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The International Convention on the Prevention of Odious Agreements: A Human Rights-Based Mechanism to Avoid Odious Debts

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Abstract

There is a lively discussion as to whether debts incurred by despotic regimes and used to the detriment of the population are legally valid. This article gives a brief introduction to the concept of so-called odious debts and argues that a legal solution is not only desirable, but feasible. Subsequently, international human rights are identified as the missing link between the behaviour of the debtor state and the assessment of individual debts. Consequently, a human rights-based mechanism for the prevention of odious agreements is developed, based on an international convention annexed to this article. The convention provides that a state is classified as odious debts-prone if it is responsible for serious and systematic violations of human rights or international humanitarian law, or if its public sector is governed by severe and systemic corruption. Agreements concluded with an odious debts-prone state are void, unless the agreement complies with principles of responsible contracting as developed in this article. Finally, the scope of application of the convention and possible state parties are specified.

Key words

draft convention; human rights; international law; odious debts; public debt

1. INTRODUCTION

Can the population of a post-dictatorial state be held responsible for debts that were incurred by their former rulers for their own oppression? With the current events in Algeria, Egypt, Libya, and many other countries, this question has attracted fresh attention.[1] Not only non-governmental organizations,[2] but also national[3] and

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1 Note, e.g., the discussion on the validity of debts incurred by the former government in Ukraine, as led by A. Gelpern, 'Debt Sanctions Can Help Ukraine and Fill a Gap in the International Financial System', Peterson Institute for International Economics, Policy Brief 14-20, available at <http://www.iie.com/publications/interstitial.cfm?ResearchID=2654> (accessed 6 May 2015), and in several legal blogs.

2 For example the Belgian Comité pour l'Annulation de la Dette du Tiers Monde (CADTM), the German erlassjahr.de or the US-american Probe International.

3 Norway in particular is promoting the discussion, see *infra* note 91; furthermore, the committee for foreign affairs and defence of the Belgian Senate has urged for the audit of odious debts, notably in Tunisia, see Resolution 3-1507/6, Proposition de Résolution sur l'Annulation de la Dette des Pays les Moins Avancés,

international institutions such as the World Bank,[4] UNCTAD,[5] and the UN[6] have recently dealt with this phenomenon. Instead of considering the debtor's solvency or systemic relevance, they ask a moral question: Should debts incurred by despotic regimes and used to the detriment of the population be regarded as valid? For instance, the European Parliament

> considers the public external debt of the countries in North Africa and the Middle East to be odious debt, considering that the debt was built by the dictatorial regimes, mostly through the personal enrichment of the political and economic elite and the purchasing of arms, often used to oppress their own populations; [and] therefore calls for the reconsideration of this debt . . . .[7]

Indeed, it seems morally wrong to burden the population of a state with a debt in the creation of which it had no voice and the proceeds of which were used for its own oppression, instead of freeing up the resources necessary for the post-dictatorial reconstruction. Unfortunately, the examples of this dilemma are abundant, and it suffices to point to countries like Iraq or Libya to see that creditors all around the world have manifest interests in preserving their claims. As morally compelling the nullity of such debt may be, the question must be asked if this moral claim can conclusively be translated into a legal concept.

This article argues that a legal solution to the dilemma of odious debts is not only desirable, but feasible. Part 2 gives a brief introduction to the historical origins of the concept of odious debts as well as its recent modifications. Part 3 explains why a legal solution is necessary. In Part 4, international human rights are identified as the missing link between the behaviour of the debtor state and the assessment of individual debts. Finally, Part 5 develops a human rights-based mechanism for the prevention of odious agreements, based on an international convention. The draft of this convention is annexed to this article.

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27 March 2007, paras. 10–12, and Resolution 3-1507/6, Proposition de Résolution sur l'Annulation de la Dette des Pays les Moins Avancés, 27 March 2007.

4 See the reports initiated by the World Bank by V. Nehru and M. Thomas, 'The Concept of Odious Debt: Some Considerations' (2008), available at <elibrary.worldbank.org/content/workingpaper/10.1596/1813-9450-4676> (accessed 6 May 2015, with critical commentary by S. Michalowski and J. 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', (2009) 48 *Colum.J.Transnat'l. L.* 59–113, and C. Paulus, ‚The Evolution of the "Concept of Odious Debts"', (2008) 68 *ZaöRV* 391, at 391–429.

5 At the level of UNCTAD, a panel at the 'Sixth Debt Management Conference', 19–21 October 2007, dealt with odious debts. See also the UNCTAD discussion paper by R. Howse, 'The Concept of Odious Debt in Public International Law' (2007), available at <www.unctad.org/en/docs/osgdp20074_en.pdf> (accessed 6 May 2015).

6 In his report, the UN Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, Particularly Economic, Social and Cultural Rights calls for the cancellation of all odious credit export agency debt, see Report of 5 August 2011, A/66/271, paras. 17 and 55(f).

7 European Union: European Parliament, *Resolution on EU Trade and Investment Strategy for the Southern Mediterranean Following the Arab Spring Revolutions*, 10 May 2012, Res. 2011/2113(INI), Consideration 6.

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2. A BRIEF INTRODUCTION TO ODIOUS DEBTS

The first scholar who framed the question of odious debts as a legal concept was Alexander N. Sack.[8] Focusing on cases of state succession, he defined as odious those debts that were incurred and used by a despotic power against the interests of the population, provided that the creditor had knowledge of the intended purpose.[9] In his treatise, Sack referred to various instances of state practice that, in his opinion, proved that those debts were non-transferable to a successor state. The textbook case for his and all later analyses is the repudiation of Cuban debt by the United States of America in 1898.[10] After having supported the Cuban struggle for independence against Spain, the USA became the new ruling power over Cuba. Here, the United States refused to assume all debts incurred by Spain at the expense of the Cuban treasury, because 'to crush the inhabitants by a burden created by Spain in the effort to oppose their independence, would be even more unjust'.[11] Indeed, vast parts of the debts were used to finance military operations in Cuba and abroad.[12]

Although Sack's work was published in 1927, it is still the point of reference for most contemporary examinations of the matter.[13] However, some co-ordinates of the debate have changed. Today, most proponents of the odious debts doctrine apply the rule to cases of mere regime change – which, as a general rule, leave the legal personality of the state unaffected[14] – and use the following three criteria for classifying a debt as odious: (i) lack of consent by the population; (ii) lack of benefit for the population; and (iii) creditor knowledge.[15] Still, the voices claiming that odious debts are void[16] seem to be outnumbered by their opponents.[17] Indeed, considering that in many instances like post-apartheid South Africa,[18] Nicaragua

8 A former tsarist minister, Sack taught law in France and the USA. On the controversial person of Sack see S. Ludington and G. Gulati, 'A Convenient Untruth: Fact and Fantasy in the Doctrine of Odious Debts', (2008) 48 *Vay.J.Int'l. L.* 595, at 595–639.

9 See A. N. Sack, *Les Effets des Transformations des États sur leurs Dettes Publiques et Autres Obligations Financières. I - Dettes Publiques* (1927), 157 et seq.

