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Odious Debts: Issues in Law and Politics

Yvonne Wong¹

Odious sovereign contracts inhibit developing country growth. They cause money and resources to be improperly transferred from one country to an undeserving one. Think tanks and civil society actors have long suggested that Indonesia is plagued by a sizeable odious sovereign contract account. Policy makers and scholars continue to grapple with how the odious debts doctrine may operate in law to curb this important problem. Taking into account the lack of transparency in an odious contract setting, this paper proposes a new approach premised on principles of transparency, accountability and citizen participation in public contracts. In design, it proposes the following: 1) the creation of ex-ante obligations and a public website on which financiers can disclose the key terms of their contractual arrangements with a sovereign government. This website enables a financier to signal the nature of their engagement with a sovereign counterpart; 2) the creation of an ex-post tribunal, in which private citizens have standing, to adjudicate the odiousness of a disputed sovereign contract. In the tribunal's deliberations, disclosure by a financier and compliance with ex-ante obligations weighs in favour of a presumption of legitimate contracting, whereas non-disclosure lends itself to a presumption of odiousness. This new approach has the right incentives for participation. It will revolutionize the currency of international law and international institutions, by giving the public a mechanism to eke out odiousness in transnational sovereign dealings. It can have important implications for Indonesia and more generally, the future of transnational trade and finance.

Keywords: odious sovereign contracts, developing country, Indonesia, odious debts

I. Introduction

Odious debts inhibit developing country growth. They cause money and resources to be improperly transferred from one country to an undeserving one. Think tanks and civil society actors have long suggested that Indonesia is plagued by a sizeable odious debt account. These debts relate mainly to those created during Suharto's reign. Yet Indonesia has and continues to service these debts.

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Policy makers and scholars continue to grapple with how the odious debts doctrine may operate in law to curb the transmission of odious debts. This paper charts the history, to present day debates about the odious debts doctrine. It notes that the doctrine is still in a very evolutionary stage, with much confusion as to the origins and scope of the actual doctrine. Yet, while there may be haziness around the doctrine, there is clarity as to the significance of the problem and its growing importance in politics. Countries such as Norway, Ecuador, and even Cambodia have all recently referred to the concept of odious debt in their international dealings. While it is inevitable that the path for the doctrine to be recognised in law will be a difficult and politically charged one, it is also inevitable that some sort of international response is necessary to deal with this growing problem. This response will have important implications for Indonesia, and more generally, the future of transnational trade and finance.

A. What are Odious Debts?

The term “odious debts” has been quite fashionable of late. It is so oft mentioned by journalists, scholars, NGO types, that it has become rather common. Yet this was not the case a few years ago. A few years ago the phrase was still being used with quotation marks, symbolizing its atypical usage, its need for further clarification. But these days are long gone. Today the words “odious debts” are used together freely, without quotation marks, without explanation, their pairing no longer extraordinary or exceptional. From the Los Angeles Times² to the Jakarta Post³, from Archbishop Desmond Tutu⁴ to Jim Harkness of Minneapolis’ Institute for Agriculture and Trade Policy⁵, the term “odious debts” has found its way into the mainstream.

Yet, to the non-initiated, to the newcomer, is the term, devoid of quotation marks, self-explanatory? One could, using basic dictionary definitions, hazard a guess at its intent – vile or revolting loans. Indeed various journalists, activists, scholars, and public officials have used it in this regard. However, such a simple interpretation for the term forgets its origins, and its once loftier goals. When still in quotation marks, “odious debts” was more than merely descrip-

² “Unjust Debt Wrings Life from Poor Nations”; May 8, 2008, Los Angeles Times

³ “Stop Adding New Debt, NGOs tell Government”; July 26, 2007, The Jakarta Post

⁴ “Unjust Debt Wrings Life from Poor Nations”; May 8, 2008, Los Angeles Times

⁵ Letters to the Editor, May 13, 2008, Christian Science Monitor

tive, it was a new legal doctrine, a new social consensus, a revolution. Does the loss of quotation marks mean the dream is realized or over? And just what was the original dream?

