FROM BILATERALISM TO COMMUNITY INTEREST

Essays in Honour of Judge Bruno Simma

Edited by

Ulrich Fastenrath
Rudolf Geiger
Daniel-Erasmus Khan
Andreas Paulus
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Christoph Vedder

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Great Clarendon Street, Oxford OX2 6DP
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Argentina Austria Brazil Chile Czech Republic France Greece
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in the UK and in certain other countries
Published in the United States
by Oxford University Press Inc., New York

First published 2011

British Library Cataloguing in Publication Data
Data available
Library of Congress Cataloging in Publication Data
Data available
Typeset by Newgen Imaging Systems (P) Ltd., Chennai, India
Printed in Great Britain
on acid-free paper by
CPI Antony Rowe, Chippenham, Wiltshire
ISBN 978–0–19–958881–7
1 3 5 7 9 10 8 6 4 2

A HISTORY OF THE DOCTRINE OF ODIOUS DEBTS: SERVING INDIVIDUAL/ BILATERAL OR COMMUNITY INTERESTS?

August Reinisch[*]

I. Introduction

'Odious debts' have been mainly relevant in the context of the law of State succession. The so-called 'odious debts' doctrine provides reasons for the non-repayment of certain types of debts incurred by a predecessor State against the interests of a successor State. The ground for the non-succession into certain debts lies primarily in the nature of the debts and the creditor's specific knowledge of the harmful effect of the debts for the debtor.

Traditionally, the 'odiousness' of certain debts was determined by the particular harm to the debtor, for example, debts incurred to fight secessionist movements that eventually prevailed and established a successor State. It was thus largely determined by the bilateral relationship between predecessor and successor State. Even where it was more broadly applied in situations of regime change, the underlying focus was a bilateral one between predecessor and successor government. Since it would ultimately 'benefit' the successor State or regime, one can also speak of their 'individual' interests being served.

Today, the basis and content of the odious debts doctrine may have changed by including community interests in the notion of odious debts. This may also explain the recent surge of interest in the concept of odious debts. It appears that it is no longer the purely bilateral relationship which is of interest, but rather a broader notion of community interests and values which are intended to be protected. This may include core notions of an international ordre public and may overlap with the concept of *jus cogens*.

This contribution aims at investigating whether and, if so, to what extent community interests may have become more prominent in the odious debts discourse.

[*] The author wishes to thank Jane A Hofbauer and Agnes S Schitter for their research assistance as well as Stephan Wittich and Christoph Schreuer for their comments on a previous draft of this contribution.

II. The Origins of the Odious Debts Doctrine

The doctrine of odious debts is usually regarded as a specific aspect of the law of State succession. While the legal consequences of State succession for the general debt of a predecessor State are not entirely settled,[1] it is widely accepted that debts known as 'odious' ('*dettes odieuses*') are among the specific categories of State debts that need not be assumed by a successor State.[2]

The concept of odious debts, or what is often referred to as the doctrine of odious debts, however, lies outside the law of State succession proper. It was developed by the Russian exile scholar Alexander N Sack in his investigation of the effect of State transformations on their debts.[3] Therein he stated that debts incurred by a 'despotic' regime not in the interest of the State but rather to preserve the despot's hold on power or to suppress the State's own population should be viewed as 'odious'.[4] Such 'odious debts' granted by a creditor who is aware that they are to be used against the interests of a State and/or its population are 'personal' debts of the despotic regime and do not bind the State or its people once they have liberated themselves from such regime.[5] In this original version, the odious debts doctrine

[1] International Law Association, 'Economic Aspects of State Succession' ILA Final Report 2006, 2: 'the rules of succession in respect of State debts are disputed, the practice is extremely differentiated, and the formulation of conclusions as to the possible customary nature of various rules is very difficult'; A Reinisch and G Hafner, *Staatensukzession und Schuldenübernahme* (Service Fachverlag, 1995) 63.

[2] ILA Final Report 2006 (n 1) ('there is general agreement in practice, confirmed unanimously by international legal writing, that so-called odious debts (ie debts of the State which do not relate to any interest of the population of the territory, or incurred in pursuit of illegal aims, like war) are not subject to succession'); HE Folz, 'State Debts' in R Bernhardt (ed), *Encyclopedia of Public International Law* (Elsevier, 1985) 484, 486 ('"Odious debts" are excluded from transition; they come to an end with the predecessor State'); Reinisch and Hafner, *Staatensukzession und Schuldenübernahme* (n 1) 71 ('*Eine gewohnheitsrechtlich anerkannte Ausnahme von der Übernahmspflicht für Schulden des Vorgängerstaates gilt für sog "dettes odieuses" oder "odious debts"*'); A Verdross and B Simma, *Universelles Völkerrecht* (3rd edn, Duncker & Humblot, 1984) 629 ('Pursuant to customary international law, the duty to assume debts [from the predecessor State] is generally excluded in cases of "odious debts"'). See also the overview by C Paulus, 'The Evolution of the "Concept of Odious Debts"' (2008) 68 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 391, 403.

[3] A Sack, *Les Effets de Transformations des États sur leur Dettes Publiques et Autres Obligations Financières* (Recueil Sirey, 1927). See the nuanced view of the role of Sack by S Ludington and M Gulati, 'A Convenient Untruth: Fact and Fantasy in the Doctrine of Odious Debts' (2008) 48 Virginia J Intl L 595.

[4] Sack, *Les Effets de Transformations* (n 3) 157–65 ('if a despotic power incurs a debt not for the needs or in the interest of the State, but to strengthen its despotic regime, to repress its population that fights against it, etc., this debt is odious for the population of the State').

[5] Ibid ('The debt is not an obligation for the nation; it is a regime's debt, a personal debt of the power that has incurred it, consequently it falls within this power.... The reason these "odious" debts cannot be considered to encumber the territory of the State, is that such debts do not fulfil one of the conditions that determines the legality of the debts of the State, that is: the debts of the State must be incurred and the funds from it employed for the needs and in the interest of the State. "Odious" debts, incurred and used for ends which, to the knowledge of the creditors, are contrary to the interests of the nation, do not compromise the latter—in the case that the nation succeeds in

even applies in situations of mere government or regime change, and not only in cases of State succession.