10 S. Ludington et. al., 'Applied Legal History: Demystifying the Doctrine of Odious Debts', (2010) 11 *Theoretical Inquiries in Law* 247, at 247–81, at 250 et seq. with further references.

11 Memorandum of American Peace Commission, Paris, 14. October 1898, printed in J. B. Moore, *A Digest of International Law* (1906), at 358 et seq.

12 M. Bedjaoui, Ninth Report on Succession of States in Respect of Matters other than Treaties, UN Doc. A/CN.4/301 and Add.1 (1977), YBILC *1977 (II/1)*, 7 et seq., at para. 160.

13 See, e.g., A. Khalfan et. al., 'Advancing the Odious Debt Doctrine', CISDL Working Paper (2003), available at <http://cisdl.org/public/docs/pdf/Odious_Debt_Study.pdf> (accessed 6 May 2015), and the references in notes 16 and 17.

14 A. Cassese, *International Law* (2005), at 77.

15 See Paulus, *supra* note 4, at 409 for further references.

16 Notably Bedjaoui, *supra* note 12, at para. 115; Howse, *supra* note 5, at 10 et seq.; J. King, 'Odious Debt: The Terms of the Debate' (2007) 32 *N.C.J.Int'l L.& Com.Reg.* 605, at 605–67, at 614 and 620 as well as a number of debt relief NGOs.

17 See, for instance, L. Buchheit et. al., 'The Dilemma of Odious Debts', (2007) 56 *Duke L.J.* 1201, at 1201–2, at 1230; S. Michalowski, *Unconstitutional Regimes and the Validity of Sovereign Debt. A Legal Perspective* (2007), at 43 et seq. with further references; Nehru and Thomas, *supra* note 4, at 14 et seq.; Paulus, *supra* note 4, at 415 et seq.

18 See below, Part 3.

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after Somoza,[19] and Indonesia after Suharto,[20] the successor regimes decided to service all debts of their predecessors raises serious doubt as to the legal validity of the concept. Accordingly, the Resolution of the European Parliament quoted in the introduction was not followed by any debt cancellation or even reconsideration. In fact, it is difficult to substantiate the judgemental notion of 'odious' with objective legal criteria. How can popular consent be measured? When does an agreement benefit the population? How much can the creditor be expected to know about the use of the proceeds? And who shall decide these controversies? In the absence of substantial answers, there is a significant risk of arbitrary application of the concept, which leads to its general rejection.[21]

3. The need for a legal solution

3.1. The reputational problem

Given the weak legal support for a repudiation of odious debts, states generally decide to refrain from invoking the doctrine. The main reason for this reluctance is the expected negative reputational consequence. If a state refuses to service its debt, this is seen as a default unless there are legally recognized reasons to justify this behaviour. As a consequence, the state's credit rating will be downgraded and the state will face difficulties in accessing private capital markets. In addition, the defaulting state will face negative political and strategic consequences in his relationship with other sovereigns. States therefore would rather pay back odious debts than be isolated from access to new loans.[22] This motivation has been expressly stated in the case of South Africa, where the Minister of Justice declared that he wanted the companies that had supported the apartheid regime to continue investing in the post-apartheid state.[23] Likewise, Iraq expressly rejected the application of the doctrine of odious debts.[24] Indeed, having obtained an overall debt reduction of about 80 per cent[25] for reasons of security and regional stability,[26] Iraq had no need

19 The successor government under Ortega first declared not to service the debts, but then backed away in order to preserve good relations to Western states, see S. Jayachandran and M. Kremer, 'Odious Debt' (2006) 96 *Am.Econ.Rev.* 82, at 86.

20 In the case of Indonesia, the USA insisted on the servicing of its debt, see J. Stiglitz, 'Odious Rulers, Odious Debts', *The Atlantic*, November 2003, at <www.theatlantic.com/past/docs/issues/2003/11/stiglitz.htm> (accessed 6 May 2015).

21 See, for instance, R. Rajan, 'Odious or Just Malodorous?', (December 2004) *Finance & Development* 54, at 55.

22 A. Feibelman, 'Contract, Priority, And Odious Debt', (2007) 85 *N.C.L. Rev.* 727–72, at 733 et seq. with further references; S. Jayachandran et. al., 'Applying the Odious Debts Doctrine while Preserving Legitimate Lending' (2006), available at <http://iis-db.stanford.edu/evnts/4930/ApplyingtheOdiousDebtsDoctrine.pdf> (accessed 6 May 2015), at 5.

23 L. Buchheit and G. Gulati, 'Odious Debts and Nation-Building: When the Incubus Departs', (2008) 60 *Me.L.R.* 477, at 485.

24 Interview with the Iraqi Minister of Finance, quoted in A. Gelpern, 'What Iraq and Argentina Might Learn from Each Other' (2005) 6 *Ch. J. Int'l. L.* 391, at 406.

25 The figure relates to Paris Club debt and private debt, see Club de Paris/Paris Club, 'The Paris Club and the Republic of Iraq Agree on Debt Relief', Press Release, 21 November 2004, available at <http://www.clubdeparis.org/sections/communication/archives-2004/irak6017> (accessed 6 May 2015) and A. Gelpern, 'Odious, not Debt' (2007) 70 LCP, at 89 for further references.

26 N. Gelpern, *supra* note 24, at 400 et seq.

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to follow this road. However, those states with less international significance will have more difficulties in dealing with the heritage of their former dictators.

An international agreement on odious debts would not only empower post-dictatorial states to reject a morally opposable debt burden, it would also enable creditors to distinguish between legitimate and invalid claims. This distinction should not be dependant on the grace of the creditor (as in the case of debt relief). Neither should it be left to the arbitrariness of the debtor. In the case of Cuba, for instance, the debts were repudiated in their entirety, although they were partly used for legitimate administrative purposes.[27] Therefore, an objective approach based on international consensus should be adopted, which would have the great merit of combining material justice with legal certainty.

3.2. Positive effects of a mechanism and global feasibility

Proponents of the odious debts doctrine advance two benefits. First, after a regime change the new government can repudiate considerable amounts of debt and thereby free up resources to invest in infrastructure, security, and for social purposes. Second, as creditors know that they will not have their claims fulfilled, they will be inhibited from lending to despotic states, which will dry out the resources available to the dictatorship and accelerate its downfall.

The main argument against the doctrine is fungibility of money.[28] The despotic government could in fact raise taxes or sell natural resources in order to finance its oppressive practices. Likewise, each loan given to the government for legitimate purposes would free up an equal amount of money that could be utilized for illegitimate purposes. Instead of taking out a loan for buying a tank, the government could take out the loan for building roads and buy the tank with the money subsequently freed up in the domestic budget. Although it will be virtually impossible to dry out despotic regimes,[29] this does not mean that the concept of odious debts is defunct. The doctrine still enables the successor government to reduce its debt burden and considerably improve its financial situation.[30]

A further argument against the concept is the fact that it will be near impossible to convince all states to regard odious debts as void. However, this is not a necessary requirement for its effectiveness. Whilst a higher number of states participating in a solution increases its legitimacy, even if a modest number of economically significant states agree with the concept, it can have full effectiveness for post-dictatorial states. A state repudiating odious debts may have strategic and financial disadvantages in its relations with those states rejecting the doctrine; however, states favourable to

27 E. H. Feilchenfeld, *Public Debts and State Succession* (1931), 339 et seq. estimates the legitimate part to be about 25 per cent.

