

# THE INSTITUTIONALIST IMPLICATIONS OF AN ODIIOUS DEBT DOCTRINE

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## I

### INTRODUCTION

Sovereigns incur debts, and creditors look to the law to hold sovereigns to their obligations. The odious debt doctrine intrudes on this settled pattern when (1) a despotic regime incurs a debt (2) for purposes that are inimical to the general welfare of the population, and (3) the creditor knows of the loan's illegitimate purpose. The doctrine purports to provide a successor regime with a full legal defense to the creditor's claim for repayment when these three requirements are met.<sup>1</sup> But this begs the question of its legal status.

The United States originated the concept of odious debt over a century ago, but since World War II, it has regularly upheld the position of creditors in negotiations with defaulting sovereign debtors. At present no treaty or legislation specifically provides for this defense, and no domestic court in any country or any modern arbitral tribunal has embraced it. Yet several prominent persons, including at least one Nobel laureate in economics, have endorsed the concept, and the doctrine enjoys a certain following among persons who think about international debt.<sup>2</sup> The regime change in Iraq has whetted interest in the issue.

The status quo, it seems clear, is one where the doctrine does not have any "legal effect," in the sense of modifying the legal relations between debtors and creditors. Should the status quo be changed? In legal terms, the question is

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1. For a good review of the doctrine, see Lee C. Buchheit, G. Mitu Gulati & Robert B. Thompson, *The Dilemma of Odious Debts*, 56 DUKE L.J. 1201 (2007).

2. For support from economists, see Seema Jayachandran & Michael Kremer, *Odious Debt*, 96 AM. ECON. REV. 82 (2006); Joseph Stiglitz, *Odious Rulers, Odious Debts*, ATLANTIC MONTHLY, Nov. 2003, at 39. For support from political activists, see sources *infra* note 23.

whether to recognize and define an odious debt defense through a treaty or national legislative acts, on the one hand, or through the decisions of authoritative dispute-settlement bodies, whether international arbitral organs or domestic courts. As a matter of convention, the latter route would involve a decision by such bodies to treat the doctrine as part of customary international law.

Others may think about the odious debt doctrine as a means to optimize the social welfare generated by sovereign-debt contracts. This article also looks at social welfare in the economic sense but attacks the problem from a different direction. If the doctrine has legal effect only because it is part of customary international law, what does its invocation imply about the source of the rules that determine the content and enforcement of sovereign debt contracts? Are the capabilities of the institutions that develop and apply the doctrine as significant as the content of the doctrine itself? Any debate about the doctrine must consider the process that produces the doctrine.

This article concludes that no satisfactory mechanism exists for instituting an odious debt doctrine. Granting the authority to void sovereign debts to an international organization—the solution favored by several prominent commentators—would present severe, and probably insoluble, agency problems. The alternative approach of adopting the doctrine as a matter of customary international law has even greater difficulties. At the end of the day, establishment of the doctrine through the medium of “international law” cannot offer a global solution to the problem of despotic debtor regimes and conniving creditors.

Underlying this argument is a larger point. The institutional issue of odious debt is a microcosm of the problems posed by customary international law. Does the capacity of an authoritative adjudicator with real enforcement power to base its decisions, and therefore its disbursement of enforcement resources, on claims about international custom present any problems? Who wins and who loses when an authoritative adjudicator looks to international custom rather than to another source of law? Does the assertion of a capacity to base enforcement decisions on international custom augment or diminish welfare? By looking at how the odious debt doctrine might work, one may arrive at a better understanding of how to think about these questions.

## II

### CUSTOMARY INTERNATIONAL LAW

It is not hard to offer a doctrinal account of customary international law, but this step raises many questions and answers none. According to section 102(2) of the Restatement (Third) of the Foreign Relations Law of the United States, “Customary international law results from a general and consistent practice of

states followed by them from a sense of legal obligation.”<sup>3</sup> But what constitutes the “practice of states”? Should state commitments to undertake certain obligations count as state practice, even if noncompliance is persistent and common? How widespread must a practice be to be “general,” and what about states that do not engage in the practice? How long must a practice be observed before one can say it is “consistent”? And, hardest of all, when does practice result from “a sense of legal obligation,” rather than from some other motivation? How can one possibly tell?

One might answer these questions using only objective standards, that is, observable behaviors judged according to pre-announced criteria. But most international-law scholarship points in a different direction. According to one widely cited account, an “invisible college” of international-law specialists both determines who belongs to the rulemaking group and uses general normative principles such as human dignity, good faith, and fairness to decide what counts as a binding norm.<sup>4</sup> Academic debate being what it is, a strand of scholarship also exists that criticizes many conventional views about the content and function of customary international law.<sup>5</sup>

When one moves from the academy to judges, a somewhat different picture emerges. According to recent appellate decisions in the United States, state practice is limited to actual state conduct and does not include aspirational statements. Moreover, according to these decisions, only persons exercising official power, such as judges and government officials, have the capacity to recognize (as opposed to describe) what the set of customary-international-law rules contains.<sup>6</sup> But references to the mainstream academic conception—the idea that a self-defined “in-crowd” can proclaim custom without bringing forth compelling evidence of either practice or sense of legal obligation—continue to crop up, most recently in dicta in a Supreme Court decision.<sup>7</sup>

For purposes of analysis, consider two highly stylized conceptions of customary international law. The *state actor* conception derives the existence of

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3. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987).

4. See, e.g., Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT’L L. 848 (1983); Oscar Schachter, *The Invisible College of International Lawyers*, 72 NW. U. L. REV. 217 (1977).

5. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 21–78 (2005); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997). This criticism in turn has prompted a massive response from the international-law establishment. See, e.g., *Symposium: The Limits of International Law*, 34 GA. J. INT’L & COMP. L. 253 (2006).

6. See, e.g., *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 156–58, 157 n.26 (2d Cir. 2003); *United States v. Yousef*, 327 F.3d 56, 99–103 (2d Cir. 2003).