There are various tales as to the origins of the "odious debt" phenomena, but the most often told story goes like this:

The birth of the odious debts concept occurred in the late 1800's when the Spanish-American war resulted in the United States reacquiring the state of Cuba back from the Spaniards.⁶ In taking back Cuba, the United States in 1898 repudiated all "Cuban debt" which they claimed had been "imposed on the people of Cuba without their consent and by force of arms".⁷ As the debts were created by the Spanish government for its own purpose and through it owns agents, in which creation Cuba had no input, the United States refused to assume liability for this Cuban debt. Therefore, the holders of this Cuban debt were unable to collect fully on their claims.⁸

Embodied in the odious debts concept then is a certain type of debt, and a basis of repudiation - not because the debts imposed an excessive burden on the successor, but because they were contracted for illegitimate purposes by illegitimate parties.

The story continues along these lines

However, while the concept had already been canvassed in the US/Cuba/Spain saga, it was not until the 1920's that an international law scholar and professor of law in Paris, Mr. Alexander Nahum Sack first coined the actual term "odious debt". Sack, who had been a former minister of Tsarist Russia, authored two major works on the obligations of successor systems: *The Effects of State Transformations on Their Public Debts and Other Financial Obligations* and *The Succession of the Public Debts of the State*. His debt theories sought to provide practical solutions for states undergoing transforma-

⁶ Others have suggested that the idea of odious debts traces further back to Aristotle, who noted that when "a democracy takes the place of an oligarchy or despotism...some persons refuse...to meet the contracts in hand on the ground that it was not the State, but the despot who entered upon them." See Cheng, T.-H, "Renegotiating the Odious Debt Doctrine", 70 *SUMMER Law and Contemporary Problems* (2007), p.12 citing Aristotle's *Politics* 162 (text of Bekker, W.E. Bolland trans., Longmans, Green and Co. 1877)

⁷ Adams, P, *Odious Debts: Loose Lending, Corruption and the Third World Environmental Legacy*, (Earthscan, 1991).

⁸ *Ibid.*

tions such as European states changing borders or independent nations emerging from colonial territories.⁹ While Sack believed in the general rule that liability for public debts should remain with the territory rather than a specific governmental structure, he noted an exception where debts were not created in the interests of the state. Such debts he denoted “dettes odieuses.”¹⁰

When a despotic regime contracts a debt, not for the needs or in the interests of the state, but rather to strengthen itself, to suppress a popular insurrection, etc., this debt is odious for the people of the entire state. This debt does not bind the nation; it is a debt of the regime, a personal debt contracted by the ruler, and consequently it falls with the demise of the regime. The reason why these “odious” debts cannot attach to the territory of the state is that they do not fulfill one of the conditions determining the lawfulness of State debts, namely that State debts must be incurred, and the proceeds used, for the needs and in the interests of the state.

Odious debts, contracted and utilized, for the purposes which, to the lenders’ knowledge, are contrary to the needs and the interests of the nation, are not binding on the nation – when it succeeds in overthrowing the government that contracted them – unless the debt is within the limits of real advantage that these debts might have afforded. The lenders have committed a hostile act against the people, they cannot expect a nation, which has freed itself of a despotic regime, to assume those odious debts, which are the personal debts of the ruler. Even if one despotic regime is overthrown by another, which is as despotic and which does not follow the will of the people, the odious debts contracted by the fallen regime remain personal debts and are not binding on the new regime.¹¹

The story crescendos here:

The birth of the Doctrine of Odious Debt by Alexander Nahum Sack.

This passage by Sack is what commentators and scholars “in the know” are generally referring to when using the words “odious debts”. More than simply a vile or loathsome debt, the general consensus is that an “odious debt” is a particular type of debt imbued with the following qualities:

⁹ Ibid.

¹⁰ Sack, A.N., *Les Effets De Transformations des Etats Sur Leur Dettes Publiques et Autres Obligations Financiers*, (Recueil Sirey, 1927).

¹¹ Ibid. at 127

1. the debt has not received the general consent of the nation,
2. the borrowed funds are contracted and spent in a manner that is contrary to the interests of the nation, and
3. the creditor lends in awareness of these facts.¹²

And because it is imbued with these three qualities, this debt is repudiable by a successor government, when it succeeds in overthrowing the repugnant dictator that contracted these "odious debts". It is asserted that the Cuban debt in the US/Cuba/Spain saga possessed these 3 qualities. This is why it is associated with the odious debts concept. However, the US simply did not go as far as Sack as formally expressing or formulating the odious debt doctrine. But the Cuban debt is nevertheless the most often cited example of the original "odious debt".