28 With further references: P. Bolton and D. Skeel, 'Odious Debts or Odious Regimes?', (2007) 70 LCP 83, at 89; see also A. Choi and E. Posner, 'A Critique of the Odious Debt Doctrine', (2007) 70 LCP 33, at 44.

29 O. Ben-Shahar and G. Gulati, 'Partially Odious Debts', (2007) 70 LCP 47, at 65 et seq. argue that it is more difficult to misuse tax revenues than loans; however, this implies a minimum of public control, which is often lacking in despotic regimes.

30 See the economic model by Jayachandran and Kremer, *supra* note 19, at 88.

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the doctrine will not regard its refusal to pay as a default. As a consequence, the state will retain full access to the latter's financial markets.[31]

A third problem is the impact of the doctrine on the population of the debtor state. Experience with trade sanctions has shown that well-intended embargos can have detrimental effects on the weakest members of society.[32] However, there is limited comparability between trade sanctions and the prevention of odious debts.[33] Whereas the former has a direct effect on the population, the latter first and foremost targets the public budget. Productivity and employment are only affected as much as they depend on public financing. Whilst the secondary negative consequences like tax rises, expropriations, or a reduction of public services can still be considerable, they are counterbalanced by the benefit of a significantly reduced debt burden after a regime change, which facilitates the transition to a possibly democratic regime.

4. Human rights – The missing link

Proponents of the doctrine of odious debts argue that a people should not be burdened with a debt if they derived no benefit from it.[34] The crucial question therefore is: when can the population of the debtor state be said to have benefited from an agreement? Whilst delivering tanks to an oppressive regime seems to demonstrate an obvious absence of benefit, the situation becomes more complicated if the same tanks are used for defending the territorial integrity of the state. Likewise, schools and hospitals seem to be clearly beneficial, until they are reserved for the ruling class,[35] or turned into prisons for the secret service. A further problem is the fact that 'the population' is a heterogeneous group who within themselves can hold contrary interests. In the Cuban affair, it has been argued that the US-American intervention was contrary to the interests of the Cuban people because the struggle for independence emanated from a minority and led to the destruction of property and infrastructure.[36] Likewise, the oppression of a minority can be endorsed or even conducted by a majority of the population.[37]

There is a wide variety of approaches to these questions, from drawing up a black and white list of beneficial transactions[38] to leaving the decision to the discretion

31 Jayachandran et. al., *supra* note 22, at 22.

32 On sanctions on Iraq and their effects on human rights see F. Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights', (2011) 11 HRLR 1, at 10 with further references.

33 For this argument, see Jayachandran et. al., *supra* note 22, at 5, and Center for Global Development, 'Preventing Odious Obligations. A New Tool for Protecting Citizens from Illegitimate Regimes' (2010), available at <http://www.cgdev.org/files/1424618_file_Odious_Debt_FINAL_web.pdf> (accessed 6 May 2015), at viii.

34 This follows from principles of political philosophy, according to which the government has the duty to act in the interest of its population, as well as from principles of unjustified enrichment; on the first argument, see J. Purdy and K. Fielding, 'Sovereigns, Trustees, Guardians: Private-Law Concepts and the Limits of Legitimate State Power', (2007) 70 LCP 165, at 167 et seq.; on the second argument, see L. Buchheit et al., *supra* note 17, at 1224.

35 C. Paulus, '"Odious Debts" v. Debt Trap: A Realistic Help?', (2005) 31 *Brook.J.Int'l L.* 83, 95.

36 L. Pérez and D. Weissman, 'Public Power and Private Purpose: Odious Debt and the Political Economy of Hegemony', (2007) 32 *N.C.J.Int'l L.& Com.Reg.* 699, at 718.

37 See D. Gray, 'Devilry, Complicity, and Greed: Transitional Justice and Odious Debt', (2007) 70 LCP 137, at 148 et seq., referring to genocide in Rwanda and Nazi Germany.

38 See, for instance, the approach by King, *supra* note 16, at 655.

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of the successive government.[39] However, there is a set of criteria which seems to have been overlooked[40] despite being objective, differentiated and universally recognized: international human rights. The different categories of human rights make it possible to appreciate whether a state respects or disregards the interests of its population, for instance through restriction of liberties, discrimination against certain groups, prohibition of democratic participation[41] or the use of public funds without regard to the fundamental needs of the population. All these different aspects can be found in the various legally binding human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR) or the International Covenant on Economic, Social and Cultural Rights (ICESCR), which are ratified by 167 and 161 states, respectively. This variety of rights *ratione materiae* and *personae* resolves the difficulty that a common interest of the whole population is often untraceable and does not protect the majority's interests if in violation of the rights of the minority.

In addition, international monitoring mechanisms have lead to objective pronouncements on the content and scope of the various rights as well as the behaviour of certain states. Human rights incorporate values inspired by a historic, geographic, philosophic, and religious plurality and have been universally recognized in various human rights treaties and in state practice. They are therefore a legitimate point of reference for assessing a state's behaviour towards its citizens.

But how can the assessment of a state's human rights record be translated into a judgement on the legitimacy of its debt? Whereas in the interest of functioning economic relations it can be presumed that states generally conclude agreements of benefit to their populations, this presumption should be rebutted if a state continuously and severely violates the human rights of its population or international humanitarian law. The same can be said if due to widespread corruption vast parts of agreements are used for the personal purposes of the ruling class. A company delivering chemicals to Saddam Hussein in the last years of his reign could and should have suspected their use in perpetrating violations of human rights and humanitarian law, even if the chemicals were officially designated for agricultural use.[42] Likewise, it can be expected that loans given to a regime that systematically uses public funds for the violation of human rights will contribute to its illegal behaviour. On the other hand, even the most violent dictator can enter into agreements for legitimate purposes, such as education or food supply. Therefore, it is important to include an assessment of the particular contract, when judging whether an agreement is odious

39 In this direction S. Michalowski, *supra* note 17, at 100 et seq.; further solutions are offered by Ben-Shahar and Gulati, *supra* note 29; Bolton and Skeel, *supra* note 28; Buchheit et al., *supra* note 17; Center for Global Development, *supra* note 33; Feibelman, *supra* note 22; King, in Khalfan et al., *supra* note 13, at 42 et seq.; Paulus, *supra* note 35; T. Pogge, 'Achieving Democracy', (2007) 21 *Ethics & International Affairs* 249, at 249–73; see also *infra*, note 43.

40 Some references to human rights can be found in Bolton and Skeel, *supra* note 28, at 95 et seq.; King, *supra* note 16, at 651; Michalowski and Bohoslavsky, *supra* note 4, at 89 et seq.; Paulus, *supra* note 35, at 98.

41 See especially Art. 25 ICCPR.

42 As an example, note the delivery of chemicals to Iraq by a German company, described in J. Kaiser and A. Queck, 'Odious Debts – Odious Creditors? International Claims on Iraq' *Dialogue on Globalization Occasional Papers* (2004), available at <http://library.fes.de/pdf-files/iez/global/02018.pdf> (accessed on 6 May 2015), at 21.