Sack's and other authors'[6] concepts of odious debts are primarily based on the historical background of the Soviet Union's refusal to repay the debts of tsarist Russia. However, contrary to the sweeping assertion of the revolutionary USSR that it was not obligated to repay the debts of its predecessor State/government, Sack's concept of odious debts worked in a much more nuanced way. He thought that the exculpatory effect only attached to a narrow notion of odious debts. In his writings, debts were considered odious if they had been incurred (1) by a non-democratically legitimized government and against the will of and/or without the consent of the people, (2) for purposes not in the interest of the people and/or the State, and (3) if the creditor was aware of these circumstances.[7]

Also, one of the most important precedents, often relied upon where the odious debts doctrine is invoked, stems from a mere regime change situation. In the 1923 arbitral decision in the so-called *Tinoco* case,[8] sole arbitrator William Howard Taft relied on a version of the yet unborn odious debts doctrine. During the proceedings between Costa Rica and Great Britain, which was offering diplomatic protection for the Royal Bank of Canada, the question was raised whether loans that had been granted to the Tinoco government and which had been mostly embezzled by Federico Tinoco himself, had to be repaid by the Costa Rican successor government. While the arbitrator affirmed the fundamental principle of the continuing validity of financial obligations in the event of a mere change in government,[9] he nevertheless maintained that the lender's knowledge of the embezzlement nullified any demands for repayment from the (successor) government.[10] The basis of this decision may indeed be regarded as a prefiguration of the odious debts doctrine.

III. Odious Debts State Practice

Even before the *Tinoco* case and throughout the twentieth century, concepts today captured in the notion of the odious debts doctrine were repeatedly invoked by

getting rid of the Government which incurs them—except to the extent that real advantages were obtained from these debts').

[6] See, eg, E Feilchenfeld, *Public Debts and State Succession* (Macmillan, 1931); G Jèze, *La Partage des Dettes Publiques au Cas de Démembrement de Territoire* (M Giard, 1921).

[7] Sack, *Les Effets de Transformations* (n 3) 157–65.

[8] *Tinoco Case (Great Britain v Costa Rica)*, Award of 18 October 1923, 1 RIAA 375; See also WH Taft, 'Arbitration between Great Britain and Costa Rica' (1924) 18 American J Intl L 147.

[9] *Tinoco Case* (n 8) 377 ('Changes in government or the internal policy of a state do not as a rule affect its position in international law').

[10] Ibid, 394 (The Bank 'must make out its case of actual furnishing of money to the government for its legitimate use. It has not done so. The bank knew that this money was to be used by the retiring president, F Tinoco, for his personal support after he had taken refuge in a foreign country. It could not hold his own government for the money paid to him for this purpose').

States trying to avoid the repayment of certain debts of their predecessor States or governments. Examples range from the United States (US) Civil War which led to a constitutional endorsement of the repudiation of certain 'odious debts',[11] the US and United Kingdom refusals to honour war debts of Cuba[12] and the Boer Republic,[13] to the People's Republic of China's repudiation of debts of the pre-revolutionary imperial Chinese government.[14]

Some would argue that the odious debts doctrine also found entry into treaty law, more precisely into the Paris Peace Treaties following the First World War. For instance, the Peace Treaty of Versailles, which in principle obligated Germany to assume portions of the pre-war debts of the German Reich,[15] in Article 255 also established that Poland would not have to assume those debts which resulted from previous German 'colonial' policies.[16] Another facet of the odious debts doctrine may be recognized in the Treaty of Saint-Germain-en-Laye which stipulated that the successor States to the Austro-Hungarian Monarchy bore no obligation to assume the Austrian war debts.[17]

[11] Fourteenth Amendment of the Constitution of the United States of America (9 July 1868) ('The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebelling, shall not be questioned. *But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States*, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void') (emphasis added).

[12] Following the Spanish-American War in 1898, which among other consequences led to the surrender of the Philippines, Puerto Rico, and Cuba to the US, the US refused to assume certain Cuban debts vis-à-vis Spain. The primary argument for this was the fact that the debts in question were those incurred for the purpose of suppressing popular rebellions against the Spanish regime. See World Bank, 'The Concept of Odious Debt: Some Considerations', Discussion Paper (22 May 2008) 9 <http://siteresources.worldbank.org/INTDEBTDEPT/Resources/468980-1184253591417/OdiousDebtPaper.pdf> accessed 15 November 2010.

[13] *West Rand Central Gold Mining Company v The King* [1905] 2 KB 391, 405.

[14] *Jackson v People's Republic of China* 794 F 2d 1490, 1495 (1986) ('the PRC maintains that under the principle of non-liability for "odious debts" China bears no responsibility for the bonds'). Because the US court recognized China's sovereign immunity, however, this question was not addressed in substance.

[15] Art 254 of the Versailles Peace Treaty between Germany and the Allied and Associated States (28 June 1919) provided that: 'The Powers to which German territory is ceded shall, subject to the qualifications made in Article 255, undertake to pay: (1) A portion of the debt of the German Empire as it stood on August 1, 1914, calculated on the basis of the ratio between the average for the three financial years 1911, 1912, 1913, of such revenues of the ceded territory, and the average for the same years of such revenues of the whole German Empire as in the judgment of the Reparation Commission are best calculated to represent the relative ability of the respective territories to make payment.'

[16] Art 255(2) of the Versailles Treaty stated: 'In the case of Poland that portion of the debt which, in the opinion of the Reparation Commission, is attributable to the measures taken by the German and Prussian Governments for the German colonisation of Poland shall be excluded from the apportionment to be made under Article 254.'

[17] Art 205(4) of the Peace Treaty of Saint-Germain-en-Laye between Austria and Allied and Associated Powers (1919) ruled: 'The above mentioned states with the exception of Austria are not burdened by any obligation resulting from war debts of the former Austrian government, wherever these titles may be located.' This debt relief was not extended to Austria because it was regarded as partially identical with the Austro-Hungarian monarchy. See W Hummer, 'Österreich seit 1918'

Apart from the above-mentioned *Tinoco* case, international judicial or arbitration practice confirming the odious debts doctrine has been rare. It seems, however, that in one important case the Iran-US Claims Tribunal at least implicitly subscribed to the odious debts doctrine. Iran had argued that Iranian debts in connection with US weapons sales to the Shah's regime represented odious debts that the new government of the Islamic Republic of Iran would not have to repay. The Claims Tribunal rejected this odious debts defence because it held that the odious debts doctrine only very narrowly applied to cases of State succession and not to those of a change in government as in the case of the Islamic Revolution. It further opined that the classic international law prerequisites for odious debts were not met in the case at hand since the debts in question were neither against the legitimate interests of Iran nor incurred for a purpose contrary to international law.[18] In doing so, however, the Iran-US Claims Tribunal confirmed the concept of odious debts as a category of international law.