And this, in a nutshell is the most recited tale of the origins of "odious debt". Since the 1920's, the concept has surfaced here and there, but more so in avant-garde settings.¹³ In the early 1990's the concept was introduced into the debt debate circles, and looked at by a few scholars¹⁴, yet the concept stayed mostly confined within the realm of NGO types. Not so today. The odious debts concept has moved from its humble activist orientated beginnings to world center stage. How did get here?

1. The revival of the Odious Debts Doctrine

History will likely remember Saddam Hussein for few good deeds, but one he can be credited with is the revival and stimulation of interest in the concept of odious debts. Perhaps one of the most spectacular events in world history, Saddam was finally ousted from Iraqi leadership, leaving behind a US\$200 billion¹⁵ debt bill to the Iraqi citizens. While repressive debt left by a dictator to

¹² Khalfan, A., J. King and B. Thomas, *Advancing the Odious Debt Doctrine*, Centre for International Sustainable Development Law, 2003, p.14. See also Adams, *Odious Debts: Loose Lending, Corruption and the Third World Environmental Legacy*.

¹³ The web page, www.odiousdebts.org, last viewed 23 April 2009, is the most active voice on odious debts. It was created in 1991 by Probe International.

¹⁴ See Adams, *Odious Debts: Loose Lending, Corruption and the Third World Environmental Legacy*; Abrahams, C., "The Doctrine of "Odious Debts"", LLM Thesis, Rijks Universiteit Leiden (2000). questioning the applicability of the doctrine in relation to South Africa's apartheid debts.

¹⁵ Estimates ranged from US\$100 billion to US\$200 billion. See Jubilee Iraq's "Saddam's Debt (latest estimates)" available at: http://www.jubileeciraq.org/debt_today.htm, last viewed 23 April 2009.

her subjects is hardly novel in the international arena, Saddam's debt legacy was unique on 2 counts – firstly, in its sheer magnitude, and secondly because it engendered a united voice amongst civil society groups, international scholars, prominent Iraqi citizens and journalists, and foreign governments – in particular the US government. These usually conflicting factions came together, like no other point in history, in basic agreement that Iraq's citizens should not be saddled with this astronomical debt.

For the scholars and civil society actors who supported debt relief, the odious debt doctrine was an obvious ally. Less so for the foreign creditor governments. Yet, for western governments, especially the United States, who was conducting its war on terror, a politically and economically destabilized Iraq was of major concern. Not only did it pose a major security risk to western countries, but it was also a major destabilizing force in the Middle East.¹⁶ Afflicting Iraq with a US\$200 billion debt bill would have only exacerbated these problems and prolonged Iraq's economic recovery. And so, lead by the Bush administration, debt relief for Iraq became the unified chant of the day.

As part of its strategy to ensure a major write down of Iraq's foreign debt bill, US officials portrayed Saddam as a ruthless dictator, who acted contrary to the interests of Iraq's citizens, thus alluding to the inherent illegitimacy of Iraq's debts.¹⁷ Although not using the actual terminology of "odious debt", the underlying principles of Sack's doctrine seemed to be supported by the US. Commentators, scholars, civil society groups and the US government thus all cried odious debt! All told, it was concerns regarding the consequences of an economically stagnant Iraq and ongoing instability in the Middle East that resulted in Iraq achieving the biggest ever debt write-down in history – an 80% haircut.¹⁸ However for the purposes of the odious debt movement, the cat was out of the bag.

¹⁶ Damle, J., "The Odious Debt Doctrine After Iraq", 70 *Law and Contemporary Problems* (Autumn 2007), p.147

¹⁷ *Ibid.* p.148

¹⁸ This was achieved through a Paris Club deal. see *Ibid.* p.148

¹⁹ On 26 January 2007, Duke Law School hosted a symposium on "Odious Debts and State Corruption" and dedicated 2 issues of its journal of *Law and Contemporary Problems* to the issue. Then on 10 February 2007, The North Carolina Journal of International Law and Commercial Regulation and the University of North Carolina School of Law held its annual symposium on "Odious Debt: Exploring the Outer Limits of Sovereign Debt Relief".