7. Cf. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733–34 (2004) (referring to “those sources we have long, albeit cautiously, recognized” as including “customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat”) (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)). Although the quoted language refers to “jurists and commentators” as just providing evidence of state practice, some have used this language as support for the claim that the aspirational statements of jurists are themselves evidence of state practice. See Bradley & Goldsmith, *supra* note 5, at 838–40 (describing use).

a custom from credible manifestations of official adherence to a practice in conditions in which adherence (that is to say, actual compliance, as distinguished from formal acceptance) is costly. This conception rests on two arguments for limitation, namely (a) that actual state behavior should count for something, but that official pronouncements without corresponding action do not count at all, and (b) that the best evidence that an actor considers itself obliged to behave in a certain way is to see persistent conduct in the face of real costs.<sup>8</sup>

The *invisible college* conception rests on two opposing arguments, namely (a) that expert opinion provides better evidence of an existing international consensus than do the observations of nonexperts (that is, regular judges not specially trained in international law) about what nations do, and (b) the officially stated aspirations of states matter a great deal, for aspirations provide valuable indications of future behavior once norm internalization has occurred.<sup>9</sup> These conceptions, of course, exaggerate the differences among those with an opinion about what customary international law is and does. Still, this stylized version helps to identify the underlying premises of a debate that has engaged much academic attention and judicial resources.

Some elaboration is necessary. First, the two conceptions need not be seen as a proxy for the question whether more or less customary international law is desirable. On the one hand, the state-actor construct is not incompatible with a robust and extensive body of customary law. Many good reasons exist for states to delegate the authority to solve collective-action problems to a third-party decisionmaker.<sup>10</sup> Eyal Benvenisti, to cite one prominent scholar, argues that at least some customary international law represents an efficiency-driven solution to such problems. He posits that states recognize in advance that straightforward negotiations may fail to produce desirable outcomes, either because differences in state interests may thwart recognition of a globally desirable result or because domestic interest groups may block one or more states from acceding to that outcome. He gives as an example the allocation of jurisdiction over waterways that affect multiple states. Faced with obstacles to mutually beneficial agreements, Benvenisti argues, the affected states delegate to a disinterested and expert third party, such as the International Court of

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8. Thus some commentators have explained the definition of *opinio juris* as a shorthand for a kind of state consent that implies voluntary choice. Maurice H. Mendelson, *The Formation of Customary International Law*, 272 RECUEIL DES COURS 155, 268–93 (1998); George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541, 544, 570–71 (2005).

9. Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004).

10. Collective-action problems, generally speaking, are those in which cooperation has a positive payoff but individual actors have an incentive to defect from the cooperative norm. For further discussion, see Paul G. Mahoney & Chris William Sanchirico, *Norms, Repeated Games, and the Role of Law*, 91 CAL. L. REV. 1281 (2003); Duncan Snidal, *Coordination Versus Prisoners' Dilemma: Implications for International Cooperation and Regimes*, 79 AM. POL. SCI. REV. 923 (1985); Paul B. Stephan, *Redistributive Litigation—Judicial Innovation, Private Expectations, and the Shadow of International Law*, 88 VA. L. REV. 789 (2002).

Justice, the authority to reach an appropriate outcome. The third-party decisionmaker in turn invokes an open-ended conception of customary international law, one not depending on the inevitably incomplete set of express international agreements, to reach the optimal result.<sup>11</sup>

Moreover, if one believes that customary international law results from voluntary state choices, it is not too great a stretch to conceive of domestic judges as agents with the capacity to make these choices. A court might act as a norm entrepreneur, hoping to persuade other jurisdictions to embrace a rule that advances some desirable goal, or it might observe the emergence elsewhere of a rule with international implications and assume that the political branches would prefer to signal cooperation rather than defection (to use the vocabulary of game theory). An early and significant decision of the U.S. Supreme Court made exactly the latter argument to justify adherence to a doctrine of sovereign immunity in the absence of a statutory rule.<sup>12</sup> It seems clear that, at a minimum, domestic courts as well as arbitral tribunals have the capability to act in this fashion in cases over which they otherwise have jurisdiction.<sup>13</sup>

On the other hand, the invisible-college conception does not necessarily lead to many binding rules. The dominant vision of customary international law within contemporary academia represents a historically contingent reaction to the particular events of the 1970s, rather than a coherent jurisprudential position.<sup>14</sup> It does not take too great a leap of the imagination to conceive of an

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11. Eyal Benvenisti, *Customary International Law as a Judicial Tool for Promoting Efficiency*, in *THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES* 85 (Eyal Benvenisti & Moshe Hirsch eds., 2004). For a sampling of scholarship about customary international law that assumes rationalism in the face of collective-action problems, see GOLDSMITH & POSNER, *supra* note 5; Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631 (2005); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002); Norman & Trachtman, *supra* note 8; Francesco Parisi & Vincy Fon, *International Customary Law and Articulation Theories: An Economic Analysis*, 2 BYU INT'L L. & MGMT. REV. 201 (2006); Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 559 (2002); Pierre-Hugues Verdier, *Cooperative States: International Relations, State Responsibility and the Problem of Custom*, 42 VA. J. INT'L L. 839 (2002).

12. *Schooner Exchange v. M'Faddon*, 11 U.S. 116 (1812) (holding that a vessel belonging to the French navy was not subject to attachment by U.S. courts).

13. In limiting this assertion to cases over which courts otherwise have jurisdiction, the statement in text takes into account the position that customary international law does not, simply by its status as customary international law, constitute federal law for purposes of federal-court jurisdiction under Article III of the Constitution or 28 U.S.C. § 1331. For the assertion that customary international law is federal law in both the constitutional and statutory jurisdictional senses, see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 111, 115 (1987); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 219 (1972). For a critical response, see Bradley & Goldsmith, *supra* note 5; A. M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1 (1995). For responses to this criticism, see Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1997); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393 (1997).

14. Paul B. Stephan, *Courts, the Constitution, and Customary International Law: The Intellectual Origins of the Restatement (Third) of the Foreign Relations Law of the United States*, 44 VA. J. INT'L L.

alternative world in which the academic mainstream might view the persons most likely to invoke customary international law, particularly domestic judges, as reactionary obstructionists of progressive change. Fearful of development of an approach to a customary international law grounded on protection of property rights and economic liberty and insensitive to human dignity, scholars might come to a consensus that states have not shown a sense of obligation about much.<sup>15</sup> The point is, again, that one's conception of how customary international law can be constituted is logically independent of one's preferences about its content.