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or not. Consequently, the remainder of this article puts forward and elaborates upon a human rights-based solution to the dilemma of odious debts.

5. The International Convention on the Prevention of Odious Agreements

5.1. General outline of the mechanism

As both the nature of the contracting state and the use of the object of the individual agreement are relevant for the qualification of an agreement as odious, the following mechanism is suggested: States should become party to an International Convention on the Prevention of Odious Agreements (ICPOA, draft text annexed). The convention provides that all agreements concluded after the entry into force of the ICPOA are void if the contracting party is a state classified as odious debts-prone, unless the agreement complies with principles of responsible contracting as set out in the convention.[43] Parties to the ICPOA commit to refraining from concluding odious agreements or issuing guarantees for such agreements and to co-operating internationally to prevent their conclusion. In addition, parties to the Convention will not treat the non-performance of an odious agreement as a default or attach any other negative consequences to the non-performance of an odious agreement. Judgments, awards, or any other enforcement orders issued on the basis of an odious agreement will not be recognized. Furthermore, creditors cannot demand the rescission of the agreement.

Member states to the convention should ideally be representative of a wide geographical, cultural, economic, and political spectrum. However, the ratification by a number of economically important states would be sufficient for the effectiveness of the model.[44] In this case, the legitimacy of the approach is ensured by reference to objective and universally recognized values as criteria for the classification as odious debts-prone (see below, Part 5.2).

This approach has the advantage that any creditor knows at the moment of the conclusion of an agreement whether the debt will possibly be odious. If this is the case, the creditor can take the necessary and appropriate measures to ensure that the agreement will be used to the benefit of the population of the debtor state (see below, Part 5.3). On the other hand, the large number of agreements with states not qualified as odious debts-prone will not have to be scrutinized for legitimacy, which reduces the impact of the mechanism on international commercial relations to a necessary minimum. This does not prevent other mechanisms like the principles of responsible sovereign lending and borrowing[45] from applying stricter standards. However, until

43 This mechanism draws on the approach offered by Jayachandran et al., *supra* note 22, refined by the Center for Global Development, *supra* note 33. With the present article, especially the criteria for the classification as odious debts-prone are elaborated, as well as the institutional design, which both aim at establishing an objective and legally-shaped mechanism. In addition, para. 3 of this article specifies principles for legitimate contracting with classified states.

44 See above, Part 3.2.

45 The UNCTAD Principles on Promoting Responsible Sovereign Lending and Borrowing of 10 January 2012 are available at <www.unctad.info/upload/Debt%20Portal/Principles%20drafts/SLB_Principles_English_Doha_22-04-2012.pdf> (accessed 6 May 2015); see also L. Buchheit and G. Gulati, 'Responsible Sovereign Lending and Borrowing', (2010) 73 LCP 63, at 63–92 et seq.

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such broad principles, which are potentially applicable to any transaction with any sovereign, are adopted, this solution will have positive effects for a number of hard cases.

An important question arises as to who shall decide which debts will be qualified as odious. For reasons of legitimacy and legal certainty, this decision should neither be left to the debtor state[46] nor to an institution which is biased in favour of creditors.[47] Instead, an independent expert body should decide on the basis of a legally organized procedure (see below, Part 5.4).

5.2. Criteria for the classification as odious debts-prone

The central question is which criteria justify the classification of debts as odious. As explained above,[48] both the character of the debtor state and the individual agreement are relevant for this qualification. In this section, the criteria for classifying states as odious debts-prone will be explained. Only if a state has been classified accordingly, does the question arise whether an individual agreement is nevertheless legitimate.[49]

A state should be classified as odious debts-prone if it must be presumed that the state will enter into agreements to the detriment of its population rather than its benefit. This is the case either if the state is responsible for serious and systematic violations of human rights or international humanitarian law, or if its public sector is governed by severe and systemic corruption.

5.2.1. Serious and systematic violations of human rights or international humanitarian law

The notion of serious and systematic violations is similar to other criteria used by the United Nations' organs for attaching trade or military sanctions, for example.[50] However, the term must be interpreted autonomously in the context of odious debts.[51] First, the quantity and quality of the violations must be taken into account. Only if human rights violations occur in a variety of cases and exceed a certain threshold of severity is a classification as odious debts-prone justified. In addition, the state's underlying intention must be considered. A state that violates the duty to protect its population from human rights violations because it lacks the resources

46 See the behaviour of Ecuador, discussed in A. Porzecanski, 'When Bad Things Happen to Good Sovereign Debt Contracts: The Case of Ecuador', (2010) 73 LCP 251, at 251–71.

47 See, for instance, J. Shafter, 'The Due Diligence Model: An Executive Approach to Odious Debt Reform', (2007) 32 *N.C.J.Int'l L.& Com.Reg.* 669, at 669–98, at 691, who suggests creating an institution within the US executive branch for this decision. See also S. Bonilla, *Odious Debt. Law-and-Economics Perspectives* (2011), 126 et seq., who suggest the Paris Club as an appropriate institution.

48 See Part 4.

49 See below, Part 5.3.

50 See, for instance, Resolution of the Security Council, 30. March 2011, S/RES/1975 (2011), para. 12 ('serious violations'); Resolution of the Security Council, 26. February 2011, S/RES/1970 (2011), preamble ('gross and systematic violations').

51 The term 'serious and systematic violations of principles laid down in certain international conventions concerning core human rights and labour rights' is used in the EU's Generalized Scheme of Preferences for the withdrawal of trade preferences, see Reg. 978/2012 of the European Parliament and the Council, 25 October 2012, [2012] OJ L 303/1, at Recital 24 and Art. 19(1)(a). However, this clause has been invoked rarely and without a systematic interpretation of the terms, see F. Schneider, 'Human Rights Conditionality in the EU's Generalized System of Preferences: Legitimacy, Legality and Reform', (2012) 15 *ZEuS* 301, 309 et seq.

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to do so should not be classified as odious debts-prone, as this would further impair its capabilities. Conversely, a minor number of human rights violations can exceed the severity threshold if the state's underlying intention is the commission of genocide.

Depending on their respective ratification, the following treaties constitute the legal sources for the states' obligations to human rights and humanitarian law: ICCPR, ICESCR, International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Convention on the Rights of the Child (CRC) with additional Protocols 1 and 2, Convention on the Rights of Persons with Disabilities (CRPD),[52] the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Suppression and Punishment of the Crime of Apartheid and the Geneva Conventions No. 1 to 4 with their additional Protocols 1 and 2. Even states with an adverse stance on human rights have ratified the majority of these instruments. For instance, Belarus has ratified all 17 conventions/protocols except the CRPD, Iran has ratified 12 conventions, and the Democratic People's Republic of (North) Korea has ratified ten conventions, including in each case the ICCPR and the ICESCR,[53] which makes them legitimate points of reference. In addition, the relevant provisions of customary international law can be considered.

