Bearer Bonds' Are a Gross Violation of International Law, Renmin Ribao, Feb. 25, 1983, at 7, translated in FBIS Daily Report: China FBIS-CHI-83-040, Feb. 28, 1983, B-2, at B-6 [hereinafter cited as U.S. Court Trial]:

From the angle of international law, the PRC, as an entity of international law, is the continuation of the old China before liberation. However, the birth of New China came after the Chinese people overthrew the rule of imperialism, feudalism and bureaucratic capitalism through protracted, hard armed struggle and won the great victory of the new democratic revolution. China has undergone radical changes in its social system to make it a new-type socialist state. The old government that oppressed and exploited the Chinese people in the past has been replaced by the new government, which represents the interests of all the people of all China. Therefore, the new Chinese government naturally disavows all unequal treaties imposed on China in the past by the imperialists and all international obligations incompatible with the new regime. This is not unprecedented in the history of international relations. For example, after the October Revolution in Russia, the Soviet Government of Workers and Peasants issued a decree on January 1918 abrogating all national debts. Provision No. 1 says: "All national debts borne by the previous landlord and bourgeois governments as listed in the special notice have been abolished as from 10 December 1917." Provision No. 3 of the decree stipulates: "All external debts should be unreservedly abolished, without any exception." ("Selected Documents of Reference for International Law," Chinese edition, 1956, p. 80). When disavowing all external debts of the Tsarist government in 1921, (Chichilin) [qi qielin 7871 0434 2651], member of the Russian People's Commission for Foreign Affairs, proclaimed: "People of no country should be responsible for repaying the debts imposed on them like shackles in past centuries."

Not inheriting "bad debts" has been a well-established principle in international law. The so-called "bad debts" include debts incurred by one country borrowing from another country out of the need to suppress its own people at home or people in its colonies.

Id. See also Shih Chun-yu, Idiotic U.S. Court Judgment, Ta Kung Pao, Feb. 10, 1983, at 2, translated in FBIS Daily Report: China, FBIS-CHI-83-033, Feb. 16, 1983, W-9, at W-10 (citing U.S. court judgment as absurd); Lan Mingliang, Sovereign Immunity Is an Important Principle of International Law - Commenting on the Statement Released by the U.S. State Department on the So-Called Huguang Railway Bearer Bonds, Guangming Ribao, Feb. 26, 1983, at 3, translated in FBIS Daily Report: China, FBIS-CHI-83-050, Mar. 14, 1983, B-3, at B-6 [hereinafter cited as Sovereign Immunity]; Liu Dagun, The Odious Nature of the Huguang Railway Loan, Renmin Ribao, Sept. 13, 1983, at 7 (excerpts of an article to be published in 1983 Guojiwenti Yanjiu, No. 4), translated at FBIS Daily Report: China, FBIS-CHI-83-179, Sept. 14, 1983, B-1 [hereinafter cited as Odious Nature].

¹⁸ The distinction between equal and unequal originally is made by Hugo Grotius, *De Jure Bella ac Pacis* (On the Law of War and Peace) (Kelsey tran. vol. II at 394 1925). The similarities between the "odious debts"

number of foreign powers, against which both the Chinese Republic and the PRC have bitterly complained.¹⁹ Consistent with its steadfast argument in international fora that it has a right under international law to abrogate unilaterally "unequal treaties" concluded by predecessor Chinese governments, the PRC has more recently argued that the odious nature of the debt incurred by the Qing government to finance the Huguang railway permitted renunciation.²⁰ Although neither position has received the general international acceptance which the PRC claims, the PRC's continued insistence on its position has probably given both positions greater currency than they might otherwise command.

The PRC also argued strongly that considerations of fairness and equity should foreclose any attempts to recover amounts lent under the scheme to finance the construction of the Huguang railway.²¹ Arguing that the railway project and the loans to underwrite the contracts were foisted upon a weak, corrupt government by rapacious foreign powers eager to carve out spheres of influence in Qing China,²² the PRC government appealed to history for vindication of its stance in Jackson.

Generally, most commentators would agree that extraordinary pressures were brought to bear on the Imperial Chinese Government by the foreign powers in the late Qing period.²³ Even with respect to foreign lending, a number of studies have documented the struggle of each nation's bankers to keep portions of the Chinese borrowing for that country's banks and the dominance of various nations over certain railroads or sections of railway lines in China.²⁴ Nevertheless, the high degree of foreign involvement in the railway construction and

and the "unequal treaties" are explored in U.S. Court Trial, supra note 53, at B-6 and in an article by Professor Jin Shixuan and Associate Professor Xu Wenshu of North China Communications University, entitled The 1911 Huguang Railroad Loan and Its Rejection by the Chinese People Fighting for Railroad Protection, Renmin Ribao, Mar. 12, 1983 at 7 (originally published in Renmin Tiedao (People's Railroad) of Mar. 9, 1983), translated in FBIS Daily Report: China, FBIS-CHI-83-052, Mar. 16, 1983, B-1 [hereinafter cited as Railroad Loan]. See also Odious Nature, supra note 53, at B-4.

¹⁹ See Chiu, Comparison of Nationalist and Communist Chinese Views of Unequal Treaties, in J. Cohen, China's Practice of International Law, 239 (1972).

²⁰ U.S. Court Trial, supra note 53, at B-7; Sovereign Immunity, supra note 52, at B-5 and B-6.

²¹ U.S. Court Trial, supra note 53, at B-7; Railroad Loan, supra note 54.

²² Railroad Loan, supra note 54, at B-1:

The loan was a foreign debt contracted by the Qing government on the eve of its collapse, or on 20 May 1911, with a banking syndicate of the four countries of Britain, France, Germany and the United States in the name of building the Huguang railroad, but actually was a last-ditch struggle to maintain its reactionary rule. It was also a product of an act of collusion between international imperialism and the Qing government and an intensified effort to oppress and exploit Chinese people.

Id. See also Odious Nature, supra note xx, at B-3 and B-4, Imperialist Powers Colluded With Each Other in Offering the Loan by Force.