Iraq's remarkable debt renegotiation triggered commentators to demand the same relief for other heavily indebted poor nations. They pointed to similar histories of ruthless dictators, projects with no benefit, and therefore illegitimate debts. If Iraq's citizens should be spared debt, so then should these. Alongside these claims, there was a surge in articles and conferences about odious debts.¹⁹ Leading international scholars and commentators debated energetically as to the existence or otherwise of the odious debts doctrine, as to the viability of such a doctrine, and the ramifications. International organizations such as The World Bank and United Nations Commission on Trade and Development (UNCTAD) also contributed to the debate, each publishing their own research paper on the issue of odious debt.²⁰ The World Bank even held a round-table dedicated to the issue of odious debts in April 2008.²¹

Thanks to Iraq's fallout, the debt debate was catapulted into the spotlight. At the end of the day, it was politics as opposed to altruism that motivated governments, nevertheless odious debts language moved from the NGO realm into the international political arena, and more generally into the mainstream. Alexander Sack became a hero, "odious debts" got its own page on wikipedia²² and the term lost its earlier quotation marks.

B. How much odious debt is there?

Having traced the history of the odious debt concept, it seems pertinent to discuss how much of the world's debt could actually fall within this concept of odious debt. This will provide some semblance of the significance of the doctrine. Recalling, the 3 salient features are as follows:

1. the debt has not received the general consent of the nation,
2. the borrowed funds are contracted and spent in a manner that is contrary to the interests of the nation, and

²⁰ UNCTAD: The Concept of Odious Debt in Public International Law: www.unctad.org/Templates/Download.asp?docid=8960&lang=1&intlItemID=2101 -, last viewed 23 April 2009. World Bank: "Odious Debt: Some Considerations": http://econ.worldbank.org/external/default/main?pagePK=64165259&theSitePK=469372&piPK=64165421&menuPK=64166093&entityID=000158349_20080723095102, last viewed 23 April 2009.

²¹ See <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK:21845838~pagePK:220503~piPK:220476~theSitePK:228717,00.html>, last viewed 22 September 2010.

²² See http://en.wikipedia.org/wiki/Odious_debt, last viewed 23 April 2009.

3. the creditor lends in awareness of these facts.

Conceivably most of Iraq's foreign debt bill incurred during Saddam's reign could constitute odious debt. However, the debt acquired early on (in the 1980's) may not be considered odious for lack of creditor awareness as to Saddam's covert odiousness. At this point, while his regime had begun systematically killing Kurdish rebels, Saddam was still portraying himself through domestic and international media as a leader devoted to building schools and hospitals.²³ Even if only the latter periods of public debt incurred by Saddam could be considered odious, for instance post 1985, this is still a substantial dollar amount. The US alone incurred upwards of US\$150 billion on the conduct of the 2003 Iraq War.²⁴

Numerous other countries can conceivably assert an odious foreign debt bill. A UK think tank, New Economics Foundation (NEF), asserts that 10 countries, including Indonesia, Argentina and Nicaragua, have a 100% odious foreign debt account for the period 1970 to 2004.

The NEF results²⁵, set out below in Table 1, show that for the 13 countries examined during the period 1970-2004, US\$726 billion is estimated to be odious debt. These figures suggest that the odious debt issue may be worth more than US\$1 trillion. Given this substantial amount, it is hardly surprising that the issue of odious debts has become so hotly debated.