This article does not address this debate about the constitution of customary international law at the level of first principles. Rather, it shows how different conceptions of customary international law affect a theoretically rich problem of great practical importance—namely, the legal status of the odious debt doctrine. There are many good reasons to compel sovereign debtors to honor their debt obligations, and other good reasons to relax this compulsion when the obligations were assumed by particularly bad regimes for particularly bad purposes and a new regime has superseded the original debtors. The question is whether bodies with the capacity to coerce sovereign debtors might look to customary international law as one of the reasons for staying their hand. How these bodies might use customary international law, in turn, reveals something about the implications of choices about what to regard as customary international law.

### III

#### SOVEREIGN-DEBT CONTRACTS

Debates over the enforceability of sovereign-debt contracts can take place in any of several fora. Law is relevant to the extent that an enforcement dispute will come to an independent body with the capacity to enforce, or block enforcement of, the contract. An arbitral tribunal, perhaps empowered by a bilateral investment treaty, might consider whether a failure to pay a debt implicates those treaty rights. And creditors might seek enforcement of the debt in a domestic court.<sup>16</sup>

To be sure, most restructuring of sovereign debt does not involve arbitration or litigation. Providers of capital, including international institutions such as the International Monetary Fund (IMF), other states, and private lenders, can assert considerable pressure simply by threatening to withhold future financing.

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33 (2003) (linking academy's support for judicial enforcement of customary international law to growing dismay with U.S. foreign policy and policymakers during the 1970s).

15. Cf. LOUIS B. BOUDIN, *GOVERNMENT BY JUDICIARY* (1932) (attacking the institution of judicial review as a means of resisting liberty-oriented constitutional jurisprudence of the contemporary Supreme Court). For articulation of just such a critique of the customary international law of investment protection, see M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* (2d ed. 2004).

16. For fuller discussion of sovereign debt and its restructuring, see William W. Bratton & G. Mitu Gulati, *Sovereign Debt Reform and the Best Interest of Creditors*, 57 *VAND. L. REV.* 1 (2004).

And what these bodies consider to be the proper limits of debt obligations may matter more than what arbitral or judicial bodies think.

But the distinction between legal rules applied formally by dispute-resolution bodies, on the one hand, and the considerations that may motivate informal dispute settlement, on the other, matters. Institutions can forgive debts or withhold future finance for any number of reasons, not only because of specified legal criteria. Moreover, they do not have to behave consistently. From a functionalist perspective, what distinguishes the work that legal doctrine does from that of general policy preferences is the functioning of independent dispute-resolution bodies with meaningful enforcement powers.<sup>17</sup> This point does not mean that legal rules are irrelevant to debtor-credit bargaining. Surely these negotiations take place in the shadow of the law. But one should not confuse the outcomes of this bargaining with the underlying legal obligation. The accommodations made in settlement of a dispute represent at best a very noisy signal about what the law requires.

When a regime borrows on behalf of a state, several legal issues arise. First, does the sovereign have the capacity to endow its creditors with conventional enforcement rights, including the ability to obtain arbitral awards and judicial judgments and to attach the sovereign's property to obtain satisfaction? Second, if the creditors can exercise these rights, can they assert them against later regimes that subsequently obtain the authority to act on behalf of the sovereign? Third, are there any circumstances under which a debt nominally contracted on behalf of a sovereign later can be repudiated?

The first two questions have affirmative answers, due to the general acceptance both of the rules of state succession and of limits on the doctrine of sovereign immunity. This means that a loan contracted by one regime creates legally enforceable rights that, depending on the sovereign's foreign asset holdings and reliance on foreign-source revenues, can result in meaningful recourse for creditors. Moreover, a regime change normally does not alter the creditors' rights. Only because of the general principle of successor liability does the third question become relevant.

#### IV

#### THE ODIOUS DEBT DOCTRINE

In the aftermath of the Spanish-American War, the United States took the position that debts undertaken by Spain but secured with Cuban revenues were invalid as to the Cuban security. Spain had used the proceeds from the loan to finance the suppression of the Cuban opposition on whose side the United States (at least nominally) had fought. The peace treaty that concluded the war

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17. For more on the distinction between formal enforcement of obligations based on rules announced *ex ante* and *ex post* informal enforcement, see SCOTT & STEPHAN, *supra* note \*, at 4, 98–101.

reflected the U.S. position, although Spain never agreed with the U.S. arguments.

Two decades later Chief Justice Taft, presiding over an arbitration between Costa Rica and the Royal Bank of Canada, invoked similar arguments to relieve Costa Rica from the burden of paying a debt for which a previous dictator had contracted. The evidence suggested that the dictator had converted the proceeds to his personal use, apparently with the knowledge of the lender. Taft ruled that Costa Rica could repudiate the loan.<sup>18</sup>

Alexander Sack, an itinerant international-law scholar, then articulated what he understood to be a principled version of the U.S. position. According to Sack, an indebtedness incurred by a prior regime is “odious” and therefore subject to repudiation without recourse if the regime acted without the consent of the governed, the debt proceeds did not benefit the subjects of the regime, and the creditor had adequate notice of both these facts.<sup>19</sup> The Sack formulation has come to be the conventional statement of the doctrine.

But in spite of Sack’s publication of the doctrine, it has played almost no role in concrete disputes since then. In 1979 the holder of Chinese imperial railroad bonds, issued shortly before the Nationalist revolution, brought a class action against the People’s Republic of China (the regime that succeeded the Nationalists, who in turn were the successors of the imperial regime that issued the bonds) to collect on these debts. The United States had just recognized the People’s Republic as the legitimate government of China. Initially China failed to appear, and the trial court issued a default judgment against it. China then sought to reopen the proceedings, defending its initial nonparticipation as reflecting its unfamiliarity with modern legal proceedings and its bad experiences with Western imperialism in the past. China also claimed that the obligations constituted odious debt because of the quasi-colonial position of the Western powers in 1911. The court reopened the proceedings, perhaps implicitly giving some weight to the odious debt argument, although its decision rested entirely on an interpretation of the doctrine of foreign sovereign immunity.<sup>20</sup>

Contrast this (at most) glancing reference to the odious debt doctrine with the widespread reluctance of new regimes to invoke it. The last thirty years have seen the collapse of authoritarian or Soviet-style governments in Europe, Asia, Africa, and Latin America, all encumbered with serious human-rights abuses and grave political injustices, yet none of the successor regimes has

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18. *Gr. Brit. v. Costa Rica*, 1 R.I.A.A. 375 (1923) [hereinafter *Tinoco Arbitration*].