The body competent for qualifying states as odious debts-prone will not have to carry out human rights investigations in the assessed country. This would not only be expensive and impracticable, but also unnecessary. In fact, there are a large number of reports on states' human rights records available which, in their synopsis, provide a distinct picture of the human rights situation in most countries. All human rights conventions provide for treaty bodies that are competent for periodic assessment and, subject to ratification, individual complaints.[54] In conducting its Universal Periodic Review, the Human Rights Council receives various reports from states and non-governmental organizations. Additionally, for the assessment of specific human rights violations,[55] the Human Rights Council makes use of Special Procedures, who are submitting reports on a regular basis. Furthermore, human rights field workers are present in more than 60 regional offices and human rights centres, country offices, as human rights components of peace missions or as human rights advisors[56] and publish reports on an ad hoc basis. In addition, nearly

52 See also the list of core international human rights instruments of the OHCHR, available at <www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (accessed 6 May 2015).

53 The ratifications are available at <treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> (accessed on 6 May 2015).

54 It has to be noted that the review periods differ from two to five years. As a consequence, the reports are not necessarily a useful indicator of the current situation in a specific country. However, taken with all other sources available, they form an important basis for assessment of a country's human rights record.

55 Currently, there are 14 country-specific Special Procedures, see the list on <www.ohchr.org/EN/HRBodies/SP/Pages/Countries.aspx> (accessed 6 May 2015).

56 See the list on <www.ohchr.org/EN/Countries/Pages/MapOfficesIndex.aspx> (accessed 6 May 2015).

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all UN bodies deal with human rights and humanitarian law in some format. The Security Council in particular has repeatedly determined that widespread human rights violations, genocide, or violations of humanitarian law have taken place in a specific country. Even the International Court of Justice occasionally deals with human rights-related issues.[57] Furthermore, regional organizations like the Council of Europe or the Inter-American Commission on Human Rights conduct human rights monitoring. There are also various non-governmental organizations with distinct international reputations, which publish reports on a periodic or ad hoc basis. Certainly, some of these sources can be criticized in specific aspects. However, consideration of the many different reports permits the drawing of a differentiated picture.

5.2.2. Severe and systemic corruption in the public sector

If vast parts of public loans are used for the personal purposes of the ruling class, the population of the debtor state is burdened with unjustified debts. Corruption has negative impacts not only on human rights,[58] but on the legitimacy of public power in general. There is a vast international consensus on the condemnation and criminalization of corruption.[59] Accordingly, the ICPOA provides for the classification of a state as odious debts-prone if its public sector is governed by severe and systemic corruption. This criterion is fulfilled if corruption in the debtor state does not occur only in isolated cases but amounts to the rule rather than the exception ('systemic'),[60] and if acts of corruption are of such a weight that they can have a considerable effect on public debt ('severe'). In this context, corruption must be understood as the abuse of public power for private or political gain[61] in a manner as defined in Articles 15 to 20 of the UN Convention against Corruption.

The decision as to the presence of severe and systemic corruption in the public sector can be made on the basis of a range of reports. Such reports are issued by institutions specializing in the field of governance and anti-corruption such as the

57 See, for instance, ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 136 et seq.

58 See M. Boersma, *Corruption: A Violation of Human Rights and a Crime under International Law?* (2012), at 103 et seq., especially 195 et seq.; see also Corruption and its Impact on the Full Enjoyment of Human Rights, in Particular Economic, Social and Cultural Rights, Working Paper Submitted by Ms. Christy Mbonu in Accordance with Sub-Commission decision 2002/106, 14. May 2003, E/CN.4/Sub.2/2003/18, para. 3.

59 For instance, the UN Convention against Corruption has 167 contracting parties, and the UN General Assembly has condemned Corruption in several resolutions, e.g. A/RES/91/151, 16 December 1996; A/RES/51/59, 28 January 1997; A/RES/58/4, 31 October 2003.

60 See also the definition by the anti-corruption organization U4: 'As opposed to exploiting occasional opportunities, endemic or systemic corruption occurs when corruption is an integrated and essential aspect of the economic, social and political system. Systemic corruption is … a situation in which the major institutions and processes of the state are routinely dominated and used by corrupt individuals and groups …', available at <www.u4.no/glossary/> (accessed 6 May 2015).

61 See the definition by M. Boersma, *supra* note 58, at 28; the World Bank defines corruption as 'the abuse of public office for private gain', World Bank, Helping Countries Combat Corruption – The Role of the World Bank, September 1997, available at <www.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf> (accessed 6 May 1995), at 8.

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World Bank,[62] the African Development Bank,[63] various research institutions[64] and non-governmental organizations such as Transparency International, as well as other reports and public comments by other relevant actors.[65]

5.3. Responsible contracting with classified states

Where it must be presumed that a state generally enters into agreements without benefit to its population, beneficial contractual relations should still remain possible. Otherwise, even the financing of legitimate public services would be 'odious' and void, which would have detrimental effects on the population. However, as the contractual partner knows that the state systematically abuses public funds, he must ensure to the extent possible that the agreement is performed to the benefit of the population. This duty is fulfilled in three steps: registration of the agreement, securing a legitimate purpose for the agreement, and assuring that this legitimate purpose is actually respected (see below).

In fact, imposing such co-responsibility on the creditor is no novelty in international commercial relations. In the Equator Principles,[66] 80 commercial banks[67] have committed to make the financing of projects with a certain environmental and social risk potential[68] conditional on environmental and social assessment (Principle 2), on the inclusion of contractual rules on compliance whose violation can result in termination of the project (Principle 8), and on the development of an environmental and social management plan and system (Principle 4). Independent experts review compliance with the principles (Principle 7). Likewise, in international development co-operation, the financing institutions are bound to ensure that funds are used to project-specific aims, which includes monitoring by the creditor or third parties. Accordingly, the World Bank's Operational Policies on Project Supervision state that:

> [to] these ends, … the Bank supervises the borrower's implementation of Bank-financed projects. … Project supervision covers monitoring, evaluative review, reporting, and technical assistance activities to a. ascertain whether the borrower is carrying out the project with due diligence to achieve its development objectives in

62 See the corruption-related criteria in the IDA Resource Allocation Index (IRAI), available at <www.worldbank.org/ida/IRAI-2011.html> (accessed 6 May 2015), and the Governance and Anti-Corruption Diagnostics, available at <www.go.worldbank.org/QFWZEIB1C0> (accessed 6 May 2015).

63 See the corruption-related criteria in the Bank's Governance Ratings, available via <www.cpia.afdb.org/> (accessed 6 May 2015).

64 Such as the Bertelsmann Foundation with its Sustainable Governance Indicators, available at <www.bertelsmann-stiftung.de/cps/rde/xchg/SID-286810B2-3A83DA88/bst_engl/hs.xsl/52957.htm> (accessed 6 May 2015).

65 E.g. the IMF, the Council of Europe's Group of States Against Corruption (GRECO), or the Follow-Up-Mechanism MESICIC to the Inter-American Convention Against Corruption.

66 The Third version of The Equator Principles, June 2013, is available at <www.equator-principles.com/resources/equator_principles_III.pdf> (accessed 6 May 2015); on the second version, see J. Conley and C. Williams, 'Global Banks as Global Sustainability Regulators? The Equator Principles', (2011) 33 *Law & Policy* 542, at 542–75.