Table 1: NEF Results

Country	Total public debt (US\$ billion)	Proportion of odious debt	Total odious debt (US\$ billion)	Cumulative net transfer (CNT)	CNT taking odious debt into account	Over-payment
Indonesia	72.9	100.00%	223.5	6	-138.4	150.6
Argentina	103.9	100.00%	180.7	49.4	-33.3	76.8
Nigeria	31.3	100.00%	94.8	12	-41.7	63.5
Philippines	35.6	100.00%	70.6	3.7	-31.1	35
Pakistan	31	100.00%	47	18.3	-17.7	16
Peru	23.5	100.00%	37.6	8.1	-12.9	14.1
Sudan	11.7	100.00%	17.5	10.8	-6	5.8
South Africa	9.8	100.00%	17.4	3.6	-4.7	7.7
Congo, Dem.	10.5	100.00%	17	10.6	-5.5	6.5
Nicaragua	4.1	100.00%	10.7	10	2.6	6.6
Ghana	5.9	93.70%	5.5	5.8	-0.2	0
Malawi	3.3	84.20%	2.8	2.8	0	0
Haiti	1.2	72.00%	0.9	1.1	0.2	0
Totals	344.7		726	142.2	-288.7	382.6

C. Applicability of the Doctrine of Odious Debt

While the odious debt concept has featured prominently in recent transnational debt restructurings, and in the media, what is its actual status in international law?

Article 38 of the Statute of the International Court of Justice²⁶ provides that the sources of international law include the following:

1. International conventions, whether general or particular, establishing rules expressly recognized by contesting states;
2. International custom, as evidence of a general practice accepted by law;
3. The general principles of law recognized by civilized nations; and
4. Subject to the provisions of Article 59²⁷, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

There is currently no international convention establishing a rule against odious debts.²⁸ Accordingly, if the odious debt doctrine forms part of international law it must be through channels (2)–(4).

In this regard, it should be noted that the law has never formally applied the doctrine. To date, no court of law has ever considered in detail Sack's 3 criteria for odious debt, and thereby produced an order granting cancellation of

²³ See Price, N. and D. Bryson, *Saddam's Reign of Fear, Murder Comes to an End*, 14 December 2003, available from: <http://springfield.news-leader.com/specialreports/saddamcaptured/1214-Saddamsrei-242855.html>, last viewed 23 April 2009.

²⁴ As in the Gulf War, there has been no claim against Iraq for these costs. But unlike the Gulf War, there is no group of states stepping forward to reimburse any of the costs of the US or its allies. See Caron, D.D., "The Reconstruction of Iraq: Dealing with Debt", 11 U.C. Davis Journal of International Law and Policy 123, 137 (2004).

²⁵ Mandel, S., *Odious Lending, Debt Relief as If Morals Mattered*, New Economics Foundation, 2006. p.17

²⁶ Statute of the International Court of Justice, available at: http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II, last viewed 23 April 2009.

²⁷ Article 59 provides: The decision of the Court has no binding force except between the parties and in respect of that particular case. *Ibid.*

²⁸ The 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts is the only international convention that contemplates issues in respect of debt repayment following a state succession. The Convention, however, is silent on the issue of government succession. Further, the Convention has not received the requisite number of ratifications to enter into force. see United Nations Treaty Collection <http://untreaty.un.org/sample/EnglishInternetBible/partII/chapterIII/treaty12.aspl> last viewed, 23 April 2009, which states that there are only six signatories (15 is required under Article 50 of the Convention).

the relevant debt. Where the doctrine has been raised by parties in a legal proceeding, the court or tribunal has distinguished the doctrine as being applicable only in cases of state succession, as opposed to those involving governmental succession.²⁹

For instance, in the Iran-US Claims Tribunal – United States v. Iran (1996), Case No. B36,³⁰ the Tribunal dismissed the applicability of the odious debts doctrine, raised as a ground of defense by Iran. They stated that: “[t]he Tribunal does not take any stance in the doctrinal debate on the concept of ‘odious debts’ in international law. In any event, the Tribunal will limit itself to stating that the said concept belongs to the realm of the law of State succession. That law does not find application to the events in Iran. The revolutionary changes in Iran fall under the heading of State continuity, not State succession.”³¹

The view from the judiciary therefore is that the odious debt doctrine does not apply in situations of governmental succession. Pursuant to this view, the doctrine has no application in law to the case of Iraq, Indonesia, Philippines, or any of the 13 countries included in the NEF study.