²³ E. Clubb, Twentieth Century China 39 (1978) [hereinafter cited as Clubb]; _____. Reid, The Manchu Abdication and the Powers, 1908-1912 34 (1973) (reprint of 1935 edition).

²⁴ See, e.g., C.K. Leung, China: Railway Patterns and National Goals 26-35 (1980) (discussing the role of international politics in China's railway development and the foreign "scramble for concessions")

lending of the late Qing period does not, in itself, prove the PRC's contention that the Huguang bonds were not just debts.²⁵

An additional factor in the PRC's insistence that it would not honor the Huguang bonds is the history of popular opposition to the foreign loans for railway construction in general, and the outcry that greeted these bonds in particular.²⁶ In the early 1900's, a fairly widespread Chinese popular movement emerged that opposed foreign construction and control of China's railways. The movement generated discontent among the Chinese populace, a discontent which eventually burst forth in numerous uprisings against the Qing government. Ultimately, the opposition culminated in sustained attempts to topple the Qing government, climaxing in an event in the city of Wuhan in Hubei province (northern terminus of the Huguang railway), which was generally considered to have begun the 1911 revolution ending imperial dynastic rule in China.²⁷ These historic instances of opposition to the imperial government remain important milestones of the revolution in the PRC political history of today. Thus, it would be difficult, if not impossible, for the PRC government to rationalize honoring the Huguang bonds in the light of their significance

[hereinafter cited as Leung]; J. Cheng, *Chinese Law in Transition: The Late Ch'ing Law Reform, 1901-1911* 20-22 (unpublished Ph.D. dissertation, Brown University 1976) (discussing Chinese attempts at self-strengthening to oppose foreign railway-building concessions). But cf. R. Huenemann, *The Dragon and the Iron Horse* (1984), an economic history of railroad construction in China from 1876-1937 which concludes that there are not grounds for Leninist charges of exploitation by foreign railroad companies.

²⁵ Without further evidence, which would have to be evinced by the PRC government, it is impossible to determine whether the terms of the Huguang bonds (interest rate, discount or premium, use of proceeds) were fair. In any number of developing countries, both earlier in this century and at present, developed countries have lent their capital for use in construction projects undertaken by less developed countries. These loans are generally acknowledged to be legal debts of the borrowing countries which must be repaid according to their terms, even when borrowers subsequently meet with financial or political difficulties. But see *Odious Nature*, supra note xx, at B-4 - B-6, arguing that the terms of the loan were unfair and one-sidedly disadvantaged China.

²⁶ U.S. Court Trial, supra note xx, at B-7: "[T]he government of New China cannot repay such debts as the bonds issued by the Qing government for the building of the Huguang railways, because recognizing and repaying this kind of debt would mean denying the ongoing revolutionary struggles waged by the Chinese people in the past 100 years or more since the Opium Wars." Railroad Loan, supra note 54, at B-3 and B-4; Odious Nature, supra note 53, at B-6:

The Huguang Railway Loan agreement severely violated China's sovereignty and the people's fundamental interests. The Chinese people started their struggle to cancel the contract and to turn down the loan as soon as planning of the loan scheme began. This mighty anti-imperialist and antifeudalist revolutionary struggle was turned into an armed uprising soon after the contract was signed and became an incident that touched off the downfall of the reactionary Qing government.

Odious Nature, supra note xx, at B-6.

²⁷ E. Rhoads, *China's Republican Revolution: The Case of Kwangtung, 1895-1913* 207-210 (1975); Sichuan Provincial Archives (Sichuan Sheng dang'an guan), *Sichuan baolu yundong dang'an Xuanbian* [Selected Documents of the Railway Protection Movement in Sichuan] (1981, Hsin hai nien Ssu-ch'uan pao lu yuntung shih liao hui pien [Collection of Historical Materials on the Railway Protection Movement in Sichuan in 1911] (1981). See also, J. Fairbank and E. Reischauer, *East Asia: the Modern Transformation* 629-631 (1965); E. Clubb, *Twentieth Century China*, 39 (1978).

in Chinese revolutionary history.²⁸ Accordingly, the PRC attempted to invoke the nationalistic opposition of the period when the Huguang bonds were issued to buttress its renunciation of them.

C. Balancing Considerations

²⁸ Odious Nature, *supra* note xx, at B-7:

The acknowledgement of the Huguang Railway bonds is by no means an issue simply concerning old debts but is a fundamental problem concerning our effort to safeguard the fruit of the revolution for which the Chinese people have unremittingly fought at the cost of blood for more than 100 years. The just stand of the Chinese Government toward the Huguang Railway bonds case conforms to the will of the 1 billion Chinese people. Adhering to this stand, the Chinese Government has safeguarded the dignity of the PRC and has won the strong support of the Chinese people of all nationalities and the sympathy of Third World countries.

Id.

The appeal to concepts of fairness, however, does not necessarily support the PRC's claims. Modern notions of state succession, centered on a balancing of competing interests,²⁹ first examine where benefits have been received and where burdens have been imposed in assigning responsibility for claims such as those over the Huguang bonds. Even conceding the PRC's claims about the foreign machinations surrounding the funding of the construction of the Huguang Railway, the railway was nonetheless built using foreign funds raised by the bonds. Moreover, for a considerable period of time thereafter (indeed, right up to the present day), China indisputably derived benefits from the Huguang Railway.³⁰ The extent of these benefits must be evaluated before the PRC could deny any obligation for repayment of the Huguang bonds. In addition, the PRC's denial of liability for the Huguang bonds ignores the fact that the regime which succeeded to the Imperial Chinese Government following the Revolution of 1911 felt obliged to continue repayment of the bonds, despite their role in the revolution. It may be argued convincingly that the Republican government recognized the usefulness of the railway and its benefits to national development, notwithstanding the controversy its financing engendered.³¹

The burden-benefit analysis of modern notions of state succession also seems to undercut the suggestions of several observers that the government of the Republic of China, still in power on the island of Taiwan and recognized as the government of all China by the United States after 1948 until normalization of relations with the PRC, should arguably have assumed the obligation to repay the Huguang bonds. First, the Taiwan government has no use of the benefit because it no longer controlled the Huguang Railway.³² All the assets of the railway remained in place on the mainland after the Republic of China government fled to Taiwan. Second, this lack of benefit outweighs the fact that the Taiwan government remained the U.S.-recognized government of China and is still the same government, using the title "Republic of China," that promised several

²⁹ See, e.g., Foorman and Jehle, Effects of State and Government Succession on Commercial Bank Loans to Foreign Sovereign Borrowers 1982. U. Ill. L. Forum 12-14 (brief review of modern theories of state succession). See also O'Connell, supra note 42, at 436; Feilchenfeld, supra note xx, at 387-89 and 546-70; Wilkinson, supra note xx, at 95-96.