67 The list of members is available at <www.equator-principles.com/index.php/members-reporting> (accessed 6 May 2015).

68 See the classification in Principle 1; furthermore, the principles are only applicable for project financing of US$ 10 million or more, see Equator Principles – Scope.

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> conformity with the legal agreements; b. identify problems promptly as they arise during implementation and recommend to the borrower ways to resolve them . . . [69]

The project supervision is performed by a task team consisting of regional staff as well as a lawyer and finance officer[70] and can be extended beyond project completion.[71]

In the context of odious debts, comparable mechanisms will ensure that funds are used for legitimate purposes. As a first prerequisite, agreements with classified states as well as any problems occurring at the performance of such agreements must be registered in a publicly accessible way with the secretariat of the ICPOA (see also below, para. 4). The registration permits revealing suspicious patterns of behaviour (e.g. purchase of various chemicals that are suitable for military use) and concretizes the obligation on future creditors to exercise diligence.

In addition to its registration, the agreement must include a clause setting out the object and purpose of the agreement, so that it can be assessed whether the agreement will be beneficial to the population of the classified state. As the examples above (Part 4) show, it is impossible to draw a list of positive or negative purposes, as whether the agreement is legitimate or not depends upon the individual circumstances.[72] Therefore, all of the following criteria must be considered for an agreement to qualify as beneficial. First, the object and the purpose of the agreement are relevant. There is an obvious difference between the sale of weapons for security forces and the delivery of construction supplies for the building of schools. Second, the justification for the classification as odious debts-prone gives some indication of the expected use of the agreement. For instance, a state that violently suppresses opposition groups should not be delivered police equipment; and in a state that privatizes public institutions for the financial benefit of the ruling elite, the ongoing use of the proceeds for public purposes must be guaranteed. Accordingly, a further criterion is the extent to which the observance of the agreement is verifiable (e.g. delivery of food versus dual-use goods). Ultimately, it is conceivable that legitimate projects are executed in a way that violates the interests of a part of the population, e.g. forced displacement of local residents for the purpose of building a dam, or schools are constructed by forced labour.

Finally, if the combination of the criteria permits the agreement to be qualified as legitimate, it must also be guaranteed that the purpose of the agreement is respected. Therefore, the contracting party must take the necessary steps to abide by the principles of responsible contracting as set out in the ICPOA (see annex, Art. 7): First of all, certain basic elements have to be included in the agreement.[73] Primarily, the object and the purpose of the agreement must be specified, e.g. delivery of building material for the construction of a specified school. Furthermore, the agreement must include a detailed implementation plan, to be observed by both contracting

69 The World Bank Operations Manual, Operational Policies (OP) 13.05 of July 2001, revised, at paras. 1 and 2, available at <http://go.worldbank.org/DZDZ9038D0> (accessed 6 May 2015).
70 The World Bank Operations Manual, Bank Procedures (BP) 13.05 of July 2001, revised, at para. 1.
71 The World Bank Operations Manual, BP 13.05, at para. 23.
72 In this direction see Paulus, *supra* note 35, at 95 et seq.
73 Some of these elements can be found in the World Bank's project implementation plan, see The World Bank Operations Manual, BP 10.00 – Annex B, January 1994.

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parties. The plan will contain detailed provisions on the use of the object of the agreement, a schedule in accordance with which the object of the agreement will be used (e.g. use of the building as a school for the next 30 years), and, if necessary, a schedule on the successive performance of the agreement according to the progress of the project (e.g. delivery of further material after a certain construction phase has been completed and approved). In addition, the plan will provide a procedure for amendments to the agreement in case of project-related obstacles and specific provisions for the prevention of negative social, environmental or human rights-related consequences (e.g. fair compensation in case of expropriation). Finally, the plan will specify project supervision and monitoring, i.e. determine the persons responsible for supervision and the monitoring intervals. Monitoring can be accomplished by internal or external experts; for those companies without dedicated departments, specialized enterprises on responsible contracting may evolve.[74] Depending on the object of the agreement, after a certain period it can be necessary to review if the object is still being used for the purpose of the agreement. Otherwise, the monitoring report will be made publicly available by the secretariat, which will restrict future agreements and thereby exert pressure on the classified state. Finally, the agreement must contain a provision on the suspension, termination, and rescission of the agreement in case of its violation; if the classified state violates the agreement, the contracting party must terminate the agreement and register the termination, so that other creditors can gain knowledge of specific problems with the performance of agreements.

A creditor who has observed these principles can demand fulfilment of the agreement by the debtor state, even if it becomes apparent that the agreement has actually been used without benefit to the population. Sanctioning a creditor with the nullity of the agreement although he has taken reasonable and appropriate measures would impose an excessive burden on the creditor. Therefore, the creditor can take legal action before a competent domestic court if, at a later date, the debtor state repudiates outstanding obligations. To that end, the agreement will contain a provision choosing the law and jurisdiction of one of the states parties to the ICPOA, contributing to the evolution of coherent standards for the legitimacy of agreements.[75]

5.4. Institutional design

As debtor state and creditor are the main parties affected by the qualification of a debt as odious, both should have standing in the procedure. However, a neutral institution should decide which debts are valid. To this end, the Convention provides for the establishment of an independent expert body, the Committee on the Prevention of Odious Agreements (CPOA). In order to assure timely decisions according to the situation in the classified states, the CPOA is established as a standing body, which will consist of two sub-committees. The Sub-Committee on Human Rights and

74 Ben-Shahar and Gulati, *supra* note 29, at 71; according to Conley and Williams, *supra* note 66, at 560, this is already the case in the field of risk management for project financing.

75 See also Art. 7(4) of the draft ICPOA, according to which the courts will work towards consistent legal practice by taking into consideration decisions by other courts of states parties to the convention.

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Humanitarian Law (CPOA-HR) will classify states according to their human rights and humanitarian law records, the Sub-Committee on Corruption (CPOA-CO) will classify states based on the corruption criterion. The premises of the CPOA could be established in Geneva, where a number of human rights-related offices of the UN are present.[76]

The composition of the CPOA can be inspired by the Human Rights Committee, which consists of highly renowned representatives from a wide geographical and cultural range[77] and is recognized for its independence and lack of political bias.[78] Accordingly, each sub-committee of the CPOA would consist of 18 independent experts with recognised competence in the requisite field and from different cultural and legal orders. Furthermore, members of the CPOA-HR should have significant expertise in the field of human rights and humanitarian law, which would enable them to appraise the relevant reports as the basis of their decision. Members of the CPOA-CO should have an economic background and experience in dealing with corruption in order to evaluate criteria for corruption in the assessed state. For members of both sub-committees, legal expertise would be of advantage because this would assure that the classification criteria are interpreted in a consistent pattern. Candidates for each committee would be proposed by states parties to the ICPOA. Ideally, suitable candidates should be selected in a public and transparent procedure.[79] The members of the committee would be elected for a four-year term; however, in order to assure consistency of the decisions, elections for half of the members should take place after two years respectively.