Recently, the odious debts doctrine has appeared to enjoy a revival, being strongly pushed by academics and non-governmental organizations active in the debt relief camp.[19] Even international organizations have felt the need to respond to the

in H Neuhold, W Hummer, and C Schreuer (eds), *Österreichisches Handbuch des Völkerrechts* (4th edn, Manz, 2004) 564.

[18] *United States of America v Islamic Republic of Iran* (3 December 1996) Chamber Two Award No 574-B36-2, 32 Iran-US Claims Tribunal Reports 164, 176, para 51: 'The Tribunal is of the opinion that the debt under the 1948 Contract cannot be classified under the notion of "odious debts" as understood in international law. They were not contracted with a view to attaining objectives contrary to the legitimate interests of Iran nor were they contracted with an aim and for a purpose not in conformity with international law.'

[19] See among the more recent contributions: O Ben-Shahar and M Gulati, 'Partially Odious Debts?' (2007) 70 L & Contemporary Problems 47; JP Bohoslavsky, 'Responsibility for Abusive Granting of Sovereign Loans' (2008) 14 L & Business Rev of the Americas 495; P Bolton and D Skeel, 'Odious Debts or Odious Regimes' (2007) 70 L & Contemporary Problems 83; LC Buchheit, 'Ethics, and International Finance' (2007) 70 L & Contemporary Problems 1; LC Buchheit, M Gulati, and RB Thompson, 'The Dilemma of Odious Debts' (2007) 56 Duke LJ 1201; LC Buchheit and M Gulati, 'Odious Debts and Nation-Building: When the Incubus Departs' (2008) 60 Maine L Rev 477; L Catá Backer, 'Odious Debt Wears Two Faces' (2007) 70 L & Contemporary Problems 1; TH Cheng, 'Renegotiating the Odious Debt Doctrine' (2007) 70 L & Contemporary Problems 7; AH Choi and EA Posner, 'A Critique of the Odious Debt Doctrine' (2007) 70 L & Contemporary Problems 33; J Damle, 'The Odious Debt Doctrine After Iraq' (2007) 70 L & Contemporary Problems 139; D DeMott, 'Agency By Analogy: A Comment on Odious Debt' (2007) 70 L & Contemporary Problems 157; AM Dickerson, 'Insolvency Principles and the Odious Debt Doctrine: The Missing Link in the Debate' (2007) 70 L & Contemporary Problems 53; A Gelpern, 'What Iraq and Argentina Might Learn from Each Other' (2005) 6 Chicago J Intl L 391; A Gelpern, 'Odious, Not Debt' (2007) 70 L & Contemporary Problems 81; T Ginsburg and TS Ulen, 'Odious Debt, Odious Credit, Economic Development, and Democratization' (2007) 70 L & Contemporary Problems 115; DC Gray, 'Devilry, Complicity, and Greed: Transitional Justice and Odious Debt' (2007) 70 L & Contemporary Problems 137; J Hanlon, 'Defining "Illegitimate Debt": When Creditors should be Liable for Improper Loans' in C Jochnick and FA Preston (eds), *Sovereign Debt at the Crossroads—Challenges and Proposals for Resolving the Third World Debt Crisis* (Oxford Univetsity Press, 2006) 109; J Hanlon, 'Wolfowitz, the World Bank, and Illegitimate Lending' (2007) 13 Brown J World Affairs 41; S Jayachandran and M Kremer, 'Odious Debt' (2006) 96 American Economic Rev 82; A Khalfan, J King, and B Thomas, 'Advancing the Odious Debt Doctrine', Centre for International Sustainable Development Law working paper (2003); JA King, 'Odious Debt: The Terms of the Debate'

increased public interest in the odious debts doctrine by commissioning studies or providing their own assessment of the matter.[20]

In the case of Iraq the scholarly endorsement of the odious debts doctrine[21] was even taken up by influential US politicians[22] and by individual congressmen who promoted a bill in the House of Representatives clearly based on the premises of the odious debts doctrine. In the words of the draft 'Iraqi Freedom From Debt Act':[23]

> According to international precedent, debts incurred by dictatorships for the purposes of oppressing their people or for personal purpose may be considered 'odious'. In cases where borrowed money is used in ways contrary to the people's interest, with the knowledge of the creditors, the creditors may be said to have

(2007) 32 North Carolina J Intl L & Commercial Regulation 605; S Ludington, M Gulati, and AM Weisburd, 'A Convenient Untruth: Fact and Fantasy in the Doctrine of Odious Debts' (2008) 48 Virginia J Intl L 596; S Ludington, M Gulati, and A Brophy, 'Applied Legal History: Demystifying the Doctrine of Odious Debts', Duke Law School Public Law & Legal Theory Paper No 236 (2009); BN Lewis, 'Restructuring the Odious Debt Exception' (2007) 25 Boston U Intl LJ 297; M Mader and A Rothenbühler (eds), *How to Challenge Illegitimate Debt—Theory and Legal Case Studies* (Aktion Finanzplatz Schweiz, 2009); EF Mancina, 'Sinners in the Hands of an Angry God: Resurrecting the Odious Debt Doctrine in International Law' (2004) 36 George Washington Intl L Rev 1239; S Michalowski, *Unconstitutional Regimes and the Validity of Sovereign Debt. A Legal Perspective* (Ashgate, 2007); C Paulus, 'Odious Debts vs. Debt Trap: A Realistic Help?' (2005) 31 Brooklyn J Intl L 83; C Paulus, 'The Evolution of the "Concept of Odious Debts" ' (2008) 68 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 391; C Ochoa, 'From Odious Debt to Odious Finance: Avoiding the Externalities of a Functional Odious Debt Doctrine' (2008) 49 Harvard Intl LJ 109; L Pérez and D Weissman, 'Public Power and Private Purpose: Odious Debt and the Political Economy of Hegemony' (2007) 32 North Carolina J Intl L & Commercial Regulation 699; K Raffer, 'Odious, Illegitimate, Illegal, or Legal Debts—What Difference does it Make for International Chapter 9 Debt Arbitration?' (2007) 70 L & Contemporary Problems 221; PB Stephan, 'The Institutionalist Implications of an Odious Debt Doctrine' (2007) 70 L & Contemporary Problems 213; JE Stiglitz, 'Odious Rulers, Odious Debts', *The Atlantic Monthly* (November 2003) <http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=content&ContentID=8577> accessed 8 August 2010; A Yianni and D Tinkler, 'Is There a Recognized Legal Doctrine of Odious Debts?' (2007) 32 North Carolina J Intl L & Commercial Regulation 749.