³⁰ See Luang, supra note xx, at 72-81; Zen Sun, The Pattern of Railway Development in China, 14 Far Eastern Q. 179-199 (1955). But see Odious Nature, supra note xx, at B-2:

Take, for example, the Huguang Railway bonds held in the hands of the American bearers: according to the contract, this railway should be finished in approximately 3 years, and the American loans should be used in building the railway from Yichang in Hubei to Kuizhou (now called Fengjie) [in Sichuan province]. However, nearly 40 years passed before liberation and there was still no railway between the two cities.

Odious Nature, supra note xx, at B-2.

³¹ Despite Sun Yatsen's announced opposition to the railway loans from foreign powers at the time they were made, before the 1911 revolution, the necessity of using foreign capital for expansion of China's railways after the establishment of the Republic of China became obvious. See Leung, supra note 59, at 51-53.

³² The government of the Republic of China fled to Taiwan in 1949; the PRC government took responsibility for railroads on the mainland by virtue of Article 36 of The Common Program of the Chinese People's Political Consultative Conference on September 29, 1949 (translated in Blaustein, supra note 49, at 47-48 (1962)).

times to remedy its defaults on the obligations at the earliest opportunity.³³ Whatever the historical responsibility of the government on Taiwan was for honoring the Huguang bonds, its flight to Taiwan certainly diminished the obligation it had earlier assumed.

In summary, international law adopts neither the United States nor the PRC views concerning the ability of states to renounce the obligations of their predecessors under international law, but rather has sought in recent times to minimize the disruption of vested rights having a legitimate expectation of being honored. The PRC's formulation of a rule at international law that "odious debts" may be repudiated has not found favor outside what remains of the socialist world today and in a few other past instances. Yet even were the rule advanced by the PRC to be adopted, it rather unlikely that the Huguang bonds are the sort of debt which should be characterized as "odious", especially when the role of the railway that they were used to finance is considered objectively in its historical context. On the other hand, the political imperative for such characterization is quite obvious.

The Odious Debt Doctrine with Respect to Lending of the 1970s and International Public Policy

Some experts, such as Bryan Thomas,³⁴ trace the debt crisis currently facing much of the developing world is, for the most part, to a period of intense, indiscriminate lending by private commercial banks and IFIs, which began in the in early 1970s. Though Thomas notes disagreement over the root causes of the 1970s lending frenzy, commentators across the political spectrum agree that there was a lending frenzy, primarily on the part of private banks, which took place roughly between 1971 and 1982 (when crisis finally struck). In recent years, officials with the World Bank and the IMF have been surprisingly candid about the failings of their respective institutions throughout this period. The gist of Thomas's thesis is that there is a long history of sovereign debt crises, which to a limited extent resemble the most recent one and "speaks to the need for innovation."

Thomas notes what he regards as a depressing but recurring pattern: sovereigns borrow more than they can afford to repay, they consequently borrow more to service the initial debt, and before long the situation spirals into a full-blown debt crisis. Lenders and borrowers learn their lesson, for a time, but collective memory ultimately erodes, and the cycle is repeated. When the stakes are high, both creditor and debtor have an interest in finding manageable solutions, or at least workable stop-gap measures. Debtors struggle to service debts, at least minimally, so that they are not shut off from further lending; creditors offer further loans so that debtors are not driven into complete bankruptcy. The relationship is at once symbiotic and pathological.

A. What Led to the Debt Crisis of the 1970s

As far back as the debts incurred to finance the disastrous Spanish Armada in the 1580s, there have been cycles of excessive lending, leading to debt crises, re-financing through

³³ Jackson, 550 F. Supp. at 872 (citing also Plaintiffs' Exhibit 6 in Jackson).

³⁴ Bryan Thomas, "The Doctrine of Odious Debts and Lending of the Seventies: Assessing the Options," Chapter 3 of a 3 Part Study, last updated February, 2002.

downward spirals, and firm resolve never to sin again. During the nineteenth century, the Bank of England intervened to prevent famous merchant bankers from descending into bankruptcy. At the beginning of the twentieth century, the Great Depression brought another debt crisis to Latin America, which took decades to conclude.³⁵

What distinguishes earlier lending from the lending of the 1970s - with particular implications for the doctrine of odious debts, among other things - is the fact that loans of previous eras came in the form of bonds, supplier credits, and direct investment. In the 1970s, by contrast, loans were primarily arranged between private commercial banks and the national governments of developing countries. In assessing the viability of applying the odious debt doctrine to loans of the 1970s, this distinction is crucial. Bondholders of earlier eras were too far removed from the end uses of their lending for the courts to establish their subjective awareness of its odious use (recall, subjective awareness of odious use, on the part of creditors, is a primary criterion in applying the odious debt doctrine). In the words of one commentator, “banks [in the 1970s] had branches or representative offices in the debtor countries and they were thus in a position to assess first-hand the local political and economic scene. A similar presumption cannot be made about bondholders.”³⁶

In the early nineteen-seventies, many developing countries were experiencing rapid economic growth: Brazil’s economy, for example, grew, on average, by 11 percent annually between 1968 and 1971; in 1970, Mexico had thirty years of solid economic growth behind it (6 percent per annum, on average). There was therefore a widespread expectation that the successes of the Asian “tigers” would be replicated in these and other Latin American countries. Obviously, these high hopes never came to fruition. Indeed, it was obvious (to some) by the mid nineteen-seventies that the debt load of developing countries was unsustainable. As it became obvious to everyone, in the late 1970s, that debts loads were unsustainable, lending to developing countries promptly dried up.