Each sub-committee should decide with a quorum of 12 members[80] and a qualified majority of two thirds of its voting members. The sub-committees should meet regularly in order to assure that the classification of states is carried out or revoked in due time and in light of the current situation in the considered states. All relevant actors should be included in the decision-making. States under classification must be informed of the establishment of a procedure and have the right to submit comments. Furthermore, the parties to the Convention, representatives of relevant international organizations and relevant non-governmental organizations should be heard. At the end of the procedure, the relevant committee would publish a detailed report that justifies the decision and that indicates the positive or negative aspects concerning future decisions. Once classified as odious debts-prone, states would have the right to inform the CPOA of any modification in circumstance that may justify revocation of the classification.

The work of the committee would be supported by a standing secretariat with full-time employees who collect relevant reports for the sub-committees and receive

76 E.g. the United Nations Office at Geneva, the Office of the United Nations High Commissioner for Human Rights and human rights treaty bodies such as the Human Rights Committee and the Committee on Economic, Social and Cultural Rights.

77 See Art. 28 et seq. ICCPR, especially Art. 28(2) and 31(2).

78 On this development, see K. A. Young, *The Law and Process of the UN Human Rights Committee* (2002), at 50 et seq.

79 See the proposal by Y. Tyagi, *The UN Human Rights Committee. Practice and Procedure* (2011), at 81 et seq. and 147 et seq. for the Human Rights Committee.

80 This reduces the workload for each individual member and ensures quicker decisions.

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communications from relevant actors. The secretariat would also be competent for the registration and publication of agreements with states classified as odious debts-prone (see above, section 5.3).

5.5. Further issues

5.5.1. Scope of application

The Convention targets any agreement concluded with odious debts-prone states. Whereas the discussion in literature is often limited to loans,[81] there is no reason why other agreements should be excluded from the mechanism as debts that are harmful to the population can result from any agreement. The purchase of chemical weapons, for example, burdens the public budget with a duty to pay, and a state that sells oil to an ally state at a bargain price and for the enrichment of the government reduces the public resources without benefit to the population. Therefore, the notion of debt should be understood in a broad way that comprises any contractual liability.[82]

Whereas the material scope of application is broad, the temporal scope should be limited to agreements concluded after the entry into force of the ICPOA. It is conceded that this considerably limits the benefit of the mechanism. However, any retroactive mechanism would not only face serious concerns of legality because of creditors' acquired rights, it is also unlikely that states would agree to such an approach.[83]

5.5.2. Legal consequences

The ICPOA provides that certain agreements concluded with odious debts-prone states are void. Accordingly, judgments, awards, or any other enforcement orders issued on the basis of an odious agreement will not be recognized in the legal order of states parties to the convention. This outcome is independent from any regime change in the classified state, as the necessary intensity of such a change would be difficult to assess.[84] Consequently, the debtor state could refuse performance of odious agreements at any moment in time. However, it could only demand rescission of the agreement after the classification has been revoked.

Yet, the nullity of a loan contract does not automatically entail that the borrower can keep the loan. Instead, the lender can normally claim back the amount based on unjust enrichment. If this were the case, the mechanism would lose vast parts of its deterrent effect. However, in most legal orders, the principles of the law of unjust enrichment exclude the claim in the case of violation of *bonos mores*. In common law, this rule follows from the principles of *in pari delicto potior est conditio possidentis* and *ex dolo malo non oritur actio*.[85] In public international law, these principles are

81 E.g. the approach by Jayachandran et al., *supra* note 22 ('loan sanctions').
82 In this direction A. Chander, 'Odious Securitization' (2004) 53 *Emory L.J.* 923, at 924 et seq.; see also the mechanism suggested by the Center for Global Development, *supra* note 33 (economic agreements). By contrast, tortious liabilities should be excluded because the creditor has no possibility of preventing their emergence and would therefore be unjustly disadvantaged.
83 Jayachandran et al., *supra* note 22, at 6 et seq. and 15, at note 18.
84 In this direction Paulus, *supra* note 35, at 93.
85 House of Lords, *Tinsley v. Milligan*, [1994] 1 AC 340, at 354 et seq.

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manifestations of the doctrine of clean hands.[86] In civil law systems, the principle is expressed e.g. in § 817 of the German Civil Code, which, in turn, is influenced by Roman law.[87] As a consequence, the debtor state is not obliged to return the object of the odious agreement.

As an exception, the claim for unjust enrichment should not be excluded if the debtor demands the rescission of the agreement. In this case, it would be unfair that the creditor must restitute the purchase price, for example, whereas the debtor state can keep the sales item. Therefore, the debtor state must return the remaining enrichment without having to compensate for depreciation.

5.5.3. Parties to the convention

In the interest of legitimacy, universal ratification of the ICPOA is desirable. Therefore, adoption of the convention by the UN General Assembly would give the convention a significant degree of legitimacy while preserving the freedom of individual states to refrain from ratifying it. There is no doubt that some states will reject the concept, yet as the convention refers to universally accepted values – as opposed to what could be perceived as political interests of some 'Western' states – the ratification by a small number of states would still be adequate; further ratifications may follow. In the beginning, some or all of the 34 OECD states could adhere to the ICPOA, as they have a similar political and economic background. At the same time, developing countries should be included, as they can contribute their experience with odious debts, and because they will gain a higher degree of legal certainty for future non-odious transactions. The OECD states include all former G7 members and represent nearly half of the global GDP;[88] their adherence would make the convention economically effective.[89] Particularly, the majority of financial transactions are performed in their legal orders.[90] Likewise, the EU could take the lead in the promotion of the convention in collaboration with Norway, which is particularly proactive in the discussion on the legitimacy of debts.[91] Finally, it would be useful to involve international financial institutions like the International Monetary Fund and the World Bank.

86 The objection *ex iniuria ius non oritur* was explicitly admitted by the International Court of Justice, *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1997, [1997] ICJ Rep. 7, at 133.

87 Paulus, *supra* note 35, at 100 with further references.

88 See the World Bank data available at <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD> (accessed 6 May 2015).

89 See above, Part 3.2.

90 See Center for Global Development, *supra* note 33, at 8 et seq.

91 See The Norwegian Ministry of Foreign Affairs, 'Debt Relief for Development. A Plan of Action' (2004), available at <http://www.regjeringen.no/upload/kilde/ud/rap/2004/0225/ddd/pdfv/217380-debtplan.pdf> (accessed 6 May 2015), at 19 et seq.; in 2006, Norway cancelled debts of about 63 million euros towards developing countries because of its creditor co-responsibility, see 'Cancellation of Debt Resulting from the Norwegian Ship Export Campaign (1976–1980)', Press Release and Fact Sheet, 2 October 2006, available at <http://www.regjeringen.no/nb/dep/ud/pressesenter/pressemeldinger/2006/cancellation-of-debts-resulting-from-the.html?id=272158> (accessed 6 May 2015).