19. ALEXANDER SACK, *LES EFFETS DES TRANSFORMATIONS DES ÉTATS SUR LEURS DETTES PUBLIQUES ET AUTRES OBLIGATIONS FINANCIÈRES* (1927). For recent commentary, see Anna Gelpern, *What Iraq and Argentina Might Learn from Each Other*, 6 *CHI. J. INT’L L.* 391 (2005).

20. *Jackson v. People’s Republic of China*, 794 F.2d 1490 (11th Cir. 1986). The precise holding of the court—that the Foreign Sovereign Immunity Act’s concept of restrictive immunity did not apply to claims arising before the Act’s enactment—later was repudiated by the Supreme Court. *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

sought debt relief on the grounds of its predecessors' unclean hands.<sup>21</sup> One might explain this deafening silence as reflecting the doctrine's nature as a power rather than a right. Nothing obliges a new regime to use the doctrine, and pragmatic reasons might counsel against doing so. Nonetheless, the failure to observe the doctrine at work in the many cases where, by its terms, it could have been applied is noteworthy.

If customary international law were merely a product of specific and material choices made by responsible official policymakers, then one could comfortably conclude that the odious debt doctrine has not become part of that body of unwritten but binding international obligations. Aside from a recent unilateral decision by the government of Norway, in its capacity as creditor, to attribute an act of debt forgiveness to the doctrine, no contemporary official support exists.<sup>22</sup> Sovereign debtors in particular have not sought its shelter. But unofficial actors are not so easily discouraged, and one still encounters a claim that the doctrine functions as a norm of customary international law. During the 1990s, supporters of developing countries' efforts to rid themselves of their inherited debt burden revived the concept and suggested that both international organs, including non-judicial bodies such as the IMF, and national courts ought to invoke the odious debt doctrine to relieve sovereign debtors.<sup>23</sup>

For the odious debt concept to be anything more than a talking point in a negotiation, some body with formal enforcement authority would have to decide to apply customary international law to a dispute between a sovereign debtor and its creditors. Because debts invariably rest on a local law of contract, the adjudicator would have to choose between recognizing a customary rule and applying national law. As a matter of industry practice, most formal sovereign-debt contracts contain choice-of-law provisions that direct the adjudicator to use either English or New York law. But even in disputes governed by an express choice of law, an English or New York court might decide that its law comprises certain rules of customary international law.

Consider the dispute that became the leading Supreme Court case of *Banco Nacional de Cuba v. Sabbatino*.<sup>24</sup> Cuba asserted its right to collect money owed under a contract of sale for sugar. Sabbatino, the receiver for a U.S.-owned

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21. See Joseph Hanlon, *Defining "Illegitimate Debt": When Creditors Should Be Liable for Improper Loans*, in SOVEREIGN DEBT AT THE CROSSROADS: CHALLENGES AND PROPOSALS FOR RESOLVING THE THIRD WORLD DEBT CRISIS 109 (Chris Jochnick & Fraser A. Preston eds., 2006).

22. Krishna Guha, *Norway Debt Cancellation Hailed by Activists*, FIN. TIMES, Oct. 4, 2006, at 43. The loans involved ships built by Norwegian firms, and a skeptic might interpret Norway's debt forgiveness as a price rebate in a tight market.

23. E.g., SOVEREIGN DEBT AT THE CROSSROADS, *supra* note 21; PATRICIA ADAMS, ODIUS DEBTS: LOOSE LENDING, CORRUPTION, AND THE THIRD WORLD'S ENVIRONMENTAL LEGACY (1991); Soren Ambrose, *Social Movements and the Politics of Debt Cancellation*, 6 CHI. J. INT'L L. 267 (2005); Kevin H. Anderson, *International Law and State Succession: A Solution to the Iraqi Debt Crisis?* 2 UTAH L. REV. 401 (2005); David D. Caron, *The Reconstruction of Iraq: Dealing with Debt*, 11 U.C. DAVIS J. INT'L L. & POL'Y 123 (2004); Anupam Chander, *Odious Securitization*, 53 EMORY L.J. 923 (2004); Detlev F. Vagts, *Sovereign Bankruptcy: In re Germany (1953)*, In re *Iraq (2004)*, 98 AM. J. INT'L L. 302 (2004).

24. 376 U.S. 398 (1964).

Cuban entity that had owned the sugar before the Castro regime had expropriated it, argued that he had the superior claim to the money. The Second Circuit, applying New York law, ascertained that New York would invoke a customary-international-law doctrine invalidating expropriations that were motivated by a retaliatory rather than a public purpose, that were discriminatory in effect, or that provided inadequate compensation.<sup>25</sup> In reversing that decision, the Supreme Court did not question the general capacity of New York courts to select rules of decision from customary international law. It determined, however, that the particular context, involving the validity of an official act of a sovereign executed within its territory, required application of federal common law that displaced state law. The Court then concluded that this federal common law, unlike New York law, would not look to customary international law.<sup>26</sup>

In the minds of many authorities today, *Sabbatino* stands for the proposition that courts have the authority to create federal common law in areas dominated by foreign relations concerns.<sup>27</sup> What the Court believed it was doing, however, was imposing a constraint on the otherwise broad power of state courts to apply customary international law, as they understood it, to cases otherwise within their jurisdiction. When it is not displaced by federal law, the choice to invoke customary international law, which implies a power to determine its content, in turn is binding on a federal court to the extent that it must look to a state's law for a rule of decision in a case over which it has jurisdiction.<sup>28</sup> Thus the law of

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25. *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845 (2d Cir. 1962).