Not to be discouraged by such an explicit rejection, advocates of the doctrine point to a case from the late 1940’s, the case of Costa Rica v. Great Britain (the Tinoco Claims Case)³², for support that the doctrine does indeed form part of international law. In this case, Costa Rica failed to honor loans made by the Royal Bank of Canada to its former dictator Federico Tinoco, on the grounds that:

- a. the loans were made by the lender to Tinoco knowing that such funds would not be used for the benefit of Costa Rica, but for Tinoco’s own use, and

²⁹ The general consensus amongst commentators is that this limitation – state succession only, was indeed prescribed by Sack’s. Thus, in its original formulation, the doctrine did not consider new governments in power through radical changes- such as the deposition of Napoleon III, the Bolshevik Revolution of 1917 in Russia, the re

volution bringing about the Peoples Republic of China, the military coups in Burma and in Sudan in the 1980s. Rather it would apply where changes in territory or in the international legal personality of a state had taken place, such as the independence of East Timor, and the secession of Montenegro from Serbia and Montenegro.

³⁰ United States v Islamic Republic of Iran. 32 IRAN-U.S CL. TRIB. REP. 162, Award No. 574-B36-2 (Arb 1996).

³¹ Ibid. at paragraph 54.

³² Tinoco Arbitration (Costa Rica v Great Britain). 1 R.I.A.A. 375 (Arb. 1948).

b. therefore such debts were illegitimate and susceptible to repudiation.

Arbitrator and US Supreme Court Chief Justice William H. Taft nullified the debt on the grounds that the payments were not made for legitimate governmental use. He stated: "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."³³

All of Sack's elements were present in this case: dictator, no benefit, creditor awareness. This case could have been used to define the scope and limits of the odious debts doctrine. However, Taft in making his decision made no reference to these elements, nor did he generally refer to the odious debt doctrine. In short, while his decision does support the general underpinnings of the odious debts concept, it is not a clear pronouncement by the judiciary of the existence of the doctrine at international law.

In relation to state practice, the evidence is not abundant. Other than a recent unilateral declaration by Norway,³⁴ and a new policy in Ecuador where it refuses to make payments on portions of Ecuador's debt that are illegitimate,³⁵ no country has ever invoked the doctrine as sole legal justification for repudiating foreign debt. In the case of Iraq, odious debts language was used strategically to provide a humanitarian gloss and to give the new Iraqi regime far more leverage in its debt renegotiations than it would have had.³⁶ Whether credible or not, Iraq's creditors were threatened with invocation of the doctrine and repudiation of Saddam-era debt. Realizing they could have received nothing, Iraq's creditors were likely to be much more willing to agree to a substantial debt write off.³⁷ But the doctrine itself was not pleaded as the basis for repudiation.

Similarly in the case of Nigeria, debt cancellation was achieved through a

³³ Annual Digest of Public International Law Cases 176 (J. Williams and H. Lauterpacht ed., 1933).

³⁴ In October, 2006, Norway cancelled debts owed to it by five states in connection with a Norwegian government program intended to facilitate the export of Norwegian-built ships. Norway's Development Minister said the ship export campaign was a "development failure" and declared: "As a creditor country, Norway has a shared responsibility for the debts that followed." See Guha, K., "Norway Debt Cancellation Hailed By Activists," *Financial Times*, 4 October 2006.

³⁵ Mapstone, N., "Disquiet over Ecuador Default," *Financial Times*, 20 November 2008.

³⁶ Damle, "The Odious Debt Doctrine After Iraq". p.150

³⁷ *Ibid.* p.150

debt write off as opposed to repudiation based on the odious debt doctrine. In seeking relief for its \$35 billion sovereign debt, Nigeria claimed odiousness pointing to the fact that it had been incurred by a corrupt, authoritarian dictator.³⁸ However, this illegitimacy argument was coupled with claims of economic need and the new government's commitment to fight corruption.³⁹ Again, odious debt language was used as a threat to facilitate a better result in debt renegotiations, but not used in and of itself as a grounds for repudiation. Yet, given the current financial crisis, other countries may follow Ecuador's lead in unilaterally refusing to repay foreign debt on the basis of "illegitimacy". Time will tell. However, for now, state practice is limited to the recent acts of Norway and Ecuador.