[20] UN Conference on Trade and Development (UNCTAD) 'The Concept of Odious Debt in Public International Law' (July 2007) UNCTAD Discussion Paper No 185, UNCTAD/OSG/DP/20007/4, 6; World Bank, 'The Concept of Odious Debt' (n 12). See also World Bank, 'The Concept of Odious Debt: Some Considerations', Economic Policy and Debt Department Discussion Paper by Vikram Nehru and Mark Thomas, Final Version May 22, 2008, <http://siteresources.worldbank.org/INTDEBTDEPT/Resources/468980-1184253591417/OdiousDebtPaper.pdf> accessed 8 August 2010.

[21] See P Adams, 'Iraq's Odious Debts' (2004) <http://www.cato.org/pubs/pas/pa526.pdf> accessed 8 August 2010; K Anderson, 'International Law and State Succession: A Solution to the Iraqi Debt Crisis?' (2005) Utah L Rev 401; A Gelpern, 'What Iraq and Argentina Might Learn from Each Other' (2005) 6 Chicago J Intl L 391.

[22] See A Elsner, 'U.S. Considering "Odious Debt" Doctrine for Iraq', Reuters (29 April 2003) reporting the US Vice Minister of Defence Paul Wolfowitz's statement to the Senate Armed Services Committee that a large part of the Iraqi debt had been used 'to buy weapons and to build palaces and to build instruments of oppression'.

[23] Iraqi Freedom From Debt Act (adopted 16 June 2003) HR 2482.

committed a hostile act against the people. Under such reasoning, such debts may be questioned.[24]

Nevertheless, at the end of the day, the rescheduling and substantial reduction of Iraq's external debt was primarily motivated by forward-looking political considerations.[25]

While these examples may form part of an evolving practice to deal with odious debts, it is clear that a claim to emerging customary international law will face difficulties. However, this contribution does not focus on proving or disproving the validity of the odious debts doctrine. Instead, emphasis will lie on the apparently changed perception of the odious debts doctrine as a tool not merely serving individual or bilateral, but rather more broadly community interests. Before doing so, and with a view to establishing the community aspect, it may be useful to look at the international law basis of odious debts.

IV. The Legal Basis of the Odious Debts Doctrine in International Law

Whether the odious debts doctrine can be regarded as part of public international law is sometimes disputed.[26] Most often, insufficient State practice is mentioned as a reason why a customary international law rule to this effect could not have developed. As already mentioned, there are indeed only a few cases in which the odious debts doctrine was unambiguously confirmed. But, of course, instances of State succession and regime changes do not happen that frequently. Thus, there is

[24] Ibid, s 2(3). See also the similar Recommendation of the Economic and Finance Committee of the Iraqi National Assembly (November 2004) <http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=content&ContentID=11907> accessed 8 August 2010 ('The previous regime accumulated a heavy burden of foreign debts to states which financed the tyrant's wars against his people first, and then against our neighbors. The foreign loans helped him build a huge military apparatus and manufacture weapons of mass destruction, including chemical weapons which he used against the Iraqi people in Halabja. The loans supported his system of oppression and paid for his palaces and prisons during the war against Iran when Iraq's oil revenue was extremely low.... There is a strong basis in international legal principle and precedent to define these debts as being "odious" and thus not legally enforceable. This legal doctrine of odious debt was formulated in the 1920s by Alexander Sack, a former Russian Minister working as a legal professor in the Sorbonne University in Paris. He published the most extensive and important works on the treatment of state debts in the event of regime change').

[25] See DD Caron, 'The Reconstruction of Iraq: Dealing with Debt' (2004) 11 U California Davis J Intl L & Policy 123; A Gelpern, 'What Iraq and Argentina Might Learn from Each Other' (2005) 6 Chicago J Intl L 391, 406; P Adams, *Iraq's Odious Debts* (2004) 10–12 <http://www.cato.org/pubs/pas/pa526.pdf> accessed 8 August 2010; RK Rasmussen, 'Sovereign Debt Restructuring, Odious Debt, and the Politics of Debt Relief' (2007) 70 L & Contemporary Problems 249, 252.

[26] See A Gelpern, 'What Iraq and Argentina Might Learn from Each Other' (2005) 6 Chicago J Intl L 391, 406; C Paulus, 'Odious Debts vs. Debt Trap: A Realistic Help?' (2005) 31 Brooklyn J Intl L 83, 91; C Paulus, 'The Evolution of the "Concept of Odious Debts"' (2008) 68 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 391; World Bank, 'The Concept of Odious Debt' (n 20) 13.

only a limited pool of situations from which one could potentially draw lessons for the validity of the claim that the odious debts doctrine forms part of customary international law.

However, as in other fields, it seems that international lawyers are preoccupied with proving or disproving the customary law foundation of certain rules of international law while neglecting the often more promising avenue of general principles of law.[27] According to Article 38(1)(c) of the Statute of the International Court of Justice (ICJ), which is generally regarded as a codification of the sources of public international law, general principles of law are primary sources of international law alongside treaties and customary law.[28]

To the extent that the odious debts doctrine may be regarded as a reflection of general principles of law it may well be possible to recognize this latter mode as the true basis of the odious debts doctrine's international validity.

Scholars discussing the odious debts doctrine have already amply referred to general principles, even though often in passing. Examples range from Feilchenfeld, one of the early leading authorities in the field,[29] to Frankenberg and Knieper, who see the foundation of the odious debts doctrine in the general legal principle banning the abuse of rights,[30] to Bothe and Brink, who argue that in the case of a change in government, claims for repayment of 'regime debts' could be a violation of good faith or against good order.[31] Recently, Howse has argued most forcefully that the odious debts doctrine may be viewed as an international law version of various general principles of law.[32]

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[27] See H Lauterpacht, *Private Law Sources and Analogies of International Law* (Archon Books, reprinted 1970); B Simma and P Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles' (1988–89) 12 Australian Ybk Intl Law 82.