The rise of syndicated lending in the late 1960s allowed banks - major U.S. banks: Citicorp, Chase Manhattan, Bank America, J.P. Morgan and Manufacturers Hanover - to negotiate much larger loans. The lead bank in a lending syndicate collected an array of fees from other participants, creating an incentive for what has since been called “loan pushing”. In the parlance of a UN study, the major “leader banks” (listed above) aggressively marketed loans to developing countries, particularly Latin American states, throughout the nineteen-seventies, prompting “challenger” banks of Europe, Canada, and Japan to enter the market.³⁷ Smaller banks, dubbed “followers” eventually got in on the action.

Having examined the evidence, economists Darity and Horn reach the conclusion that, in fact, for major banks in the 1970s, bad loans were good business. They write that, “[i]ronically...loan pushing is most consistent, within the context of the rational expectations hypothesis, with [the view that] bankers knowingly made bad foreign loans.” Darity and Horn claim, among other things: that banks received substantial up-front fees for arranging loans to

³⁵ R. Buckley, *Emerging Markets Debt: An Analysis of the Secondary Market* (Boston: Kluwer Law, 1999) at.8.

³⁶ L. Buchheit, “The New Latin American Debt Regime—Cross-Border Lending: What’s Different This Time?” 16 *J. Intl. L. Bus.* 44 at 48 (1995).

³⁷ Economic Commission for Latin America and the Caribbean, *Transnational Bank Behaviour and the International Debt Crisis*, Estudios e informes de la CEPAL series, No. 76, quoted in Buckley, *ibid.* at 9. W. Darity and B. Horn, *The Loan Pushers: The Role of Commercial Banks in the International Debt Crisis*, (Cambridge, Mass. : Ballinger, 1988) at 65.

developing countries; that major banks relied, with good reason, upon IFIs (such as the IMF) as de facto guarantors of their loans to developing countries; that due to economies of scale, small banks were put at greater risk than large banks by their involvement in lending to developing countries, so that at the end of the day, debt crises may actually have further strengthened the market dominance of the major banks.³⁸

Walter Wriston, then Chairman of Citicorp, asserted with confidence in the 1970s that, “[c]ountries never go bankrupt.”³⁹ Loan officers wanting to advance their careers were keen to oversee large loans, and as many as possible. And senior bank officials were hungry for the high interest rates and significant upfront fees they could extract from Southern borrowers. There is no simple explanation of the lending frenzy that took place in the 1970s. The behavior of major lenders throughout this period admits of several explanations. A mixture of short-sightedness and greed, combined with layers of principal-agent problems combined to produce this latest developing country debt crisis. Note that these explanations are, for the most part, compatible with the supposition that both local bankers and senior bank officers knew what they were getting involved in as the 1970s loan crisis fomented. Local officers went ahead with risky loans because they were rewarded for bringing in contracts and seldom punished for defaults. Senior bank officers went ahead with risky loans because high interest loans, accompanied by substantial front-payments, are impressive on the current balance sheet, which in turn drives up the value of a bank’s shares (in the short run, at least.)

By 1982, when the debt crisis came to a head, total exposure of U.S. banks to developing countries accounted for 287.7 per cent of the banks’ total capital.⁴⁰ Thus, as one writer puts it, “the magnitude of the problem...means that repudiation or a total collapse by even a single country could jeopardize the survival of numerous banks and perhaps of the financial system as a whole.” Furthermore, syndicated lending, by its legal nature, tends to discourage lenders from suing on their debt. Syndicated loans invariably contain contractual provisions which require that any recovery made by any single creditor be shared with all other creditors.⁴¹

The perils for countries choosing the course of unilateral debt repudiation is illustrated by the difficulties encountered by the Peruvian economy, following President Alan Garcia’s decision, in 1984, to repudiate a substantial portion of that country’s debt. The jury, however, remains out as to whether Peru’s subsequent economic problems resulted from this act (and foreign investors’ reactions) or from other causes. As Lothian writes:

Peru did not experience a sudden shutdown of foreign loans and equity capital in response to the infamous ten percent debt moratorium. Furthermore, Peru’s trade and short-term credit were not measurably affected by international hostility toward the country. Indeed, export credits increased annually each year from 1983-1988. Shortfalls in the flow of import credit could be financed, at least temporarily, from increased reserves brought about by reduced remittances on external debt.⁴²

³⁸ Darity and Horn, *supra* note ____.

³⁹ Find cite.

⁴⁰ Cite?

⁴¹ See K. Clark & M. Hughes “Approaches to the restructuring of sovereign debt” in M. Gruson & R. Reisner *Sovereign Lending: Managing Sovereign Risk* (London: Euromoney Publications, 1984) at 136.

⁴² T. Lothian, “The Criticism of the Third-World Debt and the Revision of Legal Doctrine” 13 *Wis. Int’l L.J.* 421 at 434 (1995).

In the end, Garcia had to return - hat in hand - to the IMF, where he agreed to repay old debts and submit Peru to an austerity program. It should be noted that Peru's unilateral repudiation is not the same as the cancellation of debt under the doctrine of odious debts. When that doctrine is invoked, with the cancellation of debt in a proper legal forum, presumably the market actors will differentiate such action from the unilateral renunciation of other "deadbeat" nations.

Obviously the hope of those who considered invoking the doctrine of odious debts in the 1970s and 1980s was that it would encourage lenders to consider various factors before making sovereign loans, with the threat that future "odious lending" might result in such debts being dishonored. Thus, attempts to articulate a modern doctrine was intended to have the positive long-term effect of discouraging lenders from participating in odious debts. But lenders are not cavalier in making loans to sovereign debtors. Major loan agreements must first be approved by lawyers on all sides, beginning with a due diligence investigation on the part of the lenders' counsel. These agreements also require a written "opinion of counsel"—both from the lender and the borrower's counsel, and, in the case of foreign borrowers, an independent foreign counsel, of the bank's choosing, before the loan is advanced.⁴³

B. *Difficulties in Applying the Doctrine of Odious Debts to debts incurred in the 1970s*

As commercial banks exposed themselves to great risk by over-lending to developing countries; their over-exposure created, in the early 1980s, a threat to the stability of the entire system of international finance. Attempts to foreclose on this debt could have spelled disaster, by triggering widespread defaults. So commercial banks were coaxed, in part by the IMF and in part by the US government, in the case of US banks, into participating in efforts to 'restructure' these debts.⁴⁴ In the late 1980s, a variety of models were employed in restructuring developing country debt, such as the Brady Plan and other restructuring schemes, which relied upon a blend of measures: partial debt forgiveness, the extension of payment schedules, the conversion of private loans into long-maturity bonds, and swapping debts for equity in recently privatized state industries.⁴⁵ Participation in restructuring was normally consensual. Restructuring plans would bring together all (or most) of a nation's creditors under revised contractual terms of the sort mentioned above.