26. *Sabbatino*, 376 U.S. at 424–37. Within months, Congress repudiated *Sabbatino*'s holding by directing federal courts to consider whether an expropriation of property by a foreign sovereign violated customary international law regardless of the official nature of the expropriation:

Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided*, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

Pub. L. No. 88-633, § 301(d), 78 Stat. 1013, amending Section 620(e) of the Foreign Assistance Act of 1961, *codified at* 22 U.S.C.S. § 2370(e)(2) (2001).

27. For a review and critique of this position, see Bradley & Goldsmith, *supra* note 5. For the Supreme Court's recent endorsement (in dicta) of the power of federal courts to develop a federal common law of foreign relations, see *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714–20 (2004). For the argument that *Sosa* confirms the point that federal courts lack a general power to recognize customary international law absent a statutory directive to do so, see Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869 (2007).

28. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

New York continues to hold that expropriations that are lacking in a public purpose, are discriminatory, or are without adequate compensation are invalid, except when federal law overrides this rule.

Absent application of the *Sabbatino* override, then, New York courts (and presumably British ones as well) have the power to invoke international custom and conceivably might do so with respect to the odious debt doctrine.<sup>29</sup> But, as noted above, the possession of a power does not imply the need to exercise it. The question remains whether state courts, federal courts applying state law, or an arbitral tribunal should recognize the odious debt doctrine as a means of facilitating sovereign-debtor repudiation of unwelcome obligations. This inquiry in turn requires a determination of the available alternatives.

Presumably, an adjudicator would consider the background of national rules that might apply to a creditor's claim. Most contracts for sovereign debt, whether bank loans or bonds, reflect the work of sophisticated counsel and are unlikely expressly to bar enforcement. A waiver of sovereign immunity and the act-of-state doctrine, as well as choice-of-forum and -of-law clauses, almost always appears. But some elements of the odious debt doctrine have counterparts in national law, in the sense that both justify the nonenforcement of the obligation in spite of the contractual commitment.

First, a debtor can argue that, under its domestic legal order, the persons who contracted for the debt lacked the legal authority to do so.<sup>30</sup> This *ultra vires* defense corresponds to Taft's determination in the *Tinoco* arbitration that the Costa Rican dictator borrowed for his own benefit and violated various local laws to do so. A similar argument was raised but rejected in *Sabbatino*, namely that the Castro government's expropriation decree violated Cuban law because of procedural irregularities.<sup>31</sup>

Second, a creditor that colludes with a regime's agents in concealing the circumstances of a transaction, such as by paying a bribe to place a loan, presumably has committed fraud, for which rescission is a conventional remedy. One may assume that the common-law doctrine of fraud can reach many abuses that coincide with the conventional understanding of odious debt. Corruption and secrecy, if proved, might render many loan contracts voidable, if not void.

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29. I will not discuss here the applicability to sovereign-debt contracts of the act-of-state doctrine articulated in *Sabbatino*, although in some cases it may be relevant. U.S. courts generally have regarded the act-of-state doctrine to be inapplicable to loans payable outside the territory of the debtor sovereign. *Allied Bank International v. Banco Credito Agricola de Cartago*, 757 F.2d 516 (2d Cir. 1985), *cert. denied*, 473 U.S. 934 (1985). There remains, however, some conceptual tension between the odious debt doctrine, which calls on adjudicators to sanction illiberal states, and the act-of-state doctrine, which insulates the official acts of illiberal states from conventional choice-of-law review by foreign courts. See Anne-Marie [Slaughter] Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907 (1992).

30. *State v. Morgan Stanley & Co.*, 459 S.E.2d 906 (W. Va. 1995) (basing judgment against broker on state customer's legal incapacity); *Hazell v. Hammersmith & Fulham London Borough Council*, 2 W.L.R. 372 (H.L. 1991) (holding debt contract unenforceable because Borough Council lacked legal capacity to enter into it).

31. 376 U.S. at 415 n.17.

What existing national law does *not* do, however, is rescind a contract when the loan contract was unwise, or the use of the loan proceeds foolish or even immoral, in the absence of a national law forbidding the borrowing authority from undertaking the transaction. If most despots bother to enact domestic laws that allow them to incur debts under conditions that please them, and if most creditors do not pay bribes or engage in other conduct that might be characterized as fraud, then national law at its current state of development would limit the capacity of new regimes to repudiate the debts of their odious predecessors.

## V

### THE CASE FOR RECOGNIZING AN ODIIOUS DEBT DOCTRINE

Should adjudicators supplement national law with the odious debt doctrine? One might start with a first-order analysis. Under what conditions would creditors and sovereign debtors overall prefer legal rules that reward nonodious regimes and isolate bad actors, which is to say both bad regimes and the lenders who knowingly connive with them to finance bad projects?

The policy case for recognizing an odious debt doctrine rests on the assertion that a rule making avoidable loans to bad regimes to do bad things would generate a separating equilibrium that might enhance overall welfare. No individual creditor or sovereign debtor, however, has an incentive to create these rules. The problem is not good regimes, which probably would welcome a contractual clause warranting their lack of odiousness and giving the creditor remedies if loan proceeds were used for odious purposes. But potentially odious regimes and their creditors have no motivation to embrace such a clause.<sup>32</sup> Nor is unilateral leadership by a single jurisdiction likely to work. If one important jurisdiction—New York or London—took the lead in adopting an odious debt rule, bad regimes seeking to finance bad projects would take their business to the other jurisdiction. Even if New York and London tried to collaborate in adopting a rule together, each would fear that the other would chisel on enforcement to attract more business from bad regimes.