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6. Conclusion

Although the international community has not yet adopted a regulatory model for dealing with odious debts, there are several reasons for optimism. First, with current and future political changes in repressive states on virtually all continents, the subject matter will regularly appear on the political agenda. As debts of post-dictatorial states and the involvement of creditors in industrial countries are being discussed in the daily press, odious debts are attracting the attention of civil society and non-governmental organizations. Consistently with these developments, states like Norway, but also branches of the UN, UNCTAD, or the World Bank seek to address the topic. Furthermore, there is a lively scholastic debate, to which this article intends to contribute by demonstrating that a practicable solution is possible and necessary. The convention suggested here may not be relevant for instances where odious debts have been incurred or fulfilled in the past. However, considering the presence of inhuman regimes, which are economically and financially supported by private and public creditors from most countries, the international community is urgently called upon to implement a solution to odious debts. The basic rule of arboriculture is equally valid for the area of odious debts: 'The best time to plant a tree was 20 years ago. The next best time is now'.[92]

Annex: Draft International Convention on the Prevention of Odious Agreements

Article 1: Definitions and scope of the convention

(1) 'Odious agreement' means any contract, treaty, or other agreement concluded between a contracting party and a State classified as odious debts-prone in accordance with articles 3 to 5 of the present Convention at the conclusion of the agreement, unless the agreement complies with the principles of responsible contracting as set out in article 7 of the present Convention.

(2) 'Contracting party' means any person, legal or natural, private or public, entering into an agreement with a classified State.

(3) 'Classified State' means any State classified as odious debts-prone in accordance with articles 3 to 5 of the present Convention.

(4) This Convention also applies to agreements concluded with a subnational entity of a classified State and with any legal entity under its control.

Article 2: Legal consequences and obligations

(1) Odious agreements are void.

92 As quoted by Panizza, cited in R. Nierlich and F. Schneider, 'Conference Report: A Debt Restructuring Mechanism for European Sovereigns – Do We Need a Legal Procedure?', (2012) 3 IILR 392, at 404.

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(2) Only the State classified as odious debts-prone at the conclusion of an odious agreement can demand the rescission of the agreement, provided the classification has been revoked.

(3) Odious agreements cannot be enforced; judgments, awards or any other enforcement orders issued on the basis of an odious agreement will not be recognized.

(4) The Parties to the present Convention will abide by the provisions in paragraphs (1) to (3) of this article and ensure compliance in their respective jurisdiction.

(5) The Parties to the present Convention will refrain from concluding odious agreements and will co-operate internationally to prevent the conclusion of such agreements.

(6) The Parties to the present Convention will refrain from issuing guarantees for odious agreements.

(7) The Parties to the present Convention will not treat the non-performance of an odious agreement as a default or attach any other negative consequences to the non-performance of an odious agreement.

Article 3: Classification of a state as odious debts-prone

(1) The Committee on the Prevention of Odious Agreements (under article 4 of this Convention) classifies a State as odious debts-prone:
   (a) if the State is responsible for serious and systematic violations of human rights or international humanitarian law; or
   (b) if its public sector is governed by severe and systemic corruption.

(2) In classifying the State, the Committee will consider the observance of relevant conventions and of relevant customary international law by drawing on reports from treaty bodies, other relevant international and regional bodies and non-governmental organizations.

Article 4: Committee on the Prevention of Odious Agreements

(1) The Committee on the Prevention of Odious Agreements (CPOA) shall consist of the Sub-Committee on Human Rights and Humanitarian Law (CPOA-HR) and the Sub-Committee on Corruption (CPOA-CO).

(2) Each Sub-Committee shall consist of 18 members of high moral character and recognized competence in the requisite field, consideration being given to the expediency of participation of those persons with legal experience. Due consideration shall be given to equitable geographical and cultural distribution and to the representation of different legal systems.

(3) The members of the Sub-Committees will be elected by secret ballot from a list of persons possessing the qualifications prescribed under article 4 (2) of the present Convention and nominated for the purpose by the Parties to the present Convention. Each State Party to the present Convention may nominate a maximum of two persons for each Sub-Committee.

(4) The election of the Committee members shall be held at a meeting of the Parties to the present Convention. At that meeting, for which two thirds of the Parties to the present Convention shall constitute a quorum, each State shall have 18 votes for each Sub-Committee. The persons elected to each Sub-Committee shall be those nominees who obtain the largest number of votes.

(5) The initial election shall be held no later than six months after the date of the entry into force of the present Convention. The members of the Committee shall be elected for a four-year term. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot. All members shall be eligible for re-election if re-nominated.

(6) In the event of the death or resignation of a member of the Committee, that member shall be replaced by the next candidate for the respective Sub-Committee having obtained a majority of the votes; in default of such candidates, new elections shall be held for this member. The same procedure applies if, in the opinion of two thirds of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary nature.

Article 5: Procedure

(1) The Sub-Committees shall meet regularly in order to assure that the classification of States is carried out or revoked in due time.

(2) All decisions shall be taken by the relevant Sub-Committee, who shall decide with a quorum of 12 members and a qualified majority of two thirds of its voting members.

(3) All relevant actors shall be included in the procedure, including the State whose classification is considered, the Parties to the present Convention, representatives of relevant International Organizations and relevant non-governmental organizations.

(4) The CPOA shall adopt procedural rules for the work of the Sub-Committees, taking into account paragraphs (1) to (3) of this article.

Article 6: Secretariat and budget

(1) The work of the Committee is supported by a Secretariat.

(2) The Parties to the present Convention provide the CPOA with the necessary financial means for its work, for which the Secretariat will prepare a draft budget.

Article 7: Responsible contracting

(1) An agreement complies with the principles of responsible contracting if it has been concluded for the benefit of the population of the classified State and if the contracting party takes the necessary steps to assure its performance for the benefit of the population of the classified State.

(2) In assessing the benefit to the population of the classified state, consideration is taken of:
   (a) the object of the agreement and its purpose;
   (b) the reasons for the classification of the contracting State as odious debts-prone;
   (c) the past behavior of the classified State with respect to other agreements;
   (d) the extent to which the use of the object of the agreement can be monitored;
   (e) the relevant surrounding circumstances.

(3) In order to assure responsible contracting, the contracting party must take necessary steps to ensure that the classified State performs the agreement for the benefit of its population. To this effect, the agreement must include, and the contracting party must ensure observance of -
   (a) the object and the purpose of the treaty;
   (b) a detailed implementation plan. The implementation plan must contain detailed provisions on the use of the object of the agreement, a schedule in accordance with which the object of the agreement will be used, and, if necessary, a schedule on the successive performance of the agreement according to the progress of the project; provisions on the procedure of amendment of the agreement in case of project-related obstacles; specific provisions for the prevention of negative social, environmental or human rights-related consequences; and provisions on project supervision and monitoring;
   (c) a provision on the suspension, termination and rescission of the agreement; and
   (d) a provision choosing the law and jurisdiction of one of the States Parties to the present Convention.

(4) Any legal dispute arising out of an agreement with a classified State shall fall within the jurisdiction of one of the States Parties to this Convention, the courts of which will work towards consistent legal practice by taking into consideration decisions by other courts of States Parties to this Convention.

(5) The conclusion of an agreement and any problems occurring with the performance of an agreement must be registered with the Secretariat of the CPOA.

Article 8: Signature, ratification, accession

(1) The present Convention shall be open for signature by all States and International Organizations.

(2) The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

(3) The present Convention shall remain open for accession by any State or International Organization. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 9: Entry into force

(1) The present Convention shall enter into force on the thirtieth day following the date of deposit of the fifteenth instrument of ratification or accession.

(2) For each State ratifying or acceding to the Convention after the deposit of the fifteenth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.