To keep creditors together and to prevent defection of individual creditors, these plans typically contained a handful of standard provisions, most notably cross default⁴⁶ clauses and

⁴³ M. Gruson, "Legal Aspects of International Lending: Basic Concepts of a Loan Agreement" in D. Barlow, ed., *International Borrowing: Negotiating and Structuring International Debt Transactions* (Washington: International Law Institute, 1986) at 300.

⁴⁴ The US government's interest in restructuring LDC debt was motivated in part by a concern that crippling LDC debts were bad for domestic exporters; Tamara Lothian writes that "[t]oward the end of the 1980s, the positions of governments and commercial banks collided." In the minds of international bureaucrats and policy-makers, two considerations were paramount: first, the prospect of deepening recession and policy instability in debtor countries; second, the related effects on international economic debts." [check?]

⁴⁵ T. Allegaert, "Recalcitrant Creditors Against Debtor Nations, or How to Play Darts" 6 *Minn. J. Global Trade* 429, at 436 (1997) .

⁴⁶ *Id.* at 438. Cross default clauses stipulate that a default (on the part of the borrower) vis-à-vis

sharing⁴⁷ clauses.

Under typical restructuring plans, loans used for legitimate and illegitimate purposes alike are lumped together, linked by cross-default and sharing clauses. As mentioned, some of these debts have even been converted into bonds. There is a worry, therefore, that legitimate and odious debts have been effectively consolidated. In the years since these restructuring plans have been instituted, holders of (putatively) odious debts have shared, on a pro-rated basis, in payments made by debtors. In some cases, at least, rescheduling was effected so thoroughly that the forensic work of separating odious from non-odious debts appears virtually impossible. This creates a tangled mess of legal and evidentiary problems.

Although Thomas's analysis begins by arguing that 1970s commercial bank lending to developing countries was uniquely amenable to cancellation under the doctrine of odious debts (because those lenders, in most cases, had more information at their disposal about the end uses of their loans than did bondholders of previous eras), he ends by acknowledging that odious debt doctrine contributed little to their resolution. Perhaps the biggest difficulty in applying the doctrine of odious debt during that era was in establishing subjective awareness (of "odious"-ness) of creditors. In Thomas's view, the restructuring plans had the effect of rolling odious debts together with non-odious debts, and subsequent trading on secondary markets immensely complicated the task of sorting them out again.

To the extent that International Financial Institutions (IFIs) played a part in creating the 1970s debt crisis, developing countries – in their efforts to have debts cancelled under the doctrine of odious debts – may have been required to demonstrate that IFIs undertook loan agreements despite subjective awareness, on the part of their agents, that the loans were likely to be used for corrupt or tyrannical purposes. There is considerable evidence to suggest that agents of these IFIs may have indeed turned a blind eye to corruption, and as a result may have contracted odious debts.

In a 1996 interview, writer and activist Noam Chomsky commented:

Debt is not valid if it's essentially imposed by force. The Third World debt is odious debt. That's even been recognized by the US representative at the IMF, Karen Lissaker, an international economist, who pointed out a couple of years ago that if we were to apply the principles of odious debt, most of the Third World debt would simply disappear⁴⁸

World Bank lending was in many important ways unlike the laissez faire policies of commercial banks in the 1970s. With World Bank loans, projects were monitored through

one creditor will constitute a default vis-à-vis all creditors party to the rescheduling agreement. Cross default clauses have the effect of putting all creditors (or at least, all who sign on to the restructuring) on an equal footing; the incentive for individual creditors to pre-emptively sue on their loans, triggering a crisis, disappears. The insertion of cross-default provisions also provides an incentive for recalcitrant creditors to sign onto restructuring agreements, as they expect debtor nations will opt first to default on the loans of the "odd man out".

⁴⁷ *Ibid.* Sharing clauses stipulate that payments made from the debtor to any creditor party be shared with all other creditors on a pro-rated basis—each creditor receiving a share proportional to his share of the total outstanding debt.

⁴⁸ D. Barsamian: "Talking 'Anarchy' With Noam Chomsky" (1996), online <<http://www.nettime.org/nettime.w3archive/200004/msg00075.html>>.

to completion. But this does not result in the conclusion that some IBRD and IDA loans of the 1970s were in part partially odious. In recent years, the World Bank has been surprisingly candid about its failings throughout this period, effectively confessing to wilful blindness in the face of corruption on the part of developing country borrowers.⁴⁹ To “deal with the cancer of corruption” the World Bank created an Anti-Corruption Task Force charged with the task of revising World Bank protocol to combat corruption.⁵⁰

World Bank loans may present some of the best test cases for innovative uses of the doctrine of odious debts. First, the extensive involvement of World Bank loan officers throughout projects makes subjective awareness easy to establish. Secondly, recent statements by officials with the World Bank amount, essentially, to confessions of the prior involvement of these organizations in odious lending. Third, World Bank debts have not been sold on secondary markets, not have they been restructured in the way that private commercial debt has been. And finally, World Bank loan contracts, as explained above, are subject to arbitration tribunals. This forum may be more willing to entertain a principle of international law such as the doctrine of odious debts.⁵¹

IMF loans, on the other hand, will not likely qualify for cancellation under the doctrine of odious debts. The IMF always imposes conditions upon its loans, and corrupt governments of the 1970s preferred to contract unconditional loans from private creditors. Furthermore, the IMF has a purely macroeconomic mandate: its role is not to fund projects, or even to gather information on the political economic activities of its members.⁵² Ironically, much of the developing country debt held by the IMF is from the period of restructuring that came after the debt crisis; it seems untenable to suppose that loans intended to avert default and aid in balance of payment problems are odious.