In summary, the odious debt doctrine does not seem to be an international custom accepted by all nations as law, nor has it been affirmed as a rule of law through judicial decisions. Given Taft's holding in the Tinoco Claims Case, and the use of odious debts language in the US/Cuba/Spain saga, and more recently in debt restructurings in Iraq and Nigeria, and in the unilateral repudiations of debt by Ecuador, and forgiveness by Norway, there is perhaps some room for the argument that the odious debt concept is a general principle of law recognized by civilized nations. However, this argument is shaky at best, given the multitude of counter-examples of nations who have not invoked the odious debt concept when they could have – for instance, South Africa for its Apartheid era debts, or the Philippines for its Marcos era debts.

This leaves only one avenue for the doctrine to be elevated to the status of international law – that of "the teachings of the most highly qualified publicists of the various nations". Accordingly, the works of prominent scholars such as Alexander Nahum Sack become very important as to the validity or otherwise of the doctrine. It is perhaps because of this category of secondary source of customary international law that every discussion of odious debts begins with a description of the eminence and writings of Sack.⁴⁰

³⁸ "Nigeria to Get \$18bn Debt Relief", *ECONOMIST*, June 30, 2005, available at <http://news.bbc.co.uk/1/hi/business/4637395.stm>, last viewed 23 April 2009.

³⁹ EADES, J., "Nigeria: At The Mercy Of Debt: Nigeria's Finance Minister Is Campaigning Hard For Debt Relief For The Country And Finding Plenty Of Sympathy But Little Action So Far", *THE BANKER*, Mar. 1, 2005, p.118.

⁴⁰ Ludington, S. and M. Gulati, "A Convenient Untruth: Fact and Fantasy in the Doctrine of Odious Debts", 48 *Virginia Journal of International Law* 595 (Spring 2008). p.599

Throughout the literature, there is general agreement as to the resume of Sack – he was a former tsarist minister, a Russian jurist and a professor of law in Paris; he was a preeminent legal scholar on public debts, a leading scholar of international law, and the originator of the doctrine of odious debts.⁴¹ With such stellar credentials, his “teachings” are surely those of the “most highly qualified publicists of the various nations”. For this reason, his quote regarding “dettes odieuses” is proof of the existence of the odious debts doctrine in customary international law. Or so the argument goes.

Albeit dead, Sack has become quite the celebrity (at least in foreign debt debate circles). So much so, that details of his life have become an obsession for some commentators. Old letters, personal papers, correspondences, physical movements – all have been hunted down and carefully examined,⁴² in a bid to better understand the “father of the odious debts doctrine.”⁴³ But what has been uncovered by this intense due diligence is that Sack – the scholar, the minister, is perhaps not so deserving of his celebrity status. Far from the current image of him being a learned international scholar, an “eminence grise”, the reality suggests that Sack was “cantankerous, outspoken, querulous and litigious.”⁴⁴ Moreover, he was never a tsarist minister, nor was he an avid supporter of debt repudiation by the Bolshevik’s of tsarist debt – which debt would have been odious pursuant to the 3 elements of the odious debt doctrine that modern commentators attribute to him!⁴⁵ Rather, his scholarship was consis-

⁴¹ See Michalowski, S., *Unconstitutional Regimes and the Validity of Sovereign Debt: A Legal Perspective*, (Ashgate Publishing Company, 2007). P.41; Vikram, N. and M. Thomas, “The Concept of Odious Debt: Some Considerations”, *World Bank Economic Policy and Debt Department Discussion Paper* (2008). p.9; Wikipedia’s entry for Odious Debts states that the “doctrine was formalized in a 1927 treatise by Alexander Nahum Sack, a Russian emigré legal theorist”. See http://en.wikipedia.org/wiki/Odious_debt, last viewed 23 April 2009.

⁴² see Ludington and Gulati, “A Convenient Untruth: Fact and Fantasy in the Doctrine of Odious Debts”. p.15-17. The authors trace Sack’s life from birth in 1890 in Moscow, the same city in which he studied economics and law, through to his move to Estonia in 1921 where he met his wife Nina. He moved to Paris in 1925, where he taught at Science Po and Ecole des Hautes Etudes while writing *Les Effets*. In 1930 he moved to the United States, lecturing at Northwestern, then at NYU until he was terminated in 1943. He spent his last days in financial despair, living at the Andrew Freedman Home in the Bronx – “a retirement home for the previously wealthy.” Sack died in 1955.