[28] Art 38(1)(c) ICJ Statute: 'The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: ... the general principles of law recognized by civilized nations.' See also recently *Inceysa Vallisoletana SL v Republic of El Salvador* (2 August 2006) ICSID Case No ARB/03/26, para 226 ('The general principles of law are an autonomous or direct source of International Law, along with international conventions and custom').

[29] Feilchenfeld, *Public Debts and State Succession* (n 6) 701 ('For practical purposes, an investigation of the just grounds for the creation of debts may be restricted to those which for centuries have been regarded as sufficient or necessary in most systems of positive law of most of the civilized nations. A survey of these systems shows that the creation of debts is justified either by the necessity of raising money for public purposes, by the doctrine that compensation is owed for tortious acts to injured persons, by consent of the debtor, or by benefits received by the debtor').

[30] G Frankenberg and R Knieper, 'Legal Problems of the Overindebtedness of Developing Countries: The Current Relevance of the Doctrine of Odious Debts' (1984) 12 Intl J Sociology of L 415, 428 ('Odious debts are excepted from the obligation of fulfilment not because they are considered an excessive burden for the successor, but rather because they are contracted under abuse of rights').

[31] M Bothe and J Brink, 'Public Debt Restructuring, the Case for International Economic Co-operation' (1986) 29 German Ybk Intl L 86, 96 ('There may also be cases where the enforcement of a claim in a case of regime succession would be against good faith or *contra bonos mores*').

[32] UNCTAD 'The Concept of Odious Debt in Public International Law' UNCTAD Discussion Paper No 185, UNCTAD/OSG/DP/20007/4 (July 2007) 6. ('Among the sources of international law recognized in Article 38 of the Statute of the International Court of Justice are "the general

The principles most often invoked in the context of the odious debts doctrine are good faith,[33] the prohibition of an abuse of rights,[34] the 'clean hands' principle or '*nemo auditur turpitudinem suam allegans*',[35] the invalidity of unconscionable acts or acts *contra bonos mores*,[36] as well as related concepts outlawing fraud and

principles of law of civilized nations". These are principles common to a wide range of the world's legal systems. Equitable limits to contractual obligations in such systems have included illegality, fraud, fundamentally changed circumstances, knowledge that an agent is not properly acting on behalf of the contracting principal and duress.... [T]he concept of odious debt is really a regrouping of a range of such equitable considerations as applied to particular transitional contexts').

[33] See B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons, 1953) 105 et seq; E Zoller, *La Bonne Foi en Droit International Public* (Pedone, 1977). This is also widely affirmed in international jurisprudence: *Lighthouses Case (France v Greece)* [1934] PCIJ Rep Series A/B No 62, 47 ('Contracting parties are always assumed to be acting honestly and in good faith. That is a legal principle, which is recognized in private law and cannot be ignored in international law'); *Nuclear Test Cases (Australia v France, New Zealand v France)* (Judgments of 20 December 1974) [1974] ICJ Rep 253, 68 ('One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith'); WTO 'United States–Import Prohibition of Certain Shrimp and Shrimp Products' (1998) WTO Doc WT/DS58/AB/R (Appellate Body Report) para 148 ('The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states'); *Inceysa Vallisoletana SL v Republic of El Salvador*, (2 August 2006) ICSID Case No ARB/03/26, para 230 ('Good faith is a supreme principle, which governs legal relations in all of their aspects and content'). As to the legal basis of good faith in national legal systems see, eg, S Whittaker and R Zimmermann, 'Good Faith in European Contract Law: Surveying the Legal Landscape' in R Zimmermann and S Whittaker (eds), *Good Faith in European Contract Law* (Cambridge University Press, 2000) 39 et seq; Art 1.7(1) UNIDROIT Principles of International Commercial Contracts 2004 ('Each party must act in accordance with good faith and fair dealing in international trade').

[34] See M Byers, 'Abuse of Rights: An Old Principle, a New Age' (2002) 47 McGill LJ 389; Cheng, *General Principles of Law* (n 33) 121 et seq; V Paul, 'The Abuse of Rights and Bona Fides in International Law' (1977) 28 Österreichische Zeitschrift für öffentliches Recht und Völkerrecht 107. See also WTO 'United States–Import Prohibition of Certain Shrimp and Shrimp Products' (1998) WTO Doc WT/DS58/AB/R (Appellate Body Report) para 148 ('One application of [the principle of good faith], the application widely known as the doctrine of abus de droit, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably').

[35] Pursuant to the Anglo-American 'cleans hand' doctrine a claimant must come to court 'with clean hands' in order to receive legal protection ('he who comes to equity must come with clean hands'). The Latin maxims *nemo auditur turpitudinem suam allegans*, *ex delicto non oritur actio* and *ex turpi causa non oritur actio* express the same underlying concept. See in detail Cheng, *General Principles of Law* (n 33) 155 et seq. See also *Inceysa Vallisoletana SL v Republic of El Salvador* (2 August 2006) ICSID Case No ARB/03/26, para 242 ('the foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes, because it is evident that its act had a fraudulent origin and, as provided by the legal maxim, "nobody can benefit from his own fraud" ').

[36] See Art 3.10(1) ('gross disparity') of the UNIDROIT Principles of International Commercial Contracts 2004 ('A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage. Regard is to be had, among other factors, to (a) the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill, and (b) the nature and purpose of the contract').

deception,[37] coercion,[38] and corruption.[39] It has been argued, for instance, that a right to refuse the repayment of odious debts may be justified because such debts were incurred by an abuse of rights, ie contrary to the interest of the population.[40] The concept of a mere procedural bar for the enforcement of odious debts, as inherent in the clean hands doctrine, has already been raised by Feilchenfeld[41] and was recently stressed by Buchheit, Gulati, and Thompson.[42] Others have emphasized the analogy to unconscionability doctrines.[43]

[37] See Art 49 Vienna Convention on the Law of Treaties (VCLT) ('If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty'); Art 3.8 (Fraud) of the UNIDROIT Principles of International Commercial Contracts 2004 ('A party may avoid the contract when it has been led to conclude the contract by the other party's fraudulent representation, including language or practices, or fraudulent non-disclosure of circumstances which, according to reasonable commercial standards of fair dealing, the latter party should have disclosed').