In other words, a collective-action problem exists. As long as odiousness *vel non* remains an insufficient ground for invalidating a sovereign's contract, creditors cannot reward nonodious regimes. If creation of a separating equilibrium were desirable, then some generally applicable mechanism to invalidate contracts with bad regimes for bad purposes might benefit all creditors and most sovereign borrowers. There are, of course, countervailing

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32. The core problem is that bad behavior by the debtor is an externality that cannot be captured by contract. The odious debt doctrine imposes a sanction that falls on the creditor. Bad regimes have no incentive to inflict this sanction on creditors (who will charge them for the *ex ante* risk), and good regimes have no mechanism for rewarding their creditors. Proposals to institute the odious debt doctrine through contract fail to account for the externality. *E.g.*, Adam Feibelman, *Equitable Subordination, Fraudulent Transfer, and Sovereign Debt*, 70 *LAW & CONTEMP. PROBS.* (forthcoming Autumn 2007).

arguments, but for present purposes, consider the hypothetical position that there exists some version of the odious debt doctrine that would generate benefits that could exceed its costs. But how can this be achieved?<sup>33</sup>

An initial objection to a freestanding odious debt doctrine is that odiousness is in the eye of the beholder and thus not truly verifiable. Here, the term “verifiable” means to incorporate the teaching of the economics of information, which distinguishes among private information (information that cannot be credibly conveyed to third parties, such as a state of mind or future intentions), observable information (information that persons in an ongoing relationship can observe, such as quality of performance, but cannot prove to a disinterested third party at an acceptable cost), and verifiable information (information that can be verified by a disinterested third party at an acceptable cost). Within this framework, only verifiable terms are contractible, for legal obligations subject to third-party enforcement must rest on verifiable conditions. A comprehensive definition of regime and project “badness” might run the risk of not being ascertainable by a disinterested third party, given the many ways that people might regard governments or projects as inadequate.

As Robert Scott and George Triantis have demonstrated, the law has developed tools for working around this problem. The principal solution is the use of a verifiable proxy for an unverifiable condition. The proxy might take the form of a rule that imperfectly captures the condition (think of “over fifty-five miles an hour” as a proxy for “unreasonably fast”) or of an allocation of the burden of proof to the person seeking to prove the condition. Proxies are costly, for either an overinclusive or an underinclusive rule will depart from the optimal but unverifiable condition. But in many circumstances the assumption of these costs is an acceptable alternative to treating the condition as noncontractible.<sup>34</sup>

For purposes of discussion, assume that a regime would qualify as odious only if it both completely lacked democratic accountability due to suppression of all forms of dissent and systematically engaged in extrajudicial violence against its citizens. The debts of such a regime would be odious only if the lender could be charged with the knowledge that the loan proceeds would be used directly and exclusively to carry out repression. For purposes of discussion, in other words, one can assume that there may exist conditions that are sufficiently stringent to make them susceptible to objective proof. Let us also stipulate that successor regimes would bear the burden of proving both that their predecessor met this test and that creditors knew that the loans they made met it.

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33. For the argument, institutional issues aside, that an odious debt doctrine is unlikely to enhance welfare, see Albert H. Choi & Eric A. Posner, *A Critique of the Odious Debt Doctrine*, 70 *LAW & CONTEMP. PROBS.* 33 (Summer 2007).

34. Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 *YALE L.J.* 814 (2006).

Some, especially those who see the odious debt doctrine as a means to launch a broad critique of global capitalism, might find this definition too confining. Among other things, it rejects the argument that money is fungible and that any capital acquired by an odious regime functionally serves its odious purposes. What this definition does, however, is identify those circumstances under which regimes are most likely to divert government resources that otherwise might benefit the general population. The objective is distinguishing between indisputably bad regimes that have no evident incentive to act on behalf of the governed and the more quotidian human-rights-abusing state (the latter class comprising, in the view of some scholars and nongovernmental organizations, the United States, Japan, and most, if not all, members of the European Union).

Were creditors to become persuaded that this standard would apply, they presumably would build an “odiousness” risk into the price of loans to sovereigns. The cost of finance would increase for bad regimes contemplating bad projects. Presumably, longer-term credit would reflect this risk more than shorter-term, for the risk of a new regime taking over from the current borrower would increase over time.<sup>35</sup> This interest surcharge would function as a tax on regimes likely to be declared odious at some later date. Although such a tax would not replace other sanctions (as the invasion of Iraq suggests), it would provide some disincentive to regimes inclined toward odiousness. Thus far, the welfare case for the doctrine seems strong.

## VI

### THE INSTITUTIONALIST IMPLICATIONS

But what of second-order effects? How would jurisdictions overcome the collective-action problem posed by the present nonrecognition of the odious debt doctrine, and what implications would these strategies have for the legal system generally? For ease of analysis, two different approaches are considered here, one involving top-down state coordination and the other involving bottom-up doctrinal innovation by courts invoking customary international law.

#### A. Top-Down Approach

Imagine an international institution with the capacity to label regimes and projects as odious and successors as nonodious. To complete the picture, suppose an international treaty pursuant to which states commit to honor the determinations of that body by requiring their courts not to enforce the contractual debts of odious regimes. Some theorists, including Nobel laureate

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35. The statement in text assumes that odious regimes cannot invoke the doctrine to discharge their debts. As noted below, under certain assumptions this actually becomes an undesirable restriction.

Joseph Stiglitz, argue that this mechanism would provide an ideal solution to the problem of odious debt.<sup>36</sup>

Lest such a proposal seem visionary, recall that some elements of this treaty regime already exist. The United Nations Security Council has the authority under the U.N. Charter to impose economic sanctions on regimes that threaten international order through their abuse of their subjects. It thus could call on all member states to refuse to recognize debts contracted by such regimes whenever a lender might be charged with knowledge of the odious use of the loan proceeds. All that is missing is a mechanism to convert Security Council resolutions into binding law of the sort that directly invalidates debt contracts. Although the Charter obligates U.N. members to carry out Security Council resolutions, it does not provide for direct effect of those resolutions in the members' domestic legal order. National governments may cite a Security Council resolution as a basis for adopting a domestic law, but a refusal to carry out a resolution may result only in another resolution.<sup>37</sup>

One might overlook this chink in the Security Council's armor. What remains interesting is that no proponent of the odious debt doctrine has seen the Security Council as the proper institutional mechanism for implementing the doctrine. The Security Council can act only with the consent of the five great powers, and rarely do they reach a consensus on what constitutes an odious regime or an objectionable use of loan proceeds. If odious debt were left only to this body, then, it would have little practical significance. In the case of Iraq, the Security Council sanctions that were adopted did not bar the Ba'athist regime from undertaking a wide array of contractual commitments (putting aside for the moment the administration of the sanctions, which may have engendered some fraud and corruption, and thus some defenses against collection under national law).