Odious Rulers, Odious Debts - Odious Debts in the 1990s and Beyond

In a recent article in the *Atlantic Monthly*,⁵³ Joseph Stiglitz noted:

At the end of World War I, John Maynard Keynes, later to become the founder of modern macroeconomics, returned from the Versailles Treaty negotiations disappointed by the outcome and wrote a forceful little book, *The Economic*

⁴⁹ Former World Bank staff member James Wesberry writes that, “From the end of World War II to almost the end of this century, IFIs maintained a ‘three-monkey policy’ toward corruption—they did not see it, they did not hear of it, and they never, never spoke of it—except perhaps in hushed words like ‘rent-seeking.’” J. Wesberry, “International Financial Institutions Face the Corruption Eruption: If the IFIs Put Their Muscle and Money Where Their Mouth Is, the Corruption Eruption May Be Capped” 18 J. Intl. L Bus. 498 at 499 (1998) .

⁵⁰ Wolfensohn quote

⁵¹ The framework is that of Bryan Thomas [cite]. See also S. O’Cleireacain, *Third World Debt and International Public Policy* (New York: Praeger, 1990) at 109.

⁵² The IMF’s Managing Director Michael Camdessus explained in 1998 that, “[The IMF] has a macroeconomic mission, and our mandate is restricted to those specific instances of corruption that may have a significant—some would say demonstrable—macroeconomic impact.” Quoted in [cite] at 517.

⁵³ Stiglitz, “The Agenda,” *Atlantic Monthly*, November, 2003.

Consequences of the Peace. Its message was simple: the burden of reparations imposed on Germany would lead to economic crisis and social and political turmoil—and the result would not be good for Europe. Keynes turned out to be right. Today, after a decade of isolation and a devastating war, Iraq faces the daunting task of reconstructing its economy while moving from a form of ersatz socialism to market capitalism.

Stiglitz goes on to note that the problem for Iraq today are debts – totaling anywhere from \$60 billion to the hundreds of billions – including reparations imposed on the country after the 1991 Gulf War, earlier debts from ammunition purchases, and obligations assumed under contracts signed during Saddam Hussein's regime. Once the oil starts to flow again, much of the revenue generated would go directly into the hands of international creditors, to the detriment of reconstruction efforts. Stiglitz argues that the country needs a respite from what others have called its "odious debts"—debts incurred by a regime without political legitimacy, from creditors who should have known better, with the monies often spent to oppress the very people who are then asked to repay the debts. As he notes with jabbing sense of irony, “Most of Iraq's current debt was incurred by a ruthless and corrupt government long recognized as such—although complicating the matter is the fact that the Iraqi regime appears to have received some support from the United States under Ronald Reagan.”⁵⁴

Yet Stiglitz notes that the International agreement on the matter of debt relief will be no easier to come by than on the need to invade Iraq. And as he goes on to observe, Iraq isn't the only country needing debt forgiveness. In the queue are: the Congolese, who would otherwise be forced to repay loans made to Mobutu which went to his Swiss bank accounts; Ethiopia, whose people would have to repay the loans made to the Mengistu "Red Terror" regime; Chileans still paying off debts incurred during the Pinochet years; South Africans with debts incurred under apartheid; and Argentines who can ill afford repayment of the money that financed the "dirty war" in their country, from 1976 to 1983.

The problem, as Stiglitz readily notes, is basically one of legal infrastructure:

Regrettably, we have no rule of law at the international level for the restructuring of government debts. In the past, Western governments had an easy way of dealing with countries that didn't meet their financial obligations: they invaded them. Today we live in what we hope is a more civilized world: we no longer openly condone armed attacks by one country on another for a failure to pay up. At the level of personal debt we've made progress, by instituting bankruptcy laws to replace debtors' prisons, portrayed so graphically in the work of Charles Dickens. And yet to date we have no parallel set of laws governing the restructuring and relief of international debt. Two years ago the International Monetary Fund at last recognized that this is a major problem and proposed a set of guiding principles. Achieving international consensus on these principles would have been difficult (the IMF was insisting, problematically, that it serve as the bankruptcy judge, or play some other central role in the bankruptcy process, despite the fact that it is one of the international community's major creditors), but the United States pronounced the initiative

⁵⁴ *Ibid.*

unnecessary, effectively blocking it altogether.⁵⁵

Stiglitz also remarks upon the “heads we win, tails you lose” nature of with regard to U.S. moves for debt forgiveness and repayment. When other countries are the creditors, we counsel debt forgiveness; when our own money is at stake, we fall back on arguments for the sanctity of contracts, regardless of the political circumstances. When Suharto was overthrown, in 1998, the Clinton administration was adamant that Indonesia honor the contracts the U.S. government had encouraged the country to enter into. When India threatened to abrogate energy contracts with Enron (which forced it to pay outrageous prices for electricity), top officials in the Bush Administration insisted that the contracts be honored. Thus, Professor Stiglitz argues that it is necessary for the United Nations to devise a set of principles to guide national courts in assessing the validity of contracts made with, and debts incurred by, outlaw regimes. Loans to build schools might be permitted, and the debt obligation, accordingly, would not be treated as odious; loans to buy arms might not be permitted. The burden-benefit analysis outlined above would determine whether a given loan could be denominated as odious.