[38] Art 51 VCLT ('The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect') and Art 52 VCLT ('A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations'); Art 3.9 (Threat) of the UNIDROIT Principles of International Commercial Contracts 2004 ('A party may avoid the contract when ir has been led to conclude the contract by the other party's unjustified threat which, having regard to the circumstances, is so imminent and serious as to leave the first party no reasonable alternative. In particular, a threat is unjustified if the act or omission with which a party has been threatened is wrongful in itself, or it is wrongful to use it as a means to obtain the conclusion of the contract').

[39] Art 50 VCLT ('If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty'); OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 21 November 1997 (1998) 37 ILM 4; United Nations Convention against Corruption, A/Res/58/4, 31 October 2003 (2004) 43 ILM 37; *World Duty Free Company Limited v Republic of Kenya* (4 October 2006) ICSID Case No ARB/00/7, para 157 ('In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal').

[40] G Frankenberg and R Knieper, 'Legal Problems of the Overindebtedness of Developing Countries: The Current Relevance of the Doctrine of Odious Debts' (1984) 12 Intl J Sociology of L 415, 428 ('Odious debts are excepted from the obligation of fulfillment not because they are considered an excessive burden for the successor, but rather because they are contracted under abuse of rights. The abuse is constituted in a purpose which contradicts the interests of the attributable subject (the population)').

[41] Feilchenfeld, *Public Debts and State Succession* (n 6) 699 ('at least an equitable argument might be advanced that international law ought not to lend its protection for the maintenance of rights, the creation of which it disapproved').

[42] L Buchheit, M Gulati, and R Thompson, 'The Dilemma of Odious Debts' (2007) 56 Duke LJ 1201, 1235.

[43] See L Catá Backer, 'Odious Debt Wears Two Faces' (2007) 70 L &Contemporary Problems 1, 38 ('Drawing on analogies from commonly understood usury notions and unconscionability doctrine, both grounded in principles of international human-rights norms, it is possible to craft a series of "universal" rules and principles of construction of sovereign loans that effectively insulate such loans against characterization as not benefiting the people of debtor countries, thus preserving such loans as a class from effective repudiation on those grounds').

V. Community Interests in the Odious Debts Doctrine

The odious debts doctrine has primarily served individual interests. If successfully invoked, it serves the interests of a successor State or regime by ridding it of debts incurred by its predecessor. This function of the doctrine will continue in the future. However, it appears that such individual interests will not remain the only ones where the odious debts doctrine can be increasingly regarded as an expression of broader general interests. Traditionally, the ground for liberating a State/government from its repayment obligation vis-à-vis its creditor lay in the unfairness of insisting on repayment based on a comparison of the 'relative fault' of the creditor and the debtor. The principle of *pacta sunt servanda* could be neglected if it could be shown that the debt did not benefit the debtor, was not incurred in its proper interest and if the creditor knew or should have known this.

A broader concept of odious debts is not limited to the interests of individual debtors. Debts may be characterized as odious, not only because they are burdensome to, or against the interests of, an individual debtor State, but rather because they are contrary to core values of the international community. In this sense, the community interests primarily determine whether the odious debts doctrine may be invoked. To the extent that its invocation leads to an effective debt reduction, such an enlarged odious debts doctrine will serve community interests because it provides a useful sanction for their breach.

That community interests have become more visible in various aspects can be recognized in a number of aspects of the odious debts doctrine. A historiography of the doctrine in this light will have to give particular credit to the role of the International Law Commission (ILC) deliberations on odious debts in the context of its work on Succession of States in Respect of Matters other than Treaties.

1. The ILC Draft—broadening the odious debts concept to debts contrary to international law

The final text of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts of 1983[44] does not contain any explicit rules with regard to odious debts. However, odious debts were discussed during the preparatory working sessions of the ILC which recognized the term 'odious debts', and differentiated between 'war debts' and 'subjugation debts' as specific forms of 'odious debts'.[45] In 1977, the ILC's Special Rapporteur on the topic

[44] UNGA, Vienna Convention on Succession of States in respect of State Property, Archives and Debts, UN Doc A/CONF 114/14 (7 April 1983), 20 ILM 306 (not yet in force).

[45] Succession of States in Respect of Matters Other than Treaties [1977] II(1) ILC Ybk 67, UN Doc A/CN.4/301, 73 ('"odious debt" as the genus, whereas "war debts" and "subjugation debts" constitute different species within [it].... [W]ar debts are those contracted by a State to sustain its

even presented a draft definition of 'odious debts'. The proposed definition was worded as follows:

> For the purposes of the present articles, 'odious debts' means: (a) all debts contracted by the predecessor State with a view to attaining objectives contrary to the major interests of the successor State or of the transferred territory; (b) all debts contracted by the predecessor State with an aim and for a purpose not in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.[46]

Such odious debts were not to be assumed by successor States.[47] These proposals demonstrated an acceptance of the odious debts doctrine both in its classic core and in an extended notion. The fact that the suggested wording was not included in the final text of the Convention has given rise to some doubts as to its continued validity under international law. Indeed, one may take the silence of the Convention as an expression of a lack of *opinio juris* concerning its continued validity. The more convincing view, however, maintains that odious debts are merely not regulated by the Vienna Convention and that thus the non-regulation of odious debts in the Vienna Convention is without prejudice to their existence under general international law. This follows from the fact that at the codification conference the general definition of State debts was narrowed down by adding the passage 'in accordance with public international law'.[48] Thus, it was ensured that odious debts would not fall within the scope of application of the Convention.[49] Odious debts remain governed by general international law outside the Vienna Convention even when the Convention enters into force at some time in the future.[50]

More relevant for present purposes is the fact that the wording proposed by the ILC Special Rapporteur demonstrated not only an acceptance of the classical odious debts doctrine, but also an extension of the traditional notion of odious debts by including the words 'all debts contracted by the predecessor state with an aim and for a purpose not in conformity with international law'.[51] Literally, this may encompass any international law violation. If this wording appears overly broad, it

war effort against another State, and "subjugation debts" are those contracted by a State with a view to subjugating a people and colonizing its territory').

[46] See M Bedjaoui, *Ninth Report on Succession of States in Respect of Matters other than Treaties* (UN Doc A/CN4/301 and Add 1 of 13 and 20 April 1977) para 173, reprinted in [1977] II(1) ILC Ybk 74 (Art C, Definition of odious debts).

[47] Ibid, para 173 (Art D, Non-transferability of odious debts: 'odious debts contracted by the predecessor State are not transferable to the successor State').