⁴³ Michalowski, *Unconstitutional Regimes and the Validity of Sovereign Debt: A Legal Perspective*. p.55

⁴⁴ Ludington and Gulati, “A Convenient Untruth: Fact and Fantasy in the Doctrine of Odious Debts”. p.17

⁴⁵ *Ibid.* p.21

tently and uncompromisingly pro-creditor.⁴⁶ Also, he was apparently not as impressive a scholar as modern commentators claim him to be – being the only tenured professor dismissed by NYU during difficult financial times.⁴⁷ Accounts of Sack's final days reinforce this new bleak version of the "inventor" of the odious debt doctrine.⁴⁸ Instead of receiving an esteemed farewell, as one would expect for such a pre-eminent, revered scholar, it is said that Sack ended his days penniless in the Bronx in a retirement home built for the previously wealthy.⁴⁹

For the proponents of the odious debt doctrine, these new findings are devastating on two counts: firstly, the legend of Sack is shattered. Secondly, the insidious consequence of a less than extraordinary Sack is that he may no longer be used as the voice of the "most highly qualified publicist of various nations". Notwithstanding his own ambiguity on the issue, without Sack the publicist, the odious debt doctrine finds even less support in the realm of customary international law.

So what we have is a big mess. The story seems to be the following:

Sack's created a doctrine called the doctrine of odious debts. This doctrine is favored by activists and now governments in respect of foreign debts owed by countries such as Iraq, Indonesia, Sudan, Democratic Republic of Congo, and more. But Sack never intended his doctrine to be used for these types of countries. Only for countries such as Germany when it reunited as one, or East Timor when it acquired its independence, or Montenegro when it succeeded from Serbia and Montenegro. However, Sack's doctrine has never been recognized in law. It has never been juridical. And now, it is discovered that Sack himself may not have been a supporter of the very doctrine he is embellished for, nor may he be a credible source for pronouncements on the state of international law.

This really leaves the odious debt doctrine in a precarious position! To summarize, we can conclude the following:

⁴⁶ Ibid. p.44

⁴⁷ Ibid. p.23

⁴⁸ Michalowski, *Unconstitutional Regimes and the Validity of Sovereign Debt: A Legal Perspective*. p.60

⁴⁹ Ludington and Gulati, "A Convenient Untruth: Fact and Fantasy in the Doctrine of Odious Debts". p.17

1. Alexander Nahum Sack coined the term "odious debt".
2. Sack was interested in state succession, not governmental succession.
3. Sack did not create the doctrine that modern day activists and commentators talk and write about.
4. The modern day doctrine of odious debt is concerned with governmental succession.
5. Sack should not be the hero of the odious debt movement.
6. There is no doctrine of odious debt recognized in international law.

Yet, all is not lost. The recent intense interest in the odious debt doctrine has produced an abundance of excellent scholarship and rich insights. These new ideas appear at an important juncture - in the midst of the world financial crisis. As the world begins to rewrite its social financial compact, it has the capacity and freedom to make juridical some version of the odious debt doctrine, whether the one most often attributed to Sack, or a newly crafted version. The NEF research tells us that the problem of odious debts is sizeable, and the recent declarations by countries such as Norway, Ecuador, Nigeria, and most recently Cambodia⁵⁰ suggests that the problem of odious debts will only continue to grow. Sovereign repudiation of debt considered odious or illegitimate will hamper recovery of the international financial system. It is an opportune time for the world community to come together and deal with the problem of odious debts. It can draw on the wealth of knowledge that has resulted from the odious debt doctrine momentum, and create a viable and just solution. Else high transaction costs will flow from unilateral repudiations and ad-hoc negotiations. Odious debts will not go away. In fact, they will only become more and more apparent, as nations follow the lead of others in declaring their foreign debts odious. The time has come for the myth and legend of the doctrine to cease, and for the international law dealing with odious debts to exist.

⁵⁰ See <http://www.phnompenhpost.com/index.php/2010092042144/National-news/hun-sen-to-make-obama-appeal.html>, last viewed 22 September 2010.