Looking back on the experience of the 1970s and 1980s, Stiglitz draws some significant conclusions with implications for the Iraqi debt:

We must now recognize that debt forgiveness and debt restructuring make as much sense for governments—benefiting debtors and creditors alike—as they do for companies and individuals. Absolutely nobody gained from the overhang of debt in Latin America in the 1980s, a decade during which growth in the region stalled and poverty increased enormously. Creditors certainly didn't get their money back, and it was only with the implementation of the long-delayed Brady plan of debt restructuring, set in motion by U.S. Treasury Secretary Nicholas F. Brady in 1989, that growth resumed.⁵⁶

Others have also echoed Stiglitz's concerns. In an article in the *Financial Times*, Harold James notes that the current situation in Iraq eerily recalls the circumstances following the Allied victory after the first World War. Most importantly, the idealism of Woodrow Wilson and the the new peaceful world order he sought to install foundered because:

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

[T]he threat to Wilsonianism arose out of the financial legacy of the first world war. A debate about the distribution of war debts and reparations paralysed the international financial system and eventually contributed significantly to the financial meltdown of the Great Depression. Reparations looked like an impossible burden, in which a moral and political claim threatened the ability of the debtors - especially Germany - to service normal public and commercial debt.⁵⁷

James argues that it would be a mistake to apply what he terms, “financial Wilsonianism,” by introducing high risk premiums and making much international lending significantly more precarious, would not insure the end of odious debt. Rather, he suggests that – as was the case with the reparations and war debts in the 1920s, which also had a basis in morality – Wilsonianism applied to the debt of dictators would produce new uncertainties and a new threat to the entire international financial system.⁵⁸ So what is to be done?

Jubilee 2000 and Debt Forgiveness Proposals

A few years before the turn of the millennium, a number of forces coalesced to create a global movement for the total forgiveness, or at least significant reductions, of debt owed the poorest countries in the world to international financial powers. They sought authority from a Biblical source, the provision in Leviticus⁵⁹ for regular “jubilees” when, in effect, the slate would be wiped clean with regard to old debts. The concern was far more contemporary and immediate, however; the proponents of Jubilee 2000 worried that the overhand of billions of dollars of uncollectible debts - and perhaps more importantly the continuing obligations to pay interest on them - was a permanent impediment to growth and economic development. Arguing that the crushing burden of debt and interest payments consigned these nations to abject poverty, the campaigners sought to free these nations from their economic shackles.

Chief among these advocates was an international campaign with national organizations in many developed countries called “Jubilee 2000.” The Jubilee 2000 Charter proposed that:

- * There is an overwhelming need for remission of the backlog of unpayable debts owed by highly indebted poor countries. Debt remission should relate to commercial, government, and IMF/World Bank debts, and debt reduction should comprehensively include all three forms of debt.

- * Creditors as well as debtors must accept responsibility for these high levels of indebtedness.

- * The remission should be a one-off, unrepeatable act, tied to the celebration of the new millennium. It would set no precedents for future loans.

⁵⁷ Harold James, *Financial Times*, May 1, 2003.

⁵⁸ *Id.*

⁵⁹ In the Jubilee Year as quoted in Leviticus, those enslaved because of debts are freed, lands lost because of debt are returned, and community torn by inequality is restored. Jubilee 2000 proponents analogized the global situation today, where “international debt has become a new form of slavery” as another circumstance requiring a jubilee. In their view, “debt slavery” required poor people in the global South work harder and harder in a vain effort to keep up with the interest payments on debts owed to rich countries including the US and international financial institutions such as the International Monetary Fund (IMF) and the World Bank.

* The precise details of remission should be worked out in consultation with both creditors and debtors for each debtor country.

* These details should be agreed by arbitrators nominated in equal numbers by both creditor and debtor, under the aegis of the United Nations.

* Their deliberations should be transparent and well-publicized, taking into account for each debtor country, that country's probity, economic management, social policies and human rights record.

* Funds available after the remission of debt should be channeled into policies which benefit the poor, in line with UNICEF's recommendations for investment in social development.

* Low income countries - with an annual income per person of less than US \$700 - should receive full remission of unpayable debt.

* Higher income countries - with an annual income per person between US \$700 and US \$2000 - should receive partial remission.

The Jubilee 2000 Charter was offered as a model for a workable and acceptable solution to the problem of poor country debt. It attempted something quite revolutionary, the creation of a new, disciplined beginning to financial relations between North and South, and a fresh start for millions of the world's poor.

In the United States, the Jubilee USA Network began as Jubilee 2000/USA in 1997 when a diverse gathering of people and organizations came together in response to the international call for Jubilee debt cancellation. Now – even after the passing of the new millennium – over 60 organizations including labor, churches, religious communities and institutions, AIDS activists, trade campaigners and over 9,000 individuals are active members of the Jubilee USA Network. In the network's own words, "Together we are a strong, diverse and growing network dedicated to working for a world free of debt for billions of people."

Aside from the campaign of religious groups, NGOs and committed individuals, governments and international financial institutions also took note of the global debt crisis. One of Bill Clinton's final acts as president was to secure Congress's approval for a \$435-million component within the last foreign-aid bill passed during his administration. This provision fulfilled the pledge the United States originally made in 1996 at the Group of Seven (G-7) summit, where the world's seven richest governments agreed to finance a debt-relief plan for 41 of the poorest third-world nations.⁶⁰

The plan--formally called the Debt-Relief Initiative for Heavily Indebted Poor Countries and commonly referred to as the HIPC initiative--was announced by the G-7 countries with much self-congratulatory fanfare. Yet, its serious shortcomings and the predictable strings attached (to deal with the moral hazard problem - more?), led many of the biggest advocates of third-world debt relief to attack the plan before the ink was even dry.

In the 1960s and 1970s, third-world debt was largely incurred by corrupt, unaccountable regimes. Many loans were officially targeted toward large, wasteful infrastructure projects, but often the money went into the pockets of the top 100 or 200 people surrounding the regime

⁶⁰ Rick Rowden, "A World of Debt," *The American Prospect*, July 2, 2001.

leaders and ended up in private Swiss bank accounts back in the first world. Much of the global South's present \$(3?) trillion in debt is from accrued interest on the original loans or on refinanced versions of them. Today, the International Monetary Fund (IMF) and the World Bank, which are largely controlled by the G-7 governments, administers most of this debt. To deal with the economic problems of the poor countries these institutions were designed to assist, the prescription for these countries' economic development is uniform and fairly draconian: reduce the role of the state and increase the role of the private international investment sector.