But how would one go about designing an international mechanism with a quicker trigger, that is, a greater propensity to characterize regimes as odious? Unless stringent criteria are used, along the lines described above, severe agency problems would result. The agency wielding this authority would find itself mired in ideological wars about what counts as a truly democratic and representative government and how governments must serve the public good. Other issues, such as the treatment of ethnic minorities or the production of greenhouse gases, also could demand attention. The agency also would struggle

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36. Jayachandran & Kremer, *supra* note 2; Stiglitz, *supra* note 2. As a substantive matter, this solution departs from the conventional description of the doctrine by making debts contracted by odious regimes unenforceable, even in the absence of a succession. This extension is necessary to make bad regimes fully internalize the cost of their misconduct.

37. For an instance of grounding "national" law (here an EC Council Regulation) on a mandate received from the Security Council, see Case T-315/01, *Kadi v. Council*, 2005 E.C.R. II-03649 (upholding freeze of assets as part of antiterror program in response to Security Council Resolution 1333). For a refusal by the German Constitutional Court to regard a Security Council resolution as a sufficient basis for a national law implementing an E.U. framework decision, see *Re Constitutionality of German Law Implementing the Framework Decision on a European Arrest Warrant* (2 BvR 2236/04), [2006] 1 C.M.L.R. 16.

to determine the specific purposes of particular debts against the background of money's fungibility. Finally, the criteria for determining whether a creditor should be charged with knowledge of the regime and the project's odious character could be strict or loose. Under conditions of unstable and evolving geopolitics, the capacity of the agency to develop conceptions of odiousness that diverge from initial conceptions would grow over time.<sup>38</sup>

These problems would be compounded if an institution with other functions received the authority to label debts as odious. A general concern is that bureaucracies, international as much as domestic, seek to maximize their discretionary power. Given this tendency, an agency would be expected to use its power to declare odiousness for its own ends, rather than to fine-tune the conception of what constitutes a bad regime.

In earlier work I raised this concern with respect to the IMF.<sup>39</sup> That body often finds itself supervising the restructuring of sovereign debt. One stopgap tool that a sovereign engaged in restructuring may employ is the issuance of exchange regulations that limit the export of foreign currency. At least one U.S. court has ruled that the question whether a state's exchange controls impose an expropriation in violation of customary international law, or instead constitute a lawful act of regulation that a foreign court must respect, turns on whether the IMF has approved of the controls.<sup>40</sup> Recognition of this power in turn strengthens the IMF's hand in its negotiations with debtor states. Some evidence suggests that the IMF uses this power principally to further the goals of private creditors, the likely future employers of current IMF staff.<sup>41</sup>

On balance, then, it seems unlikely that any international agency would gain the power to declare regimes or projects odious on any broader terms and subject to any lower procedural hurdles than those applicable to the Security Council. The great powers, and the United Kingdom and the United States in particular, are not likely to surrender their capacity to veto these declarations, and giving the declaratory authority to an international agency with its own agenda presents additional difficulties that would further diminish the likelihood of their consent.<sup>42</sup> What are the alternatives? Can other bodies, particularly arbitral tribunals and domestic courts, respond to the collective-

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38. See generally Paul B. Stephan, *Courts, Tribunals, and Legal Unification—The Agency Problem*, 3 CHI. J. INT'L L. 333 (2002).

39. Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INT'L L. & BUS. 681, 692–93 (1996–97).

40. *West v. Multibanco Comermex, S.A.*, 807 F.2d 820 (9th Cir. 1987), 482 U.S. 906 (1987).

41. Erica R. Gould, *Money Talks: Supplementary Financiers and International Monetary Fund Conditionality*, 57 INT'L ORG. 551 (2003).

42. Note that a comparable situation is presented by the International Criminal Court (ICC), which exercises the power otherwise held by the Security Council to decide when to prosecute criminal violations of international law. Paul Stephan, *U.S. Constitutionalism and International Law: What the Multilateralist Move Leaves Out*, 2 J. INT'L CRIM. JUST. 11 (2004). As of this writing, a majority of the great powers, and four other states that possess nuclear weapons, have refused to accede to the treaty establishing the ICC.

action problem with a welfare-enhancing solution that, by virtue of its declared status as customary international law, binds all relevant actors?

## B. Bottom-Up Approach

If a top-down approach to odious debts seems impracticable, then perhaps a bottom-up strategy might recommend itself. Hypothetically, the odious debt doctrine could become part of customary international law if an authoritative tribunal were to declare it so. Of course, the tribunal would not admit to such a bold exercise of power. Rather, it would “find” the doctrine within customary international law by noting the weight of authoritative opinion declaring that the doctrine had become an international rule and position itself as following this authority. Once one tribunal makes this move, it could create pressure on others to do the same. Thus New York might follow London, or London New York, because of a common acceptance of the obligation to apply customary international law, an obligation that is stronger than the duty to follow the national law of other states.

Several objections immediately present themselves. Even if one were to concede a general obligation to apply customary international law, why would one tribunal accept another’s version? In Benvenisti’s example, the disputants have agreed on a single forum. This move solves the problem of coordinating among different versions of customary law. But absent such coordination, what chance is there of any one version’s dominating the others? If there exists a risk that New York and London might chisel when applying nominally identical national legal standards, is there not a similar risk with regard to the application of a common international custom?

But resting the odious debt doctrine on customary international law presents an even deeper problem than the possibility of divergent interpretations. Whatever the desirability of the odious debt rule in the abstract, it remains true that the doctrine has played no significant role in the last eighty years, a time of great regime changes and adjustments in sovereign debt. Invoking the doctrine now would unambiguously count as a surprise. Yet for it to have any effect in a judicial or arbitral proceeding, it must apply *ex post*. The *ex ante* effects of a rule applied *ex post* necessarily include legal instability.

Judicial or arbitral adoption of a surprising new rule, in the context of the international sovereign debt market, presents two kinds of instability problems. First, the introduction of new, unanticipated terms into long-established and widely used contracts increases legal risk generally. Tribunals will have difficulty reassuring contractors that an odious debt decision is a one-off matter, and not part of a general skepticism about the enforceability of sovereign debt contracts. Second, finding an acceptable proxy for odiousness would be no easier for courts than for an international agency.