[48] Art 33 Vienna Convention on Succession of States in respect of State Property, Archives and Debts (n 44) ('For the purposes of the articles in the present Part, "State debt" means any financial obligation of a predecessor State *arising in conformity with international law* towards another State, an international organization or any other subject of international law'; emphasis added).

[49] L Leyendecker, *Auslandsverschuldung und Völkerrecht* (P Lang, 1988) 182; JA King, *The Doctrine of Odious Debt in International Law: A Restatement*, 66 (Working Paper, 2007) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1027682> accessed 8 August 2010.

[50] See also Michalowski, *Unconstitutional Regimes* (n 19) 45.

[51] See Bedjaoui, *Ninth Report on Succession of States* (n 46).

is worth recalling the examples given by the ILC Special Rapporteur in his commentary. He cited as illustrations for the extended notion of odious debts, debts for the purpose of conducting a war of aggression, colonization, apartheid, genocide, or violations of the self-determination principle[52]—interestingly, all examples of *jus cogens* violations.[53] This implies a limited set of international law violations. Whereas traditional odious debts are directed against the major interests of the successor, the suggested broadened concept of odious debts includes debts that are directed against the major interests of third parties or of the international community at large. The legal consequence, however, remains the same. Even if such debts are not incurred against the interests of the successor State, but rather against those of third parties, the successor nevertheless bears no obligation to assume and repay them.

The fact that the draft definition of odious debts by the ILC Special Rapporteur did not become part of the final text is understandable given the ultimate decision to limit the applicability of the Convention to debts 'arising in conformity with international law'.[54] Also, the Vienna Convention has still not entered into force. But it appears that the suggested broadening of the definition of odious debts reflects contemporary considerations and has proven to be highly relevant for subsequent developments.

2. Odious debts reflecting the international ordre public and evidencing a trend towards the 'constitutionalization' of international law

In its mitigated form the notion of odious debts suggested by the ILC Special Rapporteur basically refers to debts incurred for the purpose of violating *jus cogens* obligations.[55] Thus, the odious debts doctrine becomes an additional tool for sanctioning *jus cogens* violations. In this respect, the non-repayment of debts incurred for purposes contrary to *jus cogens* obligations may serve as a deterrent to those who would otherwise be willing to finance such activities. Hence, the odious debts doctrine may provide another example of legal consequences stemming from *jus cogens* violations. The sole uncontested consequence is found in Articles 53[56] and 64[57] of

[52] Ibid, paras 133–9.

[53] On the relationship between *jus cogens*, *erga omnes* obligations and community interests, see B Simma, 'From Bilateralism to Community Interest' (1994) 250 Recueil des Cours de l'Académie de Droit International 217.

[54] See n 48.

[55] Bedjaoui, *Ninth Report on Succession of States* (n 46).

[56] Art 53 ('A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.')

[57] Art 64 relates to the unlikely, but theoretically possible case of *jus cogens superveniens*, which means the creation of a new peremptory norm of international law after the conclusion of a treaty. ('If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates').

the 1969 Vienna Convention on the Law of Treaties (VCLT)[58] according to which treaties that violate *jus cogens*, either at the time of conclusion or subsequently, are automatically void. In addition, there is a heated contemporary debate about a potential loss of jurisdictional immunity of States violating *jus cogens*.[59] While the supreme courts of Greece and Italy have in some cases ruled that States (implicitly) waived their immunity defence by the commission of *jus cogens* violations,[60] courts in England, the US, and Germany have rejected such legal consequences.[61]

The enlarged concept of odious debts, broadly including *jus cogens* violations, clearly reinforces community interests. It may be regarded as a tool to serve community interests by sanctioning behaviour that clearly contradicts such interests. In a broader sense, it may thus also be regarded as an element of the potential 'constitutionalization' of international law,[62] by demonstrating the relevance of core communal values for the application and observance of rules of international law.

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[58] Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331, 8 ILM 679.

[59] See also A Bianchi, 'Denying State Immunity to Violators of Human Rights' (1994) 46 Austrian J Public Intl L 195; J Kokott, 'Mißbrauch und Verwirkung von Souveränitätsrechten bei gravierenden Völkerrechtsverstößen' in U Beyerlin (ed), *Recht zwischen Umbruch und Bewahrung, Festschrift für Rudolf Bernhardt* (Springer, 1995) 135; M. Reimann, 'A Human Rights Exception to Sovereign Immunity: Some Thoughts on Princz v Federal Republic of Germany' (1995) 16 Michigan J Intl L 403; LM Caplan, 'State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy' (2003) 97 American J Intl L 741; L McGregor, 'State Immunity and Jus Cogens' (2006) 55 Intl & Comparative LQ 437; R van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford University Press, 2007) 301 et seq; H Fox, *The Law of State Immunity* (2nd edn, Oxford University Press, 2008) 150 et seq.

[60] *Ferrini v Federal Republic of Germany* (6 November 2003) Corte di Cassazione, Judgment No 5044, 87 Rivista diritto internazionale 539, para 9.1 ('The recognition of immunity from jurisdiction for States that are responsible for such offences is in blatant contrast with the normative framework outlined above, since this recognition obstructs rather than protects such values, the protection of which is rather to be considered, in accordance with such norms and principles, essential for the entire international community, so that in the most serious cases it should justify mandatory forms of response.... This therefore rules out the possibility that in such hypotheses the State could enjoy immunity from foreign jurisdiction'); *Federal Republic of Germany v Prefecture of Voiotia* (2000) Hellenic Supreme Court 11/2000, (2000) 49 Nomiko Vima [Law Tribune] 212, ILDC 287 ('H.2 The tort liability exception from State immunity was also applicable in relation to claims arising out of military operations, when the relevant acts constituted a breach of a peremptory rule of international law').

[61] *Al-Adsani v Government of Kuwait* (1996) 107 ILR 536; *Al-Adsani v United Kingdom* (App no 35763/97) ECHR 2001-XI; *Hugo Princz v Federal Republic of Germany* (1996) 813 F Supp (DDC 1992), 103 ILR 598, overruled by Court of Appeals, District of Columbia Circuit, 26 F 3d 1166 (1994), 103 ILR (1996) 604; BVerfG, 2 BvR 1476/03, 15 February 2006 para 18 ('Nach geltendem Völkerrecht kann ein Staat Befreiung von der Gerichtsbarkeit eines anderen Staates beanspruchen, wenn und soweit es um die Beurteilung seines hoheitlichen Verhaltens—so genannter acta iure imperii—geht.... Da die am Geschehen in Distomo beteiligte SS-Einheit den Streitkräften des Deutschen Reiches eingegliedert war, sind die Übergriffe, unabhängig von der Frage ihrer Völkerrechtswidrigkeit, als Hoheitsakte einzuordnen').