Since the early 1980s, the IMF and the World Bank have based new loans on nations' compliance with "structural-adjustment programs"--economic-reform policies with a free market bias. This stamp of approval acts as a green light for the release of additional bilateral and multilateral loans. Because nearly all private foreign investment goes to about a dozen "emerging market" economies -- China alone receives the bulk of it -- most poor nations depend entirely on bilateral or multilateral loans and foreign aid just to service the interest payments on decades of previous debt. Poor countries must prove that they are implementing the economic reforms at a satisfactory pace in order to have each "tranche," or portion of the loan, released.⁶¹

Proponents of Jubilee 2000 have another very different program in mind. In their own words:

[W]e are promoting an international insolvency framework – **the Jubilee Framework** – that will involve citizens in the resolution of international debt crises, and will, we believe, be the first vital step towards democratising international capital markets and therefore the global economy as a whole. The deregulation of capital markets, from 1979 onwards, has led them to become detached from democratic institutions in nation states. Introducing an insolvency framework will introduce regulation and discipline over the flows of international capital – through lending and borrowing. It will do so not just in bankrupt states; but in states where lax lending and excessive borrowing could lead to bankruptcy. In other words, the very existence of the framework could help regulate capital movements, and prevent future crises.⁶²

As might be expected, the usual coalition of anti-globalization, self-proclaimed “friends” of the global South have trumpeted their support for this regime. Typical is the position of the activist Noam Chomsky:

The Jubilee 2000 call for debt cancellation is welcome and merits support, but is open to some qualifications. The debt does not go away. Someone pays, and the historical record generally confirms what a rational look at the structure of power would suggest: risks tend to be socialized, just as costs commonly are, in the system mislabelled "free enterprise capitalism."

⁶¹ See generally, Guest Editors: John E. Serieux and Yiagadeesen Samy, Special Issue, Published with the permission of CJDS, “Debt Relief for the Poorest Countries,” *Canadian Journal of Development Studies* (CJDS), Volume XXI, No2. 2001

⁶² Ann Pettifor, “Chapter 9/11? Resolving international debt crises – the Jubilee Framework for international insolvency,” A report from Jubilee Research at NEF, February 2002.

A complementary approach might invoke the old-fashioned idea that responsibility falls upon those who borrow and lend. The money was not borrowed by campesinos, assembly plant workers, or slum-dwellers. The mass of the population gained little from the borrowing, indeed often suffered grievously from its effects. But they are to bear the burdens of repayment, along with taxpayers in the West -- not the banks who made bad loans or the economic and military elites who enriched themselves while transferring wealth abroad and taking over the resources of their own countries.⁶³

Voices have also been heard from the affected countries in the South, who support the efforts on their behalf undertaken by their friends in the developed world:

Southern African economies are still haunted by apartheid debt, almost a decade after the racist political system was abolished in South Africa. A campaign launched in the region claims that the debts are 'odious': "The doctrine of odious debt imposes morality on the part of international financial institutions, and makes them more responsible for the purpose to which their loans might be put."⁶⁴

The African churches' group goes further and demands reparations for victims of apartheid, "now, not 50 years from now." It targets banks in the west that continued to lend money to the apartheid regime even up to the close of its existence. Front line states bordering South Africa would also qualify because they had to borrow to protect, defend, repair themselves from the aggression of the regime. What is interesting in this last instance is that the rhetoric adopts the terminology of "odious debt," which had been – at most – a footnote in the discussion of debt forgiveness. What is more difficult to determine is how much the threat of repudiation based on legally cognizable claims of "odiousness" might underlie the willingness of creditors to adjust the debt obligations of certain countries or the whole group. In any event, over the past two or three years, new schemes relying on the odious debt principle have surfaced, as will be examined below.

New Proposals for Odious Debt Treatment - Candidates and Approaches

⁶³ Noam Chomsky, Jubilee 2000, <<http://user.chollian.net/~marishin/eco/jubilee.html>>.

⁶⁴ Inter-Church Coalition on Africa Debt, *Structural Adjustment and Jubilee News*, June 2001.

Potential recent examples of candidates for the label of “odious debts,” identified by Kremer and Jayachandran,⁶⁵ include debts incurred in the following countries by the regimes listed:

- Nicaragua (Somoza regime looted \$100-500 million)
- Philippines (Marcos regime amassed a fortune of \$10 billion)
- Haiti (Duvalier regime was reported to have absconded with \$900 million)
- South Africa (apartheid government spent heavily on police and military to repress majority population)
- Congo - former Zaire (Mobutu Sese Seko had personal accounts for \$14 billion)
- Nigeria (Abacha reportedly held \$2 billion in Swiss bank accounts in 1999)
- Croatia (Tudjman looted unknown amounts, used to suppress media and to attack violently his political opponents)

⁶⁵ Michael Kremer and Seema Jayachandran, “Odious Debt,” *Finance & Development*, June 2002, at 36.

As Kremer and Jayachandran note, at present countries repay even odious debts for several reasons.⁶⁶ First of all, if they failed to repay, their assets abroad might be attached to make payments. Second, in the international community, a high priority is placed on reputational interests in not being perceived as defaulting on debt, financial scofflaws. Third, as countries such as Peru, Argentina and Mexico have learned, there are real financial consequences of not being able to borrow in international markets if there were to be a default, whatever the reason. Finally, most developing countries have well-grounded fears of difficulty in attracting foreign investment if any public debts were repudiated.

These real difficulties have led some analysts to conclude that the international community should establish some institution which could impartially assess and definitively determine that certain debts and/or the regimes which contracted them were “odious.” This would be done in advance, warning lenders that successor governments would be justified in repudiating any new loans that the odious regimes received.

The legal issues are significant. Among other things, the laws in creditor countries would have to be changed in some way to make odious debt contracts legally unenforceable. International financial institutions would have to decline the opportunity to bail out creditors who might be disadvantaged. And the independent institution which would determine whether regimes are legitimate and their debts obligations for successor regimes to pay must be structured in a manner that inspires global confidence.

Conclusion [to come - legal universality? Overall usefulness of the concept? Compare Baker campaign to get Iraqi debt reduced by “jawboning” with the other attempts, in other regions and countries? How much is consensual re-scheduling affected by the concept?]

⁶⁶ Michael Kremer and Seema Jayachandran, “Odious Debt,” *Finance & Development*, June 2002, at 37.