As many have noted, claims about the content of customary international law, especially regarding the human rights that individuals enjoy against states,

have exploded in the last quarter century.<sup>43</sup> Because these claims rest largely on the views of politically insulated expert jurists rather than of politically accountable governments or legislatures, the centrifugal pressure to expand customary international law's domain (and thus of the experts) is great, and the centripetal pressures are essentially nonexistent. A judge seeking to consult the invisible college about the content of human-rights law to determine what qualifies as odious would find a wealth of opinion but no clear and determinant core.

The indeterminate nature of customary international law is not just a general problem, but one that affects the odious debt doctrine specifically. One can find, for example, reputable authorities that regard repression and murder as sufficient, but by no means necessary, to label a regime as odious. These commentators also appear to regard any loan made to such a regime as at least presumptively odious, no matter what the nominal project.<sup>44</sup> Many of the current proponents of the doctrine make arguments that echo those of the New International Economic Order of the 1970s, which challenged the capacity of postcolonial regimes ever to enter into binding commitments with powerful institutions of the developed world.<sup>45</sup> Experts question the economic choices of any regime, especially in the developing world, that fails to address environmental concerns, the interests of indigenous peoples, or the rights of workers. If odiousness is determined in light of these views, then much of sovereign borrowing, both past and future, carries enforcement risk. Yet expanding the scope of odiousness—a process that seems inevitable if customary international law is to do the work—erodes the supposed benefits of a separating equilibrium that the doctrine hypothetically would create.

The central problem is that once a court puts customary international law in play, it is difficult to find a midpoint between the divergent positions that the state-actor and invisible-college conceptions indicate. By focusing on authoritative official actions that entail real costs, a decisionmaker might conclude that only regimes and uses subject to Security Council sanctions count as odious. By focusing on the positions of publicists, a decisionmaker might find fault with many regimes past and present and all or most of their borrowing. The first outcome may seem too stringent, while the latter opens up too many

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43. Bradley & Goldsmith, *supra* note 5, at 839–40.

44. *E.g.*, Chris Jochnick, *The Legal Case for Debt Repudiation*, in SOVEREIGN DEBT AT THE CROSSROADS, *supra* note 21, at 133, 147.

45. See A NEW INTERNATIONAL ECONOMIC ORDER: SELECTED DOCUMENTS 1945–1975 (2 vols.) (Alfred George Moss & Harry N.M. Winton eds., 1977); THE NEW INTERNATIONAL ECONOMIC ORDER: THE NORTH-SOUTH DEBATE (Jagdish N. Bhagwati ed., 1977); OSWALDO DE RIVERO B., NEW ECONOMIC ORDER AND INTERNATIONAL DEVELOPMENT LAW (1980); THE CHALLENGE OF THE NEW INTERNATIONAL ECONOMIC ORDER (Edwin P. Reubens ed., 1981); FOREIGN TRADE IN THE PRESENT AND A NEW INTERNATIONAL ECONOMIC ORDER (Detlev Chr. Dicke & Ernst-Ulrich Petersmann eds., 1988); Seymour J. Rubin, *Economic and Social Human Rights and the New International Economic Order*, 1 AM. U. J. INT'L L. & POL'Y 67 (1986); Burns H. Weston, *The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth*, 75 AM. J. INT'L L. 437 (1981).

possibilities. Yet the optimal midpoint lacks support in either conception. Many murderous and repressive regimes have not faced Security Council sanctions. And many flawed, but not truly appalling, regimes have been excoriated by the invisible college. Debates about what kinds of projects further the general welfare are equally open-ended.

## VII

### CONCLUSION

Several conclusions result from this analysis. First, legislators hypothetically could adopt *ex ante* rules to guide future sovereign debtors. For example, either the United States or the United Kingdom reasonably might amend its statutory law of sovereign immunity to block enforcement of sovereign-debt obligations in cases that satisfy a narrow and clear definition of odiousness. A precedent of sorts (as a mirror) exists in the 1996 amendment to the U.S. Foreign Sovereign Immunities Act, which lifted immunity for certain acts of terrorism and other gross human-rights abuses.<sup>46</sup> States might extend immunity to debts incurred by prior regimes that engage in comparable misconduct. The sanctions regime of Title III of the Helms–Burton legislation, which provides a cause of action against persons who “traffick” in property seized by the Cuban government as part of its revolution but also eliminates this action once the U.S. president determines that Cuba has enjoyed a democratic restoration, also provides a model for this hypothetical legislation.<sup>47</sup> The adoption of such rules, of course, would have no bearing on the Iraqi debt, absent a constitutionally dubious attempt to apply such legislation retroactively. Moreover, that models exist does not mean that adoption of such a statute, or perhaps the negotiation of a U.K.–U.S. treaty that did the same kind of work, is desirable. The difficulties—in particular, agency issues and potential chiseling—remain.

Second, judicial efforts to achieve this outcome in advance of any legislation present substantial drawbacks. They could increase the cost of transition away from authoritarian and repression regimes, for successors regimes would have difficulty credibly committing either to the honoring of past obligations or to not backsliding on their own human-rights obligations. A general rise in the cost of credit to developing-country sovereigns seems a more likely outcome than either the establishment of a separating equilibrium between good and bad regimes or increased pressure on lenders not to prop up dictators.

Ultimately, the odious debt issue illustrates the limits of what international law can do. Not all collective-action problems are soluble through formal legal intervention at an acceptable cost. The bottom-up, case-by-case, fact-specific methodology that customary international law employs is a particularly

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46. Antiterrorism and Effective Death Penalty Act of 1996, § 221(a)(1), Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. § 1605(a)(7)).

47. Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, § 302(h)(1)(B), Pub. L. No. 104-114, 110 Stat. 788 (codified at 22 U.S.C. § 6082(h)(1)(B)).

unsatisfactory way of attacking this problem. Recognition that international law does not always supply a solution should not be mistaken for a rejection of its function or value. There are other ways to attack bad regimes that do bad things and those who underwrite their misdeeds. For example, the spread over the last decade of anticorruption regimes, which motivate competition among states to prosecute each other's multinational companies for inducing governments to disregard the public interest, points to one promising approach. But undoing the bounds of contract is not the answer.