[62] See A von Bogdandy, 'Constitutionalism in International Law: A Proposal from Germany' (2006) 47 Harvard Intl LJ 223; M Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework Analysis' (2004) 15 Eur J Intl L 907; R St J MacDonald and DM Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Nijhoff, 2005); JHH Weiler and M Wind (eds), *European Constitutionalism beyond the State* (Cambridge

3. Odious debts as part of the general principles of law—reflecting interests of the international community at large and not merely individual or bilateral interests

The recent trend to focus more on general principles of law than on customary international law primarily serves the purpose of establishing the odious debts doctrine as part of international law.[63] However, general principles of law also seem to indicate a potential for community interests. If one takes the principle of good faith, which is often regarded as a 'basic' or 'supreme' principle,[64] it is evident that respect for good faith not only facilitates dealings between individual subjects of law; it also transcends bilateral relations by enabling respect for the law in a broader sense. The same can be said with regard to the general principles of clean hands/*nemo auditur turpitudinem suam allegans* or abuse of rights.[65] They contribute to uphold the integrity of the legal system—a core value of the international community.

VI. The Potential of the Odious Debts Doctrine to Serve Community Interests in Future Sovereign Debt Restructuring

Finally, the category of odious debts may gain relevance in a future sovereign debt restructuring mechanism (SDRM)[66] or sovereign insolvency proceedings.[67] The abandonment of the SDRM proposed by the International Monetary Fund in 2003[68] has certainly dampened the expectation that such a mechanism could be

University Press, 2003); C Walter, 'Constitutionalising (Inter)national Governance. Possibilities for and Limits to the Development of an International Constitutional Law' (2001) 44 German Ybk Intl L 192.

[63] See n 29 et seq.

[64] Cf *Nuclear Test Cases (Australia v France, New Zealand v France)* (Judgments of 20 December 1974) [1974] ICJ Rep 253, 268 ('One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith'); *Inceysa Vallisoletana SL v Republic of El Salvador*, ICSID Case No ARB/03/26, Award, 2 August 2006, para 230 ('Good faith is a supreme principle, which governs legal relations in all of their aspects and content').

[65] See n 33.

[66] See A Krueger, First Deputy Managing Director, International Monetary Fund, 'International Financial Architecture for 2002: A New Approach to Sovereign Debt Restructuring' (26 November 2001) Speech at the American Enterprise Institute <http://www.imf.org/external/np/speeches/2001/112601.htm> accessed 8 August 2010. See also International Monetary Fund, 'Proposals for a Sovereign Debt Restructuring Mechanism (SDRM)' (January 2003) <http://www.imf.org/external/np/exr/facts/sdrm.htm> accessed 8 August 2010.

[67] See S Hagan, 'Designing a Legal Framework to Restructure Sovereign Debt' (2005) 36 Georgetown J Intl L 299; C Paulus, 'Die Rolle des Richters in einem künftigen SDRM' in W Gerhardt, H Haarmeyer and G Kreft (eds), *Insolvenzrecht im Wandel der Zeit. Festschrift für Hans-Peter Kirchhof* (ZAP Verlag fur die Rechts- und Anwaltspraxis, 2003) 421; RK Rasmussen, 'Sovereign Debt Restructuring, Odious Debt, and the Politics of Debt Relief' (2007) 70 L & Contemporary Problems 249, 51; DF Vagts, 'Sovereign Bankruptcy: In Re Germany (1953), In Re Iraq (2004)' (2004) 98 American J Intl L 302.

[68] In particular US resistance to SDRM plans effectively ended the debate. See JW Snow, US Secretary of the Treasury, Statement at the Meeting of the International Monetary and Financial

established soon. Nevertheless, recent instances of de facto insolvency or near-insolvency of States, such as Iceland in 2009 and Greece in 2010, have reinforced the need for a more principled and structured approach to dealing with sovereign debt than the ad hoc nature of debt rescheduling and restructuring in the Paris and London Clubs.[69] The scale of economic and financial crises currently demonstrates that an orderly debt restructuring or even reducing mechanism is not only in the interest of the affected States but has become a necessity for the international community since the dimension of recent instances of insolvencies or near-insolvencies threatens not only single national economies but the international financial system at large. Any kind of orderly insolvency proceedings, inspired by domestic law analogies, will have to incorporate a screening process of creditors' claims. In this process of assessing the validity and ranking of debts, the odious debts doctrine may serve a useful part, by either excluding or at least relegating certain types of debt. An orderly State insolvency procedure is still a distant goal. However, the community interest in setting something up along the lines of domestic law models is becoming increasingly compelling.

VII. Conclusion

There may remain some doubts about the international law status of the odious debts doctrine. But its recent re-emergence and prominence in the public international law discourse demonstrates a high potential for serving core community interests. The characterization of certain types of debts as 'odious' is increasingly determined by the degree to which they contradict core community values, such as *jus cogens* norms. Its increased application is likely to serve community interests by providing an additional tool to sanction behaviour directed against such interests. The odious debts doctrine may equally play an important role in any more institutionalized, future insolvency proceedings for sovereign debtors. In this latter role, the doctrine will also serve community interests.

Committee (12 April 2003) <http://www.imf.org/external/spring/2003/imfc/state/eng/usa.htm> accessed 8 August 2010.

[69] See A Reinisch, *State Responsibility for Debts—International Law Aspects of External Debt and Debt Restructuring* (Böhlau, 1995); T Callaghy, 'Innovation in the Sovereign Debt Regime: From the Paris Club to Enhanced HIPC and Beyond' (World Bank Operations Evaluation Department, 2002); A Gibson, 'Tackling Sovereign Debt Systematically—If Not Now then When?' (2010) <http://www.re-define.org/blog/2010/02/05/tackling-sovereign-debt-systematically-if-not-now-then-when> accessed 8 August 2010; Eurodad 'A Fair and Transparent Debt Workout Procedure' (17 December 2009) <http://www.eurodad.org/uploadedFiles/Whats_New/Reports/Eurodad%20debt%20workout%20principles_FINAL.pdf?n=13> accessed 8 August 2010.